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## TORT LAW: THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS — REOPENING PANDORA'S BOX — *Johnson v. Ruark Obstetrics*

### INTRODUCTION

Negligent infliction of emotional distress first appeared in North Carolina case law over one hundred years ago.<sup>1</sup> Initially, the North Carolina courts granted relief liberally, reasoning that “the nerves are as much a part of the physical system as the limbs”<sup>2</sup> and that “mental anguish is actual damage”<sup>3</sup> for which the plaintiff is entitled to recover in tort.<sup>4</sup> However, as the courts became increasingly burdened with mental anguish cases<sup>5</sup> and realized the lack of mechanisms to protect against fraudulent claims,<sup>6</sup> the courts imposed prerequisite tests to limit recovery.<sup>7</sup> In spite of the overwhelming trend in North Carolina case law to limit recovery for the negligent infliction of emotional distress,<sup>8</sup> the North Caro-

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1. *Young v. Western Union Tel. Co.*, 107 N.C. 370, 11 S.E. 1044 (1890). The early courts referred to the tort as “mental anguish,” “mental distress,” and “emotional distress.” See generally Robert G. Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C. L. Rev. 435 (1980) (tracing history and development of the negligent infliction of emotional distress in North Carolina).

2. *Kimberly v. Howland*, 143 N.C. 399, 403, 55 S.E. 778, 780 (1906) (granting relief to plaintiff for nervous condition resulting from dynamite blast).

3. *Young*, 107 N.C. at 386, 11 S.E. at 1048.

4. See also *Green v. Western Union Tel. Co.*, 136 N.C. 489, 49 S.E. 165 (1904) (granting recovery for mental distress resulting from delayed telegram delivery); *Bowers v. Western Union Tel. Co.*, 135 N.C. 504, 47 S.E. 597 (1904) (permitting recovery for mental distress resulting from delayed telegram delivery unless telegram was related to business rather than to personal affairs).

5. *Bowers*, 135 N.C. 504, 47 S.E. 597 (1904). The North Carolina Supreme Court noted that more actions for mental anguish were brought in North Carolina than in any other state except Texas, giving the courts cause to complain of the additional burden. *Id.* at 505, 47 S.E. at 597.

6. See generally Byrd, *supra* note 1, at 435-37.

7. Byrd, *supra* note 1, at 437.

8. In *Johnson v. Ruark Obstetrics*, the North Carolina Supreme Court preferred to categorize as “misstatements” the long line of cases requiring a physical impact or physical manifestation in order to recover. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990). However, as Justice Webb points out in his dissent, “In applying this ‘overwhelming weight’ of authority the majority has found it necessary to overrule *Hinnant v. Power Co.* [sic], 189 N.C. 120, 126 S.E. 307 (1925), and seven cases decided by the Court of Appeals.” *Johnson*, 327 N.C.

lina Supreme Court in *Johnson v. Ruark Obstetrics*,<sup>9</sup> abandoned all prerequisite tests and reopened the Pandora's box that one hundred years of case law had sought to close.

Prior to the *Johnson* decision, the courts required the plaintiff to prove that the defendant's negligence either (1) caused emotional distress by physical impact or injury<sup>10</sup> or (2) caused emotional distress followed by physical manifestations.<sup>11</sup> In order for a bystander plaintiff to recover, the plaintiff had to show that (1) he was within the "zone of danger" and (2) suffered a subsequent manifestation of the emotional distress.<sup>12</sup> However, in *Johnson*, the North Carolina Supreme Court held that "a plaintiff need not allege or prove any physical impact, physical injury, or physical manifestation of emotional distress in order to recover" if the plaintiff has "established that he or she has suffered severe emotional distress as a proximate result of the defendant's negligence."<sup>13</sup>

This Note will first trace the development of the negligent infliction of emotional distress in North Carolina case law. Second, the Note will explain the limitations on recovery adopted in other jurisdictions and explore the policies behind those limitations. Finally, this Note will analyze the *Johnson* decision by comparing its holding to the recent national trend and by noting problems that the North Carolina Supreme Court did not adequately address.

## THE CASE

In *Johnson v. Ruark Obstetrics*, the plaintiffs, Glenn and Barbara Johnson, parents of a stillborn fetus, brought individual actions against defendant doctors for negligent infliction of emo-

at 318, 395 S.E.2d at 106 (Webb, J., dissenting).

9. *Johnson*, 327 N.C. 283, 395 S.E.2d 85 (1990).

10. See e.g. *King v. Higgins*, 272 N.C. 267, 158 S.E.2d 67 (1967) (permitting recovery for emotional distress accompanying physical injuries in an auto collision); *Britt v. Carolina N. R.R.*, 148 N.C. 37, 61 S.E. 601 (1908) (holding mental suffering to be a proper element of damages where train severed plaintiff's leg).

11. See e.g. *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 42 S.E. 983 (1902) (allowing recovery for emotional distress caused by blasting damage to property followed by physical manifestations including sleeplessness and loss of attention).

12. See e.g. *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960) (denying recovery because plaintiff was in no danger herself). See also *Byrd supra* note 1, at 465-66.

13. *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97.

tional distress stemming from the loss of the fetus.<sup>14</sup> Defendants began providing prenatal care to the mother upon the discovery of the pregnancy during the first trimester and continued the care through the delivery of the stillborn.<sup>15</sup> Defendants detected fetal heart tones on the morning of the delivery, but notified parents later in the day that the fetus had died.<sup>16</sup> Defendants delivered the stillborn seven hours later.<sup>17</sup> The Johnsons alleged that the doctors negligently provided inadequate prenatal care by failing to treat the mother's diabetic condition and proximately causing the fetus to die of malnutrition.<sup>18</sup> Plaintiffs sought damages for individual injuries for the pain, suffering and emotional distress of enduring the labor with the knowledge that the fetus was dead.<sup>19</sup> Defendants moved to dismiss for failure to state a claim upon which relief could be granted, arguing that in order to maintain an action for negligent infliction of emotional distress in North Carolina, the emotional distress must be caused or accompanied by physical injury.<sup>20</sup>

The trial court granted the motion to dismiss.<sup>21</sup> The North Carolina Court of Appeals reversed, holding that the fatal injury to the fetus constituted an injury to the mother as well because the fetus had been attached to the mother at the time of the injury.<sup>22</sup> The North Carolina Supreme Court granted defendants' petition for discretionary review and affirmed the appellate decision on different grounds.<sup>23</sup> The court held that the plaintiffs need not prove any physical impact if severe emotional distress proximately resulting from defendants' negligence could be proven.<sup>24</sup>

## BACKGROUND

### A. *Development in North Carolina*

The tort of negligent infliction of emotional distress originated

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14. *Johnson*, 327 N.C. at 287, 395 S.E.2d at 87.

15. *Id.* at 286, 395 S.E.2d at 87.

16. *Id.* at 287, 395 S.E.2d at 87.

17. *Id.*

18. *Johnson v. Ruark Obstetrics*, 89 N.C. App. 154, 156, 365 S.E.2d 909, 910 (1988).

19. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 287, 395 S.E.2d 85, 87 (1990).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 288, 395 S.E.2d at 88.

24. *Id.* at 304, 395 S.E.2d at 97.

in North Carolina under the name of mental anguish in *Young v. Western Union Telephone Company*.<sup>25</sup> The defendant received a message that the plaintiff's wife was at the point of death, but failed to deliver the message until after the plaintiff received a letter by mail a week later informing him of his wife's death.<sup>26</sup> The plaintiff sued in tort for gross negligence and mental anguish.<sup>27</sup> The North Carolina Supreme Court allowed recovery, noting that although the plaintiff alleged no physical injury, "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter."<sup>28</sup>

As the case law developed, however, it became evident that this seemingly liberal view toward allowing recovery was limited to a few narrow exceptions. Telegram delay cases involving death or serious illness formed the first category in which the courts allowed recovery absent a physical injury or physical manifestation.<sup>29</sup> Cases involving the negligent handling of a dead relative's corpse made up a second notable category which required no physical injury in order to recover.<sup>30</sup>

The North Carolina Supreme Court instituted a mechanism for limiting recovery for the negligent infliction of emotional distress in *Kimberly v. Howland*.<sup>31</sup> The defendant negligently blasted with dynamite, sending a rock crashing through the roof of plaintiff's home where plaintiff lay in bed pregnant.<sup>32</sup> Although the rock did not strike the plaintiff, she suffered shock and nearly miscarried.<sup>33</sup> The court insisted that "there must be an injury" which

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25. *Young v. Western Union Tel. Co.*, 107 N.C. 370, 11 S.E. 1044 (1890).

26. *Id.* at 371, 11 S.E. at 1044.

27. *Id.*

28. *Id.* at 385, 11 S.E. at 1048.

29. See e.g. *Hancock v. Western Union Tel. Co.*, 137 N.C. 48, 49 S.E. 53 (1905) (permitting recovery for anguish caused by delay in delivery of telegram regarding death of brother); *Green v. Western Union Tel. Co.*, 136 N.C. 489, 49 S.E. 165 (1904) (permitting recovery for mental anguish caused by delay in delivery of telegram requesting family member to meet teen-age girl at depot when train arrived at midnight).

30. See e.g. *Gurganious v. Simpson*, 213 N.C. 613, 197 S.E. 163 (1938) (unauthorized autopsy); *Bonaparte v. Fraternal Funeral Home*, 206 N.C. 652, 175 S.E. 137 (1934) (withholding body to induce payment); *Kyles v. Southern Ry.*, 147 N.C. 394, 61 S.E. 278 (1908) (intentional mutilation of corpse).

31. *Kimberly v. Howland*, 143 N.C. 399, 55 S.E. 778 (1906).

32. *Id.* at 401, 55 S.E. at 779.

33. *Id.*

must have been "the natural and direct result of the negligent act of the defendant."<sup>34</sup> The court allowed recovery, defining injury:

While fright and nervousness alone do not constitute an injury within the meaning of this issue, if this fright and nervousness is the natural and direct result of the negligent act of the defendant, and if this fright and nervousness naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an injury within the meaning of this issue.<sup>35</sup>

Therefore, a plaintiff bringing a negligent infliction of emotional distress claim must prove that physical injury accompanied or followed an emotional injury in order to recover.

*Hinnant v. Tidewater Power Company*<sup>36</sup> articulated the general rule that, absent a physical injury or physical manifestation, "mental suffering, unrelated to any other cause of action, is not alone a sufficient basis for the recovery of substantial damages."<sup>37</sup> The court acknowledged that certain categories of exceptions had been carved out of the general rule and listed as exceptions telegram delay cases, breach of promise to marry cases, and "similar instances in which mental suffering is recognized as the ordinary and proximate consequence of the wrong complained of."<sup>38</sup>

The courts imposed a final mechanism for limiting recovery in *Williamson v. Bennett*.<sup>39</sup> Recalling the recent experience of her brother, the plaintiff believed she had hit a child on a bicycle when defendant collided with plaintiff's car.<sup>40</sup> Although the evidence disclosed a physical impact, the courts denied plaintiff recovery for her resulting nervous disorder because the accident did not proximately cause the injury.<sup>41</sup> Under this rule, a plaintiff may never recover for emotional distress arising simply from the plaintiff's concern for another person's condition. However, if the defendant's negligent act placed the plaintiff himself within the "zone of danger" so that the plaintiff was in imminent danger of physical harm

34. *Id.* at 404, 55 S.E. at 780.

35. *Id.* at 404, 55 S.E. at 780-81 (quoting trial judge).

36. *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), *overruled on other grounds*, *Nicholson v. Hugh Chatham Memorial Hosp.*, 300 N.C. 295, 266 S.E.2d 818 (1980).

37. *Hinnant*, 189 N.C. at 128, 126 S.E. at 312.

38. *Id.*

39. *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960).

40. *Id.* at 500, 112 S.E.2d at 49.

41. *Id.* at 507, 112 S.E.2d at 54.

and the plaintiff suffered emotional distress as a result, the plaintiff may recover.<sup>42</sup>

### B. Prerequisite Tests In Other Jurisdictions

In order to limit recovery for the negligent infliction of emotional distress to valid claims, the courts in all states have adopted one of various prerequisite tests.<sup>43</sup> Most of the states apply one or more of the following three tests or some variation of them.

#### 1. The Physical Impact Test.<sup>44</sup>

Under the physical impact test, the plaintiff may not recover for emotional distress unless he also suffered physical impact or physical injury as a result of the defendant's negligence.<sup>45</sup> Some states will permit recovery if the plaintiff suffers physical injury contemporaneously with the negligent act.<sup>46</sup>

#### 2. The Zone of Danger and Physical Manifestation Test.<sup>47</sup>

Almost always used in combination, the zone of danger and

42. See Byrd *supra* note 1, at 465-66.

43. Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 334 (1984).

44. For a survey of jurisdictions applying the physical injury or impact test, see Douglas Bryan Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781, 792-93, n.59 (1988) (listing Arkansas, District of Columbia, Georgia, Indiana, Kentucky, and Oregon).

45. See *e.g.* King v. Higgins, 272 N.C. 267, 158 S.E.2d 67 (1967) (physical injuries sustained in an auto accident); King v. Britt, 267 N.C. 594, 148 S.E.2d 594 (1966) (mental anguish claim permitted for facial mutilation sustained in an auto accident); Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906) (dynamite blast sent rock through roof, landing on bed of pregnant woman); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 88 (1901) (pregnant woman miscarried due to fright when defendant's horse-drawn carriage stopped so close to woman that she stood between the heads of two horses).

46. This variation merely expands the test to allow recovery where the negligence did not precede the emotional distress. Mark A. Beede, Comment, *Duty, Forseeability, and the Negligent Infliction of Emotional Distress*, 33 ME. L. REV. 303, 304, n.9 (listing North Carolina, Ohio, Oklahoma, Oregon, and South Dakota). See also Bell, *supra* note 44, at 334.

47. For a survey of jurisdictions adhering to this test, see Bell, *supra* note 44, at 796-98, n.91 (listing Arizona, Colorado, Delaware, Idaho, Illinois, Maryland, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, South Da-

physical manifestation tests require that the plaintiff must have (1) been in imminent danger of physical harm (in the "zone of danger") by the defendant's negligent act and (2) must have suffered a subsequent physical manifestation of the emotional distress.<sup>48</sup>

### 3. *The Dillon Test.*<sup>49</sup>

The California Supreme Court articulated this test in *Dillon v. Legg*.<sup>50</sup> This test will permit recovery of claims if the plaintiff is a foreseeable victim of the defendant's negligence. In determining whether a particular plaintiff was foreseeable, courts should look to three factors: (1) the proximity of the plaintiff to the scene of the accident; (2) the observation of the negligent act rather than learning about it later; and (3) the relationship between the plaintiff and the primary victim.<sup>51</sup>

### C. *Policies Behind Limiting Recovery*

Throughout the development of law on negligent infliction of emotional distress, courts have been reluctant to permit unfettered recovery for mental injuries.<sup>52</sup> Several policies have contributed to this reluctance. First, due to the intangible nature of mental injury claims, courts fear that plaintiffs may be able to feign the injury and succeed on fraudulent claims.<sup>53</sup> Second, damages for emotional distress cannot be calculated with any degree of certainty, leaving

kota, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin).

48. RESTATEMENT (SECOND) OF TORTS §§ 313(2), 436(3) (1965).

49. The *Dillon* test, or a modified approach, had been adopted by 20 jurisdictions in 1987. Jin Hwang, *Emotional Distress Law in Disarray*, 1987 ANN. SURV. AM. L. 475, 475 n.4 (1989) (listing Alaska, California, Connecticut, Hawaii, Iowa, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, and Wyoming).

50. *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In this case the mother and sister of a child watched as a car ran over and killed the child. The zone of danger test yielded unsatisfactory results. The sister could recover because she was in the zone of danger, but the mother was barred from recovery of the same injury because she was not in imminent danger herself.

51. *Id.*

52. Beede, *supra*, note 46; Bell, *supra* note 43; Byrd, *supra*, note 1; P.G. Guthrie, Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R.3d 1337 (1970).

53. Byrd, *supra* note 1, at 435.

open the possibility of unreasonably high awards and unlimited defendant liability.<sup>54</sup> Third, a flood of litigation may result,<sup>55</sup> including unmeritorious claims, which would overburden the courts unnecessarily.<sup>56</sup>

#### ANALYSIS

Recognizing the current national trend toward less restrictive recovery,<sup>57</sup> the North Carolina Supreme Court, in *Johnson v. Ruark Obstetrics*,<sup>58</sup> abandoned the prerequisite tests developed in North Carolina case law over the last one hundred years.<sup>59</sup> The court articulated the new rule: a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress.<sup>60</sup>

In following the national trend and adopting an expansive rule for recovery, the North Carolina Supreme Court failed to ade-

54. Bell, *supra*, note 44, at 353. See generally, Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1920).

55. *Bowers v. Western Union Tel. Co.*, 135 N.C. 504, 47 S.E. 597 (1904) (court noted high number of mental anguish cases); Marlowe, *supra* note 44, at 784.

56. Prosser noted that:

It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.

William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939). However, the policy behind limiting claims of negligent infliction of emotional distress is concerned with fraudulent, questionable, or trivial claims. See generally Byrd, *supra* note 1, at 435-36.

57. In *Johnson*, the North Carolina Supreme Court noted that, "[a]s the courts have faced new and more compelling fact patterns, the tests have progressed in a linear fashion towards allowing greater degrees of recovery." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 290, 395 S.E.2d 85, 89 (1990) (quoting Marlowe, *supra*, note 44, at 817).

58. *Johnson*, 327 N.C. at 290, 395 S.E.2d at 89.

59. The North Carolina Supreme Court asserts that these tests never existed and that the unfortunate language in a long line of cases are merely "misstatements." *Id.* at 290, 395 S.E.2d at 89. In order for the court to find the absence of limitations in North Carolina case law, the court had to overrule two of its own cases and seven court of appeals cases.

60. *Id.* at 304, 395 S.E.2d at 97.

quately address problems that have arisen in jurisdictions that have adopted expansive rules.

A. *Comparison of the Johnson Holding to the National Trend*

The current national trend is clearly moving toward relaxed restrictions on recovery for the negligent infliction of emotional distress.<sup>61</sup> Common fears reflected in policies for restricting recovery no longer seem as threatening as they once did. First, the fear that plaintiffs could fraudulently recover for feigned mental distress has abated due to advances made in psychiatric and psychological examining techniques.<sup>62</sup> Second, the fear that unreasonably high damages would be awarded as a result of the difficulty in calculating intangible injuries is not a concern peculiar to the negligent infliction of emotional distress.<sup>63</sup> Yet courts find this concern over high damage awards tolerable in other torts.<sup>64</sup> Third, negligent infliction of emotional distress cases do not clog the court dockets as predicted by early courts.<sup>65</sup> However, one of the early policies for restricting recovery remains in force: courts still seem concerned about preventing unlimited defendant liability. All courts find some limiting devices necessary in that area.

The Supreme Court of California set the stage for more expansive recovery for the negligent infliction of emotional distress in *Dillon v. Legg*.<sup>66</sup> In that case, the defendant negligently struck an infant child with his automobile, causing the infant fatal injuries.<sup>67</sup> The infant's mother was in close proximity, but she was not within the zone of danger herself.<sup>68</sup> The California Supreme Court adopted a new rule which would permit the mother to recover because the court felt there could be no doubt that a parent who

61. See Bell, *supra*, note 43, at 334.

62. See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1248-62 (1971). See also Paul David Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEVELAND-MARSHALL L. REV. 428, 435-37 (1957).

63. Bell, *supra* note 43, at 353-54. The same concern exists in any tort concerned with intangible injuries. Common examples include: damage to reputation, loss of enjoyment of life, loss of consortium, and pain and suffering.

64. See Paul E. Marth, Comment, *Loss of Enjoyment of Life - Should It Be a Compensable Element of Personal Injury Damages?*, 11 WAKE FOREST L. REV. 459 (1975).

65. Beede, *supra*, note 46, at 308.

66. *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

67. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

68. *Id.*

witnesses the death of his or her child would foreseeably suffer mental injury.<sup>69</sup> The court expressed its concern over potential unlimited defendant liability and articulated three factors to be considered which were designed to keep recovery within reasonable bounds.<sup>70</sup> This "Dillon test," or variations of it, is quickly becoming the majority rule across the nation.<sup>71</sup>

In *Johnson v. Ruark Obstetrics*,<sup>72</sup> the North Carolina Supreme Court followed the national trend and adopted an expansive rule for permitting emotional distress recovery. In doing so, the court also seemed to adopt the reasons articulated in other jurisdictions for rejecting most of the long-held policies behind limiting recovery for the negligent infliction of emotional distress.

First, the court expressed its apparent confidence in modern psychiatry and psychology by defining "severe emotional distress" as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."<sup>73</sup> The court seems convinced that modern psychiatry and psychology can detect when emotional distress is being feigned. The long-standing requirement of showing a physical impact or injury or a physical manifestation in order to authenticate one's emotional distress is no longer required to safeguard against successful litigation of fraudulent claims.

Second, the North Carolina Supreme Court suggests that the problem of uncertain damages is manageable. The court followed the reasoning that "if recovery is limited to instances where it would be generally viewed as appropriate and not excessive, then, by definition, the defendant's liability is commensurate with the

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69. *Id.* at 735-36, 441 P.2d at 917, 69 Cal. Rptr. at 77.

70. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. As noted above, the three factors are: (1) proximity to the scene; (2) contemporaneous observance; and (3) relationship between primary victim and plaintiff. *Id.* at 728, 441 P.2d at 912, 69 Cal. Rptr. at 72.

71. See Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 486-87 (1982) ("most courts"); John A. Flanagan, Note, *Negligent Infliction of Emotional Distress: A Proposal for a Recognized Tort Action*, 67 MARQ. L. REV. 557, 572-74 (1984); Rosalee A. Miller, Comment, *Bystander Recovery for Negligent Infliction of Emotional Distress in Iowa: Implementing an Optimal Balance*, 67 IOWA L. REV. 333, 338 (1982).

72. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990).

73. *Id.* at 304, 395 S.E.2d at 97.

damage that the defendant's conduct caused."<sup>74</sup> If a jury returns an excessive verdict, the trial judge has the authority to reduce the recovery.<sup>75</sup>

Third, North Carolina courts will not be overburdened by administering fair and proper claims. The North Carolina Supreme Court insists that "our trial courts have adequate means available to them for disposing of improper claims for negligent infliction of emotional distress. . . ."<sup>76</sup>

Finally, the North Carolina Supreme Court, like all other jurisdictions, retains some concern over preventing unlimited defendant liability. The new rule set forth by the court limits recovery for severe emotional distress to damages reasonably foreseeable as a result of the defendant's negligent act.<sup>77</sup> In order to keep foreseeability within reasonable bounds, the court adopted the *Dillon* factors to be considered on the question of foreseeability: (1) plaintiff's proximity to the negligent act; (2) whether the plaintiff personally observed the negligent act; and (3) the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned.<sup>78</sup>

### *B. Problems the Court Failed to Address Adequately*

In adopting such an expansive rule for recovery and including the *Dillon* factors of foreseeability, the North Carolina Supreme Court failed to address adequately the problems experienced by other courts which have adopted similar tests. The most common problems concern (1) what constitutes presence at the scene; (2) how closely related the plaintiff must be to the primary victim in order to recover; (3) which senses must be used in observing the negligent act; and (4) in consideration of these problems, whether the *Dillon* factors provide any real limits on foreseeability.

#### *1. The Proximity Problem*

The first *Dillon* factor seems straightforward: in determining foreseeability, the court should consider whether the plaintiff was located near the scene of the accident or was a distance away from

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74. *Id.* at 306, 395 S.E.2d at 98 (quoting Marlowe, *supra* note 44, at 819).

75. *Id.* at 306, 395 S.E.2d at 98.

76. *Id.*

77. *Id.* at 304, 395 S.E.2d at 97.

78. *Id.* at 305, 395 S.E.2d at 98.

it.<sup>79</sup> However, the year following the *Dillon* decision a test case arose in California which proved the factor unmanageable. In *Archibald v. Braverman*,<sup>80</sup> the plaintiff mother arrived on the scene shortly after an explosion injured her son. Clearly the mother was not at the scene of the accident, but the court permitted recovery, holding that the mother's presence was "sufficiently contemporaneous" with the explosion to satisfy the *Dillon* factor.<sup>81</sup> In contrast, the California Supreme Court denied recovery for the emotional distress suffered by a father who observed the stillborn birth of his child in *Justus v. Atchison*.<sup>82</sup> Although the father was present at the scene of the accident, he did not suffer "disabling shock" until being informed by a doctor of the injury.<sup>83</sup> Thus persons who were not present at the scene of the accident may recover whereas persons who were present but unaware of the injury until a short time later may not recover. The result is arbitrary. The factor demonstrates no improvement over the prior zone of danger and physical manifestation requirements.

## 2. *The Relationship Problem*

Courts have grappled with the problem of how to apply the relationship factor.<sup>84</sup> How closely related to the victim must the plaintiff be in order to recover? All courts that have adopted the *Dillon* factors have had to establish additional guidelines.<sup>85</sup> Most courts agree that it is foreseeable that close relatives will be upset by serious injury to a loved one.<sup>86</sup> Some courts insist that there must be a marital or intimate familial relationship between the plaintiff and the victim.<sup>87</sup> Some states acknowledge that close emo-

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79. *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

80. *Archibald v. Braverman*, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

81. *Id.* at 256, 79 Cal. Rptr. at 725.

82. *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

83. *Id.* at 585, 565 P.2d at 122, 139 Cal. Rptr. at 97.

84. Marlowe, *supra* note 44, at 809-10.

85. See Marlowe, *supra* note 44, at 809-10.

86. See generally David J. Liebson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 196 (1976-77); Harvey Teff, *Liability for Negligently Inflicted Nervous Shock*, 99 LAW Q. REV. 100 (1983).

87. See e.g. *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985) (permitting brother to recover for mental anguish resulting from watching a garbage truck back over and kill his sister).

tional attachments may exist beyond those bounds.<sup>88</sup> Without additional guidelines, this factor creates only questions and imposes no limits on recovery.

### 3. *The Perception Problem*

Courts have struggled with the problem of determining when a person "observed" the negligent act. At least seeing or hearing the impact seems sufficient.<sup>89</sup> However, in *Burris v. Grange Mutual Companies*,<sup>90</sup> a parent could not recover for emotional distress even though the parent was present at the scene because the parent had "no sensory perception of the events surrounding the accident."<sup>91</sup> Explicit rules must be established to provide the guidance necessary to make the perception factor an effective limitation.

### 4. *Do the Factors Really Limit Foreseeability?*

The *Dillon* factors attempt to avoid unlimited defendant liability by limiting foreseeability. However, in consideration of the problems discussed above, such limitation on foreseeability seems unlikely if factors are mere considerations rather than strict requirements. As Justice Meyer points out in his dissent in the *Johnson* case, "California, that jurisdiction with the greatest experience in permitting wide latitude for recovery of serious emotional distress, has found it necessary to strictly construe the *Dillon* requirements and has in fact begun a retreat from the broad rule set out in *Dillon*."<sup>92</sup> In *Thing v. La Chusa*,<sup>93</sup> the California Supreme Court admitted that many difficulties had been encountered with the *Dillon* factors and that California found them unmanageable. Consequently, California adopted strict requirements based on the *Dillon* factors in hopes of solving some of the uncertainties in

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88. See, *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985) (acknowledging that others beyond parents, children, and spouses may recover).

89. See e.g. *Nazaroff v. Superior Court*, 80 Cal. App. 3d 553, 566-67, 145 Cal. Rptr. 657, 664 (1978) (mother heard neighbor scream her son's name as the son drowned); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979) (mother heard thud when car struck her child); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 79-80, 451 N.E.2d 659, 766 (1983) (held hearing was sufficient).

90. *Burris v. Grange Mut. Cos.*, 46 Ohio St. 3d 84, 545 N.E.2d 83 (1989).

91. *Id.* at 93, 545 N.E.2d at 91.

92. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 308, 395 S.E.2d 85, 100 (1990).

93. *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

recovery.<sup>94</sup>

### CONCLUSION

In the *Johnson* case, the North Carolina Supreme Court adopted an expansive rule for permitting recovery for the negligent infliction of emotional distress, abandoning limitations developed by one hundred years of case law. The policies behind those limitations have diminished in importance and the limitations effectuating those policies are no longer necessary.

The single policy remaining against recovery is the need to prevent unlimited defendant liability. The North Carolina Supreme Court blindly adopted the *Dillon* factors of proximity, relationship, and perception of the accident as a means of controlling the potentially infinite defendant liability. The court failed to acknowledge that California and other jurisdictions adopting the *Dillon* approach have found the factors ineffective in providing any real limits on foreseeability and thus liability. The result of adopting the *Dillon* factors in each of these jurisdictions has been inconsistent case law and arbitrary limits imposed subsequently to resolve the conflicts.

By adopting the *Dillon* approach in using the factors as considerations rather than strict guidelines, the North Carolina Supreme Court has reopened the Pandora's box of unlimited liability problems that one hundred years of case law had successfully closed. Courts in the state must now grapple with the problems created by the *Johnson* decision and attempt to create another method for controlling recovery under the theory of the negligent infliction of emotional distress.

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94. *Id.*