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Lauren Keefe

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I. INTRODUCTION

In Fernandez v. Walgreen Hastings Co., the New Mexico Supreme Court established new limits on the ability of bystanders who witness injuries to their relatives to recover damages for negligent infliction of emotional distress (NIED). The court held that bystanders are permitted to recover for emotional distress damages only when the injury was caused by a sudden, traumatic event and the plaintiff was aware that the event was causing injury to the victim. In adopting both a sudden occurrence test and a meaningful observation test, the court limited the application of NIED to the traditional types of accidents in which the court first recognized the cause of action. This Note describes the historical context of NIED, examines the Fernandez court’s rationale, and explores the implications of the Fernandez decision for future New Mexico NIED cases.

II. STATEMENT OF THE CASE

Plaintiff Eufelia Manuelita Fernandez sued Walgreen Hastings Company (Walgreens) and two of its employees after the death of her 22-month-old granddaughter, Margarita Danielle Valdez. On January 3, 1994, Margarita was diagnosed with viral croup. Plaintiff went to Walgreen’s pharmacy to fill an order for Pediapred, a steroid prescribed to keep Margarita’s airway from swelling. The pharmacy mistakenly provided Pediaprofen, a pain reliever with only mild anti-inflammatory properties. Plaintiff, unaware of the pharmacy’s mistake, administered several doses of the ineffective medicine to her granddaughter. The next day, after Margarita’s condition noticeably worsened, the family drove her to the hospital. Still in the car, Margarita began to suffocate due to the blockage in her throat. Eufelia was holding her granddaughter while she turned blue and then fell into a coma. The girl died two days later.

Plaintiff sued for NIED and loss of consortium. Walgreens filed a motion to dismiss both counts for failure to state a claim. Because Plaintiff filed an affidavit with her response brief, the trial court heard the matter as a motion for summary judgment, and granted judgment in favor of Walgreens on both counts. Plaintiff appealed to the court of appeals, which certified the case to the supreme court. The supreme court affirmed the trial court on the

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2. See id. at 268, 968 P.2d at 779.
3. Unless otherwise cited, all factual and procedural information is from Fernandez, 126 N.M. at 265-66, 968 P.2d at 776-77.
4. A motion to dismiss for failure to state a claim brought under N.M. R. Crtv. P. 1-012(b)(6) is treated as a motion for summary judgment brought under N.M. R. Crtv. P. 1-056 when matters outside the pleadings are presented to the trial court. See Graff v. Glennon, 106 N.M. 668, 668, 748 P.2d 511, 511 (1988).
5. This Note only examines the loss of consortium issue as it relates to the NIED claim. The Fernandez decision was novel, however, in that it extended the loss of consortium cause of action to include grandparents. See Fernandez, 126 N.M. at 271-73, 968 P.2d at 782-84.
NIED claim, the supreme court held that NIED does not compensate for the observation of a family member's suffering where the plaintiff was not a bystander to a sudden, traumatic injury-producing event and was also not aware of the cause of the victim's injuries.6

III. BACKGROUND

Emotional injuries have never been afforded equal treatment with physical injuries. At early common law, damages for "shock" or "fright" were not available except in cases of intentional assault.7 Gradual recognition of the validity of emotional injuries, however, has led courts to loosen restrictions on emotional distress recoveries. Courts first recognized that plaintiffs who suffered physical injuries should be allowed to recover for the pain and suffering associated with those injuries.8 The next expansion was the "zone of danger" rule, which allowed recovery for those who were threatened with, but did not actually suffer, physical injuries.9 In many of these zone of danger cases, the plaintiffs who escaped without physical injuries often watched while others were not as lucky.10 Often, those plaintiffs who were in the zone of danger were allowed to recover for the emotional distress damages that resulted from watching the injuries inflicted on third parties as well as the emotional distress from their fear for their own safety. Those outside the zone of danger, however, had no cause of action as a result of witnessing the same event.12 Courts reasoned that injury to a bystander who was outside the zone of danger was not foreseeable; therefore, the tortfeasor owed no duty to the bystander.13

A. The Bystander Cause of Action

In 1968, in Dillon v. Legg,14 the California Supreme Court further expanded recovery for emotional injuries by recognizing a cause of action for bystanders who suffered emotional distress as a result of merely witnessing an accident that causes

6. See id. at 268, 968 P.2d at 782.
7. At least one scholar, however, has noted that even early case law did not support the generalization in some cases that "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." See Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033, 1033 (1936) (quoting Lynch v. Knight, 9 H.L. Cas. 577, 598 (1861)).
8. See, e.g., Pittsburgh C.C. & St. L. Ry. Co. v. Story, 63 Ill. App. 239 (1896) (holding that in an action to recover damages for personal injuries, mental as well as bodily suffering resulting from the injury may be considered in estimating the damages, but mental suffering alone and unconnected with the bodily injury cannot be considered).
9. See, e.g., Hambrook v. Stokes Bros., 1 K.B. 141 (C.A. 1925) (allowing wrongful death recovery against the owner of a runaway lorry which nearly struck a pregnant woman, causing her extreme fright and resulting in a miscarriage and subsequent death from shock). The Hambrook court noted "[t]he cause of action . . . appears to be created by breach of the ordinary care of duty to take reasonable care to avoid inflicting personal injuries, followed by damage, even though the type of damage may be unexpected—namely, shock." Id. at 156.
10. See, e.g., Tobin v. Grossman, 249 N.E.2d 419, 420 (N.Y. App. Div. 1969) (involving a mother who was standing on a sidewalk when her child was struck by automobile).
11. See, e.g., Bowman v. Williams, 165 A. 182 (Md. 1933) (finding that plaintiff has right to recovery even when his injuries arose from fear for the safety of his children rather than for his own).
12. See Tobin, 249 N.E.2d at 434.
13. See id.
serious injury to a loved one, despite being outside the zone of danger. In *Dillon*, the plaintiff was a mother who was standing on a sidewalk watching her two daughters cross the street when one was suddenly struck and killed by a car. Both she and her surviving daughter brought a claim for emotional distress damages against the negligent driver. The trial court applied the zone of danger test, which had been affirmed in California just five years earlier, allowing the sister to recover but rejecting the mother’s claim, even though the two were standing only a few feet apart. Calling this result “incongruous and somewhat revolting,” the *Dillon* court rejected the zone of danger test and held that courts should apply general negligence principles in determining whether the defendant owed a duty to the plaintiff.

The *Dillon* court bolstered its decision with classic statements establishing foreseeability as the primary factor in determining duty, but its decision did not elevate emotional injuries to a status equal to that of physical injuries. Although the court noted that “general principles of tort law are acknowledged to work successfully in all other cases of emotional trauma,” the court also articulated the following specific factors that should be used to determine whether the emotional injury to bystander was foreseeable:

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 direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident as contrasted with learning of the accident from others after its occurrence; and
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.

The court also limited its holding to plaintiffs whose emotional trauma is so severe it manifests in a physical illness as well. In expanding recovery for emotional distress injuries the court rejected arguments that NIED recovery would lead to a flood of litigation and force courts to sift through countless fraudulent claims. The

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15. See *id.* at 915, 920.
16. See *id.* at 914.
17. See *id.*
19. See *Dillon*, 441 P.2d at 915.
20. *Id.* at 919 n.4.
21. See *id.* at 920.
22. See *id.* at 919 (quoting Judge Cardozo’s declaration in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928), that “[t]he risk reasonably to be perceived defines the duty to be obeyed”). The *Dillon* court also cited Pros. Harper and James: “Duty ... is measured by the scope of the risk which negligent conduct foreseeably entails.” *Id.* at 920 (citing 2 Fuller v. Harper & Fleming James, The Law of Torts 1018 (1956)). Prof. Prosser, meanwhile, was cited for the proposition that the injury to Mrs. Dillon, and others like her, was foreseeable. “When a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock.” *Id.* at 914 (citing William L. Prosser, *Law of Torts* 353 (3d ed. 1961)).
23. *Id.* at 919.
24. *Id.* at 920.
25. See *id.* at 917. The court noted that Mrs. Dillon alleged in her complaint that she “‘sustained great emotional disturbance and shock and injury to her nervous system’ which caused her great physical and mental pain and suffering.” *Id.* at 914.
court asserted that such prophesies should not stop the court from compensating legitimate injuries and noted that such predictions had accompanied prior expansions of tort law and yet had rarely come to pass. Still, the Dillon court acknowledged the factors it identified in its opinion would be insufficient to guide future courts as new cases emerged. Indeed, the court predicted that "[i]n future cases the courts will draw lines of demarcation upon facts more subtle than the compelling ones alleged in the complaint before us."28

Despite those words, the justices on the Dillon court might not have predicted either the profound impact the case would have or the level of dissension that would arise over how to draw the "lines of demarcation." Thirty-two years after Dillon, the majority of states have adopted the California position in one form or another. Only a handful of states have rejected the bystander cause of action altogether. A minority have either maintained the direct impact requirement, or the zone of danger requirement.31

Courts that have allowed bystander recovery have been divided on what standard to apply to these cases. A few have used the factors articulated in Dillon as general guidelines for determining when a bystander's emotional injury is foreseeable. Some have adopted a more liberal approach, using only the general principles of negligence to determine whether a plaintiff should recover damages. In these states, it is generally up to the fact-finder to determine whether the tortfeasor had a duty to the bystander plaintiff. A far greater number of jurisdictions have used the Dillon factors, or variants thereof, as bright-line tests, thereby creating an issue that can be addressed by the court on a motion to dismiss or for summary

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26. The Dillon court asserted that "[t]he possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the entire class of claims in which that potentiality arises." Id. at 917-18.

27. See id. at 921-22. In particular, the court noted that it had rejected such arguments in loosening standards for privity of contract in products liability cases, in granting recovery for intentional infliction of emotional distress, and in "open car" cases in which courts have held car owners liable for injuries that result after theft of unsecured vehicles. See id.

28. Id. at 921.

29. See, e.g., Mechanics Lumber Co. v. Smith, 752 S.W.2d 763, 765 (Ark. 1988) (noting that "a claim of negligent infliction of emotional distress is not recognized in Arkansas"); Gideon v. Norfolk Southern Corp., 633 So. 2d 453, 453 (Ala. 1994) (rejecting all forms of bystander recovery); OB-GYN Assoc. of Albany v. Littleton, 386 S.E.2d 146, 149 (Ga. 1989) (holding that Georgia does not recognize the "fear for another" rule which permits recovery of damages for emotional distress by one who witnesses injury to another).


34. See, e.g., Masaki, 780 P.2d at 576.
To a plaintiff, the position a state court takes determines whether it will be a jury that determines whether his or her injury merits recovery, or whether he or she must meet specific criteria to get past a judicial gatekeeping function. The key dilemma in these cases is how to balance the need to compensate foreseeable injuries against the need to place reasonable limits on recovery. Those jurisdictions that impose strict bright-line rules have expressed concern that foreseeability casts too wide a net when it comes to emotional injuries and have insisted that recovery must be limited in order to maintain certainty in the law and avoid imposing liability out of proportion to a defendant’s negligent conduct.

Those advocating a more flexible approach, on the other hand, conclude that stringent restrictions lead to arbitrary results, excluding plaintiffs who suffer genuine, foreseeable emotional injuries. “[C]onfusion and inconsistency are the result of a strict construction of the Dillon guidelines. The courts have woven a web of arbitrary rules having little or no relation to the reasonable foreseeability of a plaintiff’s emotional distress.”

B. New Mexico Adopts a Modified Dillon Approach

New Mexico first recognized a bystander cause of action in the 1983 case, Ramirez v. Armstrong. New Mexico’s approach differed from Dillon in two significant ways. First, the New Mexico court established firm criteria limiting the new cause of action, rather than merely articulating general guidelines. Second, New Mexico’s criteria were more detailed than those in Dillon. When Ramirez was decided, New Mexico’s criteria, especially that dealing with the relationship between the plaintiff and the victim, were the most specific of any jurisdiction at that point. New Mexico announced four limitations on bystander recovery:

1) There must be a marital or intimate family relationship between the victim and the plaintiff, limited to relationships between husband and wife, parent and child, grandparent and grandchild, brother and sister, and to those persons who occupy a legitimate position in loco parentis;
2) The shock to the plaintiff must be severe and result from a direct emotional impact upon the plaintiff caused by the contemporaneous sensory perception of the accident as contrasted with learning of the accident by means other than

36. See, e.g., Calkins v. Cox Estates, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990) (holding that in New Mexico duty is a question of law to be decided by the courts, while foreseeability of injury is a question of fact to be decided by a jury). But see, e.g., Mobaldi v. Bd. of Regents of Univ. of California, 127 Cal.Rptr. 720, 725 (Cal. Ct. App. 1976) (holding that the court, not the jury, is to determine whether the plaintiff’s injury was foreseeable in negligent infliction of emotional distress cases).
37. See, e.g., Thing v. La Chusa, 771 P.2d 814, 828 (Cal. 1989) (recognizing that “drawing arbitrary lines is unavoidable if we are to limit liability and establish meaningful rules for application by litigants and lower courts”).
40. See id. at 541, 673 P.2d at 825.
contemporaneous sensory perception, or by learning of the accident after its occurrence;
3) There must be some physical manifestation of, or physical injury to, the plaintiff, resulting from the emotional injury;
4) The accident must result in physical injury or death to the victim.  

Despite these differences, the Ramirez court echoed the reasoning of Dillon. First, it reiterated the importance of foreseeability. "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant." The Ramirez court also emphasized the importance of the interest in emotional security," adding, "[t]he tort of negligent infliction of emotional distress is a tort against the integrity of the family unit." Finally, the court rejected the notion that recognition of a bystander cause of action would lead to a flood of new litigation because "this type of action has not proven to be unmanageable to the California courts."

Seven years later, in Folz v. State, the court abandoned the requirement that the plaintiff suffer a physical injury as a result of his or her emotional distress, explaining that "[p]hysical manifestation should not be the sine qua non by which to establish damages resulting from emotional trauma." In its decision, the Folz court relied heavily on an Ohio case that had abandoned the Dillon factors for the more flexible general negligence standards in bystander cases. The Folz court, however, maintained the other three factors as threshold requirements.

The New Mexico Court of Appeals addressed the scope of the contemporaneous sensory perception element in Acosta v. Castle Construction, Inc., holding that a plaintiff who heard but did not see an accident could recover NIED damages. That case involved a construction foreman whose brother was electrocuted on the construction site. The plaintiff heard screaming, and ran to find a coworker performing cardiopulmonary resuscitation on his brother, who had also been working at the site. The plaintiff observed smoke coming from his brother’s nose and mouth. The court of appeals, holding that the experience of hearing the accident was sufficient to meet the sensory perception element, reversed the trial court’s dismissal and remanded for further proceedings.

42. Ramirez, 100 N.M. at 541-42, 673 P.2d at 825-26.
43. Id. at 541, 673 P.2d at 825.
44. See id.
45. Id.
46. See id. at 542, 673 P.2d at 826.
48. Id. at 470, 797 P.2d at 259.
50. See Folz, 110 N.M. at 471, 797 P.2d at 260. In eliminating the physical manifestation requirement, New Mexico was once again following the path tread by California, which had taken the same step a decade earlier. See Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980) (holding that issue of whether plaintiff has suffered serious and compensable emotional distress is matter of proof to be presented to trier of fact).
52. See id. at 30, 868 P.2d at 675.
53. See id. at 29, 868 P.2d at 674.
54. See id.
55. See id. at 30, 868 P.2d at 675.
Acosta, like Folz, can be viewed as expansion of the NIED tort to a class of plaintiffs that had previously been excluded. The Acosta court, however, noted that the Ramirez test chose language broad enough to encompass a plaintiff who did not see the injury-causing accident, explaining "[i]f the Court wanted to require presence and sight as elements, it could have easily done so, but it did not. Instead, the Court chose a phrase that has a broader meaning . . . ."56 The New Mexico Supreme Court reiterated this point in its next bystander case, stating that Acosta "did not expand the concept of contemporaneous sensory perception, but rather properly applied it to the facts presented . . . ."57

During this time, the supreme court expanded the availability of compensation for emotional injuries besides NIED. In 1994, the court recognized a cause of action for loss of consortium, defined at that time as "the emotional distress suffered by one spouse who loses the normal company of his or her mate when the mate is physically injured due to the tortious conduct of another."58 In the same year, in another line of cases separate from the tort cases dealing with negligent infliction of emotional distress, the court allowed plaintiffs to recover emotional distress damages arising out of a breach of contract action.59

Nonetheless, in its next bystander case, Gabaldon v. Jay-Bi Property Management, Inc.,60 the supreme court reversed the trend toward expansion of the NIED tort. In Gabaldon, the court affirmed summary judgment against a plaintiff whose son had nearly drowned while playing at a water park.61 The plaintiff was not present at the park when the accident occurred, but she came to the scene after receiving a phone call from a park employee.62 The court found that the plaintiff had not met the contemporaneous sensory perception requirement and denied recovery for NIED.63 The court declined to impose a rule requiring a plaintiff to be present at the scene of an accident,64 electing instead to adopt the "ambulance rule," which allowed recovery for a plaintiff who was not present at an accident but came upon the scene shortly thereafter so long as he or she was present before emergency medical professional arrived at the scene.65

56. See id.
60. 122 N.M. 393, 925 P.2d 510 (1996).
61. See id. at 393, 925 P.2d at 510.
62. See id.
63. See id.
64. See id. at 397, 925 P.2d at 514. Many jurisdictions have imposed such a rule. See infra, note 124.
65. See Gabaldon, 122 N.M. at 397, 925 P.2d at 514 (explaining that "[t]he shock of seeing efforts to save the life of an injured spouse in an ambulance or hospital . . . will not be compensated because it is a life experience that all may expect to endure") (internal citation omitted). The court did not focus on the intervening phone call, which could have been the basis for denial of recovery under Dillon because the plaintiff learned of the accident from another party, rather than witnessing it herself. See Dillon, 441 P.2d at 920; see also Mazzagatti v. Everingham, 516 A.2d 672, 679 (Pa. 1986) (holding that a defendant owes no duty of care to relative who comes to the scene after learning of the accident from another party). Some jurisdictions have considered but rejected a rule denying recovery to witnesses who were at the scene of an accident "voluntarily," either after learning of the
Gabaldon could be viewed as an expansion of NIED, as the court had never previously indicated that a plaintiff who arrived after an accident could recover under an NIED theory. The Gabaldon court was unambiguous, however, in its intention to impose bright-line limits on recovery and to prevent future expansion of the tort. The Gabaldon court noted that even California had recognized that the flexible approach adopted in Dillon "had proven to be unworkable." The court thus emphasized that the elements of NIED were "mandatory preconditions" rather than flexible guidelines. Furthermore, the court stated that it would not rely on foreseeability alone in determining who could recover for damages under this tort, but instead would impose limitations in order to limit the liability imposed on a defendant.

It is apparent that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury. In order to avoid limitless liability out of all proportion to the degree of a defendant’s negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.

The determination as to who recovers, the court explained, is a policy decision imposed by the courts. Making a distinction that would prove important in Fernandez, the Gabaldon court explained that the purpose of NIED is to compensate a specific type of emotional distress—the mental anguish that results from witnessing either the accident that causes injury to a loved one or from seeing the immediate aftermath. In contrast, the court stated that bystander NIED is not intended to compensate "the grief and despair to loved ones that invariably attend nearly every accidental death or serious injury." The court explained:

[the compensable serious emotional distress of a bystander under the tort of negligent infliction of emotional distress is not measured by the acute emotional distress of the loss of the family member. Rather the damages arise from the bystander’s observance of the circumstances of the death or serious injury, either when the injury occurs or soon after.]

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accident or who were aware of the risk of injury before the accident. See Turner v. Medical Ctr., 686 A.2d 830, 833 (Pa. Super. Ct. 1996) (holding that plaintiff’s NIED claim should not be denied on the basis of her voluntary presence while sister delivered baby); Stump v. Ashland, 499 S.E.2d 41, 50 (W.Va. 1997) (holding that voluntary presence at fire should not bar recovery because "it would be the natural reaction of a person to rush to the scene in order to affect a rescue or aid the injured victim").

66. See Gabaldon, 122 N.M. at 396-97, 925 P.2d at 513-14.
67. See id. at 395, 925 P.2d at 512. In Thing, the California Supreme Court stated that the Dillon court was overly optimistic in believing that recognition of NIED, without express limitations, would not lead to a flood of litigation. To the contrary, the Thing court observed that "[i]n the ensuing twenty years, like the pebble cast into the pond, Dillon’s progeny have created ever widening circles of liability." Thing v. La Chusa, 771 P.2d at 819 (Cal. 1989).

68. See Gabaldon, 122 N.M. at 397, 925 P.2d at 514.
69. See id. at 395, 925 P.2d at 511.
70. Id. (quoting Thing, 771 P.2d at 826-27.)
71. See id. at 396, 925 P.2d at 513 (noting that NIED is a judicially created cause of action, and therefore the court has the ability to either expand or contract a plaintiff’s ability to recover damages).
72. See id.
73. Id. at 397, 925 P.2d at 514.
IV. RATIONALE

In each of the prior New Mexico cases, the plaintiffs sought recovery after an accident that brought sudden harm to a relative. The New Mexico Supreme Court found that Fernandez presented a different type of case. While Margarita lapsed into a coma just one day after the pharmacy misfilled the prescription, the court noted that hers was "a condition that progressively led to a more and more serious condition over time," rather than an injury caused by a sudden, external occurrence such as an automobile accident. The court therefore set out to determine whether the course of events that led to Margarita's injury could be considered an "accident," such that a witness to those events could meet the contemporaneous sensory perception element of the NIED test.

A. The Sudden Occurrence Test

Plaintiff argued that the word "accident" refers to the victim's injury. The court rejected this position, explaining that if the observation of the victim's injuries alone were sufficient, a plaintiff could recover even if he or she was not a bystander to the injury-producing event. The court noted that New Mexico's contemporaneous sensory perception element requires a plaintiff seeking damages for NIED to observe more than the victim's injuries. "Although undoubtedly horrific and tragic, witnessing a victim's suffering and death is not compensable under NIED." The court reiterated the position taken in Gabaldon that the purpose of bystander NIED is to compensate a plaintiff's emotional trauma from observing the actual injury-producing event, not from merely observing the resulting injury to the his or her loved one. The court explained that "[t]he former is an external occurrence that immediately causes an injury, whereas the latter is an internal condition of the victim." The court adopted the sudden occurrence test as a means of differentiating these two different emotional injuries, holding that a plaintiff must "observe a sudden, traumatic, injury-producing event at the time of its occurrence or soon after, but before the arrival of emergency medical professionals."

Applying this test, the court found no sudden, traumatic event in the circumstances leading up to Margarita's death, and therefore determined that Plaintiff could not recover damages for bearing witness to her granddaughter's suffering. Specifically, the court held that Margarita's lack of treatment "was not,
and cannot possibly be, comprehended as a sudden, traumatic event. Instead, "her going untreated was a condition that progressively led to a more and more serious condition over time, and can hardly be called an event." The inability to pinpoint a specific, observable event was fatal to Mrs. Fernandez' case. "If we cannot point to a moment in time at which the sudden, traumatic, injury-producing event occurred, then we must assume that Plaintiff's shock and emotional distress resulted instead from witnessing the suffering and death of the victim, which, although tragic, is not compensable under NIED. Thus, the court held that Plaintiff had not stated a valid claim for NIED.

B. Meaningful Observation Test

In addition to the sudden occurrence test, the court adopted a meaningful observation test, holding that the plaintiff must be aware at the time the injury-producing event occurs that the event is causing injury to the victim. The court explained that this requirement was also consistent with the position that the plaintiff's emotional distress must result from witnessing the injury-producing event, not from witnessing the injury. The court reasoned that if the plaintiff did not understand at the time of the event that the defendant was causing injury to the victim, then the plaintiff's suffering was a result of witnessing the injury alone. "When the bystander contemporaneously perceives both the sudden injury-producing and the injury and understands the causal relation between the former and the latter, the bystander's resulting shock and severe emotional distress are compensable." The trial court had taken a more restrictive position, argued by the defendant, that the plaintiff must observe the defendant's negligent conduct that causes the injury. The trial court had held that even though Plaintiff had personally picked up the prescription, she did not witness the pharmacist's actual mistake in putting the wrong medicine in the bottle. The supreme court explained that this definition also

84. Fernandez, 126 N.M. at 269, 968 P.2d at 780.
85. Id.
86. Id.
87. See id. at 268, 968 P.2d at 779.
88. Id.
89. See id. at 267, 968 P.2d at 778. Some jurisdictions impose a requirement that the plaintiff observe the defendant's negligent conduct. See, e.g., Bloom v. Dubois Reg'l Med. Ctr., 597 A.2d 671, 682 (Pa. 1991) (holding that "[t]he gravamen of the observance requirement is clearly that the plaintiff in a negligent infliction case must have observed the traumatic infliction of injury on his or her close relative at the hands of the defendant" (emphasis added)). The dissent in that case argued that the test was inappropriate because it would allow recovery even when the observation of negligent conduct played no role in the plaintiff's emotional trauma. See id. at 684 (Del Sole, J. concurring and dissenting). One year later, in Love v. Cramer, 606 A.2d 1175 (Pa. 1992), the Pennsylvania Supreme Court determined that a daughter who witnessed her mother suffer from a heart attack stated a claim for NIED against her mother's treating physician because the daughter was also present during the examination in which the doctor failed to properly diagnose the mother's condition. See id. at 1178. In some jurisdictions, this requirement has been imposed only in the context of NIED claims arising in medical malpractice cases. See, e.g., Gendek v. Poblete, 654 A.2d 970, 974 (N.J. 1995) (holding that plaintiff must witness actual malpractice, observe effect of malpractice on patient, and immediately connect malpractice with injury); Tebbutt v. Virostek, 483 N.E.2d 1142, 1143 (N.Y. 1985) (holding that observation of injury must be contemporaneous with conduct causing injury or death).
did not fit with past cases which allowed bystander NIED recovery. For example, the court pointed out that the plaintiff in Acosta, who witnessed his brother die from shock after striking an electrically charged fence, was allowed to recover even though he did not witness the act or omission that caused the excessive voltage in the fence. Rather, the plaintiff observed the event that caused injuries to his brother. Using an oft-cited example, the court noted that a bystander to an automobile accident need not know the driver of an automobile was drunk to recover emotional distress damages, so long as the bystander witnessed the accident.

In rejecting Plaintiff's claim, the court noted that she did not know the cause of her granddaughter's suffering until after her granddaughter's death. "What Plaintiff observed was the progression of Margarita's injuries: the blockage of her airway, her suffocation, and her death. She did not know their cause and witnessed no causal event." Identifying the injury-producing event as the pharmacist's act of providing the wrong medication, the court noted that Plaintiff did not know at that time that this act would cause injury to her granddaughter. In addition, the court noted that this event in itself would not cause Plaintiff emotional distress. Alternatively, the court reasoned that even if Margarita's going untreated was the injury-producing event, Plaintiff did not state a claim for NIED because she had not alleged that she was aware Margarita was going untreated while the girl was suffocating. "When the injury-producing event is either not observed or observed but not understood as injury-producing, a claim for NIED will not lie."

C. Public Policy

Perhaps more important than the specific tests adopted by the Fernandez court was the clear statement that New Mexico would continue to limit bystander recovery as a matter of public policy. Describing bystander recovery as a "vexing problem," the court explained that it needed to "balance the competing goals of providing reasonable compensation to bystanders who experience such suffering, and restricting liability where the harm is too remote from the defendant's conduct." The court emphasized that NIED recovery must be limited even when the injury is foreseeable and the resulting emotional distress is severe.

It would certainly cause any parent great anguish to witness one's child in pain and to be unable to alleviate it. However, the parents of every child injured through the negligence of another are not entitled to recovery for their emotional

90. See Fernandez, 126 N.M. at 267, 968 P.2d at 778.
91. See Acosta, 117 N.M. 28, 30, 868 P.2d 673, 675.
92. See id.
93. See Fernandez, 126 N.M. at 267, 968 P.2d at 778.
94. Id. at 268, 968 P.2d at 779.
95. See id. at 269, 968 P.2d at 780.
96. See id.
97. See id.
98. Id.
99. Id. at 270, 968 P.2d at 781.
distress—no matter how foreseeable we may agree that such anguish would be.\(^{100}\)

The court stated that its new limitations on NIED recovery would achieve three policy goals. First, these limitations provide more certainty in the law.\(^{101}\) Second, they limit the potential exposure of negligent actors.\(^{102}\) Finally, these limitations would serve to isolate the particular type of injury the court intended for the NIED tort to compensate.\(^{103}\) The court explained: “[w]e believe our approach reflects a reasonable compromise between the competing goals of facilitating recovery for negligently caused emotional distress and providing trial courts, insurers, and the public with clearer guidelines for assessing exposure to liability.”\(^{104}\)

V. ANALYSIS

A. Policy, Not Foreseeability, Determines Whether a Plaintiff Will Recover for NIED

*Fernandez* represents a further retreat from the emphasis placed on foreseeability in *Ramirez* and *Dillon*. As the court implicitly acknowledged, the defendants in this case could have foreseen that an adult family member would be with Margarita while the girl suffered the ill effects of the defendants’ failure to provide the right medication.\(^{105}\) Plaintiff’s emotional injuries were no less foreseeable than the physical injuries to Margarita, which were clearly compensable.\(^{106}\)

The two new limits imposed by the *Fernandez* court do not serve to isolate the foreseeable from the unforeseeable. The California Supreme Court, for example, specifically criticized the sudden occurrence test for eliminating claims based on foreseeable injuries.

The “sudden occurrence” requirement is an unwarranted restriction on the *Dillon* guidelines. Such a restriction arbitrarily 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.\(^{107}\)

Similarly, the meaningful observation test is not useful as a tool for determining whether the defendant should have reasonably anticipated the injury to the plaintiff. For example, an intoxicated driver should reasonably foresee that he could strike a pedestrian while driving. He may also foresee that this pedestrian would be accompanied by a loving family member who would suffer emotional injuries as a

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100. *Id.* at 266, 968 P.2d at 777 (quoting Marchetti v. Parsons, 638 A.2d 1047, 1051 (R.I. 1994)).
101. *See id.* at 270, 968 P.2d at 781.
102. *See id.*
103. *See id.*
104. *Id.*
105. As noted above, the *Fernandez* court quoted a Rhode Island case that found the need to deny compensation in some cases "no matter how foreseeable we may agree that such anguish would be." *See id.* at 270, 968 P.2d at 781 (quoting Marchetti, 638 A.2d at 1051).
106. The *Fernandez* defendants conceded that they provided the wrong medication, and parties settled the wrongful death claim. *See Appellant’s Reply Brief at 1, Fernandez* (No. 24195).
result of witnessing the accident. Thus, the bystander is a foreseeable plaintiff, regardless of whether the bystander understands the causal connection between the accident and the victim’s injuries. In this case, whether Plaintiff understood that the pharmacy caused her granddaughter’s suffering is irrelevant to the question of whether the pharmacy could have foreseen that Mrs. Fernandez would have suffered emotional injuries if they failed to provide the correct prescription.

Further, it is not clear that foreseeability was ever a determining factor in the guidelines for NIED. The Dillon court derived its three guidelines as a means to determine whether the defendant should have foreseen the plaintiff’s injuries. Subsequent case law, however, has undermined this part of the Dillon court’s premise. Judges and commentators have condemned each of these guidelines, when imposed as a bright-line test, as arbitrary restraints that deny recovery despite the foreseeability of injury to the plaintiff.

Most jurisdictions, for example, allow spouses to recover for NIED, but not fiancées. This has indeed led to arbitrary results, where the timing of the wedding alone determines whether or not the plaintiff recovers. Similarly, some courts and commentators have questioned whether the emotional injury resulting from the observation of an accident is any more foreseeable than an emotional injury that might result from the long-term results of that accident.

Dillon-based elements do not provide a means to determine whether an injury was foreseeable or not because they focus exclusively on characteristics of the plaintiff. The original inquiry, in Dillon, was whether the defendant could have

108. See Dillon v. Legg, 441 P.2d 912, 920-21 (Cal. 1968) (explaining, in regard to the requirement that the plaintiff be present at the scene of the accident, that “[t]he defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction”). As noted above, the Dillon court required the plaintiff to suffer physical manifestations of emotional distress in order to recover distress damages. See id. at 920. Addressing the contemporaneous sensory perception requirement, the Dillon court asserted that emotional injury was more foreseeable when the plaintiff actually observed the accident rather than learning of the accident after the fact. See id. at 921. Similarly, the court asserted that “a defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so.” Id.; see also Ramsey v. Beavers, 931 S.W.2d 527, 531 (Tenn. 1996) (“Obviously, it is more foreseeable that one witnessing or having sensory observation of the event will suffer effects from it.”).


110. See Elden v. Sheldon, 758 P.2d 582, 582-83 (Cal. 1988) (denying recovery even though plaintiff had lived with decedent for several years in stable relationship and was “de facto spouse”). But see Dunphy v. Murphy, 642 A.2d 372, 373 (N.J. 1994) (allowing recovery for NIED for a plaintiff who had lived with accident victim for more than two years, was engaged to victim and had set a wedding date).

111. Rejecting a strict blood relationship requirement, the Florida Supreme Court noted that a plaintiff who is affiliated with the victim could very well be described as a close relation. See Champion v. Gray, 478 So. 2d 17, 20 (Fla. 1985), receded from by Zall v. Meek, 663 So. 2d 1048 (Fla. 1995).

112. See Diamond, supra note 108, at 487.

113. See, e.g., Mobaldi v. Board of Regents, 127 Cal. Rptr. 720, 727 (Cal. Ct. App. 1976) (stating that “foreseeability depends upon what the emotionally traumatized plaintiff observes”). The Mobaldi court’s argument is based on the assumption that it is always foreseeable that a close relative will be in close proximity to the accident scene. See, e.g., Portee v. Jaffee, 417 A.2d 521, 525 (N.J. 1980) (“The possibility that a parent may be near her young child is always substantial.”).
foreseen the injury to the plaintiff. This approach is consistent with the notion of foreseeability as put forward by Judge Cardozo, who articulated the principle that the risk of injury to the plaintiff must be "apparent to the eye of ordinary vigilance."

Factors that examine the plaintiff's location, relationship to the victim, and perception of the injury or event are only marginally effective in determining whether the defendant could have foreseen the injury to the bystander. As Professor John Diamond noted:

The Dillon guidelines, which have been applied by California courts as limitations on duty, do not rely solely on the relationship between the plaintiff and the defendant, as do many traditional barriers to tort recovery. Rather, they are based on the fortuities of the circumstances in which the plaintiff suffered the injury.

Even if the Dillon-based factors did function to distinguish between foreseeable and unforeseeable injuries, they would not provide sufficient limitations on recovery for emotional distress damages. As the Gabaldon court noted, the Dillon court was overly optimistic in predicting that a foreseeability-based approach to NIED would not lead to a flood of litigation. Foreseeability alone does not provide sufficient limits on recovery for emotional injuries because the foreseeability test operates differently when applied to emotional injuries than to physical injuries. When a negligent driver causes an accident, the zone of foreseeable physical damage is relatively limited. With emotional damages, the range of foreseeability is broader and extends beyond the immediate limits of time and place. In Dillon and Ramirez, the courts' recognition of the plaintiff's emotional injuries did not expand liability beyond the range of foreseeable physical injuries. As noted above, it may be equally foreseeable that emotional damage will extend beyond a bystander on the scene to a relative who arrives shortly thereafter or a relative who is at home, but must cope with the accident's after effects. It would be a rare case in which the victim of a negligently inflicted injury did not have a relative or friend who suffered some negative emotional effect as a result. In the context of emotional injuries, foreseeability does not provide a sufficient limitation on the range of injuries for which a negligent actor should be held liable.

With Fernandez, the New Mexico Supreme Court has effectively abandoned the search for elements that determine whether or not a plaintiff's injury was foreseeable. Instead, the court has consciously derived tests that will eliminate liability for some foreseeable injuries, and will limit NIED recovery to a specific

114. See Dillon v. Legg, 441 P.2d 912, 921 (Cal. 1968) ("[C]ourts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen").


116. See Diamond, supra note 109, at 487-90. In Diamond's view, emotional injuries to relatives are foreseeable regardless of whether the relative was present and witnessed the infliction of injury. See id. Diamond, therefore, would not draw a distinction between NIED and loss of consortium, as New Mexico and most states have. See Fernandez, 126 N.M. 271-73, 968 P.2d at 782-84 (1998); Romero v. Byers, 117 N.M. 422, 426, 872 P.2d 840,844 (1994); see also Ford Motor Co. v. Miles, 967 S.W.2d 377, 384 (Tex. 1998) (differentiating bystander cause of action from loss of consortium); cf. Jones v. Sanger, 512 S.E.2d 590, 595 (W. Va. 1998) (holding that mental anguish damages in wrongful death action are not duplicative of action for NIED).

117. Diamond, supra note 109, at 487.

type of emotional injury that the court has determined should be compensated. The question remains, however, as to whether the limits articulated in *Fernandez* provide a principled basis by which to determine whether a plaintiff is deserving of compensation for an emotional injury caused by a negligent defendant.

**B. The Fernandez Test Does Not Serve to Identify Particularly Severe Emotional Injuries.**

Just as the court did not argue that the distinction it drew in determining which emotional injuries would be foreseeable, the court never asserted that this distinction was based on a value judgment about the severity of the emotional trauma in both contexts. In comparison, some courts that have adopted tests similar to those in *Fernandez* have argued that some emotional injuries are more severe than others, and therefore more deserving of judicial protection.

In *Mazzagatti v. Everingham,*119 for example, the Supreme Court of Pennsylvania theorized that plaintiffs who observe sudden events have no time to prepare themselves for what they are about to see, and therefore suffer deeper emotional injuries.120 The court explained:

> [w]e believe that where the close relative is not present at the scene of the accident, but instead learns of the accident from a third party, the close relative's prior knowledge of the injury to the victim serves as a buffer against the full impact of observing the accident scene. By contrast, the relative who contemporaneously observes the tortious conduct has no time span in which to brace his or her emotional system.121

Other courts have explained that everyone can expect to suffer pain at the death or illness of a loved one, whereas bystanders to sudden accidents suffer "particularly exquisite anguish . . . when they personally observe trauma strike a loved one like a bolt from the blue."122 As one New Jersey court explained:

> [d]iscovering the death or serious injury of an intimate family member will always be expected to threaten one's emotional welfare. Ordinarily, however, only a witness at the scene of the accident causing death or serious injury will suffer a traumatic sense of loss that may destroy his sense of security and cause severe emotional distress.123

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119. 516 A.2d 672 (Pa. 1986).
120. See id. at 679.
121. Id. Although the court in *Mazzagatti* was addressing the observation requirement, it relied on the same rationale when imposing the sudden occurrence test in *Cathcart v. Keene Industrial Insulation,* 471 A.2d 493 (Pa. Super. Ct. 1984). Pennsylvania's highest court questioned the validity of this argument just five years after *Mazzagatti* was decided, viewing the emotional interests at stake for those who witness a sudden event and those who witness injuries that develop or occur over a longer period of time as different. See Bloom v. Dubois Reg'l Med. Ctr., 597 A.2d 671, 682 (Pa. Super. Ct. 1991) (“[O]ne might well question whether there is a sufficient ‘buffer’ inherent in hearing from a third party that a terrible injury has been inflicted on a loved one and in seeing the horrible results of an accident but not the accident itself to justify denial of recovery for emotional distress . . . .”).
These arguments do not explain the *Fernandez* result, where there was no evidence that Plaintiff had a chance to "brace herself for the emotional blow she would sustain." Nor is there any basis to say that Plaintiff's suffering was less significant than that suffered by the plaintiffs in *Ramirez*, *Folz*, or *Acosta*, or that Plaintiff's tragedy was within the realm of experience we can all expect to endure. The lower court in *Fernandez*, though it felt bound to dismiss the case, also described the result as unjust. "[O]nly the heartless would deny [Plaintiff]'s] claim to have suffered severe shock and distress from witnessing her twenty-two month old granddaughter suffocate, go limp and die almost literally in her arms." In an affidavit filed with her Response to Defendants' Motion for Summary Judgment, Plaintiff stated that "nothing in my seventy-five years has been more terrifying and painful than watching and holding Margarita while she suffered, suffocated and died." The *Fernandez* court recognized that Mrs. Fernandez's experience was "horrific and tragic."

Nor is there a convincing argument that those plaintiffs who meet the meaningful observation requirement will suffer more severe injuries than those who do not. The *Fernandez* court did not argue that a plaintiff who watches a loved one suffer experiences more grief when she knows that someone else has caused that pain. As one California court explained, "[i]t is observation of the consequences of the negligent act and not observation of the act itself that is likely to cause [severe] trauma . . . ." The *Fernandez* court's distinction between emotional distress arising from observation of an actual injury-producing event and trauma resulting from merely observing the resulting injury may be based primarily in the history of the tort. *Ramirez v. Armstrong* recognized the right of bystanders to recover for emotional injuries. A subsequent case emphasized that this tort should not compensate "the grief and despair to loved ones that invariably attend nearly every accidental death or serious injury." Thus, the *Fernandez* court limited the NIED tort to the facts of the earlier cases, emphasizing that "[t]his case does not present a fact pattern which NIED was designed to remedy" without providing a reason why this plaintiff was less deserving of compensation than those who were successful in prior cases.

124. Although the *Fernandez* court cited language from *Gabaldon* describing the "shock of seeing efforts to save the life of an injured spouse in an ambulance or hospital" as an "experience that all may expect to endure," see *Fernandez*, 126 N.M. at 266, 968 P.2d at 777 (quoting *Gabaldon v. Jay-Bi Property Management*, 122 N.M. 393, 397, 925 P.2d 510, 514 (1996)), it never claimed that the same argument applied to Plaintiff's experience.

125. *Appellant's Reply Brief at 8-9*, *Fernandez* (No. 24195) (quoting the Record at 116).

126. *Id.* at 8 (quoting the Record at 66).


128. *Mobaldi v. Bd. of Regents of the Univ. of California*, 127 Cal. Rptr. 720, 727 (Ct. App. 1976) (holding that "[i]t is observation of the consequences of the negligent act and not observation of the act itself that is likely to cause [severe] trauma . . . .") See also *Diamond*, supra note 109, at 489 (recognizing "there is no persuasive evidence that contemporaneous sensory perception of the actual accident is a prerequisite of severe mental harm, or that such perception merits compensation while witnessing the destructive results does not").

129. *See Mobaldi*, 127 Cal. Rptr. at 727.

130. *See Appellant's Brief at 8-9*, *Fernandez* (No. 24195) (quoting the Record at 116).

126. *Id.* at 8 (quoting the Record at 66).
The need to limit NIED to its historical context, however, was rooted in concern about future expansion. The Fernandez court was particularly concerned with the broadening of this tort, noting, for example, that "[i]f observation of the injury or death were sufficient to show contemporaneous sensory perception, recovery for NIED could occur in virtually all medical malpractice cases." Although Plaintiff presented a compelling case for expansion of NIED beyond the specific fact patterns recognized in earlier case law, the court’s overriding concern seemed to be that a broader range of plaintiffs would be allowed recovery in the future if the elements of NIED were construed broadly enough to allow Plaintiff to recover.

C. Any Limitation on NIED Will Be Criticized as Arbitrary

With no basis in foreseeability or on severity, the distinction made by the Fernandez court could easily be dismissed as arbitrary. But even the most liberal guidelines could be subject to this criticism. Whenever the law draws a line, cases falling close to the line will make any rule seem arbitrary, and dissenters will be able to find examples of a sympathetic plaintiff who fell outside the bounds set by the law. The complaint that such results are arbitrary has been the main impetus of prior expansions of the NIED tort.

For example, there has been a gradual expansion of the contemporaneous sensory perception element. Many courts, unlike New Mexico, continue to deny recovery to plaintiffs who arrive at the scene of an accident shortly after the accident occurred. Those courts have pointed to the Dillon distinction between contemporaneous sensory perception and learning of an accident from another source. In Gabaldon, New Mexico denounced this distinction as arbitrary. "A family member may come upon the scene of an accident so soon after the accident that the victim’s condition is virtually the same as at the time of impact. We cannot say that the effect on the family member is distinguishable in any meaningful way."

The Gabaldon rule, however, is itself arbitrary, allowing recovery for relatives who arrive before an ambulance is on scene, but not after, without explanation as to why that harm can be meaningfully distinguished. In contrast, other courts have derived broader rules. In Gates v. Richardson, the Wyoming Supreme Court determined that a plaintiff should be allowed to recover for NIED so long as there has been no material change in the victims' condition or location. Even the Wyoming court, however, has acknowledged the possibility for arbitrary results.

131. Fernandez, 126 N.M. at 267, 968 P.2d at 778.
132. See, e.g., Thing v. La Chusa, 771 P.2d 814, 830 (Cal. 1989) (denying recovery to plaintiff who was not present at the scene of the accident but who arrived shortly after and saw her son lying in the roadway, bloody and unconscious); United Servs. Auto. Ass’n v. Keith, 970 S.W.2d 540, 542 (Tex. 1998) (denying recovery to a mother who arrived at the scene of an automobile accident while her daughter was still trapped inside her vehicle, screaming for help).
133. Gabaldon, 122 N.M. at 397, 925 P.2d at 513.
134. See id. at 397, 925 P.2d at 514. In addition, the Fernandez court’s decision to maintain the Gabaldon rule contradicts its assertion that a bystander “must observe more than the victim’s injury or death.” Fernandez, 126 N.M. at 268, 968 P.2d at 779. A relative who arrives after an accident will only observe the injuries to the victim.
136. See id. at 199.
"Once the victim's condition or location has materially changed, ... the moment of crisis for which recovery is allowed is deemed to have passed ... Shock or emotional distress may occur after this point, but it is no longer compensable."137

The Fernandez decision acknowledges that there is no way to escape these arbitrary results, and no way to limit recovery if the court repeatedly expands recovery in an attempt to do so.138 No jurisdiction has derived an NIED test that avoids arbitrary exclusion of some plaintiffs. Nor has any jurisdiction derived a means to distinguish cases, at the prima facie stage, on the basis of either foreseeability or severity. Thus, the courts are faced with two choices. They can allow all cases to proceed to trial, or they can impose limits, though arbitrary, on emotional distress recovery in an attempt to provide certainty for judges and litigants and to limit the liability imposed on negligent defendants.

As the Fernandez court recognized, some limits are necessary to limit liability and maintain certainty in the law. The law in the past several decades has expanded the extent to which a negligent actor can be held responsible for the indirect effects of his negligence. The negligent driver is held responsible for any physical injuries or property damage he causes. He is also held responsible for the pain and suffering associated with those physical injuries. Twenty years ago, that would be the extent of his damages. Today, New Mexico recognizes both loss of consortium and NIED.139 Thus, the number of claims arising out of a single accident has increased, creating further pressure on the courts. Similarly, the amount of damages the negligent actor has to pay has increased, thereby raising the potential that the defendant will be required to pay damages out of proportion to his culpability.

As the Fernandez court recognized, without limits on recovery, the tort of NIED would expand to include the grief of every plaintiff who experiences grief at the loss of a relative. There would then be no viable distinction between NIED and loss of consortium, which is traditionally available only to spouses. If further expansion is allowed for both of these torts, multiple recovery will accompany nearly every negligent act. "Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."

137. Contreras v. Carbon County Sch. Dist., 843 P.2d 589, 593 (Wyo. 1992). The Contreras court acknowledged that other courts, most notably Massachusetts, had adopted even more liberal rules. See id. (citing Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978), which allowed NIED recovery even though plaintiff did not see the injured victim until after arrival at a hospital). The Contreras court argued, however, that "[t]he shock received on seeing an injured loved one in a hospital setting ... is of a different quality than coming upon him or her at the scene of an accident." Contreras, 843 P.2d at 594.

138. See generally Fernandez, 126 N.M. at 270, 968 P.2d at 781 (discussing public policy considerations).


VI. IMPLICATIONS

A. Fernandez Precludes Further Expansion of NIED

Under the Fernandez holding, a plaintiff will have to prove, at the prima facie stage, that he or she has met all the elements of the NIED tort, including the two-part test to satisfy the contemporaneous sensory perception element. Both Fernandez and Gabaldon represented a reversal of the trend toward expansion of this tort. Given the stringent attitude adopted by the New Mexico Supreme Court in Fernandez, it is unlikely that the court will be receptive to plaintiffs seeking future expansion. This is significant because other jurisdictions have seen a broadening of NIED recovery. For example, in R.D. v. W.M., the Wyoming Supreme Court allowed family members of a woman who committed suicide to bring an NIED claim against the woman’s stepfather, who had allegedly contributed to her poor mental state and facilitated the act of suicide. While it may be possible to categorize the successful act of suicide itself as a sudden, traumatic event, that act was far removed from the alleged injury producing event—either the abuse or the negligent dissemination of drugs. Thus, it is likely that New Mexico would dismiss such a case without reaching the more complicated issue of whether NIED applies when the victim is the actor that initiates the injury-producing event.

Nor would New Mexico have been likely to grant recovery in a case like Craft v. Wicker, in which the Alaska Supreme Court eliminated the contemporaneous perception requirement and allowed parents to pursue a NIED claim against the man who sexually assaulted their fourteen-year-old daughter. The Alaska court determined that the parents stated a claim for NIED because they witnessed the girl’s emotional distress immediately after the incident. First, New Mexico would likely dismiss this case for failure to meet the contemporaneous sensory perception test. In addition, in each case in which New Mexico has granted recovery the victim has suffered traumatic physical injuries that resulted in death or required immediate emergency medical attention. The New Mexico courts have never granted recovery when the main injury to the victim was emotional. Were the court to grant recovery in a case like this, there would be no logical way to distinguish these parents from the relatives of every other victim of a violent crime.

Fernandez sends a clear message that the court will not entertain the type of expansion allowed in Wyoming and Alaska, and provides the state’s trial courts

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141. See supra part III.
142. 875 P.2d 26 (Wyo. 1994).
143. Other jurisdictions have also addressed claims from the relatives of suicides. In Leo v. Hillman, 665 A.2d 572, 577 (Vt. 1995), the Vermont Supreme Court relied on the zone of danger test to reject NIED claims brought against a psychiatrist by the family members of a suicide victim. In Vasilik v. Federbush, 742 A.2d 591 (N.J. Super. Ct. App. Div. 1999), a New Jersey court rejected a father’s NIED claim based on a clinic’s failure to hospitalize his son, who committed suicide fifteen hours later. The court ruled that the father, who had not accompanied his son to the clinic, did not immediately connect the clinic’s negligence with his son’s suicide. See id. at 594.
144. 737 P.2d 789 (Alaska 1987).
145. See id. at 792.
146. Conceivably, the plaintiffs could argue that they were present immediately after the incident and saw its effects, and therefore met the requirements as set forth in Gabaldon v. Jay-Bi Property Management, Inc., 122 N.M. 393, 397, 925 P.2d 510, 514 (1996).
with an efficient means to dispose of such cases. As discussed in the Analysis section, some New Mexico plaintiffs will have an alternative avenue for recovery in loss of consortium, just as Plaintiff did in this case.

B. New Mexico Will Need to Clarify the Availability of Emotional Distress Damages in Contract Actions

Some plaintiffs who do not meet the Fernandez standards may be able to recover emotional distress damages under the breach of contract theory developed in Flores v. Baca. After Fernandez, however, it is not clear how broadly the court will apply Flores. In that case, the court held that a plaintiff could recover emotional distress damages in a breach of contract action when the breaching party assumed an obligation to use reasonable skill and care to avoid severe mental distress to the other party. Because it was a breach of contract action, the limitations imposed on bystanders did not apply. Thus, even those family members who did not personally see the decomposed body were allowed to recover for emotional distress damages in that case. The New Mexico Supreme Court reaffirmed the Flores holding in Jaynes v. Strong-Thorne Mortuary, less than a year before Fernandez was decided.

Conceivably, Fernandez could have been brought as a breach of contract case, on the theory that the drug store breached its sales contract by providing the wrong prescription. Plaintiff, however, did not bring a claim for breach of contract, and thus the tort claim was the only one before the court. As a result, the court did not discuss the implication of the Fernandez decision for breach of contract cases. In future cases, however, the court may decide that Fernandez is the controlling precedent for most cases involving emotional injuries to third parties, and perhaps limit Flores and Jaynes to the funeral service context.

148. See id. at 310, 871 P.2d at 966. In Flores, the body of a man was exhumed two weeks after his burial. It was discovered that the funeral director had done an incomplete and inadequate job embalming the body. As a result, the body was severely decayed when it was exhumed. The court awarded emotional distress damages to the widow and her thirteen children, holding that the funeral director had undertaken a contractual duty to prevent the sort of emotional trauma the family members suffered. See id. at 309, 314, 871 P.2d at 965, 970.
149. See id. at 309, 871 P.2d at 965.
150. 124 N.M. 613, 954 P.2d 45 (1997). In Jaynes, a mortuary service disturbed a grave within a family plot while preparing another grave. The Jaynes court affirmed Flores, but denied the plaintiffs’ claims because they had not alleged sufficiently serious emotional distress. See id. While both of these cases involved burials, the Jaynes court declined to articulate a rule specific to funeral directors, instead preserving the application of Flores to those breach of contract actions in which emotional distress is within the contemplation of the parties. See id. (discussing Flores, 117 N.M. at 312, 871 P.2d at 968).
151. Because Plaintiff purchased the drugs, she would be a principal party to the contract, and her granddaughter a third-party beneficiary. Though it does not present as strong a case as Flores, the plaintiff could have argued that the contractual sale was designed to avoid mental anguish. The store was providing drugs for a sick child. Plaintiff’s sole purpose in purchasing the drugs was to make her granddaughter well. It could be argued, then, that one of the aims of this contract was to secure the emotional well-being of the child and her family members.
C. *Fernandez* Will Guide New Mexico's Treatment of NIED in the Malpractice Context

Although *Fernandez* involved the allegedly negligent dispensation of drugs, it was not a medical malpractice case.\(^{152}\) New Mexico has not yet determined whether or to what extent a bystander to an injury caused by medical malpractice can bring a claim for NIED. The *Fernandez* court, however, indicated that the tort could be available to the relatives of malpractice victims in the rare cases in which they met the newly devised standards for contemporaneous sensory perception, along with the other elements of NIED. Thus, the malpractice would have to result in a sudden, traumatic event, rather than a slowly progressing illness,\(^{153}\) and the plaintiff would have to understand at the time that this sudden event is causing injury to the patient.

Cases that could meet the *Fernandez* test have arisen in other jurisdictions. In the malpractice context, bystander claims often arise when parents bring in children for treatment,\(^{154}\) or malpractice occurs during the delivery of a child.\(^{155}\) While a misdiagnosis "normally does not create the kind of horrifying scene that is a prerequisite for recovery,"\(^{156}\) in some cases malpractice does cause a sudden, traumatic event. In *Mobaldi v. Board of Regents of the University of California*,\(^{157}\) for example, a boy suffered immediate convulsions and then fell into a coma after a nurse mistakenly injected him with a dangerous level of glucose.\(^{158}\) His mother, who was holding the boy at the time, successfully brought a claim for NIED.\(^{159}\) Bystanders to malpractice, however, may have a more difficult time meeting the meaningful observation requirement. In *Mobaldi*, for example, the injury-producing event was the nurse's injection of glucose. Under New Mexico's standards, that plaintiff could only recover if she understood that the injection caused the boy's...
sudden reaction. Thus, the Fernandez factors will limit the possibility that a bystander to medical malpractice will be able to recover for NIED.160

Future defendants may ask the New Mexico courts to go even further and follow jurisdictions that have denied all NIED recovery in the medical malpractice context.161 Courts that have adopted this approach have raised public policy concerns about the need to limit malpractice liability and the potential that hospitals will seek to limit liability by refusing to allow relatives to accompany patients during treatment.162 In addition, the Texas Supreme Court raised the following concern:

The very nature of medical treatment is often traumatic to the layperson. Even when a medical procedure proves to be beneficial to the patient, it may shock the senses of the ordinary bystander who witnesses it. A bystander may not be able to distinguish between medical treatment that helps the patient and conduct that is harmful. A physician’s primary duty is to the patient, not the patient’s relatives.163

The language in Fernandez, however, seemed to indicate that New Mexico would not impose a different rule for NIED cases arising out of malpractice.164

VII. CONCLUSION

In Dillon v. Legg, the California Supreme Court granted bystanders to accidents the right to recover for emotional distress damages, and proposed that courts should apply the same standards for foreseeable emotional injuries that govern recovery for foreseeable physical injuries. Although New Mexico’s courts adopted a more


161. See Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 78 (Tex. 1997) (holding that a bystander to medical malpractice cannot recover mental anguish damages). The Wisconsin Court of Appeals determined that because medical malpractice is governed exclusively by statute, it was up to the legislature to expand recovery to bystanders. See Zulikowski v. Nierengarten, 565 N.W.2d 164, 167 (Wis. Ct. App. 1997). Some courts have held that medical practitioners owed no duty of care to the relatives of patients, only to the patients themselves. See, e.g., Gray v. INOVA Health Care Services, 514 S.E.2d 355, 356 (Va. 1999) (hospital owed no duty to mother when performing tests on daughter); O’Hara v. Holy Cross Hosp., 561 N.E.2d 18, 20-22 (Ill. 1990) (emergency room does not have a duty to protect a nonpatient bystander from fainting by virtue of the fact that the nonpatient is allowed to enter the emergency room and remain with the patient during treatment; hospital’s initiative in inviting mother to observe son’s preoperative care did not create special relationship and thereby impose duty of care). In jurisdictions that apply the zone of danger or physical impact rules there is little potential for extension into the medical malpractice context. Such claims have arisen, however, in cases involving stillbirths. See, e.g., Tebbutt v. Virostek, 483 N.E.2d 1142, 1143 (N.Y. 1985); Parsons v. Chenango Mem’l Hosp., 620 N.Y.S.2d 604, 605 (N.Y. App. Div. 1994) (holding that mother who endured prolonged labor did not demonstrate independent physical injury or presence in ‘zone of danger,’ and therefore could not recover for emotional distress from death of child after birth).

162. See Edinburg, 941 S.W.2d at 80.

163. Id. at 81.

164. See Fernandez, 126 N.M. at 267-68, 968 P.2d at 778-79.
restrictive approach than California when first recognizing NIED in Ramirez v. Armstrong, the Ramirez court also sought to compensate foreseeable emotional injuries. The New Mexico Supreme Court’s decision in Fernandez represents a recognition that foreseeability does not provide a sufficient limitation on the range of emotional injuries for which a negligent actor should be held liable. The Fernandez court further recognized that courts must set firm limitations on the right to recover for indirect emotional injuries, even though the application of such limitations will sometimes lead to arbitrary results. In Fernandez, the court chose to limit NIED recovery to those emotional injuries that arise from observation of injury-producing events, rather than those that arise from observing the suffering of a loved one. Thus, it held that plaintiffs must establish that they 1) witnessed a sudden, traumatic, injury-producing event, and 2) were aware at the time of the event that it was causing injury to the victim in order to meet the contemporaneous sensory perception prong of the NIED test. Those plaintiffs who do not meet these tests can legitimately claim that the court is denying recovery to foreseeable, severe injuries. Such limitations are necessary, however, to provide certainty in the law and insure that defendants are not exposed to liability out of proportion to their culpability.

LAUREN KEEFE