

July 1986

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Recommended Citation

Francis X. Clinch and Jodie L. Johnson, *Compensation of Emotional Distress in Montana: Distinctions between Bystanders and Direct Victims*, 47 Mont. L. Rev. (1986).

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COMPENSATION OF EMOTIONAL DISTRESS IN MONTANA: DISTINCTIONS BETWEEN BYSTANDERS AND DIRECT VICTIMS

Francis X. Clinch and Jodie L. Johnson

I. INTRODUCTION

Courts have been unwilling to extend legal protection to a person's interest in peace of mind.¹ Especially they have disfavored liability for negligent infliction of emotional distress.² Courts fear that, because emotional injury cannot be observed objectively, judicial remedy will lead to compensation of fraudulent claims.³ Fearing both a flood of litigation and unlimited liability, many courts have rejected compensation for emotional distress.⁴ In its recent decisions in *Versland v. Caron Transport*⁵ and *Johnson v. Supersave Markets*,⁶ the Montana Supreme Court announced two very different standards for proving the genuineness of foreseeable emotional distress.

This comment discusses the traditional standards of proof which courts employed to determine the genuineness of emotional distress and traces the development of standards allowing compensation for foreseeable bystander victims of emotional distress. It then analyzes Montana cases addressing emotional distress and discusses the problems raised by the *Versland* and *Johnson* decisions. Finally, it will urge the adoption of a uniform standard for proving the genuineness and compensability of foreseeable emotional distress.

II. TRADITIONAL METHODS FOR LIMITING LIABILITY

A. *The Distinction Between the Direct Victim and Bystander Victim*

The Montana Supreme Court and other courts distinguish direct victims of emotional distress from bystander victims of emo-

1. See W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 54-55 (5th ed. 1984) [hereinafter cited as LAW OF TORTS].

2. *Id.* § 54, at 359-60.

3. See, e.g., *Spade v. Lynn & Boston R.R. Co.*, 168 Mass. 285, 288, 47 N.E. 88, 89 (1887); *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969).

4. See, e.g., *Spade*, 168 Mass. at 288; *Tobin*, 24 N.Y.2d at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

5. ___ Mont. ___, 671 P.2d 583 (1983).

6. ___ Mont. ___, 686 P.2d 209 (1984).

tional distress.⁷ Courts make the distinction in an effort to ensure that only foreseeable emotional distress injuries be compensated.⁸ The *Versland* case illustrates the distinction and its rationale.

The plaintiff in *Versland* was a farm wife who suffered emotional distress after seeing the defendant's semi-truck strike and kill her husband as he was riding a bale wagon on a state highway.⁹ There were two victims in *Versland*. The direct victim, to whom the defendant directed his negligent conduct,¹⁰ was the farmer whom the defendant struck and killed. The bystander victim was the farmer's wife who watched her husband die and suffered emotional distress even though the defendant directed none of his conduct toward her.¹¹

Courts define as foreseeable those injuries suffered by individuals towards whom a defendant directs his negligent conduct, such as the farmer in *Versland*; thus, such injuries are generally subject only to proof that they are genuine.¹² Recent judicial trends lean toward also compensating a bystander who suffers foreseeable emotional distress after seeing the death or serious injury of another.¹³ The Montana Supreme Court, in *Versland*, required proof that the bystander's emotional distress was foreseeable in addition to proof that it was genuine.¹⁴

B. Standards To Ensure the Validity of Claims for Direct Victims

While courts have traditionally subjected compensation for emotional distress to stringent rules which limit the type of persons compensated,¹⁵ they have also allowed recovery for emotional distress upon proof of another cause of action.¹⁶ Plaintiffs suffering

7. *E.g.*, *Versland*, ___ Mont. at ___, 671 P.2d at 585; *Paugh v. Hanks*, 6 Ohio St. 3d 72, 76-78, 451 N.E.2d 759, 764-65 (1983); *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 922-23, 686 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980).

8. *Versland*, ___ Mont. at ___, 671 P.2d at 587; *Paugh*, 6 Ohio St. 3d at 78, 451 N.E.2d at 765; *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968).

9. *Versland*, ___ Mont. at ___, 671 P.2d at 584.

10. *Molien*, 27 Cal. 3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

11. *Versland*, ___ Mont. at ___, 671 P.2d at 588.

12. *Molien*, 27 Cal. 3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

13. *See infra* notes 45 to 56 and accompanying text.

14. *Versland*, ___ Mont. at ___, 671 P.2d at 585.

15. *See Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 933-34, 122 Cal. Rptr. 470, 481-82 (1975).

16. *Southern Express Co. v. Byers*, 240 U.S. 612, 615 (1916); *Charlie Stuart Oldsmobile, Inc. v. Smith*, 171 Ind. App. 315, 325, 357 N.E.2d 247, 253 (1976); *Smith v. Gowdy*, 196 Ky. 281, 283-84, 244 S.W. 678, 679 (1922); RESTATEMENT (SECOND) OF TORTS § 47, comment b, at 80-81 (1965).

physical impact¹⁷ or physically manifesting the claimed emotional distress have also recovered.¹⁸ Other courts have modified these rules and allowed recovery to plaintiffs who were within the “zone of danger” of the defendant’s negligent conduct.¹⁹

1. Parasitic Damages

Courts traditionally compensated “parasitic” emotional distress to plaintiffs who proved another “host” cause.²⁰ If a plaintiff proved, for example, that the defendant tortiously invaded his property, the courts permitted compensation for emotional distress arising from the invasion.²¹ Courts employing this standard avoided its harshness, however, by finding a host cause in even the most trivial of circumstances.²² Exceptions eventually swallowed the rule, and rendered it useless as a tool for assuring the validity of claims.²³

2. Physical Impact Rule

The court in the 1888 English case of *Victorian Railways Commissioners v. Coultas*²⁴ first announced the rule that, absent physical impact such as a train hitting the plaintiff’s body, compensation cannot be granted for emotional distress.²⁵ Although the British courts soon abandoned the rule,²⁶ courts in Massachusetts²⁷ and New York²⁸ quickly adopted the holding and other jurisdic-

17. See, e.g., *St. Louis, I.M. & S.R. v. Bragg*, 69 Ark. 402, 405, 64 S.W. 226, 227 (1901); *Easton v. United Trade School Contracting Co.*, 173 Cal. 199, —, 159 P. 597, 599 (1916); *Mahoney v. Dankwart*, 108 Iowa 321, 325-26, 79 N.W. 134, 135 (1899); *Nelson v. Crawford*, 122 Mich. 466, 471, 81 N.W. 335, 336 (1899); *Miller v. Baltimore & O.S.W.R. Co.*, 78 Ohio 309, 322-23, 85 N.E. 499, 503-04 (1908).

18. See, e.g., *Keck v. Jackson*, 122 Ariz. 114, 115, 593 P.2d 668, 669-70 (1979); *Towns v. Anderson*, 195 Colo. 517, 519, 579 P.2d 1163, 1165 (1978); *Summers v. Western Idaho Potato Processing Co.*, 94 Idaho 1, 2, 479 P.2d 292, 293 (1971); *Sears, Roebuck & Co. v. Young*, 384 So. 2d 69, 71 (Miss. 1980); see also RESTATEMENT (SECOND) OF TORTS § 436A (4th ed. 1971). But see *Rodrigues v. State*, 52 Hawaii 156, 170-71, 472 P.2d 509, 519-20 (1970).

19. *Towns*, 195 Colo. 517, 579 P.2d 1163; *Robb v. Pennsylvania R.R.*, 58 Del. 454, 210 A.2d 709 (1965); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978).

20. See *supra* note 7 and cases cited.

21. E.g., *Meyer v. 4-D Insulation*, 60 Or. App. 70, 652 P.2d 852 (1982).

22. E.g., *Rodrigues*, 52 Hawaii at 170, 472 P.2d at 519 (quoting *Fraser v. Blue Cross Animal Hosp.*, 39 Hawaii 370, 373 (1952)).

23. *Rodrigues*, 52 Hawaii at 170, 472 P.2d at 519.

24. 13 App. Cas. 222 (P.C.) [1888].

25. *Id.*

26. *Dulieu v. White & Sons*, 2 K.B. 669 [1901]; *Bell v. Great N. Ry. Co.*, 26 L.R. Ir. 428 [1890].

27. *Spade*, 168 Mass. 285, 47 N.E. 88.

28. *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

tions throughout America followed.²⁹

By allowing recovery even to plaintiffs suffering only the slightest impact, courts subsequently reduced the rule to a mere formality.³⁰ The weakened rule, however, failed to distinguish valid from invalid claims. Further, commentators and courts criticized the underlying rationale of the rule, arguing that proof of emotional distress was readily available.³¹ Courts, therefore, required a high threshold of proof for serious mental distress sufficient to limit fraud.³²

Commentators and courts also have disputed the "floodgates" rationale underlying the physical impact rule. Professor Prosser noted that the fear of a flood of litigation cannot alone justify judicial refusal to grant compensation to victims of genuine emotional distress.³³ The courts which abandoned the physical impact requirement encountered no resulting flood of litigation.³⁴

3. *Physical Manifestation Rule*

Most jurisdictions require that the plaintiff physically manifest the claimed emotional distress.³⁵ Although the rule does not require contact with the plaintiff's body, it does call for objective evidence of physical injury. Fear of fraudulent claims again justifies the requirement: "The temporary emotion of fright, so far from serious, is so evanescent a thing, so easily counterfeited, and so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence."³⁶ Exceptions to the rule arise in the cases of negligent mishandling of corpses and negligent forwarding of telegraph messages.³⁷ Because the mishandling of a

29. See, e.g., *supra* note 17.

30. See, e.g., *Porter v. Delaware, L & W.R.R.*, 73 N.J.L. 405, 63 A. 860 (1906) (impact when dust fell in plaintiff's eye); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (impact when plaintiff inhaled smoke); *Interstate Life & Accident Co. v. Brewer*, 56 Ga. App. 599, 193 S.E. 458 (1937) (impact where coins harmlessly hit plaintiff's body).

31. See Comment, *Refining the Traditional Theories of Recovery for Consumer Mental Anguish*, 1979 B.Y.U. L. Rev. 81, 86-87. See also *Towns*, 195 Colo. at 519, 579 P.2d at 1164; *Falzone v. Busch*, 45 N.J. 559, 564, 214 A.2d 12, 14 (1965).

32. See *Molien*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831; *Rodrigues*, 52 Hawaii 156, 472 P.2d 509; *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983); *Paugh*, 6 Ohio St. 3d 72, 45 N.E.2d 75.

33. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939).

34. E.g., *First Nat'l Bank v. Langley*, 314 So. 2d 324, 339 (Miss. 1975); *Falzone*, 45 N.J. at 567, 214 A.2d at 16.

35. See *supra* note 18.

36. LAW OF TORTS, *supra* note 1, § 54, at 362.

37. See, e.g., *Carey v. Lima, Salmon & Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1959) (defendant negligently embalmed the body of plaintiff's father); *Western Union*

corpse and the delivery of an incorrect telegraph message concerning a loved one's health, in almost all circumstances, would give rise to severe emotional distress, the courts find special likelihood that such claims are genuine.³⁸

C. *The Bystander Victim and the Zone of Danger Rule*

The most controversial cases involve bystander victims who observe the injury or death of another person. Other courts allow compensation if the plaintiff was "in close enough proximity to an accident to have been placed in actual physical danger, and, that as a result of being within the 'zone of danger' a plaintiff-bystander's emotional suffering was deemed genuine because of the fear of that physical danger."³⁹

Recovery is allowed under this rule even if no physical harm results.⁴⁰ Although the courts initially employed the zone of danger rule to mitigate the harshness of the physical impact rule,⁴¹ seemingly deserving plaintiffs who were not within the zone of danger have been denied compensation under the more lenient rule.⁴² Recently, the arbitrary results engendered by this rule and the other traditional rules forced some jurisdictions, including Montana, to adopt a more flexible rule of foreseeability.⁴³

III. MODERN TREND TOWARD REASONABLE FORESEEABILITY

A. *The Reasonably Foreseeable Bystander*

The California Supreme Court initiated the break from the traditional tests of compensable emotional distress in the cele-

Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930) (defendant misinterpreted a message with medical results concerning plaintiff's daughter); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943) (defendant failed to deliver message of the death of plaintiff's brother).

38. See LAW OF TORTS, *supra* note 1, § 54, at 362.

39. *Pugh*, 6 Ohio St. 3d at 75, 451 N.E.2d at 763.

40. See *Towns*, 195 Colo. 517, 579 P.2d 1163; *Robb*, 58 Del. 454, 210 A.2d 709; *Shelton*, 570 S.W.2d 861. See also RESTATEMENT (SECOND) OF TORTS § 436, at 456-57 (1965).

41. See *Bowman v. Williams*, 164 Md. 397, 403-04, 165 A. 182, 184 (1933) (defendant negligently drove truck into plaintiff's house); *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 408, 234 A.2d 656, 658 (1967) (same).

42. *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952) (court denied recovery to mother outside the zone of danger when witnessed children being run over); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972) (recovery denied to mother watching baby being fatally dropped to the floor); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935) (recovery denied to husband of mother who died after watching car run down child).

43. *E.g.*, *Dillon*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (overruling *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963)); *Verland*, ___ Mont. ___, 671 P.2d 583.

brated case of *Dillon v. Legg*.⁴⁴ In *Dillon*, a parent who witnessed the death of her child recovered damages for the emotional trauma which she suffered, even though she was outside the zone of danger.⁴⁵ The California court rejected as hopelessly artificial the rule requiring a plaintiff-bystander to be in fear for his own personal safety in order to recover.⁴⁶

The court in *Dillon* rejected the assumption that imposing liability for emotional distress injuries leads to "successful assertion of fraudulent claims."⁴⁷ Emotional distress, the court found, can be proven.⁴⁸ The mere possibility that some fraudulent claims might prevail failed to "justify an abdication of the judicial responsibility to award damages for sound claims . . ."⁴⁹

The central issue in such a case is whether a defendant owed a duty of care toward a plaintiff to refrain from causing the plaintiff emotional distress.⁵⁰ The *Dillon* court announced a test which examines whether the defendant could have "reasonably foresee[n] the injury to plaintiff."⁵¹ The test involves consideration of:

- (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
- (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from another 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.⁵²

The California court employed the foreseeability test when the plaintiff is a bystander rather than the direct victim of a defendant's actions; the court found that a direct victim's emotional distress is always foreseeable.⁵³ In *Dillon*, however, the court still required physical manifestation of emotional distress.⁵⁴ Other jurisdictions are split in their acceptance of the *Dillon* analysis.⁵⁵

44. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72.

45. *Id.* at 731, 441 P.2d at 915, 69 Cal. Rptr. at 75.

46. *Id.*

47. *Id.* at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.

48. *Id.* at 743, 441 P.2d at 922, 69 Cal. Rptr. at 82.

49. *Id.* at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78.

50. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

51. *Id.*

52. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

53. *Molien*, 27 Cal.3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

54. *Dillon*, 68 Cal.2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

55. Courts rejecting bystander recovery include *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Keck*, 122 Ariz. 114, 593 P.2d 668 (*en banc*); *Shelton*, 570 S.W.2d 861; *Grimsby v. Sampeon*, 85 Wash. 2d 52, 530 P.2d 291 (1975); *Whetham v. Bismarck Hosp.*,

B. *The Reasonably Foreseeable Direct Victim*

In *Molien v. Kaiser Foundation Hospitals*⁵⁶ the California Supreme Court similarly rejected the traditional tests for compensable emotional distress. In *Molien*, however, the plaintiff was the direct victim⁵⁷ of the defendant's conduct.⁵⁸ There, the plaintiff recovered for emotional distress which he suffered after the defendant-hospital incorrectly diagnosed his wife as syphilitic, advised his wife to tell him of the diagnosis and required him to submit to a blood test.⁵⁹ The court noted that compensation for emotional distress normally depends on (1) the finding of proof of physical injury, (2) the assertion of an independent cause of action and (3) the allegation of intentional, extreme and outrageous invasion of mental tranquility.⁶⁰

The court in *Molien* rejected traditional judicial line-drawing and found unsatisfactory judicial allowance of compensation in cases where all three factors are present and denial of compensation in all other circumstances.⁶¹ The court held that the paramount consideration is whether sufficient proof of serious mental injury exists.⁶² The court left this question to the trier of fact, and suggested that expert medical testimony may objectively establish the validity of a claim.⁶³

IV. JUDICIAL TREATMENT OF EMOTIONAL DISTRESS IN MONTANA

A. *Historical Background*

Montana has been at the forefront in allowing recovery for emotional distress. In 1889 the United States Supreme Court, applying Montana law, in *Kennon v. Gilmer*,⁶⁴ allowed recovery for mental anguish which accompanied bodily injury. The court noted, "[I]t is impossible to exclude the mental suffering in estimating

197 N.W.2d 678 (N.D. 1972); *Guilmette v. Alexander*, 128 Vt. 116, 259 A.2d 12 (1969). Courts allowing bystander recovery include *Versland*, ___ Mont. ___, 671 P.2d 583; *Paugh*, 6 Ohio St. 3d 72, 451 N.E.2d 759; *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975); *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974).

56. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831.

57. By "direct victim" the court refers to one to whom the defendant's negligent conduct is directed. *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.

58. *Id.*

59. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

60. *Id.* at 926-27, 616 P.2d at 819, 167 Cal. Rptr. at 837.

61. *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

62. *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

63. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

64. 131 U.S. 22 (1889).

the extent of the personal injury for which compensation is to be awarded."⁶⁵ In *Cashin v. Northern Pacific Railway*,⁶⁶ the plaintiff suffered severe shock when the defendant's blasting showered the plaintiff's home with rocks.⁶⁷ The court found physical injury in the shock to the plaintiff's nervous system and allowed recovery of damages.⁶⁸ This opened the door to compensation for emotional injuries absent a physical injury.

In *Kelly v. Lowney & Williams*,⁶⁹ the court reaffirmed the stance taken in *Cashin*, and stated, "[I]n this state there may be recovery for damages for personal injuries occasioned by fright or mental shock though there be no physical contact."⁷⁰ The category of compensable emotional distress expanded to instances where the plaintiff did not fear for his personal safety in *French v. Ralph Moore, Inc.*⁷¹ In *French*, the defendant's negligently-installed gas tanks contaminated the plaintiffs' home and restaurant.⁷² The court stated, "There seems to be no sound reason to refuse to award damages for discomfort and annoyance where the only injury is to the real property since it is obvious that such an injury may cause discomfort and annoyance without also causing an actual physical injury to the person."⁷³

In *Dawson v. Hill & Hill Trucking*,⁷⁴ the court refused to compensate sorrow, grief, and mental distress in a wrongful death action. The court expressly overruled prior decisions which held that only pecuniary loss could be recovered in such a case⁷⁵ and attributed its reversal to social change and the development of tort principles.⁷⁶

B. Bystander Victims: *Versland v. Caron Transport*

In *Versland v. Caron Transport*,⁷⁷ the Montana Supreme

65. *Id.* at 26.

66. 96 Mont. 92, 28 P.2d 862 (1934).

67. *Id.* at 99, 28 P.2d at 865.

68. *Id.* at 102, 28 P.2d at 866.

69. 113 Mont. 385, 126 P.2d 486 (1942).

70. *Id.* at 390, 126 P.2d at 488.

71. ____ Mont. ____, 661 P.2d 844 (1983). See also *Newton v. City of Roundup*, 60 Mont. 24, 198 P.441 (1921); *Nelson v. C & C. Plywood*, 154 Mont. 414, 465 P.2d 314 (1970).

72. *French*, ____ Mont. at ____, 661 P.2d at 846.

73. *Id.* at ____, 661 P.2d at 848 (quoting *Kornoff v. Kingsburg Cotton Oil Co.*, 45 Cal. 2d 265, ____, 288 P.2d 507, 513 (1955)).

74. ____ Mont. ____, 671 P.2d 589 (1983).

75. *Id.* at ____, 671 P.2d at 594. See also *Mize v. Rocky Mtn. Bell Telephone Co.*, 38 Mont. 521, 100 P. 971 (1909); *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 P. 142 (1909) (*Dawson* overruled both cases which followed pecuniary loss rule).

76. *Dawson*, ____ Mont. at ____, 671 P.2d at 592.

77. ____ Mont. ____, 671 P.2d 583.

Court adopted the reasonable foreseeability test in allowing bystander recovery for emotional distress.⁷⁸ The court in *Versland* also rejected the assumption that the physical manifestation rule was necessary to prevent fraudulent claims. It held that medical science provides adequate means of determining whether a plaintiff has suffered "serious and compensable injury."⁷⁹

The court in *Versland* held compensable a bystander's emotional distress when it determined that the defendant could have foreseen the distress.⁸⁰ The court modified the *Dillon* criteria for determining the foreseeability of a bystander's emotional distress:

1. The shock must result from a direct emotional impact upon the plaintiff from the sensory and contemporaneous perception of the accident, as contrasted with learning of the accident from others after its occurrence.
2. The plaintiff and victim must be closely related, as contrasted to an absence of any relationship or the presence of only a distant relationship.
3. Either death or serious physical injury of the victim must have occurred as a result of the defendant's negligence.⁸¹

C. Direct Victims: *Johnson v. Supersave Markets*

In *Johnson v. Supersave Markets*,⁸² the Montana Supreme Court extended its *Versland* decision and allowed direct victims of negligent acts to recover damages for emotional distress without showing physical injury.⁸³ In *Johnson*, city police arrested and jailed the plaintiff whose wife had written a bad check to the defendant supermarket.⁸⁴ The Montana Supreme Court found the supermarket negligent because it failed to inform the police that the plaintiff had previously made complete restitution. It also affirmed the award of damages for the emotional distress of the jailed plaintiff.⁸⁵ The *Johnson* court did not discuss foreseeability, presumably because the plaintiff was a direct victim. However, it did emphasize its reluctance "to permit damages for specious emotional upset."⁸⁶ To foreclose fraudulent claims, the court required proof of a host cause of action for emotional distress and limited

78. *Id.* at ____, 671 P.2d at 588.

79. *Id.*

80. *Id.*

81. *Id.*

82. ____ Mont. ____, 686 P.2d 209 (1984).

83. *Id.* at ____, 686 P.2d at 212.

84. *Id.* at ____, 686 P.2d at 210-11.

85. *Id.* at ____, 686 P.2d at 211-12.

86. *Id.* at ____, 686 P.2d at 212.

damage awards to those cases where "tortious conduct results in *substantial* invasion of a legally protected interest and causes *significant* impact upon the person of plaintiff."⁸⁷ The invasion of the plaintiff's interest in freedom, and by the plaintiff's emotional response to being jailed, the court found, fulfilled this standard.⁸⁸

V. ANALYSIS OF VERSLAND AND JOHNSON

A. *Parasitic Damages for Emotional Distress in Direct Victim Cases*

The court in *Johnson*, seeking to assure the genuineness of claims through its standard of substantial invasion of a legally protected interest, banished emotional distress to the category of parasitic damages. This holding contradicts *Versland*. The *Versland* criteria determine the foreseeability of emotional distress suffered by one to whom a defendant did not direct his negligent conduct.⁸⁹ After fulfillment of the three-pronged foreseeability test, the *Versland* holding allows compensation upon proof that the emotional distress is genuine.⁹⁰ Although both the direct and bystander victims suffer foreseeable emotional distress, only direct victims under *Johnson* must prove the invasion of a legally protected interest, other than peace of mind, before receiving compensation.⁹¹

In *Molien*, the California court rejected the requirement of an independent cause of action as a prerequisite to an award for emotional damages: "[A]lthough we recognize a need to guard against fraudulent claims, we are not persuaded that the presently existing artificial lines of demarcation are the only appropriate means of attaining this goal."⁹² The court adopted the proposition that "freedom from negligent infliction of serious mental distress is entitled to independent legal protection,"⁹³ and relied upon a heavy standard of proof that the emotional distress is serious to assure the validity of the claims.⁹⁴

Rather than focusing on the seriousness of the emotional distress, the Montana Supreme Court added the most archaic of standards as an additional barrier to compensation. By requiring the invasion of another legally protected interest, the court contra-

87. *Id.* at ____, 686 P.2d at 213.

88. *Id.*

89. *Versland*, ____, Mont. at ____, 671 P.2d at 587.

90. *Id.* at ____, 671 P.2d at 588.

91. *Johnson*, ____, Mont. at ____, 686 P.2d at 213.

92. *Molien*, 27 Cal. 3d at 927, 616 P.2d at 819, 167 Cal. Rptr. at 837.

93. *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

94. *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

dicted its *Vermland* holding and denied independent legal protection to the right to freedom from infliction of emotional distress.

The standard is also problematic because it fails to define a legally protected interest. The court derived this requirement from the Oregon Supreme Court's decision in *Meyer v. 4-D Insulation*.⁹⁵ In *Meyer*, the Oregon Court of Appeals found a substantial legal interest only in "certain intentional torts, private nuisance, invasions of privacy and other miscellaneous cases."⁹⁶ The invasion of these interests, the court held, gives rise to compensable mental distress.⁹⁷ Unlike the court in *Meyer*, which required the invasion of a significant interest,⁹⁸ the Montana Supreme Court in *Johnson* required the significant intrusion on *any* legally protected interest.⁹⁹

The plaintiff wife in *Vermland* received compensation for emotional distress upon the mere proof that her distress as a bystander was foreseeable and genuine. Ironically, had her husband survived to press a claim for emotional distress, the standards in *Johnson* would have required him, as a direct victim, to offer more extensive proof as a prerequisite to recovery.

B. *The Significant Impact Standard in Direct Victim Cases*

The second standard in *Johnson*, that the impact of the tortious conduct must be significant, demonstrates the court's desire to compensate only valid claims for mental distress. The court, however, failed to define "significant impact."¹⁰⁰ In *Johnson*, the plaintiff's divorce attorney testified that while in jail, the plaintiff "was much more agitated than what I had seen him before" and that he "seemed disoriented . . . in a sense that he didn't understand why he was there, what had happened that had led him there."¹⁰¹ The attorney also testified that the plaintiff uncharacteristically repeated questions and exhibited "[a] lot more hand movement, expressions, pacing, and nervousness"¹⁰² From this evidence the court, somehow, found "serious" impact.

The court in *Vermland* indicted that it would rely on "today's more advanced state of medical science, technology and testing

95. 60 Or. App. 70, 652 P.2d 852 (1982).

96. *Id.* at ____, 652 P.2d at 854.

97. *Id.*

98. *Id.*

99. *Johnson*, __ Mont. at ____, 686 P.2d at 213.

100. *Id.* at ____, 686 P.2d at 214.

101. *Id.* at ____, 686 P.2d at 213.

102. *Id.* at ____, 686 P.2d at 213-14.

techniques" to assure the genuineness of claims for emotional distress.¹⁰³ The testimony of the lay witnesses in *Johnson*, however, sets a low threshold for proof of genuine emotional distress and renders doubtful the court's alleged concern for compensating only serious emotional distress.¹⁰⁴

C. *Distinction Between Injury and Distress in Johnson*

The court in *Johnson* distinguished physical and mental injury from mere distress. Physical and mental injury, the court held, is compensable in all cases.¹⁰⁵ Mental distress is compensable only upon proof of the invasion of a legally protected interest causing significant impact on the plaintiff.¹⁰⁶

This distinction appears to be drawn from the court's earlier decision in *Cashin*.¹⁰⁷ In that case, the court acknowledged the rule denying compensation for mental pain and suffering absent physical injury, but found that the alleged shock itself constituted physical injury.

The court in *Cashin* found that the plaintiff met the requirement that physical injury accompany a claim for damages for mental pain and suffering by alleging in his complaint, damages to the nervous system:

It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish and falls within the physiological, rather than psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system. * * * Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected.¹⁰⁸

The California Supreme Court in *Molien*, analyzing identical language, refused to recognize a distinction between physical and mental injury¹⁰⁹ and allowed compensation for all serious emotional distress proven to be genuine.¹¹⁰

The distinction between injury and distress is problematic.

103. *Versland*, ___ Mont. at ___, 671 P.2d at 588.

104. *See Johnson*, ___ Mont. at ___, 686 P.2d at 213.

105. *Id.* at ___, 686 P.2d at 212.

106. *Id.* at ___, 686 P.2d at 213.

107. 96 Mont. 92, 28 P.2d 862 (1934).

108. *Cashin*, 96 Mont. at 102, 28 P.2d at 866 (quoting *Sloane v. Southern Ry.*, 111 Cal. 668, ___, 44 P. 320, 322 (1896)).

109. *Molien*, 27 Cal. 3d at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

110. *Id.*

The court in *Johnson* described emotional distress as "pass[ing] under various names such as mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry."¹¹¹ That description and the description of injury found in *Cashin* defy clear differentiation, especially insofar as both include "nervous shock." A plaintiff alleging "nervous shock" as injury could plead damages under the *Cashin* holding and avoid proving substantial invasion of a legally protected interest as required in *Johnson*. The same plaintiff could allege "nervous shock" as emotional distress under the *Johnson* holding and employ the seemingly lax factual standard for significant impact found in that case.

The court in *Versland* recognized no dichotomy and reduced the determination to "whether plaintiff suffered a serious and compensable injury."¹¹² It found physical manifestation to be merely one element which a trier of fact could consider in finding that emotional distress is genuine.¹¹³ In the case of a direct victim, proof of physical injury is one fact along with other evidence which the trier of fact could consider in determining whether there has been significant impact upon the plaintiff.

VI. RECOMMENDATION

In *Versland*, the Montana Supreme Court continued its progressive policy of compensating emotional distress damages by following the lead of jurisdictions allowing recovery for bystander victims. The *Versland* standards determine whether a bystander plaintiff shares with the direct victim one of the basic elements for recovery in tort: foreseeable injury. Once a bystander plaintiff demonstrated that his injuries were foreseeable, the only barrier to his recovery was the requirement that he prove the genuineness of his injuries.

The *Johnson* decision represents a step backward in the analysis of compensable emotional distress. For no apparent or logical reason, the *Johnson* court requires a different test of genuineness for the direct victim than it does for the bystander victim. The bystander victim need only prove the genuineness of the injury, but the direct victim must also prove the invasion of another legally protected interest.

111. *Johnson*, ___ Mont. at ___, 686 P.2d at 212 (quoting *Roberts v. Saylor*, 230 Kan. 289, 637 P.2d 1175 (1981)).

112. *Versland*, ___ Mont. at ___, 671 P.2d at 588.

113. *Id.*

The requirement of a host cause of action as a condition for recovering emotional distress damages fails to assure the validity of claims. Courts have found a host cause of action in almost any situation.¹¹⁴ The requirement will merely encourage extravagant pleading, an evil which the court in *Versland* cited when it rejected physical injury as a condition for recovery.¹¹⁵

The *Johnson* decision is also at odds with itself in requiring proof of a significant impact, while allowing compensation for distress which bordered on the trivial. The distinction which the court found between emotional injury and emotional distress also promises to encourage extravagant pleading and to confuse the facts to be plead and proven in a case involving mental distress.

Johnson purports to ensure that only valid claims for emotional distress are compensated. A unified approach to compensating foreseeable direct and bystander victims, requiring a higher standard of proof of genuineness of distress, would better meet this goal. After fulfilling the *Versland* test, the foreseeable bystander victim should be subject to the same test of genuineness as that applied to the direct victim. Other jurisdictions follow the standard announced in *Versland*, that the injury be serious, in allowing compensation for emotional distress of both direct and bystander victims.¹¹⁶

The court in *Molien* relied exclusively on proof that the mental distress was serious¹¹⁷ and held that objective proof of emotional distress can adequately preclude fraudulent claims.¹¹⁸ In *Rodrigues v. State*,¹¹⁹ the Supreme Court of Hawaii also required proof of serious emotional distress and found it "where a reasonable man, normally constituted, would be unable to adequately cope with the emotional distress engendered by the circumstances of the case."¹²⁰ The Ohio Supreme Court, employing *Rodrigues*, allows compensation only in cases such as psychosis or neurosis.¹²¹ This more stringent standard ensures that emotional damages, whether they be termed injury or distress, are genuine.

In following these decisions, the Montana Supreme Court need

114. See *supra* note 22 and accompanying text.

115. *Versland*, ___ Mont. at ___, 671 P.2d at 587 (quoting *Molien*, 27 Cal. 3d at ___, 616 P.2d at 280, 167 Cal. Rptr. at 838).

116. See, e.g., *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 136, 447 N.E.2d 109, 113 (1983) (direct victim recovered for serious emotional distress); *Paugh*, 6 Ohio St. 3d at 78, 451 N.E.2d at 765 (bystander recovered for serious emotional distress).

117. *Molien*, 27 Cal. 3d at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

118. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

119. *Rodrigues*, 52 Hawaii at 172, 472 P.2d at 519.

120. *Id.* at 173, 472 P.2d at 520.

121. *Paugh*, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759, 765.

only extend its holding from *Verland* and find unnecessary traditional limitations on recovery for emotional distress "in light of today's more advanced state of medical science, technology and testing" ¹²²

122. *Verland*, ___ Mont. at ___, 671 P.2d at 588.