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Molien v. Kaiser Foundation Hospitals: Negligent Infliction of Emotional Distress

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In Molien v. Kaiser Foundation Hospitals, the California Supreme Court recognized that the interest in freedom from negligent infliction of mental distress is a protectable interest, and that an accompanying physical injury need not exist in order to recover damages. The author presents a discussion of the history and policies behind the right to recover from negligently inflicted emotional distress. The author also discusses and analyzes the court's opinion in Molien and agrees with the court that the fears of opening the floodgate of litigation which before Molien precluded recovery, was arbitrary. Finally, the author concludes that the holding is part of a natural evolution in the area of negligently inflicted emotional distress, and discusses its probable impact.

I. INTRODUCTION

In *Molien v. Kaiser Foundation Hospitals*,[1] the California Supreme Court held that damages may be awarded for emotional distress caused by the negligent conduct of another; with no corresponding claim of physical injury required for such recovery. The high court decision reversed the state court of appeal which had denied such damages. This note will discuss the history of recovery for the negligent infliction of mental distress and policies which until now have limited recovery. The *Molien* decision and its future impact will then be analyzed, with the resulting conclusion that the court was correct in its holding.

II. HISTORY OF THE LAW OF RECOVERY FOR MENTAL DISTRESS

A. *Intentional Infliction of Mental Distress*[2]

American courts first allowed recovery for emotional distur-

1. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

2. Intentionally inflicted mental distress is discussed here to underscore the relevant difference between negligently and intentionally inflicted distress. Unless otherwise noted, use of the term "mental distress" will be in reference to emotional injury negligently inflicted. Furthermore, mental distress is a very difficult phrase to define medically and legally. Many different terms have been used to denote the same idea, such as emotional disturbance, mental suffering, mental anguish, emotional distress, and emotional harm. *See* RESTATEMENT (SECOND) OF TORTS § 46, comment j at 77-78 (1965); Schwartz, *Neuroses Following Trauma*, TRAUMA, Dec. 1959, at 32. *See also* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971). In this article the author defines mental distress as "any traumatically induced reaction which is

bance only in conjunction with an intentional tort. Damages for mental or emotional harm could be recovered if such harm were inflicted as a result of defamation, malicious prosecution, false imprisonment, battery, or seduction.[3] Because these damages were dependent upon violation of some recognized legal right, they were termed "parasitic".[4] The courts looked to the particular circumstances of such cases and then determined whether the emotional injury claimed by the plaintiff was likely to have resulted from the defendant's actions. The courts felt that the principal claim, the intentional tort, guaranteed that the emotional disturbance was genuine.[5]

Courts, however, soon realized that such a limitation on recovery for emotional harm was too strict, and that under certain conditions recovery should be allowed even in the absence of a traditional tort. An independent cause of action for emotional distress was first recognized in the English case of *Wilkinson v. Downton*.[6] In that case, the defendant falsely told the plaintiff that her husband had been in an accident and was laying in a ditch with both legs broken. As a result, the plaintiff suffered shock to her nervous system and serious physical consequences. The American courts followed the English lead and permitted recovery for such emotional harm caused by unusually heartless conduct. The type of conduct the courts wanted to prevent was such as telling a simple-minded woman to dig up a "pot of gold" under conditions of extreme public humiliation,[7] or wrapping up a gory dead rat and sending the package to a "sensitive soul."[8]

It was apparent by the first half of this century that a trend had developed in American cases. The courts began imposing liability for extreme or outrageous conduct calculated to cause serious emotional distress by recognizing the tort of intentional infliction of emotional distress. The rationale for recognizing this tort was that a defendant's outrageous conduct made it reasonably certain that the emotional injury was caused by defendant's conduct, that

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medically detrimental to the individual." *Id.* at 1255. The author defines traumatic stimulus as an "impact, force or event which acts upon an individual for a brief or extended period of time, and can be either physical or purely psychic." *Id.* at 1248.

3. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1049 (1936). *See also* W. PROSSER, THE LAW OF TORTS, at 51-52 (4th ed. 1971).

4. Magruder, *supra* note 3, at 1048.

5. *See* C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 914-45 (2d ed. 1969) for a good review of the classic cases in which parasitic damages for emotional harm were allowed.

6. [1897] 2 Q.B. 57.

7. Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

8. Great A. & P. Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931).

the injury was of a severe nature, and that it was not feigned.[9] It was the magnitude and severity of defendant's conduct which gave credibility to plaintiff's claim for emotional injury damages, serving as an objective criterion for evaluating the plaintiff's emotional harm.

The *Restatement Second of Torts* has adopted this reasoning stating that the intentional infliction of mental distress constitutes an independent tort.[10] Under the *Restatement* rule, damages for mental distress are no longer merely a parasitic element, but an injury serious enough in its own right to warrant legal protection.[11]

B. Negligent Infliction of Mental Distress

In contrast, where mental distress was negligently caused, the courts appeared more cautious. Such caution stems from the courts' fear of trivial and fraudulent claims.[12] The courts seem to believe that an alleged emotional injury occasioned by merely negligent, as opposed to extreme and outrageous intentional conduct, is less likely to be genuine or severe enough to warrant compensation.

The courts, however, did recognize that a total bar against re-

9. For a review of the development of intentional infliction of mental distress and the policies involved, *see* Magruder, *supra* note 3 at 1033; Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222 (1939).

10. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

11. "The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it." State Rubbish Ass'n v. Siliznoff, 38 Cal. 2d 330, 337, 240 P.2d 282, 285 (1952), (quoting RESTATEMENT OF TORTS § 46, comment d at 72-73 (Supp. 1948)). Several courts have allowed recovery for intentionally inflicted mental distress despite the absence of physical harm. *See* Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963).

12. The following articles trace the development of the law with regard to negligently inflicted mental distress: Bohlen & Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance*, 32 COLUM. L. REV. 409 (1932); Harper & McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426; Magruder, *supra* note 3, at 1033; Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193. *See also* Greyson, *Recent Developments in the Negligent Infliction of Emotional Shock*, 3 N. KY. ST. L.F. 76 (1975).

covery for negligently inflicted emotional harm was too extreme and that under some circumstances, justice required recognition of such a cause of action. Thus, the courts allowed a plaintiff to maintain a cause of action for negligently inflicted mental distress, but only in the presence of special limiting and qualifying factors, thereby ensuring the credibility of plaintiff's claim. Such factors existed where the emotional harm was accompanied by some discernible physical injury caused by the negligent act.[13] It was the physical manifestation of the emotional injury which the courts viewed as a guarantee that the claim was genuine and severe enough to warrant compensation.[14]

Although the general rule was that no action would lie for the negligent infliction of mental distress absent a physical symptom, there had been exceptions. As in a case where it was apparent from the particular circumstances that the harm was genuine and serious. In one group of cases involving telegraph companies, emotional harm resulting from the negligent transmission of a message (such as one announcing death), was compensated even absent physical manifestation,[15] because the message itself revealed the likelihood of the emotional harm. A second group of cases involved the negligent mishandling of corpses.[16] An independent right of recovery for emotional harm was recognized, apparently because the courts believed that such harm to close friends and relatives of the deceased is clearly foreseeable. Thus,

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13. RESTATEMENT (SECOND) OF TORTS § 436A (1965): "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." *See* Spade v. Lynn & B. R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897). The plaintiff, a passenger on defendant's subway, was frightened by the manner in which defendant's conductor treated a drunken passenger. The court held there could be no recovery for fright where there was no injury to the person from without. In Mitchell v. Rochester Ry., 151 N.Y. 107, 109, 45 N.E. 354 (1896), the plaintiff was waiting to board a horsedrawn trolley which was negligently stopped in such a way that the plaintiff was standing between the horses' heads. Although she was not touched, plaintiff was frightened, fainted and shortly thereafter suffered a miscarriage. The court held there could be no recovery for any physical consequences resulting from fright alone.

14. Herrick v. Evening Express Publishing Co., 120 Me. 138, 140, 113 A. 16, 17 (1921) (if no bodily injury, then no premise upon which to base a conclusion of mental suffering). *See* Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 233-34 (1962); Note, *Negligently Caused Mental Distress: Should Recovery Be Allowed?* 13 S. D. L. REV. 402 (1968).

15. Western Union Tel. Co. v. Cleveland, 169 Ala. 131, 53 So. 80 (1910); Metzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895); Western Union Tel. Co. v. Lane, 152 S.W.2d 780 (Tex. Civ. App. 1941); Nitka v. Western Union Tel. Co., 149 Wis. 106, 135 N.W. 492 (1912).

16. Carey v. Lima, Salmon & Tully Mortuary, 168 Cal. App. 2d 42, 335 P.2d 181 (1959); Torres v. State, 34 Misc. 2d 488, 228 N.Y.S.2d 1005 (1962); Lott v. State, 32 Misc. 2d 296, 225 N.Y.S.2d 434 (1962).

where the courts have had some external assurance that the claim was worthy of redress, recovery has been allowed.

The requirement of a physical manifestation was not the only standard used by the courts to ensure the credibility of the emotional injury claim. The "impact rule" became widely accepted in one form or another. Under this rule courts were willing to permit recovery, despite no apparent physical injury, when the cause of action had been established by a physical impact.[17] For example, in *Zelinsky v. Chimics*,[18] the plaintiff was involved in a minor automobile accident. The court held that although there was no apparent physical injury, the impact of collision alone was sufficient to allow recovery for resulting mental disturbance, since the degree of physical impact could also provide assurances that the alleged claim was not illusory.[19]

The "impact rule," however, had its faults as could be seen by the way in which the courts strained in their application of the rule. In *Morton v. Stack*,[20] a child suffered mental disturbance as a result of being trapped in a burning building. The court held that smoke inhaled by the child constituted sufficient physical impact to assure an actual injury.[21] Such decisions resulted in harsh and anomalous results[22] and have led to the virtual aban-

17. *See* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Huston v. Freemansburg Boro., 212 Pa. 548, 61 A. 1022 (1905). Parasitic damages for mental distress often accompanied a cause of action established by the physical impact. Without a physical impact, however, there was no recognized cause of action upon which relief for mental distress could be granted. Thus, large awards for emotional injury were granted although the physical impact was slight. However, no such award was recognized if physical impact of some sort could not be established.

18. 196 Pa. Super. Ct. 312, 175 A.2d 351 (1961).

19. *Id.* at 318, 175 A.2d at 354.

20. 122 Ohio St. 115, 170 N.E. 869 (1930).

21. *Id.*

22. The impact requirement was often satisfied by minimal contact. *See* Kentucky Traction & Term. Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (a trifling burn); Porter v. Del. Lack. & W. R.R. Co., 73 N.J.L. 405, 63 A. 860 (Sup. Ct. 1906) (dust in eyes); Kenney v. Wong Len, 81 N.H. 427, 128 A. 343 (1925) (mouse hair in stew touched the roof of plaintiff's mouth). At times the requirement was reduced to an absurdity: Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (horse "evacuated its bowels" into plaintiff's lap). While recovery was granted for trivial impacts, serious emotional harm with resulting physical damage would often go uncompensated because the negligent conduct causing the mental distress failed to produce any "impact." *See* Boden v. Del-Mar Garage Inc., 205 Ind. 59, 185 N.E. 860 (1933) (wife denied recovery after seeing a car strike her husband); Blessington v. Autry, 105 N.Y.S.2d 953 (Sup. Ct. 1951) (recovery denied to a mother who witnessed her child's fatal injury).

donment of the "impact rule" by a majority of the states today.[23]

Due to the flaws in the "impact rule," a more liberal approach for allowing compensation for negligently inflicted mental distress was developed by the courts.[24] Although recovery continued to be viewed exclusively as parasitic damages,[25] courts came to require only that the plaintiff suffer subsequent physical injury resulting directly from the negligently inflicted mental distress.[26] In addition, the courts applying this approach often considered whether the mental distress and its consequences caused the plaintiff to fear for his own safety. Recovery was denied if he did not fear for his safety. This was especially true in bystander cases where the plaintiff suffered mental distress as a result of defendant's negligent injury of a third party.[27]

Instead of fear for personal safety, some courts used a "zone of danger" test. This theory enabled a plaintiff to recover if he could prove that he was in a physical zone of peril created by the negligent act.[28] The rationale behind this theory was that it was reasonably foreseeable that a plaintiff would fear for his own safety

23. Prosser has suggested that the "impact rule" is almost certainly destined for extinction. W. PROSSER *supra* note 3, at 332. *See also* Lambert, *Tort Liability for Psychic Injuries*, 41 B.U. L. REV. 58 (1961).

24. See W. PROSSER *supra* note 3, at 332.

25. Courts still limited recovery to instances where plaintiff would have had a cause of action regardless of this mental distress. *See* Baltimore & O. R.R. v. McBride, 36 F.2d 841 (6th Cir. 1930). The fact that the plaintiff suffered physical injury as a part of the aggregate attending results precluded the defense that the connection between the negligent cause and the resulting nervous shock was too remote for legal contemplation and replaced the narrower impact limitations. *Id.* at 842. *See*, Mashunkashey v. Mashunkashey, 189 Okla. 60, 113 P.2d 190 (1941) (mental pain and suffering only compensable when made an element of damages); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941) (mental suffering compensable where wrongful act infringed upon legal right); Becker v. Borough of Schuylkill Haven, 200 Pa. Super. Ct. 305, 189 A.2d 764 (1963) (plaintiff must furnish basis for damages according to some definite legal rule).

26. *See* Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (action allowed for physical injury directly caused by defendant's negligence despite lack of impact); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890) (miscarriage suffered from witnessing assault held compensable). *But see* Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 249 P.2d 843 (1952) (loss of sleep and severe distress from receiving wrong baby not recoverable).

27. The dual requirements of the injury approach are apparent in Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933), where the defendant negligently drove his truck into the plaintiff's house, causing injuries to the latter arising from fear for her safety as well as for the safety of her children. The court held that recovery should be allowed where clear and substantial physical injury resulted from fright directly attributable to the defendant's negligent act. *Id.* at 404, 165 A. at 184. *See also* Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

28. Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) is the leading case with respect to the zone-of-danger test. Here plaintiff-husband sought recovery for the wrongful death of his wife, who allegedly died as a result of emotional shock after witnessing, from her window, a negligent motorist strike and kill her infant

if he were in this zone, thus adding credibility to his claim of mental distress. This theory solved the problem of adequately proving the genuineness of the claim, a problem which the "impact rule" sought to resolve by requiring an actual physical impact. The courts believed the "zone of danger" test would eliminate this artificial barrier to recovery for plaintiffs with legitimate claims. The "zone of danger" test eventually became the majority viewpoint in this country.[29]

As the foregoing suggests, the courts have been less than consistent in their approach to recovery for infliction of mental distress. The courts have continued to express fears that unlimited and undeserved liability will result from an extension of independent protection to mental equilibrium.[30] These American courts have repeatedly rationalized that it would be impossible to weed out false claims,[31] that a flood of litigation would ensue,[32] and that defendants would be subject to liability without a corresponding degree of culpability.[33] *Molien* brought out that these fears depict the arbitrariness of public policy decisions and raise questions concerning the wisdom of cutting off liability on a per

daughter. The Wisconsin Supreme Court approached the problem in terms of the absence of a duty owed by defendant to those outside the zone of danger.

29. 2 F. HARPER AND F. JAMES, LAW OF TORTS, at 1034 (1956).

30. *See* Lambert, *supra* note 23, at 585; Smith, *Relation to Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 U. VA. L. REV. 193, at 198 (1944).

31. *See* McCardle v. George B. Peck Dry Goods Co., 271 Mo. 111, 195 S.W. 1034 (1917) (fearing of opening the door to false claims); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 A. 561 (Sup. Ct. 1900) (court must guard against feigned injuries and speculative claims); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958) (for every wholly genuine claim, there would be a tremendous number of false ones).

32. *See* Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900) (concern over false claims and flood of new litigation); Ward v. West Jersey & Seashore R.R. Co., 65 N.J.L. 383, 47 A. 561 (Sup. Ct. 1900) (agreeing with other courts that a flood of litigation might ensue); Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953) (fear that a "wide door" would be opened to fictitious claims).

33. *See* Cosgrove v. Beymer, 244 F. Supp. 824 (D. Del. 1965) (compensating mental distress would burden the courts and defendants); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963) (concern over a lack of duty owed to plaintiff by defendant), *overruled* by Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). The court rejected the argument that inability to fix limits of liability justified the absolute denial of recovery. Instead it concluded that a test based on reasonable foreseeability could adequately fix limits of recovery. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79. *See also* Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) (fear that liability would be wholly out of proportion to the culpability of the tortfeasor).

se basis. In *Molien*, the majority held that liability could not be cut-off on such a per se basis.

Several American jurisdictions have shown dissatisfaction with the traditional approach and have indicated a greater willingness to abandon unnecessarily restrictive tests in determining liability. This willingness exists because these particular courts have recognized the increasing complexity of society and the growing competence of medical science in determining the existence and extent of mental injuries.[34] By disposing of arbitrary restrictions, these courts have shown that they recognize that freedom from mental distress should be protected.[35] Furthermore, these courts have provided protection by applying such traditional tort principles as foreseeability.[36] For example, in *Dillon v. Legg*,[37] the California Supreme Court defined those circumstances under which a tortfeasor has a duty to refrain from negligently causing a bystander to suffer mental distress.[38]

Finally, these jurisdictions have shown their reluctance to deny recovery on a per se basis, by recognizing that certain kinds of mental injury are marked by definite physical symptoms which are capable of medical proof.[39]

In *Rodrigues v. State*,[40] the Supreme Court of Hawaii confronted the issue of whether a plaintiff's interest in freedom from mental distress should be accorded independent legal protec-

34. *See* Batalla v. State, 10 N.Y.2d 237, 241, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961). The plaintiff was not barred from recovering damages for severe emotional and neurological disturbances by any artificial test or rule. While riding in a chairlift at a ski resort, she was severely frightened when a state employee negligently forgot to close the safety bar on her chair. In its opinion, the court stated that it would look to whether "there is a real connection between the ultimate damage and the original wrong." *Id.*

35. *See* Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958) (the court specifically held that freedom from mental disturbance was a protected interest in the State of New York).

36. *See* Wallace v. Coca-Cola, 269 A.2d 117, 118, 122 (Me. Sup. Ct. 1970) (the court held that the plaintiff's mental and emotional suffering was compensable if it were reasonably foreseeable and manifested by objective symptoms).

37. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

38. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The court held that the determination of whether mental injuries may be foreseeable, and thus a defendant liable, depends upon three factors: (1) the plaintiff's physical proximity to the negligent act; (2) whether the shock occurs from plaintiff's direct observation or subsequent communication from a third person; and (3) the relationship of plaintiff to the victim.

39. *See* Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970). The defendant negligently caused an electrical explosion, which frightened two children who were nearby. The court found that one of the children should be given an opportunity on remand to prove allegations of traumatic neurosis, nervousness, and emotional disturbance since these reactions constituted objective and physical injuries.

40. 52 Hawaii 156, 472 P.2d 509 (1970).

tion.[41] In its opinion, the court noted the pervasive expansion of psychic stimuli in modern society and the growing understanding of the debilitating effects of mental distress. From these observations, the court concluded that negligent infliction of mental distress is entitled to independent legal protection.[42] The opinion, however, failed to adequately support its holding. That is, the court failed to sufficiently consider whether mental distress is detrimental enough to warrant independent legal protection, and whether it is capable of the objective proof required for such protection. It is due to the existence of such questions that most jurisdictions have refused to extend legal protection to mental equilibrium.[43] In *Molien*, however, the court answered these questions in the affirmative, and in doing so, extended legal protection of mental equilibrium to its most liberal point yet.

III. *MOLIEN V. KAISER FOUNDATION HOSPITALS*

A. Facts

Plaintiff Stephen Molien and his wife Valerie Molien were members of the Kaiser Health Plan. Mrs. Molien went to Kaiser for a routine physical examination where she allegedly was negligently examined and tested by Kaiser staff physician Dr. Kilbridge. As a result of the doctor's alleged negligence, Mrs. Molien was misdiagnosed as having contracted an infectious type of syphilis. Due to this diagnosed condition, Mrs. Molien underwent treatment which included massive and unnecessary doses of penicillin. It was further alleged that on account of Dr. Kilbridge's conduct, Mrs. Molien suffered "injury to her body and shock and injury to her nervous system."

Mrs. Molien was instructed to advise her husband of her diagnosis and plaintiff was required to undergo tests in order to determine whether he too had contracted syphilis. Plaintiff's tests were negative.

41. The suit in *Rodrigues* was instituted under the Hawaii State Tort Liability Act. The Supreme Court of Hawaii found that the state highway department was negligent in failing to protect the plaintiff-homeowner from flood damage caused by improper drainage of surface water following the blockage of a highway culvert. The plaintiff's home was flooded, and extensive damage was caused. Mrs. Rodrigues testified that she was "shocked" at what had become of the home that she and her husband had waited 15 years to build. Recovery was based on the mental distress caused by the property damage, not upon the property damage itself. *Id.*

42. *Id.* at 174, 472 P.2d at 520.

43. *See* notes 31-33 *supra* and accompanying text.

As a result of the alleged negligent diagnosis, Mrs. Molien became highly upset believing that her husband was engaged in extramarital sexual activities. The plaintiff claimed that such suspicion led to tension and hostility between the spouses, and ultimately caused the dissolution of their marriage. Finally, it was alleged that the events stemming from the negligent misdiagnosis, caused plaintiff to suffer "extreme emotional distress."

The plaintiff filed his complaint against Kaiser Foundation Hospitals and Dr. Kilbridge, praying for damages for mental suffering and loss of consortium alleging that as a consequence of defendant's acts plaintiff had been deprived of the love, companionship, affection, society, sexual relations, solace, support, and services of his wife.

Plaintiff appealed to the California Supreme Court from a judgment entered after a general demurrer was sustained by the state court of appeal.

B. The California Supreme Court Analysis

1. Determining Whether Defendant Owes A Duty: Is Mental Distress a Reasonably Foreseeable Consequence of Defendant's Negligent Act?

The court[44] held that a right of recovery exists for negligently inflicted mental distress absent a corresponding claim of physical injury. In determining whether a defendant should be held liable for a negligent act which caused the mental distress, the critical question is foreseeability of risk. Justice Mosk cited *Dillon v. Legg*,[45] wherein this court stated: "In order to limit the otherwise potentially infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable."[46] This foreseeable risk was not limited to actual physical impact but applied to emotional injury as well.[47]

In *Dillon*,[48] foreseeability of the mental distress to the plaintiff was said to be based on several factors.[49] Though these factors

44. The majority was comprised of five justices: Chief Justice Bird and Justices Mosk, Tobriner, Newman and Manuel. The dissent was comprised of two justices: Clark and Richardson. Mr. Justice Mosk wrote the opinion for the majority while Mr. Justice Clark authored the dissenting opinion.

45. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

46. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

47. *Id.* at 739-40, 441 P.2d at 920, 69 Cal. Rptr. at 80.

48. In *Dillon* a mother sought damages for emotional trauma and physical injury that resulted when she witnessed the negligently inflicted death of her daughter.

49. *See* note 38 *supra*.

served to determine damages suffered by the witness to an injury of a third person, the court felt these factors were inapplicable where, as in *Molien*, the plaintiff himself was a direct victim[50] of the assertedly negligent act. Thus, the court borrowed only the general principle of foreseeability from *Dillon* and held that determination is to be based on the facts at hand on a case by case basis. Such use of the general principle of foreseeability, however, is adequate to fix limits of recovery; therefore, the court was correct in abandoning the rigid standards established by *Dillon*.[51]

Negligence has always been defined as conduct which falls below a standard established by the law for the protection of others against unreasonable risk of harm.[52] The idea of risk necessarily involves a recognizable danger, *i.e.*, foreseeable danger, based upon some knowledge of the existing facts and some reasonable belief that harm may follow.[53] A risk is a danger which is apparent, or should be apparent, to one in the position of the actor.[54] Here, it is clear that the risk of mental distress to the plaintiff in *Molien* was apparent to the defendant physician. In holding that the risk of harm to plaintiff was reasonably foreseeable to defendants, the court emphasized the probable effect of an erroneous diagnosis of syphilis. Since syphilis is normally transmitted only by sexual relations, a spouse is likely to suspect the other spouse of extramarital relations, and such suspicion would likely cause anxiety, hostility, emotional distress and marital discord.[55] Furthermore, the plaintiff was a specifically foreseeable victim, as Dr.

50. In *Molien*, the plaintiff was a direct victim in that the defendant's negligent misdiagnosis of plaintiff's wife showing her to have syphilis gave rise to the probability that the plaintiff also had syphilis, and such negligence deprived plaintiff of companionship, affection, and sexual enjoyment.

51. *See* note 42 *supra* (where serious mental distress to plaintiff was a reasonably foreseeable consequence of defendant's act, defendant's liability would be imposed by application of general tort principles).

52. *See generally* W. PROSSER at 236-98. The important inquiry in cases of recovery for mental distress should be expressed in terms of foreseeability, proximate cause, and duty. Proximate cause establishes what results flow from defendant's negligence. By adding the requirement that such results be reasonably foreseeable, the courts can then determine whether the defendant owed a duty of care to not inflict mental distress upon the plaintiff. *Id.*

53. *Id.*

54. *Id.*

55. There is support for this contention that a spouse may suspect a mate of infidelity if one carries syphilis. By statute, false imputation of syphilis constitutes slander per se. CAL. CIV. CODE § 46 (West Supp. 1980).

Kilbridge advised Mrs. Molien that her husband would also have to be examined.

Thus, as a result of concluding that plaintiff was a foreseeable victim of defendant's tortious conduct, the court held that the defendant owed plaintiff a duty to exercise due care in diagnosing the physical condition of his wife. In effect, the court was recognizing that one's interest in freedom from the negligent infliction of mental distress is a protectable interest.[56] Cognizant of this protectable interest, the courts can look to all the factual circumstances, as the court did in *Molien*, to determine whether the emotional injury sustained was reasonably foreseeable.

Surely a jury based on their own experiences, as well as upon all the facts and circumstances of the case, can also determine whether the plaintiff was a foreseeable victim of mental distress. Representing the conscience of the community, a jury seems best able to determine whether the average person would suffer an emotional injury under the circumstances of a given case. As Dean Prosser stated:

> so far as distinguishing true claims from false ones is concerned, what is required is rather a careful scrutiny of the evidence supporting the claim; and the elimination of trivilities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of law.[57]

2. The Physical Injury Requirement: Should a Plaintiff Be Allowed To Recover For Negligent Infliction Of Mental Distress Without Suffering A Physical Injury?

The *Molien* court then turned to the issue of whether plaintiff was barred from recovery by the fact that he had suffered no physical injury. This was truly the pervasive issue of the case because the previous state of the law was that there could be no recovery of damage for negligently inflicted emotional distress if it was not accompanied by physical injury. However, the law did entitle plaintiff to recover damages if plaintiff had suffered a shock

56. 52 Hawaii 156, 472 P.2d 509 (interests in freedom from negligent infliction of serious mental distress is entitled to independent legal protection).

57. W. PROSSER at 51. *See also* Vinicky v. Midland Mut. Casualty Ins. Co., 35 Wis. 2d 246, 151 N.W.2d 77 (1967). A 12 year old boy suffered mental distress, *e.g.*, frequent and intense nightmares and hysteria, from seeing his unconscious father after automobile accident caused by defendant's negligence. The jury proved themselves capable of determining the merits of an emotional injury claim after examining all the evidence. In Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956), plaintiff recovered from fright and shock suffered by sisters when a negligently installed gas pressure regulator in house caused gas to escape and ignite. The jury proved themselves capable of detecting fraudulent or trivial claims.

to the nervous system or other physical harm which was proximately caused by defendant's negligent conduct.[58]

The primary reason for the physical injury requirement, as the court pointed out, was that it served as a means of assuring the legitimacy of the alleged claim.[59] The court, however, believes that such barriers to recovery are unnecessary since mental injury today is capable of proof. Since recovery is a question of proof, it is unnecessary to deny remedy in all cases just because some claims may be false.[60]

Nonetheless, the physical manifestation requirement did not fulfill its objective; it did not ensure that the plaintiff's emotional injury claim was genuine and serious. The rule was instead used as in *Ver Hagen v. Gibbons*[61] to arbitrarily limit liability. The dissent in *Ver Hagen* highlighted the arbitrary characteristics of the rule, stating that most severe mental disturbances are characterized by some physical reaction, and it is often only an "accident of pleading" that the requirement is not met.[62]

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58. *See* L.A. COUNTY SUPERIOR COURT, BOOK OF APPROVED JURY INSTRUCTIONS No. 12.80 at 523 (6th ed. 1977).

59. Herrick v. Evening Express Publishing Co., 120 Me. 138, 140, 113 A. 16, 17 (1921) (if no bodily injury then no premise upon which to base a conclusion of mental suffering). *See* Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILLA. L. REV. 232, 233-34 (1962); Note, *supra* note 14, at 402.

60. The court cites W. PROSSER at 328 in support of this view. *See also* Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958). In *Ferrara*, the court specifically held that freedom from mental disturbance was a protected interest in the state of New York. *Id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999. The *Ferrara* court emphasized that:

> [Certain] kinds of mental injury are marked by definite physicial symptoms, which are capable of clear medical proof. It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. The problem is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false. The very clear tendency of recent cases is to refuse to admit incompetence to deal with the problem and to find some basis for redress in a proper case.

Id. quoting W. PROSSER at 328.

61. 47 Wis. 2d 220, 177 N.W.2d 83 (1970).

62. Justice Wilkie observed:

> [A] plaintiff who suffers great emotional distress is entitled to recover damages from the negligent infliction of such distress. The absence of a physical manifestation of such distress should not change this result since severe mental disturbances are almost always characterized by some type of physical reaction and frequently it is only an accident of pleading that the adverse consequences complained of are characterized as mental rather than physical.

Id. at 229, 177 N.W.2d at 87-88.

Thus as the *Molien* court put it, the physical injury requirement "encourages extravagant pleading and distorted testimony."[63] The argument is spurious that emotional harm is easy to feign but that a physical manifestation is proof of its authenticity. Alleging and proving a sufficient physical manifestation can be just as easily feigned as psychological manifestation.[64] As a result, the finding of a physical injury may depend on the ingenuity of counsel in framing the pleadings. The physical injury requirement is both overinclusive and underinclusive, as the *Molien* court points out. It is overinclusive in that it permits recovery for mental distress even when the physical injury is trivial. It is underinclusive as it denies valid claims from being proved. One of the best refutations of the physical injury rule is that in the trivial injury cases, all the alleged hazards of fabricated claims are present, and yet almost all jurisdictions allow the plaintiff to recover in the trivial injury cases.[65] When the evidence is the same but for the physical injury, there is no reason to think that a jury would more easily find the existence of mental distress when a trivial physical injury is pleaded than where it is not.

The arbitrary denial of recovery in all cases discourages the bringing of meritorious actions and at the same time allows the prosecution of fabricated claims, for surely those capable of perjuring evidence will not hesitate to manufacture one additional feature of the occurrence, a slight injury, to insure recovery. In short, the physical injury requirement has proved arbitrary and unreliable. As Justice Mosk observed: "In our view the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme."[66]

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63. 27 Cal. 3d at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.

64. For example, the evidence showing that there have been tremors or vomiting comes from the same source as evidence of pure psychological injury, that is, from the plaintiff himself, his friends, relatives, and physicians. These manifestations can be easily induced.

65. In Porter v. Del. L. & W. R.R. Co., 73 N.J.L. 405, 63 A. 860 (1906), the plaintiff sustained shock when the defendant's bridge fell while she was walking under it. She alleged dust fell in her eyes and that something touched her neck. This was held a sufficient physicial manifestation. Dye v. Chicago & Alton R.R. Co., 135 Mo. App. 254, 115 S.W. 497 (1909), a common carrier case, found that being cold and wet was sufficient bodily injury to sustain the cause of action for mental anguish. There, the plaintiff was frightened by being let off at the wrong station due to the defendant's negligence. Block v. Pascucci, 111 Conn. 58, 149 A. 210 (1930), also held physical injury sufficient where the plaintiff fell to the floor from fright; therefore, suffered some pains in her hands.

66. 27 Cal. 3d at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839 (1980).

Even if it's true that emotional harm is difficult to prove, this is not a valid reason for denying recovery to a plaintiff who has overcome that burden. Difficulty of proof of emotional harm, as well as the legitimacy and substantiality of the claim, are similar with respect to the nature of proof which the plaintiff must present. Therefore, with or without an allegation of physical manifestation, the trier of fact faces the same kind of task in each case, *i.e.*, that of determining the veracity of the plaintiff's evidence.

For justification of its disposition of the physical injury requirement, the *Molien* court relies heavily on the Hawaii Supreme Court case of *Rodrigues v. State*.[67] *Rodrigues* held that mental distress actions should be given the status of independent torts, no longer requiring accompanying physical injury for recovery. The Hawaii Court reached its conclusion after considering the cumulative impact of psychic stimuli in twentieth century society and the debilitating effect of mental distress.[68] It felt that social policy could no longer dictate against the need to extend legal protection[69] and that the criteria for determining the existence of a duty must change with a changing society.[70] In according negligent infliction of mental distress the status of an independent tort, the *Rodrigues* court held that there is a duty to refrain from the infliction of such distress.[71]

The Hawaii Court recognized the need to limit liability and, as a result, held that recovery would be limited to claims of *serious* mental distress.[72] Such 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."[73] Thus the essential question, the one which the *Molien* court adopted from *Rodrigues*, is the question of proof. That proof which will support a cause of action for mental distress will be "some guarantee of genuineness in the circumstances of the case."[74] In *Molien*, the proof and guarantee of genuineness was the social stigma attached to syphilis.[75] It is

67. 52 Hawaii 156, 472 P.2d 509 (1970).
68. *Id.* at 173-74, 472 P.2d at 520.
69. *Id.*
70. *Id.* at 170, 472 P.2d at 518-19.
71. *Id.* at 174, 472 P.2d at 520.
72. *Id.* at 173, 472 P.2d at 520.
73. *Id.*
74. *Id.*
75. *See* note 55 *supra* and accompanying text.

easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord and resulting emotional distress to a married patient's spouse.

Justice Mosk[76] was satisfied that the jurors are best situated to determine if the guarantee of genuineness exists in a plaintiff's claim. Mosk's basis for this contention was that the juror's own experience, as well as expert medical testimony, will provide the jurors with an adequate basis for weeding out false claims.

A demand for positive medical proof of the plaintiff's mental injuries serves to protect defendants from false or frivolous claims. Such a requirement provides a jury with a solid basis for arriving at a fair award in cases where the mental injury is real and substantial. Such proof is available today.[77]

C. The Dissent

The major thrust of Justice Clark's dissenting opinion centers around the classic public policy concepts which have been the basis of American courts' denial of recovery: (1) the fear that there will be a flood of litigation;[78] (2) the fear that there will be fictitious claims;[79] and, (3) the reluctance to subject a defendant to unlimited liability out of proportion to his wrongful act.[80]

The fear of a flood of litigation is based on an expected increase in fraudulent actions coupled with an increase due to actions based on mental distress of a trivial nature. This argument has to contend with two factors. First, those courts which have relaxed their limitations on recoveries of this type have not experienced any substantial increase in litigation.[81] Secondly, aside from practical considerations, several courts have noted that a court may

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76. *See* note 44 *supra*.

77. [W]e now possess the tools whereby we can intelligently evaluate claims of emotional injury. Psychiatry and clinical psychology, while not exact sciences, can provide sufficiently reliable information relating to the extent of psychological stress, and to the causal relationship between the injury and the defendant's conduct, to enable a trier of fact to make intelligent evaluation judgments on a plaintiff's claim. There is no reason to retain a long-standing legal rule when the factual assumptions underlying the norm are no longer supportable.

Alsteen v. Gehl, 21 Wis. 2d 349, 359, 124 N.W.2d 312, 317-18 (1963). *See* Leong v. Takasaki, 55 Hawaii 398, 411-13, 520 P.2d 758, 766-67 (1974); W. PROSSER at 328 n.40.

78. *See* note 32 *supra*.

79. *See* note 31 *supra*.

80. *See* note 33 *supra*.

81. *E.g.*, Okrina v. Midwestern Corp., 282 Minn. 400, 405, 165 N.W.2d 259, 263 (1969). In Lambert, *supra* note 23, at 592, the author asserts: "The truth of the matter is that the feared flood tide of litigation has simply not appeared in states following the majority rule allowing recovery of psychic injuries without impact. The volume of litigation has been heaviest in states following the *Mitchell* doctrine and its impact rule." *See* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

not refuse to adjudicate a particular type of case simply because its docket may increase. The duty of a court is to redress legal wrongs "and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do."[82] Thus, a court which denies recovery for this reason, denies for unsubstantiated administrative reasons wholly unrelated to the primary purpose of the law, *i.e.*, the redress of legal wrongs.[83]

The second fear, that of fictitious claims, should also be rejected. Faced with the tremendous advances which medical science has made in recent years, particularly in the area of mental disorders, such a reason for limiting recovery is unnecessary.[84]

In *Wilson v. Lund*,[85] a 1971 wrongful death action in Washington State, the court talked about the fact that there was no longer a substantial justification for the denial of recovery for purely emotional injuries. The court noted that:

> Modern-day, advanced psychiatric-phychological knowledge discounts former somewhat limited and provincial limitations surrounding proof or disproof of such injuries. And, it should be emphasized that 'intangible-emotional' injuries can and do constitute real and significant harms.[86]

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82. W. PROSSER, *supra* note 9, at 37. For further support that a court may not refuse to adjudicate a particular type of case simply because its work load would otherwise increase, *see* Hopper v. United States, 244 F. Supp. 314, 315 (D. Colo. 1965); Dillon v. Legg, 68 Cal. 2d 728, 736, 441 P.2d 912, 917-18, 69 Cal. Rptr. 72, 77-78 (1968); Green v. Shoemaker & Co., 111 Md. 69, 81, 73 A. 688, 692 (1909); Batalla v. State, 10 N.Y.2d 237, 241-42, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 38 (1961); Niederman v. Brodsky, 436 Pa. 401, 412-13, 261 A.2d 84, 89 (1970). The court in *Dillon* asserted that "[c]ourts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of 'administrative convenience' to sweep away a class of claims a number of which are admittedly meritorious." 68 Cal. 2d at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78.

83. In Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970) the court commented that it is the business of the law to remedy wrongs even at the expense of a flood of litigation. *See also* Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969) (the court stated:

> This court has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts. Similarly, it has rejected the argument that recognizing a right of recovery may increase the number of fraudulent claims, so long as the damages are not too conjectural).

84. *See* note 62 *supra*. *See also* Comment, *supra* note 2, at 1248-62 (author discusses the medical aspects of mental distress and how such distress is today capable of proof).

85. 80 Wash. 2d 91, 491 P.2d 1287 (1971).

86. *Id.* at 97, 491 P.2d at 1291.

In view of the fact that modern medical science has the capability of "satisfactorily establishing the existence, seriousness, and ramifications of emotional harm,"[87] courts can no longer deny recovery on the strength of precedents which point to the difficulty of proving emotional damages.

The dissent's argument that a jury may not be able to distinguish between a legitimate claim and a fictitious claim can be advanced in any situation. In his dissent, Justice Clark cites a medical study[88] stating that questions of the effects of emotional distress would not be easy ones for jurors. However, the Supreme Court has noted that:

> So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful.[89]

As noted earlier, medical science provides the tools whereby claims of emotional injury can be adequately evaluated.[90] Physicians today are equipped with methods to "accurately detect malingerers and fraudulent claimants so that such fears [of false claims] should not be used as an excuse to deny a plaintiff his right to present his case."[91] In cases where recovery for mental distress as a parasitic element has been granted, medical proof of psychic injuries has been readily accepted.[92] If the standard of proof has been sufficient in these cases, there are no evidentiary or logical reasons for rejecting such proof in cases involving mental distress alone.[93]

While the dissent is correct in its concern for problems of proof, such problems, though difficult, are "neither insurmountable nor unique to mental distress cases and should not prevent a plaintiff from presenting his case in court."[94] Surely a jury in judging the veracity of a plaintiff's evidence can weigh[95] the probabilities sufficiently to determine the legitimacy of the claim.[96]

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87. Comment, *supra* note 2, at 1253.
88. Smith, *supra* note 12, at 193.
89. United States v. Johnson, 319 U.S. 503, 519 (1943).
90. *See* notes 77 and 85-86 *supra* and accompanying text.
91. Comment, *supra* note 2, at 1237. *See* McMahon v. Bergeson, 9 Wis. 2d 256, 101 N.W.2d 63 (1969) (medical testimony established mental distress was suffered by the plaintiff apart from the physical impact of the auto accident caused by defendant's negligence); Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEV.-MAR. L. REV. 428, 430 (1957); Smith, *supra* note 12, at 56. *See generally* Keschner, *Simulation of Nervous and Mental Disease*, 44 MICH. L. REV. 715 (1946).
92. *See* notes 4 and 5 *supra*.
93. *See* W. PROSSER at 328-30.
94. Comment, *supra* note 2, at 1248-62.
95. *See* note 57 *supra* and accompanying text.
96. *See generally* Comment, *supra* note 2, at 1237 (1971).

The third public policy concept[97] that the dissent discusses as reason to deny recovery, rests in the fear that once the rigid lines drawn by the arbitrary restrictions are erased, a negligent defendant may be rendered susceptible to potentially unlimited liability. Such a concern is a real danger and is without doubt the motivating force behind the various limiting doctrines from which the courts have retreated. Yet, this concern must be balanced against recognition of the plight of the injured plaintiff. The honest litigant should not be denied redress for an injury which was foreseeable and culpably caused by another.

It seems that the requirement of "genuine and serious" mental distress as adopted by the majority opinion from the *Rodrigues*[98] case provides an adequate way to limit liability. Courts and juries have long applied the standard of conduct of "the reasonable man of ordinary prudence"[99] in determining negligence cases. It therefore seems reasonable that courts and juries are likewise competent to apply a standard of serious mental distress;[100] and that such a standard applied in conjunction with medical testimony and the foreseeability standard, will insure that defendants are not subjected to unlimited liability which is out of proportion to his wrongful act.

After examining and analyzing prior decisions, both in California and in other jurisdictions, the majority of the justices[101] in *Molien* were convinced that the time had come to recognize the concept of negligent infliction of emotional distress as an independent tort. This decision serves as a reminder that the law is constantly changing, developing new standards, and defining new limits for novel causes of action.

The evolution in the area of negligently inflicted mental distress first became apparent in *Dillon*. In *Dillon*, California acknowledged that one not directly injured or endangered by forces set in motion by defendant's negligence might recover damages for psychic injury. In taking this step, the *Dillon* court was not rejecting the doctrine of stare decisis as one might first think. Rather, the court was reinforcing the purpose of that doctrine by realizing that, in order to further public confidence in the law,

97. *See* note 80 *supra* and accompanying text.
98. *See* notes 67-74 *supra* and accompanying text.
99. *See* W. PROSSER at 150.
100. *See* note 72 *supra* and accompanying text.
101. *See* note 44 *supra*.

precedent should be adhered to only when based on fundamentally sound logic capable of promoting the public interest.[102] The *Dillon* court, breaking from past precedent, accepted responsibility for defining limits on the newly created cause of action, and took the first step toward appropriate and well-balanced boundaries by establishing criteria for standards of foreseeability of harm to bystanders.[103]

Once *Dillon* was decided, the decision in *Molien*, dispensing with the physical injury requirement, was inevitable. The American judiciary has had sufficient time to weigh the virtues and drawbacks of the standards set forth in *Dillon*.[104] In *Molien* the time had come to redefine the boundaries of present causes of action for mental distress in order to protect emotional health and well-being. To move in such a direction is to continue the evolutionary process of the law and to provide a means for its implementation.

The *Molien* decision is significant and though it is a natural progression of the law, it will undoubtedly arouse attention across the nation. While plaintiffs' attorneys will praise *Molien* as a breakthrough, attorneys for defendants will condemn it as overambitious. Also certain to be affected are the liability insurers who will be busy researching what the probable insurance losses will be and what premium price increase must be charged to offset such losses.

Though *Molien* cannot be faulted for giving a plaintiff who claims an emotional injury the chance to present his case, we can expect some inconsistency in the cases which shall follow. Since recovery of damages for negligently inflicted mental distress is a question of proof, those recovering will be those who can convince jurors that a defendant's wrongful conduct proximately caused such injury, and that such injury was legitimate. Consequently, while one jury is being unsympathetic to plaintiffs' evidence in one case, another jury may be finding in favor of the plaintiff in a factually similar case. However, such inconsistency is easier to swallow than a law which would preclude a plaintiff from presenting his case absent some arbitrary limitation.

Thus, American courts will be carefully considering the liberal

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102. Mr. Justice Harlan, in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), discussed the doctrine of stare decisis in a decision which created a new cause of action for wrongful death in maritime law. He stated: "[A] judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Id.* at 405.

103. *See* notes 38 *supra*.

104. *Id.*

stand which California has taken in *Molien*. In their scrutiny, they must question whether policy is truly promoted by denying a judicial forum to plaintiffs suffering serious emotional injury simply because of some arbitrary limitation placed upon recovery.

The time has come for every state to evaluate the needs of society and to accept the *Molien* decision. That is, "where it is established by a fair preponderance of the evidence [that] there is a proximate causal relationship between an act of negligence and reasonably foreseeable mental and emotional suffering by a reasonably foreseeable plaintiff, [and that mental suffering is genuine and serious], such proven damages are compensable."[105]

IV. CONCLUSION

This article has shown the history and policies behind the right to recover from negligently inflicted mental distress, leading up to the *Molien* case. The California Supreme Court evaluated the right of recovery in *Molien* and held that the right to recover for emotional distress caused by a defendant's negligent conduct should be allowed where it is foreseeable, genuine, and serious in nature; and that these elements are capable of being proved. Furthermore, no limitation such as a physical manifestation would be necessary in order for a plaintiff to present his case in court. The purpose of this article has been to show that the fears which had kept courts from granting such a cause of action are arbitrary; and in effect, the *Molien* case is a logical extention of that never-ending process whereby the law endeavors to keep pace with a changing society.

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105. Wallace v. Coca-Cola Bottling Plants Inc., 269 A.2d 117, 121 (Me. 1970).