MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATURE
HOUSE OF REPRESENTATIVES

January 21, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on January 21, 1987, at 8:00 a.m. in Room 312-D of the State Capitol.

ROLL CALL: All members were present.

HOUSE BILL NO. 167: Rep. Gilbert, sponsor, District No. 22, stated HB 167 eliminated the right to recover damages for emotional or mental distress in all cases except those cases involving actual physical injury from physical contact or threat of physical contact. The fundamental problem of the liability crisis is increasing unpredictable sizable awards and juries seem to be free in handing out these awards. There did not seem to be any restraints. The time has come to try and put a cap on these awards and on these cases. We need to put a stop to them.

PROPONENTS: DOLPHY POHLMAN, Montana Association of Defense Counsel, pointed out that recovery for emotional distress was first permitted in assault cases only. The law was otherwise reluctant to accept a persons interest in piece of mind as entitled to independent legal protection. Common problems in allowing recovery for emotional distress cited by numerous courts were:

(1) Difficulty of proving measuring damages -- mental pain is metaphysical and hard to qualify.

(2) Problem in finding proximate connection between defendant's conduct and the plaintiff's mental state.

(3) Fear of subjecting courts to a flood of suits based on trivial and fictitious claims.

Traditionally a majority of American courts required the plaintiff suffer some physical touching or "impact" as a result of defendant's negligent conduct in order to recover the emotional distress. A large number of states that rejected the impact rule adopted the "zone of danger" rule to limit recovery for emotional distress. In Montana, the cause of action for the negligent infliction of emotional distress has also been expanding. In Versland vs. Caron Transport, 671 P.2D 583 (1983), Montana adopted the Dillon holding, slightly modifying its elements in allowing a wife

to recover damages for emotional distress upon witnessing her husband's death from a collision. He submitted written testimony. (Exhibit A).

JIM ROBISCHON, Montana Liability Coalitions, submitted a list of Montana Liability Coalition supporters. (Exhibit B). He said the bill did not allow for the recovery of damages in cases involving contracts or breach of contracts or in a commercial action relating to a contract.

F. H. Boles, President of the Montana Chamber of Commerce, stated the Montana Liability Coalition and the Montana Chamber of Commerce had put tort reform as the number one priority of the year. They need meaningful tort reform enacted in this legislation. It is one of the areas that they thought reform should be enacted and support for HB 167 was encouraged.

GERALD J. NEELY, Montana Medical Association, supported the measure because of the impact on the availability of insurance and on that basis, the association supported the bill.

JAMES T. AHRENS, President of the Montana Hospital Association, stated the Association was a member of the Montana Liability Coalition and supported the legislation.

KATHRYN IRIGOIN, State Auditor's Office, stated she supported HB 167 with amendments and more strongly supports HB 209. She submitted amendments. (Exhibit C).

LORNA FRANK, Montana Farm Bureau, stated as a grass roots organization, the Bureau supported the legislation.

GEORGE ALLEN, Montana Retail Association, went on record in support of the bill.

BOB HELDING, Montana Realtors and the Montana Motor Carriers, supported the enactment of HB 167.

BOB CORREA, Bozeman Chamber of Commerce, went on record in support of the bill.

CHIP ERDMANN, Montana League of Savings Institutions, stated they also rose in support of HB 167 because they felt it was a judicial doctrine that had gotten out of hand. The way our government was designed, the various branches were there to balance one another and this was one case where the legislative branch should balance off some of the excesses of the judicial branch.

H. S. HANSON, Montana Technical Council, supported any legislation of HB 167's nature.

KEITH ANDERSON, President of the Montana Tax Payers Association, supported the bill.

JANE CAMPBELL, Executive Director of the Montana Society of CPA's, supported the bill.

OPPONENTS: JOHN C. HOYT, Great Falls Attorney, stated he has lived in Montana for 65 years, is a rancher and lives on his ranch, is engaged in the oil business, is a business man, and is a taxpayer. He said that it was impossible to discuss HB 167 without overlapping into HB 209 and wished to discuss both bills together. Mr. Hoyt used Mr. Pohlman's testimony to point out that Mr. Pohlman hit the nail on the head when he said the problem with emotional damages was the truth of emotional damages. Mr. Hoyt referred to the number of farmers who have killed themselves because of the emotional distress their concerns caused when they were no longer able to provide for their families and were being moved off their farms. Proponents of these bills do not tell us that people who suffer emotional distress are not damaged, but what they are saying is just do not compensate them, and do not make the wrong doers responsible. We cannot ignore this suffering. He further stated that today we have techniques that can be used for very accurate measures of the damage a person sustains because of emotional situation. He demonstrated the M.M.P.I. profile, a standard reliable and an absolutely objective test. Suffering is a situation that does not go away. He stated there was another area involved in the issue which was the area of disfiguration. Under HB 209, damages for disfiguration would be limited to $200,000.00. He submitted photos of two ladies severely burned. (Exhibit D (1-7)). He stated this was done with the permission of the ladies and not done to generate sympathy for the ladies, and was not done to shock anyone. This was done to advise the committee when this type of legislation came before them, they must know what eliminating non-economic damages, or capping them at $200,000.00, can do. We need some tort reform but we need the right tort reform.

ZANDER BLEWETT, Attorney from Great Falls, stated if the bill passed, there would not be anymore libel and slander in the state because there would not be any damage. Wrongful detention, intentional infliction of emotional distress, blackmail, kidnapping of children, all fraud damages, insurance bad faith, criminal activity that was tortuous, are just a few things that will be effected by HB 167 and 209 in the state of Montana. He urged these bills be killed.

REP. KELLY ADDY, testified in opposition to the bill. He stated the bill dealt with tort reform and it limited damages.

STEVE WALDRON, Montana Council of Mental Health Centers, stated the centers realize there is need for liability reform and they support some proposals for tort and liability reform. However, HB 167 goes too far. He urged the bill be laid to rest.

DEBRA JONES, Women's Lobbyist Fund, stated WLF opposed HB 167 and 209 because it would subject women to unfair disadvantages in the civil process. The bills would force juries to discriminate against people in the lower income brackets, the majority of whom are women. The payment of non-economic damages ensures that no matter what the income, we are all entitled to be compensated for our injuries. The WLF urged the bills be given a "Do Not Pass" recommendation. She submitted written testimony. (Exhibit E).

ERIC THUESAN, attorney from Great Falls, stated he was asked by the Montana Trial Lawyers to speak on their behalf in opposition to HB 167. He pointed out that three questions must be answered in order to decide if the bill was making sound public policy. How was the bill going to work? Was it fair to the people of Montana? Did it recognize what the people had lost? The answers to the questions were "no". Cases of high award were an exception to the rule and the Montana Supreme Court had the right to reduce an award if they felt it was based on passion or prejudice. He feels the bill is not sound public policy and it will breed disrespect for the law.

JOE BOTTOMLY, attorney from Great Falls, stated the drafters of the bill did not intend to mislead the committee when they said the bill would bring the law back to the 1980 law. All the crimes, wrongs and torts the bill abolished, amounting to at least 14, are not all recent. They date back to 1897. He emphasized do not throw the baby out with the bath water.

LISA LOVELL, law student from the university of Montana and President of the Association of Student Trial Lawyers for the State of Montana, stated she was opposed to HB 167. She pointed out she would perhaps feel differently if the proponents had convinced her that the victims mentioned had not suffered any damages. She felt the proponents talked about money instead of people.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 167: Rep. Gould asked Mr. Robischon how many times settlements were made between the two parties and, in the case of the Noonan's,

did they actually receive the $700,000.00 or did they make a settlement? Mr. Robischon stated that the Noonon case was presently on appeal to the Montana Supreme Court and included in the appeal was that award for damages of mental and emotional distress.

Rep. Daily asked Mr. Hoyt how much money was actually received in the Dunphy and Noonan cases. Mr. Hoyt stated he could not answer that question because he did not know what happened in those cases. Rep. Daily then asked Mr. Hoyt about the one case that was settled for $150,000.00 and he questioned if the person would have to pay income taxes on the settlement amount. Mr. Hoyt stated that he did not believe so. Income tax was not paid on most awards unless it involved punitive damages or the loss of wages. Rep. Daily asked Mr. Robischon the same question and he stated that in the Dunphy case, the award was $500,000.00, which included, in addition to the $150,000.00, an award for punitive damages of approximately $250,000.00. If the Dunphy's had their agreement under the customary continent fee arrangement, the attorney's would have taken 40% of the $500,000.00. He stated that the Dunphy's would not pay income tax on the $150,000.00.

Rep. Miles pointed out to Rep. Gilbert that the bill did not make anymore sense to her now than when it was defeated in the interim committee this summer and she asked him to explain what he meant by metaphysical injury and did the word "or" on line 18 relate to the actual physical injury. She also asked if there must be actual physical injury resulting from threat of physical injury or simply actual physical injury resulting from physical contact separate from threat of physical injury. Rep. Gilbert answered the first part of her question probably did not make anymore sense to her. However, it made just as much sense to him as it ever did. It was a matter of philosophy he said. Rep. Gilbert said as far as it was written, it involved one or the other, and, maybe a combination of both. There can be physical contact or a threat of physical contact. Rep. Miles asked Rep. Gilbert if the actual physical injury must result from physical contact. Rep. Gilbert referred the question to Mr. Pohlman who stated he would link the physical contact with the actual physical injury and the threat of physical contact with the actual physical injury. Rep. Miles asked Rep. Gilbert if any other states have implemented legislation like this. Rep. Gilbert answered he was not aware of any other states having this type of legislation. Rep. Mercer asked Mr. Hoyt if it was correct to say that HB 167 would in no way limit or effect the emotional distress or damages the persons in the pictures could get. Mr. Hoyt said that would be correct.

Rep. Mercer stated that currently in Montana there was a $750,000.00 limitation on governmental damages.

Rep. Daily asked Mr. Boles if insurance rates were set nationally or by state. He said that insurance rates were set by various companies depending on the areas and the risks found in those areas. Rep. Daily asked him if the bill would lower insurance rates and Mr. Boles said that was impossible for him to answer. Mr. Boles stated the Montana Chamber of Commerce was not interested in discussing it as an insurance crisis, but a liability crisis. Chairman Lory asked that any further questions be reserved for Executive Session.

Rep. Gilbert stated this was a matter of philosophy, a matter of right and wrong, and who should get what. If lightening struck your son in a field and you were an actual witness, who are you going to sue? God? He felt that money did not replace mental pain and anguish. He felt the bill would be helpful to the people of Montana. He closed the hearing on HB 167.

HOUSE BILL NO. 209, Rep. Gilbert, sponsor, District No. 22, explained the bill limited the amount of noneconomic damages recoverable in personal injury or wrongful death actions and defined economic damages and noneconomic damages. A new section had been added on page 2(2), which states that compensation for actual economic damages, as defined in 27-1-202, suffered by the plaintiff, was not to exceed $200,000.00.

PROPONENTS: JIM ROBISCHON, Montana Liability Coalition, stated the Coalition favored HB 167. The bill limited the amount of recovery but the right to punish people who were careless existed and for that reason they supported the bill.

KATHY IRIGOIN, State Auditor's Office, pointed out the State Auditor generally supported the concept behind HB 209, although she questioned the $200,000.00 threshold placed on noneconomic damages as being too low. She hoped the bill would be passed.

F. H. BOLES, Montana Chamber of Commerce, supported the legislation.

IRVIN DELLINGER, Executive Secretary of the Montana Building Material Dealers, supported the bill.

JAMES T. AHRENS, Montana Hospital Association, supported HB 209.

JANE CAMPBELL, Executive Director of the Montana Society of CPA's supported the bill.

OPPONENTS: DEBRA JONES, Woman's Lobbyist Fund, opposed the bill. (See Exhibit E, HB 167).

DOLPHY POHLMAN, Montana Association of Defense Counsel, stated the Association opposed the bill because of the caps dealing with maximum recovery.

JOHN HOYT, attorney from Great Falls, explained emotional damages were actual damages. It was fiction if anyone thought insurance rates would come down, or that insurance would be more available and it was fiction to think insurance companies want caps. The insurance industry had the ability to limit its' risks. Mr. Hoyt pointed out that he had gathered there were some people in the legislature who were not fond of lawyers and in response to that, he jokingly stated there were some he did not like either, but the truth was that their society had to have judicial legal under pinions. He stated when Hitler first took power, the first thing he did was to eliminate juries. Hitler then publicly announced he would never rest until he taught every German that to be a lawyer was a very shameful thing. Mr. Hoyt noted that they must have a little consideration there in the legislature.

ERIC THUESAN, Montana Trial Lawyers Association, pointed out that this was not HB 167 with $200,000.00 caps; this was a different bill and it covered different damages. HB 167 covered physical pain and not just emotional pain. he stated that he had trouble seeing any social beneficial purpose on putting a limit on damages. The bill did not show any trust in the jury or the safeguards that already existed in the system.

REP. ADDY went on record in opposition to the bill.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 209: Rep Meyers asked Mr. Thuesan where did they draw the line and who should be compensated. Mr. Thuesan stated the changes in the tort system should cause the rates to go down. He further stated the State of Montana represented only 1% of the underwriting of the insurance industry and there was national jury verdict research done with Montana placing below the normal in the size of awards jurors put out. He did not feel this would reduce rates. He said he saw people justifiably scared because of the rates and they felt something had to be done. They were just not sure what needed to be done and were willing to do anything. The evidence was that this would not effect rates.

Rep. Meyers asked Mr. Theusan about the liability of a volunteer. He stated there was limited immunity to people who render their services with no compensation. Rep. Addy stated the testimony that had been heard did not seem to be saying that we needed to put a ceiling on things, but that we needed to raise the threshold. He asked Mr. Hoyt how he felt about putting on a standard of proof for those kinds of torts. Mr. Hoyt answered it was agreed that caps were not needed and were not wanted. It was clearly understood that proof was needed for damages. The last thing in the world the independent lawyers wanted to do was to lose credibility with the jury. Juries were inclined to rule for the defense and the only time the plaintiff did get a recovery was when the plaintiff's counsel was able to convince the jury that damages were necessary and should be awarded. Mr. Hoyt stated what was fair should be done and what was not fair should not be done.

Rep. Bulger asked Mr. Blewett if Montana did have an insurance problem and Mr. Blewett answered yes, there was a problem. Rep. Bulger asked Mr. Blewett if the bill was not the answer, what was. He explained the problems in Montana, as he saw them, were the wrongful discharge laws, medical malpractice problems, liability for directors and officers of non-profit organizations and a number of other areas that they propose legislation. No one wanted the caps. They want to fix the problems and he said that he felt the legislature would fix them this session.

Rep. Gilbert closed the hearing by saying this was an issue that must be resolved. It was time to take some action.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 11:45.

Earl Lory

EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

EXHIBIT A
DATE 1-21-87
HB 167

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

HISTORICAL OVERVIEW

Recovery for emotional distress was first permitted in assault cases only.

The law was otherwise reluctant to accept a persons interest in piece of mind as entitled to independent legal protection. Common problems in allowing recovery for emotional distress cited by numerous courts were:

(1) Difficulty of proving measuring damages--mental pain is metaphysical and hard to qualify.

(2) Problem in finding proximate connection between defendant's conduct and the plaintiff's mental state.

(3) Fear of subjecting courts to a flood of suits based on trivial and fictitious claims.

In the 1930's courts started allowing recovery for the Intentional Infliction of Emotional Distress. Until the late 1960's all jurisdictions in the United States held emotional distress caused by another parties negligence was compensable in damages only where the plaintiff suffered a physical impact (however slight) as a result of the defendants conduct or was within the zone of danger at the moment the wrongful act occurred. The purpose of both the "impact rule" and the "zone of danger" requirement was to guaranty the genuineness of the claim. Prosser and Keaton, The Law of Torts, §62 (5th ed. 1984).

The Impact Rule

Traditionally a majority of American courts required the plaintiff suffer some physical touching or "impact" as a result of defendant's negligent conduct in order to recover the emotional distress. Mitchell v. Rochester Railway Co.,45 N.E. 354 (1896). The courts felt "impact" afforded the desired guaranty that the mental disturbance was genuine. However as time progressed the requirement of impact which was supposed to guaranty genuineness was drastically watered down by the courts. The impact requirement has been satisfied by a "slight blow", "trifling burn", trivial jolt or jar, electric shock, forcible seating on floor, dust in eye, Porter 63 A. 860 (N.J. 1906), and inhalation of smoke, Morton 170 N.E. 869 (Ohio 1930). The "impact" element has also been met by a fall brought about by fainting after witnessing a collision, Comstock 177 N.E. 431 (1931); plaintiff wrenching her own shoulder in fright, Freedman (1938) 12 N.E.2d 739; and a horse defecating on a patrons lap at the circus.

The courts continued to water down the impact rule to the point where it had virtually been disregarded, and in fact all through the impact rule does remain alive in a few isolated jurisdictions (Ellington, 404 F.Supp.1165 (Fla.)) the overwhelming majority of states have completely rejected the rule.

The Zone of Danger

A large number of states that rejected the impact rule adopted the "zone of danger" rule to limit recovery for emotional distress. In order for a bystander to recover for emotional distress under the zone of danger rule, the plaintiff had to be located within the zone of the defendant's negligent conduct and feared for his/her own safety. Amaya v. Home, Ice Fuel & Supply Co, 379 P.2d 513 (1963-since overruled). Proponents of the zone of danger rule argue that rule provides an objective standard by which liability can be limited. Tobin v. Grossman, 249 N.E.2d 419, 424. The zone of danger rule was a widely accepted one. Although there are those states that hold tight to the requirement that a bystander must be in the zone of danger in order to recover for emotional distress (VA, NY, Minn, MD, Tenn, LA), the trend has been to expand the cause of action and abandon the zone of danger requirements, many states feeling the zone of physical danger is arbitrary and enlarges the area of licensed negligence.

Dillon v. Legg

In 1968 in Dillon v. Legg, 441 P.2d 912, the California Supreme Court abandoned the zone of danger rule, reversing the lower court allowing recovery for emotional trauma suffered by a mother who witnessed her daughter's death as she was run over by a motorist crossing the street. The lower court held that the mother could not recover damages for the negligent infliction of emotional distress as she was not in the "zone of danger". In its opinion the court stated, "this case thus illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other...[w]e can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule". Id at 915.

The court further stated that the possibility of increased fraudulent assertions (resulting from elimination of the zone of danger) prompting recovery in isolated cases did not justify a wholesale rejection of the entire class of claims. The court pointed out that there were several other recognized cases of action (intentional infliction of emotional distress, mental suffering, fear for own safety resulting in physical injury) more

susceptible to fraudulent claims that those of bystanders suffering emotional distress from witnessing an accident to a family member.

The court rejected the notion that had opened the door to unlimited liability rather they held the Defendant owes a duty, in the sense of potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent in the first place. The court felt liability could be circumscribed by the application of general tort principals. The court stated "since the chief element in determining whether the defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case". The court went on 920 to say that the duty or obligation would be adjudicated on a case by case basis. Id at 920.

The court then delineated three elements that it felt courts should take into account when determining whether the defendant should reasonably foresee the injury to the plaintiff or whether the defendant owed the plaintiff a duty of due care. The Dillon elements are:

(1) Whether the 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 observation of the accident, as contrasted with learning of the accident after its occurrence.

(3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or presence of only a distant relationship.

Id. at 920.

These Dillon factors have been adopted in some variation or another in at least 20 states (see Appendix) and the number is expanding rapidly. Some states have actually imposed limitations on the holding in Dillon. In Kinard v. Augusta Sash and Door Co., ___ S.E.2d ___ (S.C. 1985) the court adopted and recognized the negligent infliction of emotional distress. Although they adopted the reasoning in Dillon they announced their own elements that must be satisfied before the Plaintiff is allowed to recover. They are:

(1) The defendant's negligence must be the cause of death or serious harm to the direct victim;

(2) The plaintiff bystander must be in close proximity

to the accident;

(3) The plaintiff and the direct victim must be closely related;

(4) The plaintiff must contemporaneously perceive the accident (doesn't have to see);

(5) The plaintiff's (bystander) emotional distress must manifest itself physically and be established by expert testimony.

By drafting additional elements the court has attempted to restrict the holding in Dillon to those cases that can satisfy stringent pre-requisites. The position of the South Carolina court (that of giving Dillon a narrow interpretation) is a minority one. Many of the states that adopted the reasoning in Dillon have expanded the holding considerably.

The California Supreme Court in Dillon required that an order for a plaintiff to recovery for negligent infliction of emotional distress, he had to be in close proximity to the accident and receive a shock resulting from the sensory and contemporaneous observation of the accident. If the plaintiff satisfied these requirements the court held the plaintiff's injuries could be reasonably foreseeable. This was crucial as the court determined foreseeability was the key factor in determining the defendants liability to the plaintiff.

In Garrett v. City of New Berlin, 362 N.W.2d 137 (1985), the Wisconsin court expanded what was "reasonably foreseeable" to the defendant. "When a defendant seriously injures or kills a victim by negligence, he has reason to know that close relatives of the victim are likely to suffer serious harm from viewing the accident, coming upon the victims body thereafter or from hearing about the tragedy later". Id. In essence the court in Garrett has eliminated the first two requirements in Dillon. Under the Garrett scenario a person who hears about an accident (death or injury to relative) after it has happened, may recover from the defendant for the negligent infliction of emotional distress. This interpretation by the court appears to open the defendant up to almost unlimited liability.

In Dziokonski v. Babineau, 380 N.E. 2d 1295 (Mass. 1978) a child was injured by a car while crossing the street. The mother came upon the scene after the accident and was severely distressed by the sight of her injured child. While accompanying her daughter in the ambulance Mrs. Dziokonski died. Her death allegedly occurring as the result of her emotional distress. Upon hearing of his daughters injury and his wife's death, Mr. Dziokonski died. The emotional distress allegedly acting as the aggravating factor.

The Massachusetts court had previously rejected the impact rule and overruled the zone of danger requirement in this case. The court adopted the reasoning in Dillon, Leong and D'Ambra and interpreted the holdings in a broad manner. The Dziokonski court held that a complaint alleging that the death of the wife was a resulting emotional distress suffered when she came upon the scene of the accident in which her child was injured and the complaint alleging that the death of the husband was the result of emotional distress upon hearing of the death of his wife and injuries to the child stated a cause of action against the defendant who's negligence was the cause of injury to the child. The court said this is true where the parent either witnesses the accident or comes on the scene while the child is still there. Id.

Again, the court has expanded the cause of action to encompass those situations where the plaintiff was not near the scene of the accident nor distressed as a result from the sensory and contemporaneous observation of the accident. By allowing a plaintiff who comes upon the scene of an accident (after the fact) to recover damages for the negligent infliction of emotional distress the courts are opening a door that will be tough to close.

In recent years the courts have stretched the "foreseeability" element to the point where anytime the defendant acts in a negligent manner he should foresee that his conduct any result in a third person emotional distress. Courts supporting the expansion of the course of action point to the elements the California court delineated in Dillon (and to those elements announced by courts in other jurisdictions) claiming that they act as an effective restraint on liability. By and large this has not been the case. Even the California Supreme Court has failed to abide by the guidelines that it established.

In Ochoa v. Superior Court (Santa Clara County), 703 P.2d 1 (1985), the California Supreme Court dispensed with the "accident" requirement it announced in Dillon, stating "...the sudden occurrence requirement is an unwarranted restriction on the Dillon guidelines. Such a restriction limits liability when there is a high degree of foreseeability of shock to the plaintiff and the shock flows from an abnormal event, and, as such, unduly frustrates the goal of compensation--the very purpose which the cause of action was meant to further". Id. at 7.

In Ochoa the plaintiff brought a cause of action for the negligent infliction of emotional distress resulting from witnessing the neglect of her son's pressing medical needs at the juvenile facility where he was incarcerated. The plaintiff did not witness her son's death, rather she was witness to lack of

appropriate action on the part of the medical staff in attending to her son while he was seriously ill.

The court held that the plaintiff could recover even though she did not witness her son's death. The court stated: "[W]e are satisfied that when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted." Id. at 8.

The court again states that the chief factor in determining extent of the defendant's liability is foreseeability but it fails to establish a functional objective criteria by which foreseeability can be consistently measured. As the court points out the holding in Dillon had been applied in an inconsistent manner, without announcing any kind of guidelines or checks outside of requiring the distress be reasonably foreseeable and serious the court has only augmented the confusion that previously existed.

California is not alone in its expansion of the action for the negligent infliction of emotional distress. Hawaii had adopted the reasoning of the Dillon decision fairly quickly after it was announced.

Although Hawaii adopted the reasoning in Dillon, it has since added new chapters to the book. In Rodrigues v. State, 472 P.2d 509 (1970), Hawaii allowed recovery for the negligent infliction of emotional distress resulting from the negligent destruction of plaintiff's property. In recognizing that an individuals interest in freedom from the negligent infliction of emotional distress is entitled to independent legal protection, the court did not distinguish between distress caused by witnessing an injury to another and that resulting from the destruction of ones property. Hawaii departed from the traditional requirement allowing recovery for distress resulting from damage to property. Hawaii was also the first jurisdiction to allow recovery for distress without showing a physically manifested harm. The Hawaiian Court also emphasized the importance of foreseeability in attaching liability to the defendant, the court also stated liability would be determined by general use of tort principles. The standard by which the seriousness of emotional distress was measured was that of the "reasonable man".

Hawaii further refined the cause of action for the negligent infliction of emotional distress in Leong, 520 P.2d 758 (1974), the court allowed a child to recover damages for emotional distress occasioned by the witnessing of the death of his foster grandmother, the court reversed the lower court re-affirming that there was no physical injury necessary in order to recover for emotional distress.

In Campbell v. Animal Quarantine Station, etc., 632 P.2d 1066 (1981), plaintiffs were allowed to recover damages for emotional distress resulting from the death of their dog caused by the negligent handling by the defendants. None of the plaintiffs witnessed the dog's death or for that matter saw the corpse of the pet, further none of the plaintiffs sought psychiatric or medical assistance to cope with the situation. The court said that it was not a requirement that the tortious event be witnessed by the plaintiffs. The court also stated medical testimony was not necessary to establish the genuineness of the claim holding that was a judgment to be made by the tries of fact. Id. at 1070. The precautionary requirement imposed by the court to ensure genuineness is that "some showing be made that the distress suffered is genuine". Id. such a showing need not invoke any particular elements but must be of sufficient nature to convince the trier of fact.

Although Hawaii is in the forefront of the movement to expand the cause of action for the negligent infliction of emotional pain, it is by no means alone in its efforts.

In James v. Lieb, 375 N.W. 109 (1985), the Nebraska Supreme Court rejected the "zone of danger" rule. The court adopted a very liberal version of the Dillon requirements. The court also eliminated the requirement that the plaintiff actually observe the occurrence resulting in the plaintiffs distress. The court cited Ferriter, 413 N.E.2d 690 (Mass) "a plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heals of the accident the two types of injury are equally foreseeable". (The court however, did require that the requirement that the psychic injury result from either death or serious injury to the direct victim, the distress need not manifest itself physically).

In Montana the cause of action for the negligent infliction of emotional distress has also been expanding. In Versland v. Caron Transport, 671 P.2d 583 (1983), Montana adopted the Dillon holding slightly modifying its elements. In allowing a wife to recover damages for emotional distress upon witnessing her husband's death from a collision. The Montana Supreme Court delineates the elements to recover for the negligent infliction of emotional distress. They are:

(1) 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 the others after its occurrence.

(2) The plaintiff and the victim must be closely related as contrasted with an absence of any relationship or the presence of only a distant one.

(3) Either death or serious physical injuries of the direct victim must have occurred as a result of the defendant's negligence. (Court does not intend for bystanders to recover even when there is severe emotional distress when the direct victim is not seriously injured).

The court held that it was not necessary for a plaintiff's emotional distress to manifest itself in the form of physical injury in order to recover.

In Dawson v. Hill & Hill Trucking, 621 P.2d 589 (1983), the court allowed for the first time recovery for mental distress in a wrongful death action in Montana. Mental distress in a wrongful death action is limited to the anguish, sorrow or grief resulting from the death whereas damages for the negligent infliction of emotional distress compensates for mental distress resulting from the witnessing of the accident, the two actions can be joined. The dissent in Dawson, Id. at 594, suggest that the legislature not the courts should determine whether damages for negligent infliction of emotional distress are proper in wrongful death cases.

In 1984, the Montana Supreme Court announced its holding in Johnson v. Supersave, 686 P.2d 209. In Johnson, the court allowed the Plaintiff to recover damages for the negligence of emotional distress resulting from wrongful arrest and subsequent brief incarceration for the writing of a bad check. The court cited the Kansas court in Roberts v. Saylor, 637 P.2d 1175 at 1180 for its definition of emotional distress "emotional distress passes under various names such as mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment and worry. However, it is only when emotional distress is extreme that possible liability arises". The court reaffirmed its position that no physical injury need result from the emotional distress. The court felt that Supersave's tortious conduct resulted in a substantial invasion of a legally protected interest (liberty) and caused a significant impact on the plaintiff. Johnson, 686 P.2d at 213.

The court allowed the plaintiff to recover for negligent emotional distress absent an injury or accident. The award was to compensate for "embarrassment" and "humiliation". It is important to note that the court specifically states that damages for emotional distress are compensatory not punitive. The plaintiff was actually incarcerated for a length of time somewhere between 55 minutes and two and one-half hours. The

jury awarded the plaintiff $17,000 to "compensate" him for his emotional distress. (Id. at 214. See also Jury Breakdown of Damages, Id.). By expanding the cause of action of the negligent infliction of emotional distress to include cases where the plaintiff alleges shame, embarrassment or humiliation, the courts have added confusion to an already confusing situation. The court gives no objective tests or standards by which to measure the foreseeability of the defendant or the distress of the plaintiff rather it appears to have given the jury free reign in ascertaining damages.

In Gibson v. Western Fire Ins. Co., 682 P.2d 725 (1984) the Montana Supreme Court upheld a decision awarding the plaintiff $250,000 to "compensate" for the emotional distress he suffered resulting from his insurance companies refusal to settle a malpractice claim. In affirming the trial court's decision, the Supreme Court stated "mental distress of a professional person fearing that his professional reputation has been damaged, and the stress of disruption of his home and professional life are elements of a jury to measure in awarding compensatory damages in tort cases". Id.

If Montana juries are to attempt to fairly ascertain liability in cases of negligent emotional distress, they must be provided with more clearly defined standards than have been given by the court as of yet. If these more clearly defined standards are not forth coming this area will continue to produce are not forth coming this area will continue to produce inconsistencies and therefore unfair holdings.

Perhaps the greatest expansion to date of the tort occurs in Payton v. Abbott Labs, 437 N.E. 2d 171 (MA. 1982) where the court held manufacturers of "D.E.S." could be liable to daughters (whose mother's had ingested the substance for anxiety over being cut down in the future by the onset of abnormalities stemming from the mother's use of the drug while the plaintiff was in utero. The court seemed to hold D.E.S. daughters though not yet exhibiting symptoms or problems may recover for physical consequences of their reasonably foreseeable anxieties provided they can prove physical harm was caused by their distress and that it's manifested by objective symptoms and substantiated by expert testimony. Decisions such as Payton make the possibility of unlimited liability for a defendant who engages in a single negligent act a reality. This should not happen.

The public will ultimately bear the cost of sanctioning claims for hurt feelings, Molien, 616 P.2d at 825.

The concept of foreseeability has been stretched to the point of tearing when a defendant can be held liable for damages for foreseeable consequences (of emotional distress) to a plaintiff not born at the time the defendant engaged in the

negligent act, and not suffering any ill effects from the negligent act. The defendant should be held accountable for his/her negligence but such accountability should not be unlimited in nature. The courts would be imposing an inordinate burden on the defendant by allowing liability to attach for those consequences that are remote from the negligent act. A negligent defendant should not be liable for all the results that follow in endless sequence from his single act. As the court said in Borer, "every injury has ramifying consequences, like the ripplings of the water, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree". 563 P.2d 858 at 861.

APPENDIX A

STATES ADOPTING OR MODIFYING THE DILLON APPROACH ALLOWING BYSTANDER RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS:

1. Montana, Versland, 671 P.2d 583 (1983).
2. Texas, Apache Ready Mix, 653 S.W.2d 79 (1983).
3. New Mexico, Rameriz, 673 P.2d 822 (1983).
4. Ohio, Paugh, 451 N.E. 759 (1983).
5. Main, Culbert, 444 A.2d 433.
6. Mississippi, Entex, Inc., 414 So.2d 437 (1982).
7. Iowa, Barnhill, 300 N.W.2d 104 (1981).
8. New Jersey, Portee, 417 A.2d 521 (1980).
9. Pennsylvania, Sinn, 404 A.2d 672 (1979).
10. New Hampshire, Courshow, 406 A.2d 300 (1979).
11. Dziokonski, 380 N.E.2d 1295 (1978).
12. Rhode Island, D'Ambra, 338 A.2d 524 (1975).
13. Hawaii, Leong, 520 P.2d 758 (1974).
14. Michigan, Toms, 207 N.W.2d 140 (1973).
15. Connecticut, D'Amicol, 326 A.2d 129 (1973).
16. Wisconsin, Garrett, 362 N.W.2d 157 (1985).
17. South Carolina, Kinard, ___ S.A.2d ___ (1985).
18. Wyoming, Gates, ___ P.2d ___ (1986).
19. CALIFORNIA, OCHOA 703 P.2d 1 (1985).

APPENDIX B

A BRIEF SYNOPSIS OF THE LAW CONCERNING THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN A VARIETY OF JURISDICTIONS.

COLORADO--impact is no longer required in cases of negligently inflicted emotional distress, if the distress results in serious physical manifestations. Deming v. Kellog, 583 P.2d 944, Campbell v. Jenkins, 608 P.2d 363.

WASHINGTON--physical impact or threat of immediate evasion of the Plaintiff's personal security is no longer required to be alleged or proven in order to recover for the negligent infliction of emotional distress. The confines of a Defendant's liability are now measured by structures imposed by the negligence theory (ie. foreseeable risk, threatened danger, and unreasonable conduct measured in light of the danger). Corragal v. Ball and Dobb Funeral Home, Inc., 577 P.2d 580.

WISCONSIN--bystander outside of his own physical danger may recover for the negligent infliction of emotional distress. The zone of danger was only recently overruled. Expand on the principals announced in Dillon, stating:

> "When a defendant seriously injures or kills a victim by negligence, he has reason to know that close relatives of the victim are likely to suffer serious harm from viewing that accident, coming upon the victim's body thereafter or from hearing about the tragedy later."

Garrett v. City of New Burlin, 362 N.W.2d 137 (1985).

Thus, in Wisconsin, a plaintiff who is outside the zone of physical danger and who did not contemporaneously perceive the accident, may still recover for the negligent infliction of emotional distress.

SOUTH CAROLINA--recognizes negligent infliction of emotional distress following Dillon. The South Carolina Supreme Court has delineated five elements to determine if recovery may be had. They are:

(1) The defendant's negligence must be the cause of death or serious harm to the direct victim.

(2) The plaintiff bystander must be in close proximity to the accident.

(3) The plaintiff and direct victim must be closely related.

(4) The plaintiff must contemporaneously perceive the accident (does not have to see it).

(5) Plaintiff's emotional distress must manifest itself physically, and be established by expert testimony.

Kinard v. Augusta Sash and Door Company, ___ S.E.2d ___ (1985). Although South Carolina has adopted the holding in Dillon they have in effect admitted the cause of action requiring additional elements be satisfied before recovery can be successful.

NEBRASKA--recently rejected the zone of danger rule. Not necessary to have emotional trauma manifest itself physically. Liability depends on a number of factors, such as where, when and how the injury to the third person entered into the consciousness of the Claimant, and what degree there was of familiar relationship. Psychic injury must result in either death or serious injury to direct victim. James v. Lieb, 375 N.W.2d 109 (1985).

NEW YORK--maintains the zone of danger rule. Tobin v. Grosman, 249 N.E.2d 419 (1969).

CALIFORNIA--still adheres to the holding in Dillon v. Legg, but emotional trauma no longer need have physical manifestations in order to allow recovery.

ILLINOIS--adopts holding announced in Dillon v. Legg, rejecting the zone of danger rule. Ricky v. Chicago Transit Authority, 428 N.E.2d 596.

ARIZONA--bystanders may recover provided they were within the zone of danger. Emotional distress must manifest itself in physical injury. Thompson, 688 P.2d 605.

VERMONT, MINNESOTA, MARYLAND and TENNESSEE--still retain zone of danger.

NEW MEXICO--allows for recovery for bystander outside the zone of physical danger if (1) a marital or intimate family relationship exists between the plaintiff and the direct victim, (2) there is contemporaneous sensory perception of the accident, (3) the emotional distress manifested itself in physical trauma. Rameriz v. Armstrong, 673 P.2d 822.

RHODE ISLAND--has rejected both the impact rule and the zone of danger rule. Bystander my recover without suffering direct impact or being in the zone of danger. D'Ambra v. United States, 388 A.2d 524.

MASSACHUSETTS--has rejected both the zone of danger rule and the impact rule stating they don't adequately address the problem

of the negligent infliction of emotional distress. The court adopts the reasoning in Dillon and D'Ambra. Emotional trauma must manifest itself in physical injury. Plaintiff need not observe the event but may come upon the scene of the accident while the victim is still there. Dziokonski v. Babineau, 380 N.E.2d 1295.

Hawaii :- Allowed recovery for negligent infliction of emotional distress to plaintiff who was informed over the phone that his dog had died. The court indicated that there is no requirement the tortious incident be witnessed by the plaintiff; further there is no requirement that the direct victim be a person. Campbell v Animal Quarantine Station, Etc, 632 P.2d 1066 (1981)

EXHIBIT 3
DATE 1-21-87
HB # 167

HB# 167

MONTANA LIABILITY COALITION
LIST OF SUPPORTERS

Montana Home Builders Association
Professional Insurance Agents of Montana
Lewis and Clark County Medical Society
Montana Taxpayers Association
Montana Retail Association
Montana Outfitters and Guides
Montana Forward Coalition
Glendive Chamber of Commerce
Montana Chamber of Commerce
Montana Society of CPAs
Montana Bankers Association
Montana Loggers Association
Montana Building Material Dealers Association
Montana Academy of Family Physicians
Montana Innkeepers Association
Wolf Point Chamber of Commerce
Billings Chamber of Commerce
Mountain Bell
Blue Cross and Blue Shield of Montana
Montana Hospital Association
Montana Dental Association
Montana Auto Dealers Association
Ennis Chamber of Commerce
Montana Chiropractic Association
Montana Contractors Association
Montana Independent Bankers
Anaconda Chamber of Commerce
Montana Farm Bureau Federation
Montana Medical Association
Montana Motor Carriers Association
Butte Chamber of Commerce
Montana Tavern Owners Association
Miles City Area Chamber of Commerce
Missoula Chamber of Commerce
Bozeman Chamber of Commerce
Havre Chamber of Commerce
Montana Chapter, National Electrical Contractors Association
Montana Association of Defense Counsel
Montana Restaurant Association
Montana Health Care Association
Helena Area Chamber of Commerce
Montana Solid Waste Contractors, Inc.
Kalispell Chamber of Commerce
Montana Hardware & Implement Association
Montana Tire Dealers Association
Montana Office Machine Dealers Association
Independent Insurance Agents Association of Montana
Montana Petroleum Association
National Federation of Independent Business
Montana Association of Realtors

1/19/87

EXHIBIT C
DATE 1-21-87
HB #167

State Auditor's
Proposed Amendment to HB 167

1. Title, line 4.
Strike: "ELIMINATING"
Insert: "LIMITING"

2. Title, lines 6 through 7.
Preceding: "EXCEPT"
Insert: "."
Following: "CASES"
Strike: "EXCEPT THOSE CASES INVOLVING ACTUAL PHYSICAL INJURY FROM PHYSICAL CONTACT OR THREAT OF PHYSICAL CONTACT.""

3. Page 1, line 11.
Strike: "prohibited -- exception"
Insert: "limited"

4. Page 1, line 13.
Strike: "prohibited"
Insert: "limited to $[amount determined by Legislature]"

5. Page 1, line 16.
Following: "worry"
Strike: ","
Insert: "."

6. Page 1, lines 16 through 19.
Strike: "except in those actions involving actual physical injury to the plaintiff or injured person resulting from physical contact or threat of physical contact."

WITNESS STATEMENT

NAME Jim Robischon - D. Pohlman BILL NO. 167

ADDRESS Helena MT DATE 3/21/18

WHOM DO YOU REPRESENT? Mont-Lico Coalition

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WOMEN'S LOBBYIST FUND

Box 1099
Helena, MT 59624
449-7917

EXHIBIT E
DATE 1-21-87
HB # 167

January 21, 1987

Testimony in Opposition to HB 209

Mr. Chairman and Members of the House Judiciary Committee:

My name is Debra Jones. I speak on behalf of the Women's Lobbyist Fund, a coalition of 39 organizations representing over 6500 individuals in Montana. The WLF opposes HB 209 because it would subject women to unfair disadvantages in the civil process. The bill would force juries to discriminate against people in the lower income brackets, the majority of whom are women. The payment of non-economic damages ensures that no matter what our income, we are all equally entitled to be compensated for our injuries.

For example, say that the same injury happened to two different people -- one a doctor with a salary of $100,000 a year, and the other a housewife, with no labor market history. (Currently there are more than 65,000 housewives in Montana.)

Say they became involved in personal injury lawsuits. The juries ruled in favor of the plaintiffs and awarded compensation for medical expenses to both plaintiffs.

The jury also compensated the doctor for wages lost -- an economic damage. Considering his salary of $100,000 a year, this figure runs up into the millions. The housewife, on the other hand, received no compensation for lost wages because our society does not recognize the economic value of housework. The housewife was compensated for hiring substitute domestic services, but her total awards so far do not even come close to the inherent value of her work in the home, nor do they come close to the millions of dollars awarded to the doctor.

Under current law, non-economic damages would be awarded to alleviate some of this disparity. But if HB 209 is enacted into law, the $200,000 cap on non-economic damages would ensure a wide gap in the total damages paid to these two plaintiffs, although the injuries were identical.

Because women dominate the lower income brackets, HB 209 would implicitly discriminate against women; it explicitly discriminates against the poor.

I would like to ask you, members of the committee, to evaluate within your own lives what kind of damage award would compensate for the loss of one of your limbs? $100,000? $200,000? What if you were a single mother with three children? Would $400,000 do it, knowing that you could never comfortably perform everyday tasks such as starting a car or signing a check? HB 209 may not allow full compensation for such injuries.

Thank you for your careful consideration on this bill. The Women's Lobbyist Fund urges you to give this bill a "do not pass" recommendation.

WITNESS STATEMENT

NAME Debra Jones BILL NO. HB 167, 20

ADDRESS P.O. Box 1099 DATE 1/21/87

WHOM DO YOU REPRESENT? Women's Lobbyist Fund

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

VISITOR'S REGISTER

HB 167 + 209

JUDICIARY COMMITTEE

AGENCY(S) _____ DATE January

DEPARTMENT _____

PLEASE PRINT.....

NAME	REPRESENTING	SUPPORT	OPPOSE
John C Hoyt	Self		X
Zander Blewett	Self		X
Debra Jones	Women's Lobbyist Fund		X
F.H. Buck Boles	MONTANA CHAMBER	X	
Keith Anderson	Montana Taxpayers Assn	X	
Dolphy Pohlman	Mt Assn Def Counsel	X	
Gerald J. Neely	Montana Medical Assoc	X	
James T. Ahrens	Montana Hospital Assn	X	
Tim Robischon	Mont. Link Coalition	X	
Alene Waldron	Montana Council Mental Health Centers		167 X
Bob Hedrick	Mt. Realtors / Mt. Motor Carriers	167 209	
Bob Correa	Bozeman Chamber of Comm	✓	
Sue Weingartner	MT Solid Waste Contrac	✓	
Jim Doherty	Self		X
Elsa Thuesen	MTLA		X
George Allen	Mt Retired Assn	X	
J.M. Rollins	ASARCO	X	
Chip Erdmann	Mt League of Savings Inst	X	
Lisa Lovell	MTLA		
John Maynard	Tort Claims / Dept of Admin	[redacted]	[redacted]
Bill Kirkpatrick	Champion Int'l		

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT.
IF YOU HAVE WRITTEN COMMENTS, PLEASE GIVE A COPY TO THE SECRETARY.

Sandy Cheney — Women's Lobbyist Fund — X

FORM CS-33A
Rev. 1985

Jane Campbell — Montana Society of CPAs — X

Montana Farm Bureau — X

Billie Wallace - Cut Bank

Le Tabbert Helena

Kathy Irigoin State Auditor Helena