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A free and unbridled press has long been thought a cornerstone of our democracy. The vital role of a free press has even been described as the guarantor of our liberty. Accordingly, in the absence of a compelling state interest, statutes prohibiting any type of publication are presumed unconstitutional. While recognizing that there is a right to publish without prior governmental restraint, there is also a correlative first amendment guarantee that the public be fully informed on matters of public concern.

When newspaper publishers deny access to individuals seeking to express themselves on public issues, these countervailing first amendment safeguards come into conflict. This first amendment anomaly arose in Tornillo v. Miami Herald Publishing Co.

Appellant, a candidate for the state legislature, requested that appellee print verbatim his replies to two editorials in the Miami Herald relating to his candidacy for public office; the newspaper refused. Relying upon a

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1. One court has stressed that: "[O]ur liberty depends on the freedom of the press and that cannot be limited without being lost." State ex rel. Singleton v. Woodruff, 153 Fla. 84, 13 So. 2d 704, 706 (1963), quoting Thomas Jefferson.
   The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'.
Florida statute, appellant initiated suit in the Florida Circuit Court for Dade County, seeking a mandatory injunction requiring the printing of his response, declaratory relief and damages. The circuit court dismissed appellant's cause, declaring the statute violative of the federal and state constitutions. In reversing the circuit court, the Florida Supreme Court held that the statute "enhances rather than abridges" freedom of speech and press and thus is not unconstitutional. The court explained that the statute does not constitute an infringement of first amendment rights since it does not exclude any specified newspaper content, but rather requires additional material in the interest of maintaining conditions conducive to free and fair elections. Judge Boyd's dissenting opinion expressed the view that since the first amendment prohibits the government from limiting the right to publish news and to comment editorially, it also prevents the government from compelling a publisher to print another person's statement against the publisher's will.

While there are several issues presented by Tornillo, it is the purpose
of this note to analyze the concept of first amendment freedoms in relation to a state-fashioned right of reply. The principal question to consider is whether a state "right to reply" statute, which requires newspapers to publish, without charge, replies of political candidates whom they criticize during election campaigns is violative of the first amendment freedom of the press.  

An Unfettered Institution

The vast majority of judicial decisions which have tested various statutes against first amendment guarantees have concerned statutory restrictions upon publication. Unless these restrictions were justified by a clear and present danger to a compelling state interest, the statutes consistently were voided.  

Constitutional litigation concerning attempted regulation of the press usually involves governmental attempts to restrict or forbid publication. The strongly embedded prohibition against unwarranted censorship of the press was recently applied to prohibit the government from restraining the publication even of classified documents alleged to be vital to the national security.  

Although the government cannot limit what a newspaper may print, it can be argued that regulations which affirmatively require publication somehow stand on a different constitutional footing. If there is a difference between compelling publication of material that the newspaper

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It is a fundamental principle that this Court has the duty, . . . to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution. Tornillo v. Miami Herald Publishing Co., — Fla. at —, 287 So. 2d at 85. See also Overstreet v. Blum, 227 So. 2d 197 (Fla. 1969); Hancock v. Sapp, 225 So. 2d 411 (Fla. 1969); Rich v. Ryals, 212 So. 2d 641 (Fla. 1968).

Preliminarily, the trial court also determined that the statutory provision in question was a criminal statute and that absent special circumstances, equity will not ordinarily enjoin commission of a crime. See Pompano Horse Club Co. v. State ex rel. Bryan, 93 Fla. 415, 111 So. 801 (1927); Annot., 52 A.L.R. 51 (1928). The supreme court stated that the action underlying appellant's cause is a civil action. No criminal penalty was sought in the case and, therefore, the validity vel non of the criminal penalty was not involved. Tornillo v. Miami Herald Publishing Co., — Fla. at —, 287 So. 2d at 90.

11. The term "first amendment" is used herein as referring to the first amendment as made applicable to the states by the fourteenth amendment. See, e.g., Near v. Minnesota, 283 U.S. 697, 707 (1931).


wishes not to print and prohibiting a newspaper from printing news or other material, then perhaps governmental regulations requiring publication should not have to meet the same constitutional standards as regulations prohibiting publication. In the rare instances when the courts have addressed these questions, however, they have rejected any concept that a newspaper may be compelled to publish material against its will.

For example, the Supreme Judicial Court of Massachusetts recently rendered an advisory opinion\(^{15}\) declaring unconstitutional a proposed statute which provided, in essence, that if a newspaper publishes a paid political advertisement, it cannot refuse to publish paid political advertising advocating a contrary view.\(^{16}\) While observing that "freedom of the press does not mean that the press may not be subjected to reasonable regulation,"\(^{17}\) the court found the proposal in violation of the first amendment because requiring a newspaper to print is the equivalent of censorship.\(^{18}\)

Compelling publication was also faced in *Associates & Aldrich Co. v. Times Mirror Co.,\(^{19}\)* in which a movie distributor claimed that his first amendment rights were violated by the newspaper’s refusal to accept certain proffered advertising without modifications requested by the newspaper. In rejecting the claim of infringement on first amendment rights, the Ninth Circuit declared:


\(^{18}\) The court stated, "Compulsion to publish all responsive political advertisements, applicable to all newspapers . . . goes beyond what is essential to the furtherance of any interest of estate in its citizens having a right of access to newspapers . . ." — Mass. at —, 298 N.E.2d at 835. See also Avins v. Rutgers, State University of New Jersey, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968) (rejecting demand that state-supported university’s law review must be compelled to publish article of taxpayer); Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971) (rejecting contention that newspapers can be required to furnish free space for expression of citizens’ views).


This, however, does not prevent a state from regulating the rates for political advertisements. See, e.g., Chronicle & Gazette Pub. Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478 (1946), appeal dismissed, 329 U.S. 690, sustaining the validity of N.H. Laws ch. 185, § 2 (1945). Here, no compulsion to publish is involved.

\(^{19}\) 440 F.2d 133 (9th Cir. 1971).
There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material.\textsuperscript{20}

In \textit{Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.},\textsuperscript{21} the court upheld the newspaper's refusal to publish advertisements submitted to it by the union which presented the union's views on a labor dispute in which it was engaged.\textsuperscript{22} The clothing workers' first amendment right to free speech was not sufficient to give them access to the newspaper's printing presses without the newspaper's consent.

Thus, in terms of the inviolability of the "free press" concept, another issue must be considered. An analysis of these cases suggest that the press does not necessarily have a public responsibility to present both sides of an important issue. Rather, the press should strictly remain an unfettered institution to be used as its owner pleases.\textsuperscript{23}

\textbf{The Right of Viewers}

A series of cases which have denied the existence at common law of a right of access to the press to respond or to publish advertising have suggested, however, that legislation providing for such a right would be permissible.\textsuperscript{24} In \textit{Approved Personnel Inc. v. Tribune Co.},\textsuperscript{25} a Florida court recognized the great weight of authority upholding the rights of newspapers to reject advertisements. The court indicated, however, that the law is settled on this point only in the absence of statutory regulations on the subject.\textsuperscript{26}

The state action problem has been a significant factor in cases in-

\begin{thebibliography}{99}
\bibitem{20} 440 F.2d at 135.
\bibitem{22} The court stated: 
\begin{quote}
It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements . . . . We do not understand this to be the concept of freedom of the press recognized in the First Amendment . . . . 435 F.2d at 478.
\end{quote}
\bibitem{23} \textit{See Note, State Control of Political Advertisements, 7 Suffolk. L. Rev. 711, 716 (1973).}
\bibitem{25} 177 So. 2d 704 (Fla. 1st D.C.A. 1965).
\bibitem{26} The court noted, "In the absence of any statutory provisions to the contrary, . . . the newspaper publishing business . . . is neither a public utility nor affected with the public interest." 177 So. 2d at 706. \textit{See also Annot.}, 18 A.L.R.3d 1277 (1968).
\end{thebibliography}
volving newspapers in which there has been no legislation affording access or a right. At the federal district court level, Judge Marovitz was unwilling to judicially fashion a right of access to the press. The court did indicate, however, some sensitivity to the problems that have developed or may arise because of a lack of access to the marketplace of ideas. Additionally, the court seemed to suggest that it would approve enforcement of a right of access if it were provided by statute. "If, in fact, concentrations of private media power are stultifying, the appropriate approach to secure a right of access would be by 'experimental, innovative legislation'."

In *Rosenbloom v. Metromedia,* a case involving a radio broadcast, the United States Supreme Court suggested the enactment of right of reply legislation as an alternative to damage suits for libel in cases where public issues are involved. In a plurality opinion, the Court reasoned: "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern." Since the concept of a right of reply has many variations, it is conceivable that some type of "reply" statute could be drafted which could meet the test of the first amendment. For example, an optional right of

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29. 307 F. Supp. at 429, quoting from, Barron, *Access to the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641, 1670, 1676 (1967). Barron believes that the right of the public to hear is the real purpose of the first amendment. He contends that the newspaper market is monopolistic, and that to further the free flow of ideas, it is necessary to pass legislation requiring newspapers to provide access for competing ideas.
31. Mr. Justice Brennan announced the decision of the Court joined only by Chief Justice Burger and Justice Blackmun. The Court rendered a total of five opinions.
32. 403 U.S. at 47. To this comment, the Court appended the following footnote:
33. See, e.g., Chafee, *Possible New Remedies for Errors in the Press,* 60 HARV. L. REV. 1 (1946); and Donnelly, *The Right of Reply: An Alternative to an Action for Libel,* 34 VA. L. REV. 867 (1948). In addition to FLA. STAT. ANN. § 104.38, there appear to have been only two similar "right of reply" statutes enacted in the United States; MISS. CODE ANN. § 3175 (1942) and NEV. REV. STAT. sec. 200.570 (1963). The Mississippi statute was eviscerated in Manasco v. Walley, 63 So. 2d 91 (Miss. 1953). Nevada repealed its mandatory right of reply statute in 1969 and replaced it with a retraction statute.
reply statute for libelous publications might be provided as an alternative to the publication of a retraction as a basis for barring recovery of punitive damages for libel against a newspaper which published such a reply or retraction. Such a statute would not raise the serious constitutional questions of a more general reply statute outside the libel context. The Court has never ruled directly upon a state statute requiring newspaper publication of a reply. It is therefore unclear that *Metromedia*, which involved a radio broadcast, intended to suggest the constitutionality of right of reply legislation when applied to newspapers.

The Court, however, has recognized the constitutionality of a governmental mandate to publish specific items in connection with the "fairness doctrine" as applied to radio and television stations by the Federal Communications Commission. While the traditional rationale for upholding equal time provisions on television and radio is based on the fact that there exist only a limited number of air waves over which broadcasts can be made, and that, as a result, broadcasting technical limitations sanction broadcasting regulations, the Court in *Red Lion Broadcasting Co. v. FCC*, stressed:

> It is the right of viewers and listeners, not the right of the broadcasters which is paramount . . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether by the government itself or a private licensee.

*A Constitutional Soapbox*

The *Tornillo* court declared: "The public 'need to know' is most critical
during an election campaign. Agreeing with the thesis propounded by Barron, the court further opined that "[T]he right of the public to know . . . is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship."

Indeed, climbing up on a soapbox and attracting a small crowd is no longer considered to be a very effective method of expression, especially when newspaper circulations reach millions. In this context, a right of reply statute might seem necessary to guarantee the first amendment idea that "[D]ebate on public issue should be uninhibited, robust and wide-open." Tornillo carefully explained that the statute does not constitute an incursion upon first amendment rights since it does not deny the newspapers any right of expression, but rather requires additional information in the interest of full and fair discussion. The Tornillo court heeded the language of Red Lion that:

Congress does not abridge freedom of speech or press by legislation . . . multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication . . . .

While it can be argued that it is possible to draw an analogy between Florida's right of reply statute and FCC regulations providing a similar right, this argument would seem to ignore the long-established constitutional distinction between broadcast media and the press. Characteristic of this distinction is the Ninth Circuit's refusal to apply the fairness doctrine to newspapers to compel publication of an editorial advertisement. That such a

40. See note 29 supra.
42. Supra note 36.
44. 395 U.S. at 401 n.28.
45. The FCC's "personal attack" regulations, which are a corollary to its fairness doctrine, provide in significant part:

When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity, or like personal qualities of an identified person or group, the licensee shall . . . transmit to the person or group attacked . . . an offer of a reasonable opportunity to respond over the licensee's facilities. 47 C.F.R. sec. 73.123 (1971).
46. The court discussed the matter as follows:

[D]ifferences in the characteristics of news media justify differences in the First Amendment standards applied to them . . . . Where there are substantially more individuals who want to broadcast than . . . frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast
distinction does exist was recently reemphasized by the Supreme Court in *Columbia Broadcasting System v. Democratic National Committee* in which the Court noted that the measure of freedom accorded to broadcasters is "not as large as that exercised by a newspaper." The Court noted the unique problems posed by the broadcast media, stating, "Unlike other media, broadcasting is subject to an inherent physical limitation." While it can be asserted that there are many more broadcasting stations than there are daily newspapers, and that newspapers also enjoy government conferred privileges, it is perhaps also true that the development of constitutional doctrine should be based neither on the hysterical over-estimation of media power nor on the failure to distinguish between regulation of the expression of ideas and regulation of the commercial aspects of a newspaper's operation.

*Tornillo* can be distinguished from *Times Mirror* in that the latter did not concern a statutory provision requiring publication to further a compelling interest. The *Tornillo* statute's validity was predicated on the overriding state interest in the integrity of the electoral process.

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47. 413 U.S. 94 (1973) (denying the Democratic National Committee's request for a declaratory ruling from the FCC that the Communications Act or the first amendment precluded a licensee from having a general policy of refusing to sell time to responsible entities to present their views on public issues). For a discussion of the *Columbia Broadcasting* case, see Note, *The CBS Decision: Access to the Media Denied*, 23 CATI. U.L. REV. 339 (1974).

48. 413 U.S. at 117-18. The Court further stated: "[T]he power of a privately owned newspaper to advance its own . . . views is bounded by only two factors: . . . the acceptance of a sufficient number of readers . . . to assure financial success; and, . . . the journalistic integrity of its editors and publishers." Id. at 117.

49. Id. at 101.

50. In addition to the three national commercial networks as of April 1st, 1970, there were, on the air, 509 commercial VHF television stations, 180 commercial UHF stations, 4,280 standard broadcast stations, and 2,111 commercial FM stations. By comparison, there are only 1,792 daily newspapers in the United States. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 144 nn.13-14 (1973) (Stewart, J., concurring).


54. In *Mills v. Alabama*, 384 U.S. 214 (1966), the Supreme Court declared unconstitutional a state statute prohibiting publication on election day of editorials concerning
is necessary, however, to consider the implications of this opinion for further regulation of the press. In *Opinion of the Justices*, the Massachusetts Supreme Judicial Court also recognized that the proposed statute was intended to foster discussion of political issues and facilitate expression of all views. Nevertheless, the court found that in actual effect the statute's enactment “may produce the chilling effect of discouraging newspapers . . . from accepting any political advertisements.”

The Florida statute can be distinguished if the premise is accepted that the opportunity for counterattack ought to be at the very heart of a constitutional theory which is concerned with ensuring vigorous debate on public issues. The emphatic language used by the Massachusetts court to deny an obligation to publish suggests that such a distinction might not be material as least for that court: “[N]o set of circumstances may exist which would support a legislative mandate that a newspaper . . . must publish a political advertisement.” Nor would the legislative interest in promoting the flow of expression of political views ever seem desirable at the expense of allowing the government to assume the editorial function. While the precise form of governmental regulation as issue in *Tornillo* may differ from that involved in *Opinion of the Justices*, the question presented is exactly the same. Both manifestly require the suspension of editorial discretion and permit the government through regulation to dictate the contents of a newspaper's columns.

**A Free Press or Community Bulletin Boards**

The *Tornillo* decision suggests that the best prospects for the emergence of a right of reply in the press are in those narrowly prescribed circumstances when the character of a candidate for public office has been attacked. It may be that while there is no constitutional duty for a court to provide a right of reply, a statute affording such a right cannot be deemed unconstitutional when a state has enacted it to promote a compelling interest.

The disagreement between the highest courts of Massachusetts and Florida on the validity of statutes creating the right of access to newspapers for political candidates indicates that states will disagree as to what constitutes a sufficiently compelling interest to justify an obligation to publish. With-

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56. See note 16 supra.
57. — Mass. at —, 298 N.E.2d at 834.
58. — Mass. at —, 298 N.E.2d at 835.
out a more decisive United States Supreme Court endorsement of right of reply statutes than that offered by the plurality in *Metromedia*,59 many state courts will be reluctant to follow *Tornillo*.

At a time when too much of our public business appears to be conducted in an atmosphere of concealment, any device designed to present "the whole story" seems palatable. There is, however, the possibility that the Florida statute will produce the same "chilling effect" feared by the Massachusetts court. Then, the historical purpose of a free press to "bare the secrets of government and inform the people"60 would be ill-served.

If a state sees a compelling interest in requiring publication of replies by attacked political candidates, is it not conceivable that a state will also perceive such an interest in legislation affording any public official the right to reply to publications critical of his conduct in office?61 The next step could be legislation demanding a newspaper to publish the reply of anyone who felt he was criticized by the press. The courts must take care not to extend *Tornillo* in this manner. If the courts do not take pains to prevent an extension of *Tornillo*, this could lead to the replacement of our traditional free press with publications resembling community bulletin boards.

Ernest W. DuBester

**TORTS—Negligent Infliction of Emotional Harm—No Impact Required When Plaintiff Himself Is Put In Physical Peril.**


Tort law has struggled for nearly a century with the question of a plaintiff's right to recover for negligently inflicted emotional harm.1 The "im-

60. 403 U.S. 713, 717 (1971).

impact rule” was a late nineteenth century development of courts attempting to deal with the problem. The Supreme Court of Virginia considered the rule recently in *Hughes v. Moore,* and the decision indicates that while its original thrust has changed, controversy still surrounds the rule's modern day application.

Plaintiff sought to recover damages for injuries she received (principally physical pain, insomnia, and extreme nervousness) from shock and fright. Her fear was allegedly caused by the defendant's negligently driving his car off the road, across plaintiff's front lawn, and directly toward the window of the house through which the plaintiff was watching. While the car struck the front porch, plaintiff herself received no physical impact. She was awarded $12,000 by the jury and the defendant appealed the judgment entered on the verdict.

Answering the basic question of whether, in the absence of a willful, wanton or vindictive wrong, a plaintiff can collect for emotional distress without contemporaneous injury, the appellate court reinterpreted Virginia's "impact rule" and held that the plaintiff could collect without physical impact as long as "there is shown a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury."

In an effort to restate the Virginia "impact rule" in complete detail, the court added a limitation to the rule which was not part of its precise holding under the *Hughes* facts. It specifically noted that its rule did not extend to recovery for those injured from shock at the viewing of a defendant's negligence toward a third person. That limitation, its underlying rationale, and the arguments made for its removal will be the primary focus of this article.

2. The rule was well-stated in Spade v. Lynn & B. R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897):

[T]here can be no recovery for fright, terror . . . if these are unaccompanied by some physical injury [nor] for such physical injuries as may be caused solely by such mental disturbance where there is no injury to the person from without.


4. For a similar fact pattern where the court found the tremor from the car's impact with the house insufficient to satisfy the "impact rule" see Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933).

5. 214 Va. at 34, 197 S.E.2d at 219.

6. For an indication that this limitation, while making the court's basic intention clear, leaves several questions unanswered see Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965) (recovery under Colorado law contingent on plaintiff being within zone of danger); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952) (recovery denied since witness was not imperiled herself); Lessard v. Tarca, 20 Conn. Supp. 295, 133 A.2d 625 (1957) (recovery denied witnesses even though they received physical injuries in the same accident).
Development of the "Impact Rule"

Its General Background

The evolution of the "impact rule" began with the English decision, Victorian Railways Commissioners v. Coults, which established the principle that no damages would be awarded for emotional distress resulting from terror, without physical injury. The early United States view adopted this precedent. It is typified by a leading New York case, in which the plaintiff, a pedestrian, suffered a miscarriage as a result of narrowly avoiding a collision with the defendant's horse drawn car. There the court stated:

The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action.

The inequities of the strict application of the rule gradually became apparent to the courts which had adopted it, and its strictures began to ease, with the most nominal impact being held sufficient to allow recovery for harms having no real connection to the impact itself.

The courts eventually began to eliminate the impact requirement altogether, at least with regard to plaintiffs who themselves were in imminent physical danger. To date a majority of jurisdictions which have considered the rule have either rejected it on first impression or abandoned it upon reconsideration. The reasoning in Niederman v. Brodsky is illustrative of the modern approach to the impact/no-impact question:

[T]he gravity of appellant's injury . . . dictate[s] that appellant

9. Id. at 110, 45 N.E. at 355; see also Wyman v. Leavitt, 71 Me. 227 (1880); Ewing v. Pittsburgh, C., C. & St. L. Ry., 147 Pa. 40, 23 A. 340 (1892); Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897). Contra, Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892) ("Now, if the fright was the natural consequence of . . . the circumstances of peril . . . and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries." Id. at 138, 50 N.W. at 1035); Mack v. South Bound R.R., 52 S.C. 323, 29 S.E. 905 (1898); Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906).
10. Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931) ("[T]he direct physical injury may be insignificant in relation to the damages consequent upon the fright." Id. at 238, 177 N.E. at 433); Potere v. City of Philadelphia, 380 Pa. 581, 112 A.2d 100 (1955) (driver received sprained ankle from road collapse under his truck, he quickly got out of truck, and was awarded $5,000 for mental distress received when the truck then fell 19 feet into resulting cavity).
11. 214 Va. at 34, 197 S.E.2d at 219.
12. 436 Pa. 401, 261 A.2d 84 (1970) (defendant's car skidded onto sidewalk hitting plaintiff's son as the two walked along, inducing severe heart damage to the plaintiff).
be afforded a chance to present his case to a jury and perhaps be compensated for the injury he has incurred.

[We abandon the impact requirement] in only those cases like the one before us where the plaintiff was in personal danger of physical impact because of the direction of a negligent force against him and where plaintiff actually did fear the physical impact.\(^\text{13}\)

The Niederman limitation on foreseeable plaintiffs provides the basis of the rule which prohibits witnesses of a negligent act from recovering for their emotional injuries, and is indicative of the majority opinion in the United States on the question.\(^\text{14}\) The rule is designed to meet situations similar to that in Waube v. Warrington,\(^\text{15}\) the leading American decision on the subject. There, a mother, watching from inside her home, saw her daughter killed when struck by a car negligently driven by the defendant. The court denied recovery for emotional injury suffered by the plaintiff on several grounds: (1) the risk of this type of injury was not foreseeable by the defendant; (2) the liability to be imposed on the defendant would be disproportionately greater than his culpability; (3) the imposition of such liability would put too heavy a burden on the highway user: (4) the greater potential for fraudulent claims: and (5) the non-existence of limits for this type of liability.\(^\text{16}\) While that decision has almost invariably been followed, its effect has been softened. Courts have frequently adopted a more lenient “zone of danger” test whereby as long as the plaintiff is in physical peril himself he can collect for emotional injuries occasioned by his fear of injury to another.\(^\text{17}\)

The artificiality of that “zone of danger” test was directly attacked in Dillon v. Legg,\(^\text{18}\) in which the California Supreme Court rejected the Waube rationale and, faced with the classic fact pattern of a mother in the home viewing her child being killed, allowed the mother to recover damages for her emotional injuries. After first dealing with the question of fraudulent claims,\(^\text{19}\) the opinion attempted to meet the Waube objections to extend-

\(^{13}\) id. at 404, 413, 261 A.2d at 85, 90.

\(^{14}\) Cases cited note 16 infra.

\(^{15}\) 216 Wis. 603, 258 N.W. 497 (1935).

\(^{16}\) Id. at 613, 258 N.W. at 501; see also Barber v. Pollock, 104 N.H. 379, 187 A.2d 788 (1963) (wife viewed accident killing husband from inside house one hundred feet from scene); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (child struck by car, and while mother was not an eyewitness she was close by).

\(^{17}\) The Waube decision itself hinted at this line of reasoning. It defined the issue in the case in terms of whether a mother “not put in peril or fear of physical impact” could recover for injuries sustained by witnessing the event. 216 Wis. at 605, 258 N.W. at 497.

\(^{18}\) 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

\(^{19}\) “[T]he possibility that fraudulent assertions may prompt recovery in isolated cases
ing recovery. It countered each by calling for a general negligence approach to the facts in a particular case, and offered guidelines to aid in determining foreseeability. The latter included whether the plaintiff was near the scene of the accident; whether the shock was the result of a contemporaneous observance of the accident rather than a second-hand reaction to learning of its occurrence; and the relationship between the victim and the plaintiff. The decision contemplated that “courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected.”

In general the decision rested on the view that the court “[saw] no good reason why the general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability, long applied to all other types of injury, should not govern the case . . . .”

The Dillon approach to emotional distress cases has been adopted in several later cases; however, it remains a minority position. Those few decisions which have adopted the Dillon rationale indicate that support for its analysis is slowly developing and that, at the very least, courts will now be confronted with arguments on both sides of the question.

Virginia “Impact Rule” Precedents

In Hughes the Virginia Supreme Court was afforded its first opportunity to test its “impact rule” since the 1932 decision of Bowles v. May which, while upholding the Virginia “impact rule” under ordinary negligence first adopted in 1902, declared:

> When such fright is due to a willful, wanton, and vindictive wrong,

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\text{Id. at 736, 441 P.2d at 917, 69 Cal. Rptr. at 77-78.}
\]

> It did not justify a wholesale rejection of the entire class of claims in which that potentiality arises.”

\[
\text{Id. at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.}
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> The court added a test for the foreseeability of a parent's presence as an additional factor in determining a defendant's duty. 

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\text{Id. at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.}
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> The court overturned its “impact rule,” called for a general negligence approach, but added a caveat: “[t]hat approach must be so limited within the bounds of foreseeability as to preclude a host of false and groundless claims.”

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\text{Id. at 121; Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970) (emotional distress arose from negligent damage to plaintiff's home).}
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\text{21. Id. at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.}
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\[
\text{22. D'Ambra v. United States, 354 F. Supp. 810 (D.R.I. 1973) (mother standing near scene, but not in physical peril herself, when child was run over by U.S. Mail truck).}
\]

\[
\text{The court added a test for the foreseeability of a parent's presence as an additional factor in determining a defendant's duty.}
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\[
\text{Id. at 820; Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970) (foreign object in bottle caused emotional distress. The court overturned its “impact rule,” called for a general negligence approach, but added a caveat: “[t]hat approach must be so limited within the bounds of foreseeability as to preclude a host of false and groundless claims.”}
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\text{Id. at 121; Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970) (emotional distress arose from negligent damage to plaintiff's home).}
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\text{25. 159 Va. 419, 166 S.E. 550 (1932).}
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\text{26. Connelly v. Western Union Tel. Co., 100 Va. 51, 40 S.E. 618 (1902).}
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recovery is generally permitted, notwithstanding the fact that there is no contemporaneous injury from without.\textsuperscript{27}

Several federal courts sitting in Virginia had considered the decision in \textit{Bowles} before the \textit{Hughes} court,\textsuperscript{28} and their conflicting opinions on its precise meaning prompted the court to reexamine the precedent. The \textit{Hughes} court's effort at clarification resulted in the new Virginia "impact rule."

\textbf{The Hughes Decision}

The court had little problem disposing of the \textit{Bowles} precedent, regardless of its original meaning. Certainly the development of the "impact rule" throughout the United States provided ample legal precedent and practical justification for its decision to revise the rule. However, while the court relied on extra-jurisdictional precedent to restate the "impact rule,"\textsuperscript{29} it made very little substantive use of these precedents when it ventured beyond that modernization of the rule to impose a strict prohibition against a witness' claim for recovery.\textsuperscript{30}

The case law, particularly \textit{Dillon}, gave strong support to the view that absolute bars should not be erected since cases could easily develop whose facts called for the plaintiff-witness recovery despite his not being within the "zone of danger." Rather than adopt a general negligence approach to the problem, the court cited and adopted the view of \textit{Waube v. Warrington} and cases which followed its analysis. However, it did not go beyond mere citation to seriously discuss the issues raised by those supporting precedents.

The \textit{Waube} decision, the leading opinion denying such recovery, at least mentioned a potential right of recovery when the witness himself was also within the physical risk.\textsuperscript{31} The court in \textit{Jelley v. LaFlame},\textsuperscript{32} also cited in \textit{Hughes}, although denying recovery to the plaintiff-witness, also hinted at a different result if the plaintiff herself had been in physical peril. And yet when the \textit{Hughes} court adopted its rule, it failed to provide for any similar contingencies. Rather the prohibitive language repre-

\textsuperscript{27.} 159 Va. at 437, 166 S.E. at 556.
\textsuperscript{29.} 214 Va. at 31-34, 197 S.E.2d at 217-20.
\textsuperscript{30.} The decision is similar to that in Niederman \textit{v. Brodsky}, 436 Pa. 401, 261 A.2d 84 (1970) in that the court's attempt to explicitly set out its rule caused it to expand the rule beyond the strict holding of the case.
\textsuperscript{31.} 216 Wis. at 605, 258 N.W. at 497.
\textsuperscript{32.} 108 N.H. 471, 473, 238 A.2d 728, 730 (1968) (mother watched as daughter
sents an absolute bar to recovery for plaintiff-witnesses.

Beyond a failure to provide specific exceptions for its bar to witnesses, the court also failed to deal with the broader policy questions raised by the *Dillon v. Legg* decision. The court failed to counter the *Dillon* thesis that certain witnesses are foreseeable plaintiffs, that foreseeability can be tested under general negligence theory, and that justice is best served by considering each case on an ad hoc basis. Instead the court imposed the ban with bare citations, both to *Waube* and *Jelley* which superficially supported its position, and to *Dillon* which had adopted the opposite view.

**Conclusion**

The “impact rule” which aroused such controversy seventy years ago has been thoroughly repudiated. The question of a witness's right to recover for emotional harm suffered by viewing another's physical peril, however, is still before us and must be adequately dealt with by the courts. The *Dillon* decision makes a well-reasoned, compelling argument that general negligence theory can be adapted to these cases with equitable results that neither overextend liability nor unjustly restrict it. However, its guidelines for determining foreseeability must be examined, applied to various fact situations, tested for the validity and fairness of their results in actual cases, and accepted or rejected based on that experience. The *Hughes* court has not contributed to that analysis, but has instead imposed a ban on a witness's recovery without discussion of either the *Waube* or *Dillon* decisions.

The court was not required to decide the question of a witness's recovery under the facts before it. Once it decided to consider the question as part of its clarification of the “impact rule,” however, its failure to present its own analysis of the relative merits of the conflicting approaches leaves potential witness-litigants in the position of being under the *Hughes* rule and yet uncertain how seriously it has been considered and how strongly the court is convinced of its merit. The *Hughes* decision has not succeeded in its attempt to clarify the rule, but instead the “impact rule” remains in controversy.

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33. 68 Cal. 2d at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.
34. See D'Ambrase United States, 354 F. Supp. 810, 820-21 (D.R.I. 1973) for an analysis of four later California cases applying *Dillon*, in only one of which did the plaintiff-witness recover.