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TORT LAW—THE EXPANSION OF THE VIABLE FETUS
WRONGFUL DEATH ACTION — PARENTS’ INDIVIDUAL
CLAIM FOR NEGLIGENT INFILCTION OF EMOTIONAL
DISTRESS CAUSED BY CONCERN FOR A THIRD PARTY:
THE VIABLE FETUS — Johnson v. Ruark Obstetrics

INTRODUCTION

Until 1987, the courts in North Carolina held that a stillborn fetus was not considered a “person” whose personal representative could pursue a N.C. Gen. Stat. § 28A-18-2 wrongful death action.¹ North Carolina’s delay² in accepting the cause of action is explained, among other rationale, as due to: first, the speculative nature of assessing the pecuniary loss of an unborn and second, the usual court concern with potential floodgate litigation. However, in DiDonato v. Wortman,³ the North Carolina Supreme Court extended the wrongful death action to include the death of a viable fetus.⁴ The DiDonato decision took North Carolina out of the small category of states to deny a viable fetus wrongful death action and linked this state with the increasing majority of jurisdictions which offer the remedy.⁵

1. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987). See Cardwell v. Welch, 25 N.C. App. 390, 393, 213 S.E.2d 382, 384 (1975), cert. denied, 287 N.C. 464, 215 S.E.2d 623 (1975). The Wrongful Death Act states “... when the death of a ‘person’ is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person liable or corporation that would have been so liable ... shall be liable to an action for damages.” N.C. Gen. Stat. § 28A-18-2 (1984).


3. 320 N.C. 423, 358 S.E.2d 489.

4. Id. at 434, 358 S.E.2d at 495. The court defined the viability of a fetus as “capable of life independent of its mother.” 320 N.C. at 427, 358 S.E.2d at 491.

The *DiDonato* decision left many issues of the viable fetus wrongful death cause of action unsettled. A brief look at the issue of damages illustrates an aspect of the *DiDonato* decision that remains controversial.

Previously, North Carolina allowed only pecuniary loss recovery in wrongful death actions.\(^6\) Pecuniary loss is determined by deducting decedent's probable living expenses from his probable gross income.\(^7\) North Carolina courts viewed assessing a fetus' probable gross income as sheer speculation.\(^8\) This assessment difficulty helps to explain North Carolina's delay in accepting a viable fetus wrongful death action. However, in 1969, the North Carolina Legislature expanded the damages available under the wrongful death statute.\(^9\) This expansion included punitive and nominal damages. Because a variety of damages were available, the courts could no longer justify denying a viable fetus a wrongful death action simply because pecuniary loss assessment was speculative. Although this expansion in recoverable wrongful death damages illus-

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6. N.C. GEN. STAT. § 28A-174 (superseded by N.C. GEN. STAT. § 28A-18-2(b)). Before 1969, a wrongful death action allowed recovery for only "such damages as are fair and just compensation for the pecuniary injury resulting from such death."


(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.
trates why North Carolina accepted a viable fetus wrongful death action, the *DiDonato* case still left the issue of damages in controversy.

*DiDonato* denied damages for the stillborn's loss of income. Loss of income damages are normally available under a wrongful death action. The court reasoned that such damages could be calculated only by sheer speculation. Damages for loss of services, companionship, advice and the like were also denied for the same reason. The court allowed recovery for the child's pain and suffering but stated that the court was not convinced that fetal pain and suffering could ever be satisfactorily proven. Basically, the only remaining allowable damages are medical expenses, funeral expenses, and punitive and nominal damages where appropriate. *DiDonato*'s reduction in recoverable damages greatly diminishes the value of the viable fetus wrongful death cause of action. This damage issue remains to be worked out among the courts. However, this Note will concentrate on the issue of floodgate litigation, more particularly, whether the viable fetus wrongful death cause of action should expand to include the parents' own claim for negligent infliction of emotional distress.

Only months passed before *DiDonato*'s floodgate concern seemed to materialize. The North Carolina courts quickly faced their next viable fetus wrongful death action in *Johnson v. Ruark Obstetrics*. In *Johnson*, the North Carolina Court of Appeals allowed the parents to join, with the stillborn wrongful death action, a cause of action in their own rights for negligent infliction of emotional distress arising from the negligently caused death of their viable fetus. Despite *DiDonato*'s concern with floodgate litigation and frivolous future claims, the parents’ claims are within the *DiDonato* accepted expansion of the viable fetus wrongful death action. A cause of action by the parents for the negligent infliction of emotional distress should come as no surprise since the *DiDonato* decision foreshadowed its occurrence. *DiDonato* denied loss of service, companionship, advice, and similar losses in the via-

10. 320 N.C. at 432, 358 S.E.2d at 494.
12. 320 N.C. at 432, 358 S.E.2d at 495.
13. *Id.* at 432, 358 S.E.2d at 494.
14. *Id.*
15. *Id.*
17. *Id.* at 171, 365 S.E.2d at 919.
ble fetus wrongful death action.\textsuperscript{18} In a footnote, the court explained that the mother would presumably recover these damages in an action brought in her own right.\textsuperscript{19} Also, \textit{DiDonato}, anticipating that the viable fetus wrongful death action would expand to include the parents' claim, held that all parents' claims in their own right, based on the same facts, must be joined with the still-born fetus wrongful death cause of action.\textsuperscript{20}

The North Carolina Court of Appeals in \textit{Johnson} saw the need to provide a means of recovery for parents whose emotional distress results from the negligently caused death of their own viable fetus. This Note will examine the rationale of the \textit{Johnson} decision and illustrate how a parent's claim for negligent infliction of emotional distress is a natural extension of a viable fetus wrongful death action. Also, the Note addresses why the \textit{Johnson} case provides a concrete example for the policy that the business of the courts is to make precedent where a wrong calls for redress, even if lawsuits must be multiplied.\textsuperscript{21}

\textbf{The Case}

In \textit{Johnson}, Glenn and Barbara Johnson sued the physicians for the wrongful death of their full term fetus, their individual emotional distress, compensatory, and punitive damages.\textsuperscript{22} Plaintiffs alleged that the defendants negligently failed to treat Mrs. Johnson's diabetic condition during the entire term of the full term pregnancy, causing their infant to die in \textit{utero} of malnutrition.\textsuperscript{23} Because the \textit{DiDonato} case, allowing a viable fetus wrongful death action in North Carolina, had not yet been decided, the trial court granted defendant's motion to dismiss all claims.\textsuperscript{24}

The North Carolina Court of Appeals reversed.\textsuperscript{25} The court of appeals retroactively applied the \textit{DiDonato} decision and allowed the action for the wrongful death of a viable fetus in \textit{Johnson}.\textsuperscript{26} The court also allowed the parents' own cause of action for negli-

\begin{flushleft}
\begin{enumerate}
  \item 320 N.C. at 432, 358 S.E.2d at 494.
  \item Id.
  \item Id. at 434, 358 S.E.2d at 495.
  \item 89 N.C. App. at 156, 365 S.E.2d at 910.
  \item Id.
  \item Id. at 171, 365 S.E.2d at 919.
  \item Id. at 159, 365 S.E.2d at 912.
\end{enumerate}
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gent infliction of emotional distress. The court reasoned that in North Carolina, there no longer existed an absolute prohibition against recovery for negligent infliction of emotional distress caused by concern for another. The court allowed recovery for the mother based on the presence of a physical injury. The court reasoned that since a physical injury to the fetus was a physical injury to the mother, the physical injury or impact requirement in a negligent infliction of emotional distress claim was satisfied. The court also allowed recovery for the father's claim stating that in North Carolina, an allegation of mental anguish suffices for an allegation of physical injury in emotional distress claims. Because the father alleged mental anguish in his complaint, the physical injury requirement was properly pleaded. In addition, the court held that the father's claim was not too remote or unforeseeable to require dismissal as a matter of public policy.

BACKGROUND - GENERAL

The law has been slow to accept the interest of freedom from mental disturbance as an independent cause of action. Justifications offered for this delay include: difficulty in measuring mental disturbance in financial terms, remoteness of mental injury resulting in questionable proximate cause, and fear of potential floodgate litigation. However, emotional suffering should be no more difficult to measure than physical suffering. Also, the law

27. Id. at 171, 365 S.E.2d at 919.
28. Id. at 163, 365 S.E.2d at 915.
29. Id. at 167, 365 S.E.2d at 917.
30. Id.
31. Id. at 170, 365 S.E.2d at 918.
32. Id. at 168, 365 S.E.2d at 917.
33. Id.
34. Id. at 169, 365 S.E.2d at 918. See generally PROSSER AND KEETON, THE LAW OF TORTS, § 54 (5th ed. 1984).
has an interest in protecting people’s mental as well as physical well being. Despite this important emotional interest, the law continues to stall in accepting mental distress as a separate cause of action. The courts’ justifications for not accepting the action include: the harm is often temporary, claims are easily falsified, and damages are perceived as grossly disproportionate compared especially to a negligent wrongdoing. 40

The majority of courts deny liability for a negligently caused mental injury that is not accompanied by some sort of physical injury or impact. The physical injury requirement helps to ensure the existence of an actual mental harm. 41 As time passed, many courts liberalized the impact requirement to such a slight touch, that frequently the impact is not responsible for the emotional injury. 42 When physical injury accompanies the mental claim, courts are more willing to offer redress since the physical injury offers assurance of a legitimate claim. 43 This physical injury manifestation replaced the once required impact on plaintiff in most jurisdictions. 44 Where genuine and serious mental disturbance has a special likelihood of occurring from the circumstances, many jurisdictions created exceptions to the physical injury requirement by assuming that physical injury is present. The courts’ exceptions include the negligent mishandling of corpses and the negligent transmission of death messages by telegraph companies. 45

Advances in the field of psychology have made measuring emotional damage more possible and accurate. Who is to say that one can place a price tag on physical injury with less speculation than on an emotional injury?

40. Restatement (Second) of Torts, § 435A comment 6 (1965).
EMOTIONAL DISTRESS

Liability has generally not been extended to create a cause of action by third persons whose mental disturbance is caused by witnessing harm to another.46 Primarily, this denial is because the defendant cannot reasonably anticipate harm to the third person and owes him no duty of care.47 However, when the third person stands in the zone of danger of physical harm, the duty to this person is breached.48 Therefore, when injury occurs through an unexpected means (i.e., mental disturbance caused by concern for another), recovery is frequently allowed.49 A majority of jurisdictions have adopted the Zone of Danger Theory for limiting negligent liability.50 In fact, the Restatement Second of Torts has adopted the Zone of Danger Theory.51

Unsatisfied with the arbitrary spatial limitations of the Zone of Danger Theory, however, the California Supreme Court allowed recovery beyond the zone of danger in the famous case of Dillion v. Legg.52 The Dillion court opted for a new theory commonly referred to as either the general foreseeability test or the "Dillion test." The Dillion test provides that a bystander's mental harm is foreseeable if the bystander: first, is physically near the accident;
second, observes the accident personally and contemporaneously; and third, is closely related to the victim. Since 1968, many jurisdictions have adopted the \textit{Dillion} test.

\section*{BACKGROUND - NORTH CAROLINA}

The \textit{Johnson} decision approached the issue of whether to allow the parents' claims for negligent infliction of emotional distress from two perspectives: first, peril of another recovery prohibition; and second, a physical injury impact requirement. Therefore, the history of both lines of reasoning is pertinent.

As early as 1913, the North Carolina courts denied recovery for mental harm caused by concern for the well being of another. In 1925, North Carolina established an absolute prohibition against any recovery for negligent infliction of emotional distress caused by concern for another. The case, \textit{Hinnant v. Tidewater Power Co.}, involved a consortium claim. The \textit{Hinnant} court spoke in terms of lack of proximate cause justifying the prohibi-
EMOTIONAL DISTRESS

In Williamson v. Bennett, the court further extended the proximate cause rationale by denying recovery due to remoteness.

The Hinnant absolute prohibition against recovery for negligent infliction of emotional distress arising from concern for another ended in 1980. Hinnant was expressly overruled in Nicholson v. Hugh Chatham Memorial Hospital, Inc. Nicholson rejected the too remote for measurement argument when applied to spousal concern for a spouse’s negligently inflicted injuries. Where some intimate relationships are concerned, the absolute prohibition against recovery for negligent infliction of emotional distress arising out of concern for another is abolished. However, in 1982 the court in Wyatt v. Gilmore held that this prohibition exception is harnessed by public policy requirements that the mental injury must be proximately caused by defendant's negligence.

The physical injury requirement in a negligent infliction of emotional distress cause of action underwent many changes in North Carolina during its development this century. Historically, North Carolina denied recovery for negligent infliction of emotional distress unless coincidental in time and place, and an actual physical impact or genuine physical injury occurred. However,

60. Id. at 508, 112 S.E.2d at 55. Recovery was denied for plaintiff's mental anguish suffered when she erroneously thought she had run over a child. The rationale of the decision was based in part on her concern for another.
61. 300 N.C. 295, 266 S.E.2d 818.
62. Id. at 304, 266 S.E.2d at 823.
63. Johnson, 89 N.C. App. at 163, 365 S.E.2d at 915.
64. 57 N.C. App. 57, 290 S.E.2d 790 (1982).
65. Id. at 61-62, 290 S.E.2d at 793. Although a fixed formula used to decide issues of remoteness and proximate cause is impossible in advance of each case, the Wyatt decision summarized public policy limitations to be considered:
1. whether the injury is reasonably close in time and location to the act of the tortfeasor;
2. whether the extent of the injury is wholly out of proportion to the culpability of the tortfeasor;
3. whether in retrospect it is too highly extraordinary that the act of the tortfeasor caused the injury;
4. whether recovery would place an unreasonable burden upon those engaged in activities similar to that of the tortfeasor;
5. whether recovery would likely open the way for fraudulent claims; and
6. whether recovery would enter a field with no sensible or just stopping place.
the physical injury requirement has been somewhat flexible. As early as 1911 in *May v. Western Tel. Co.*, North Carolina held that a mental injury would suffice for the physical injury requirement since the former was often equally, if not more serious. This rationale expanded the number of cases that could fulfill the physical injury requirement, thus making the action less difficult to maintain. North Carolina continues to adhere to this policy. Further evidence that the physical injury requirement is flexible can be seen in cases that hold that physical injury is not required where "coincident in time and place with the occurrence producing the mental stress, some actual physical impact is caused to the plaintiff." Recent decisions outside North Carolina have rejected requiring separate allegation or proof of physical injury for negligent infliction of emotional distress claims when mental injury is


67. 157 N.C. 327, 72 S.E.2d 1059 (1911).

68. Id. at 332, 72 S.E.2d at 1061. Furthermore, where the claim for emotional distress is otherwise proper, our courts do not bar recovery simply because strictly separating "physical" from "mental" injuries is difficult. See Wesley v. Greyhound, 47 N.C. App. 680, 691, 268 S.E.2d 855, 862-63 (1980) (holding general principles of the law of torts support a right of action for physical injuries resulting from either a willful or a negligent act none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, as those of the former class are frequently much more painful and enduring than those of the latter).


Examples in other jurisdictions that have allowed recovery for physical injury, using this interpretation which includes mental injury are: Petition of United States, 418 F.2d 264, 269 (1st Cir. 1969) (depression, emotionally upset and inability to continue working at sea); D'Ambra v. United States, 396 F. Supp. 1180, 1183 (D.C.R.I. 1973) (psychoneurosis, loss of appetite, insomnia, nightmares of accidents); Espinosa v. Beverly Hospital, 114 Cal. App. 2d 232, 249 P.2d 843 (1952) (jury instruction upheld which stated that a definite nervous disturbance or disorder is classified as a physical injury); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970) (loss of weight, inability to perform household chores, extreme nervousness and irritability); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973) (withdrawal from socialization and for nine months unable to function, depression); Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931) (nervous prostration).

70. Williamson, 251 N.C. at 503, 112 S.E.2d at 52.
ANALYSIS

Throughout this century, the United States engaged in a process of adopting theories that expanded liability for the negligent infliction of emotional distress caused by concern for another (liability to a bystander). The physical impact theory is the most restrictive theory in terms of affording liability. North Carolina's adherence to the impact rule is explained by the lack of opportunity to rule on this issue.

This analysis illustrates that the court of appeals in Johnson properly allowed recovery for the parents' claim by applying the physical injury and impact theory. At the same time, a strong argument exists for adding this case to the list of exceptions that allow recovery without physical impact or injury because the nature of the cases ensure that mental disturbance has a special likelihood of occurring. Applying the facts of this case, the plaintiffs arguably would also recover under the majority Zone of Danger Theory or the Dillion reasonable foreseeability theory. Analysis of the Johnson holding illustrates that the parent's recovery under established North Carolina law, is a natural extension of the viable fetus wrongful death action. The facts and circumstances of the Johnson case also provide the North Carolina Supreme Court with an excellent opportunity to join the ranks of other states by adopting a more progressive theory. Later analysis of these theories indicates that adoption of a new theory of liability would render a just result in North Carolina.

A. Parents' Recovery is Proper Under Existing North Carolina Law.

The North Carolina Court of Appeals in Johnson reversed the
trial court's dismissal of the parents' claims. This decision allowed an action for wrongful death of a viable fetus as well as the parents' claims in their own right for negligent infliction of emotional distress arising from the death of the fetus.\(^76\)

The Johnson court began by applying retroactively the North Carolina decision in *DiDonato*, announced only months prior, which permitted an action for the wrongful death of a viable fetus.\(^77\) The parents individually claimed negligent infliction of emotional distress.\(^78\) The parents alleged that their distress resulted from enduring labor with the knowledge that the unborn child was dead, the delivery of the dead child, and the dramatic circumstances surrounding the stillbirth of the child.\(^79\)

The *Johnson* court noted, in addressing the parents' claims, that the defendants challenged on two grounds.\(^80\) First, defendants pointed out that on occasion, North Carolina courts denied recovery for mental anguish caused by concern for the peril of another.\(^81\) Defendants contended that the plaintiffs' concern was for the peril of another—the viable fetus.\(^82\) Second, defendants contended that the plaintiffs' emotional distress was not the proximate result of an actual physical impact or did not manifest itself by a genuine physical injury.\(^83\) Because the physical impact or injury requirements were lacking, defendants contended that recovery should be denied in North Carolina.\(^84\)

The *Johnson* court stated in reference to the offered defenses that the absolute prohibition against compensating emotional distress arising from injuries to others has been overruled.\(^85\) Where some intimate relationships are involved, recovery is allowed because emotional injury is not too remote for measurement.\(^86\) This intimate relationship exception is harnessed by public policy factors that the court stated should be weighed when emotional injury

\(^{76}\) *Johnson*, 89 N.C. App. at 171, 365 S.E.2d at 919.

\(^{77}\) *Id.* at 159, 365 S.E.2d at 912.

\(^{78}\) *Id.* at 156, 365 S.E.2d at 910.

\(^{79}\) *Id.* at 162, 365 S.E.2d at 914.

\(^{80}\) *Id.*

\(^{81}\) *Id.*

\(^{82}\) *Id.*

\(^{83}\) *Id.*

\(^{84}\) *Id.*

\(^{85}\) *Id.* at 163, 365 S.E.2d at 915.

\(^{86}\) *Id.*
is arguably too remote.\textsuperscript{87} The court agreed that injury or impact is required in North Carolina. However, the court stated that it was solid North Carolina law that either impact or injury will suffice and that both are not required.\textsuperscript{88} The court added that mental injury will suffice for a physical manifestation of the emotional harm.\textsuperscript{89}

The court granted relief for the mother's claim of negligent infliction of emotional harm.\textsuperscript{90} The court reasoned that the physician's failure to treat the mother's diabetes for the full term of the pregnancy amounted to a potential physical injury and impact to the mother herself.\textsuperscript{91} The court also granted relief for the father's claim.\textsuperscript{92} The court stated that allegations of mental anguish were sufficient to allege physical injury.\textsuperscript{93} Before a dismissal is granted, the defendants must demonstrate that no forecast of evidence could entitle plaintiff to recover.\textsuperscript{94} As stated earlier, mental anguish will suffice for the physical injury requirement of a negligent infliction of emotional distress claim. Because the father's complaint alleged mental anguish, the court held dismissal was improper because it could not be held that as a matter of law that there existed no forecast of evidence that could prove the physical injury.\textsuperscript{95} The court later held that the father's mental injury arising from his concern for his son was not too remote to be barred by public policy.\textsuperscript{96}

Basically, the \textit{Johnson} decision is a direct application of existing North Carolina law to a new fact situation. The court applied the physical impact-injury theory long adhered to in North Carolina to ensure the genuineness of the claim and set a limit on liability. However, considering the floodgate litigation concern expressed in \textit{DiDonato}, the North Carolina Supreme Court might place greater weight on defendants' objections and question the court of appeals' interpretation of North Carolina law. Therefore,

\begin{itemize}
  \item 87. \textit{Id.} at 164, 365 S.E.2d at 916. See \textit{supra} note 65 for public policy considerations.
  \item 88. 89 N.C. App. at 165, 365 S.E.2d at 916.
  \item 89. \textit{Id.}
  \item 90. \textit{Id.}
  \item 91. \textit{Id.} at 166, 365 S.E.2d at 916.
  \item 92. \textit{Id.} at 167, 365 S.E.2d at 917.
  \item 93. \textit{Id.} at 168, 365 S.E.2d at 918.
  \item 94. \textit{Id.}
  \item 95. \textit{Id.}
  \item 96. \textit{Id.} at 170, 365 S.E.2d at 918.
\end{itemize}
potential problems with the Johnson case should be addressed and dismissed.

The defendants contended that their failure to treat the diabetes for the full term of the pregnancy, resulting in the fetus' death, was not an injury or impact to the mother. The defendants reasoned that the fetus had reached the independent stage of viability. The supreme court should reject this argument as did the court of appeals. First of all, the argument lacks logic. Setting all legal, philosophical, and technical arguments aside momentarily, it should be common sense that an injury of the magnitude to kill an unborn fetus inside the mother's body necessarily has an impact on the mother. Undoubtedly this death causes the mother some sort of physical injury. Second, notwithstanding the effect on the fetus, the failure to treat the mother's diabetes for nine months is a breach of duty to the mother directly, causing impact and physical injury to the mother's body in general. Third, as noted earlier, the impact requirement has been diminished to a slight touching and can be easily fulfilled. In light of the slight touchings accepted as impact in other jurisdictions, North Carolina should accept the argument that because the mother and fetus are attached by the uterine wall, an injury to the fetus is an impact on the mother. Finally, persuasive authority supports the finding that for mental distress claims, an injury to a fetus is also an injury to the mother.

The defendants' main argument for viable fetus independence focused on a North Carolina case that imputed the legal fiction of personhood to a fetus for some purposes. The Johnson court distinguished the case by stating that personhood imputed to a fetus for some purposes does not determine whether a fetal injury is im-

97. Id. at 166, 365 S.E.2d at 917.
98. Id. at 166, 365 S.E.2d at 918.
99. Id. at 167, 365 S.E.2d at 914.
100. Id. at 167, 365 S.E.2d at 917. The defendants contended that the court had previously recognized a fetus as a separate entity in Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980), aff'd in relevant part, 302 N.C. 357, 275 S.E.2d 439 (1981). Because of this separate entity theory, a fetal injury cannot necessarily be imputed to the mother. The court of appeals held that the Stam court's recognition of separate "personhood" could not be applied only for certain purposes. The Johnson court used the DiDonato definition of viability meaning capable of life independent of its mother. See Johnson at 159, 365 S.E.2d at 913.
102. Stam, 47 N.C. App. at 218, 267 S.E.2d 335 at 342, aff'd in relevant part, 302 N.C. 357, 275 S.E.2d 439.
pact or injury on a mother. An in-depth analysis on the personhood of a fetus would be too involved at this point. Suffice it to say that the above arguments should persuade that an injury to a fetus is impact on a mother. However, if the court disagrees with the above arguments as well as the court of appeals' rationale, and holds that an injury to the fetus is not an injury to the mother, then recovery would still be proper. Even if the fetus is considered a third party, the court could properly grant relief under negligent infliction of emotional distress caused by concern for a third person as discussed below.

Defendants contended that the parents' recovery should be denied because North Carolina did not allow recovery for negligent infliction of emotional distress caused simply by concern for another. The Johnson court rejected the argument and interpreted the Nicholson case to apply to the fact situation at hand. Although the court's interpretation was natural and logical, a brief analysis should follow in support of the court's interpretation. Nicholson overruled the absolute prohibition against recovery for negligent infliction of emotional distress caused by concern for another. The Nicholson court found that recovery for a spouse's emotional injury suffered as a result of witnessing negligently inflicted injury to his spouse was not too remote for measurement. The Johnson court interpreted the decision to mean that "where some intimate relationships are affected, there is no longer any absolute prohibition against compensating emotional distress arising from injuries to others." Johnson applied the interpretation to the parent-child relationship and allowed recovery.

The North Carolina Court of Appeals' interpretation should not be disturbed for many reasons. First, the interpretation ap-
peals to sound logic considering the close relationship between a mother and her fetus. Second, it can be argued that the Johnson decision is not an expansion of Nicholson but is within the boundaries of the North Carolina Supreme Court exception declared in Nicholson. Logically speaking, in our society, many parent-child relationships are built of stronger emotional ties than spousal relationships. Considering this concept, the justification for the established Nicholson spousal extension will frequently be weaker than the proposed Johnson parent-child extension. Third, as argued in Johnson, the parent-child relationship is well within the public policy limitation on liability referred to earlier in Wyatt to ensure against unforeseeable liability. And finally, the general tort principle should be remembered—that to be held liable for negligence, the extraordinary consequences or means of consequences need not be foreseen. Instead, the physician need only be aware of the risk of danger his omission creates. Surely, any doctor using reasonable care would be aware of the effect of not treating a pregnant woman's diabetes and the likelihood of emotional distress resulting from the death of the fetus. The defendants next contended that the father's claim should be denied because he failed to allege impact or physical injury. The court's ruling, allowing the father's claim, involves no major substantive issue for the supreme court to overrule. The court of appeals referred to

111. Wyatt, 57 N.C. App. at 162, 290 S.E.2d at 793. The following analysis utilizes the factors set forth in Wyatt to illustrate that the father's claim in Johnson is within the public policy limits of foreseeability: (1) The emotional injury is a direct result and immediate result of the physician's negligence; (2) The extent of the injury is not out of proportion to the culpability of the tortfeasor. This is because basic human feelings should favor compensation for the innocent mother losing her child as opposed to finding the negligent physician not liable; (3) In retrospect, it is not too highly extraordinary that the negligent act caused the injury because death by malnutrition is the obvious result of a physician's failure to treat the mother's diabetes for the full term pregnancy. Also, the mother's emotional distress is a natural result of her child's negligently caused death; (4) Liability will not overburden physicians since treating the mother's diabetes during pregnancy should be common practice; (5) Recovery here will not open the way for fraudulent claims because the close emotional attachments between parent and child ensure the genuineness of the plaintiff parents' claim; (6) This case does not risk entering a field with no just stopping point since the Johnson decision limits liability to the parents. This extension is within the Nicholson exception.

112. See Prosser and Keeton, supra note 34, § 43, at 281.
113. Id. at 280.
114. Johnson, 89 N.C. App. at 167, 365 S.E.2d at 917.
Woodell v. Pinehurst\textsuperscript{115} and Campbell v. Pitt County Memorial Hospital, Inc.\textsuperscript{116} in stating that in North Carolina, a defendant must show that the plaintiff neither offered nor forecasted evidence of physical injury in order to be entitled to a dismissal.\textsuperscript{117} However, the court distinguished the Johnson case on the fact that in Woodell and Campbell, summary judgment had been entered after discovery and trial evidence. In Johnson, the dismissal was granted after the pleadings only under Rule 12(c).\textsuperscript{118} Because dismissal was entered after the pleadings, the father should be allowed to show whether his alleged mental anguish would manifest itself into actual physical injury.\textsuperscript{119} The court continued to apply the same analysis discussed earlier in reference to the mother’s claim to illustrate that recovery by the father was within the North Carolina public policy limitations to liability.\textsuperscript{120} Provided that the father can show mental injury, the above analysis regarding the mother’s recovery applies to the father’s recovery as well.\textsuperscript{121} The birth and death of a child is an experience endured by both the mother and the father, and the father’s emotional distress is equally foreseeable. Therefore, the court should make no distinction regarding recovery based on whether the plaintiff is a mother or a father.

As the foregoing indicates, the facts in the Johnson case fall within established North Carolina law. The parents’ own cause of action for the negligent infliction of emotional distress arising out of concern for their child is therefore a natural extension of the DiDonato viable fetus wrongful death claim.

Since the Johnson decision is limited to parents, it poses no threat to the normal policy concerns of ensuring genuine claims and limiting the scope of liability. The North Carolina impact or physical injury rule successfully ensures a genuine claim and limits liability in this case. However, the line drawn to limit liability

\begin{itemize}
\item \textsuperscript{115} 78 N.C. App. 230, 336 S.E.2d 716, aff’d per curiam, 316 N.C. 550, 342 S.E.2d 523 (1986).
\item \textsuperscript{116} 84 N.C. App. 314, 352 S.E.2d 902, aff’d, 319 N.C. 458, 356 S.E.2d 2 (1987).
\item \textsuperscript{117} Johnson, 89 N.C. App. at 168, 365 S.E.2d at 918.
\item \textsuperscript{118} Id. N.C. R. Civ. P. 12(c) requires that before a case is dismissed on the pleadings, one must show that the opponent has shown no forecast of evidence that would entitle him to recovery.
\item \textsuperscript{119} Id. See supra note 69 and accompanying text.
\item \textsuperscript{120} Id. at 169, 365 S.E.2d at 919.
\item \textsuperscript{121} See infra note 111.
\end{itemize}
must be meaningful and not arbitrary. Advancements in medical science have eliminated the need to confine liability for negligent infliction of emotional distress to only those cases where the plaintiff suffers physical impact.\textsuperscript{122} Genuine emotional distress can now be ascertained more accurately.\textsuperscript{123} Other jurisdictions throughout this century have recognized the need to extend liability beyond the impact theory to include meritorious but otherwise deniable claims.\textsuperscript{124} As a result of this recognition, many jurisdictions have adopted alternative theories that draw new and less arbitrary lines to limit liability.\textsuperscript{125} Jurisdictions extending liability beyond the impact theory allow recovery for: (1) plaintiffs in situations where emotional distress has a special likelihood of occurring;\textsuperscript{126} (2) third party plaintiffs who are also within the zone of danger of the original risk created by the defendant;\textsuperscript{127} and (3) plaintiffs whose emotional harm is reasonably foreseeable as a result of the risk created by defendant.\textsuperscript{128}

\textbf{B. Parents' Recovery is Proper Under Other Theories.}

Although not discussed by the \textit{Johnson} court, a brief look at the more progressive theories illustrates that recovery in the \textit{Johnson} case is proper under each theory. The \textit{Johnson} case provides the North Carolina Supreme Court with an excellent and rare opportunity to adopt a more just and progressive theory on the negligent infliction of emotional distress caused by concern for another.

\textit{1. Special Likelihood Cases}

Many jurisdictions have expanded liability beyond physical impact or injury in cases where there exists "an especial likelihood of genuine and serious mental distress, arising from the special circumstances which serves as a guarantee that the claim is not spurious."\textsuperscript{129} Two widely recognized exceptions include permitting recovery for: first, emotional harm resulting from negligent trans-

\begin{itemize}
\item \textsuperscript{122} Culbert, 444 A.2d at 435.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} \textit{See supra} notes 42-54 and accompanying text.
\item \textsuperscript{125} \textit{Id}.
\item \textsuperscript{126} \textit{See supra} note 45.
\item \textsuperscript{127} \textit{See supra} note 50 and accompanying text.
\item \textsuperscript{128} \textit{See supra} note 54 and accompanying text.
\item \textsuperscript{129} Prosser and Keeton, \textit{supra} note 34, § 54, at 362.
\end{itemize}
mission by a telegraph company of a message announcing death;\textsuperscript{130} and second, emotional harm to a close relative resulting from negligent mishandling of a corpse.\textsuperscript{131} Prosser, the leading scholar in the field of torts, notes that more exceptions will likely be created for other types of cases.\textsuperscript{132}

One example of a new exception carved out is the case of Johnson v. State.\textsuperscript{133} Johnson v. State allowed the relative of a hospital patient to recover for emotional harm sustained as a result of negligent misinformation given by the hospital that the patient had died.\textsuperscript{134} Rationales justifying these exceptions include: first, the obvious close kinship and sentimental attachment of the plaintiff to the loved one involved;\textsuperscript{135} and second, the fact that the defendant was especially aware of the deep emotional ramifications of his conduct.\textsuperscript{136}

The Johnson v. Ruark case at hand has the ingredients to create a new exception: first, immediate family close kinship; and second, high emotional sensitivity surrounding the death of a loved one combined with a physician who certainly is aware of the deep emotional ramifications of his conduct. The physician's awareness of the risk of emotional harm is especially true here considering the extreme sensitive and emotional state of parents as they go through childbirth. By limiting the exception to the parents, the present Johnson decision ensures the genuineness of the claim and limits the scope of liability for this exception. The North Carolina Supreme Court should seriously consider creating this exception.

\textsuperscript{130} See, e.g., Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895).


\textsuperscript{132} Prosser and Keeton, supra note 34, § 54, at 362.

\textsuperscript{133} Id. at 37 N.Y.2d 378, 372 N.Y.S.2d 638, 334 N.E.2d 590.

\textsuperscript{134} Id. at ___, 372 N.Y.S.2d at 643, 334 N.E.2d at 593.

\textsuperscript{135} Hall v. Jackson, 24 Colo. App. 225, 134 P. 151 (1913); Carson v. Chase, 47 Minn. 307, 50 N.W. 238, (1891).

2. Zone of Danger Cases

As the century progressed, many jurisdictions declined to follow the impact rule. Advances in medical science eliminated the once perceived need to define the tortfeasor's liability so narrowly.\(^{137}\) As stated earlier, courts no longer found a justified distinction between valid and invalid claims based on impact, because impact had become diluted to a slight touching.\(^{138}\) This arbitrary line drawn to limit liability led courts to adopt the Zone of Danger Theory. The Zone of Danger Theory limits liability beyond physical impact and allows recovery for bystander plaintiffs who are within the zone of risk created by the negligent act.\(^{139}\) The courts felt that a bystander fearing for his own safety added credibility to his claim and helped to ensure genuine emotional distress.\(^{140}\) Also, the zone of danger provided a definite line beyond which courts could limit liability.\(^{141}\) Juries could objectively and effectively determine liability based on whether the plaintiff's fear was for himself.\(^{142}\) The Zone of Danger Theory would provide recovery for more meritorious claims that fell short of fulfilling the physical impact requirement. By 1968, most states had forsaken the physical impact rule in favor of the Zone of Danger Theory.\(^{143}\)

The Johnson case should be affirmed under the Zone of Danger Theory. The risk created by the physician's omission in failing to treat Mrs. Johnson's diabetes for the full pregnancy term posed an immediate and great threat to her own body, causing Mrs. Johnson to fear for her own safety.\(^{144}\) Mrs. Johnson was definitely within the zone of danger created by the physician's negligence. The father would also recover under Zone of Danger Theory. The zone of danger is not restricted to physical danger; emotional injury will also suffice.\(^{145}\) The distinction between the mother and the father is indefensible in denying recovery for the father. One

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138. See supra note 42.
139. Waube v. Warrington, 216 Wis. 603, 258 N.W.497 (1935).
141. Stadler v. Cross, 295 N.W.2d 552, (Minn. 1980).
142. Id.
144. Johnson, 89 N.C. App. at 166, 365 S.E.2d at 916.
145. Lantry, supra note 54, at 215.
parent is as much entitled to recovery as the other. With this in mind, the father's emotional injury is also within the zone of danger created by the physician's negligence and therefore recovery is proper. Considering the above analysis, North Carolina could join the majority of jurisdictions by adopting the Zone of Danger Theory and allowing recovery for both of the Johnson parents.

3. "Dillion Test" Cases

Many jurisdictions hold that the zone of danger is an unnecessary and rigid line used to limit liability. These courts feel that liability should be extended beyond fearing for one's own safety because there are cases beyond the zone of danger where there is no doubting the claim's genuineness. Also, the judiciary has a responsibility to award damages to those with meritorious claims. Therefore, these jurisdictions have adopted the Dillion test, also known as the reasonable foreseeability test. The reasonable foreseeability test first adopted in Dillion, applies general tort principles to set the limits of liability. A defendant is liable only for injuries to others if the injuries were reasonably foreseeable to the defendant at the time of the negligent act. The three guidelines set out in Dillion to determine reasonable foreseeability include: first, whether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it; second, whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory or contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and third, whether the plaintiff and the victim were closely related, as contrasted with an absence of a relationship or the presence of only a distant relationship. All three factors enhance the likelihood that the defendant will have foreseen the harm caused by his negligence. Of course, these guidelines are to be applied on a case by case basis. As stated earlier, many jurisdictions have adopted the Dillion test since the

146. Id.
147. Dillion, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912.
148. See supra note 54.
149. Id.
150. Dillon at 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d at 912.
151. Id. at —, 69 Cal. Rptr. at 79, 441 P.2d at 919.
152. Id. at —, 69 Cal. Rptr. at 80, 441 P.2d at 920.
Recovery is proper for the Johnson parents under the Dillion test. The parents certainly were located near the scene of the accident. Of course, the mother cannot be otherwise, but the Johnson opinion also states that the father was present throughout the pregnancy, labor and delivery of the dead fetus. Contemporaneous observance cannot be contested since the parents heard the news of the negligent conduct from the physicians and engaged all their sensory faculties in the deliverance of the dead child. Finally, our society recognizes the strong emotional ties between parents and their children. All three factors are undeniably fulfilled; the parents’ injuries are foreseeable. Once again, the Johnson case presents a clear opportunity for recovery in North Carolina under a more progressive theory on negligent infliction of emotional distress.

No doubt that problems exist with the Dillion test. Who is to say that a parent will not just as likely endure emotional injury upon hearing the news by telephone? Perhaps a non-relative or distant relative would be more emotionally damaged than a parent or a sibling. These questions make the Dillion test guidelines appear arbitrary. Perhaps no theory exists that accounts for every possible variable or scenario. Yet, slight arbitrariness is better than the basic unfairness of denying a remedy to one who has suffered a wrong at the hands of another.

The above analysis indicates that the theories on negligent infliction of emotional distress caused by concern for another underwent progressive development without universal agreement. Each theory requires limiting factors to be present prior to recovery. Although the limiting factors are different in each theory, there exist the common thread of concern for ensuring genuine claims and limiting liability. More important to North Carolina, is the realiza-

153. See supra note 54.
154. Johnson, 89 N.C. App. at 169-170, 365 S.E.2d at 918.
155. Id.
156. It is noted that on July 28, 1988, the United States Court of Appeals for the Fourth Circuit favorably cited the Johnson v. Ruark holding in upholding a similar North Carolina claim. The federal court accepted the Johnson rationale in holding that the parents’ claim for emotional distress arising out of a wrongful death or wrongful life action of their children should not have been denied as a matter of law. Gallagher v. Duke, 852 F.2d 773 (4th Cir. 1988). The North Carolina Supreme Court had not rendered a decision on Johnson as of publication of this Note.
tion that other jurisdictions utilize more just theories of liability and prove the theories reliable. North Carolina can benefit from the experimentation and experience of these other jurisdictions by adopting one of these theories. Consequently, this move would provide a fairer remedy for plaintiffs suffering from negligent infliction of emotional distress caused by concern for another.

**Conclusion**

In *Johnson v. Ruark Obstetrics*, the court held that recovery was proper in a viable fetus wrongful death action for the parents' claim in their own right for negligent infliction of emotional distress caused by concern for another. Applying the North Carolina impact/physical injury theory, the court held that injury to the fetus was impact on the mother. The court also held in allowing the father's claim, that the father's mental injury, if proven, sufficed for physical injury.

Basically, the recovery in *Johnson* is proper by directly applying established North Carolina law. However, *Johnson* presents the first major case which tests the court's concern for floodgate litigation in response to allowing the viable fetus wrongful death claim in *DiDonato*. The court will be forced to make a decision between its reluctance to expand *DiDonato* and its desire to allow recovery for a meritorious claim.

Over the past century, other jurisdictions in this country have expanded their theories of liability for the negligent infliction of emotional distress beyond the impact/physical injury theory. These theories include allowing recovery for: first, plaintiffs in situations with a special likelihood of resulting emotional distress; second, plaintiffs within the zone of danger; and third, plaintiffs whose emotional injury is reasonably foreseeable. Each of these theories has proven reliable in assuring genuine claims and limiting liability. Not only is recovery proper under the North Carolina impact/physical injury rule, but *Johnson* should also be affirmed under each of the alternative theories discussed. During this stage of progress in other jurisdictions, North Carolina has had little opportunity to adopt a new theory on liability.

The parents' claim for negligent infliction of emotional distress arising from concern for another has been shown to be a natural extension of the viable fetus wrongful death action under each theory in our country. The *Johnson* case provides the North Carolina courts with a fact situation where recovery is proper under any of the above theories of liability. Why should the court
refuse to adopt one of the more just theories of liability when affirming the *Johnson* decision?

*Bruce Batchelor*