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A Clear Judicial Day in North Carolina—*Johnson v. Ruark Obstetrics* Smooths the Way for Plaintiffs' Claims for Negligent Infliction of Emotional Distress

"[T]here are clear judicial days on which a court can foresee forever,"¹ and in North Carolina, such a day has arrived. In *Johnson v. Ruark Obstetrics & Gynecology Associates*,² the North Carolina Supreme Court conclusively rejected the long-held and widely followed view that a plaintiff could not recover for negligent infliction of emotional distress absent the showing of some related physical injury, either as a cause of the distress or as a consequence of it.³ By way of replacement, the court decreed that "an allegation of ordinary negligence will suffice,"⁴ so long as the plaintiff also "allege[s] that severe emotional distress was the foreseeable and proximate result of such negligence."⁵ By rejecting the imposition of bright-line rules or standards,⁶ the *Johnson* decision is the judicial equivalent of a clean slate.

This Note chronicles the North Carolina courts' treatment of tort claims for negligent infliction of emotional distress and examines the varying limitations and restrictions imposed by the courts in their attempts to develop workable rules. It analyzes the *Johnson* court's selective application of precedent and questions both the court's disinclination to establish more specific standards regarding availability of the claim and the wisdom of dismissing several decades of contrary case law as "erroneous." The Note then explores the potential effects of *Johnson*. The Note concludes that the court should have set forth clearer standards to better guide the trial courts in determining whether to allow the

1. *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 327 N.C. 283, 309, 395 S.E.2d 85, 100 (Meyer, J., dissenting) (quoting *Thing v. La Chusa*, 48 Cal. 3d 644, 668, 771 P.2d 814, 830, 257 Cal. Rptr. 865, 881 (1989) ("with apologies to [lyricist] Bernard Witkin")).

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

3. The court found it necessary to overrule a number of cases that "require[d] a plaintiff to show—in addition to mental or emotional injury—a physical impact, physical injury, or a physical manifestation of emotional distress to succeed on a claim of negligent infliction of emotional distress." *Id.* at 301, 395 S.E.2d at 95. The court overruled *Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), *overruled on other grounds* in *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980). The court also disapproved *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), *disapproved in* *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960); and *Kimberly v. Howland*, 143 N.C. 398, 55 S.E. 778 (1906), to the extent those cases implicated a physical injury requirement.

In addition, *Johnson* overruled seven decisions of the North Carolina Court of Appeals. The overruled decisions were *Edwards v. Advo Systems, Inc.*, 93 N.C. App. 154, 376 S.E.2d 765 (1989); *Ledford v. Martin*, 87 N.C. App. 88, 359 S.E.2d 505 (1987), *disc. rev. denied*, 321 N.C. 473, 365 S.E.2d 1 (1988); *Campbell ex rel. McMillan v. Pitt County Memorial Hosp., Inc.*, 84 N.C. App. 314, 352 S.E.2d 904, *aff'd on other grounds*, 321 N.C. 260, 362 S.E.2d 273 (1987); *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 336 S.E.2d 716 (1985), *aff'd*, 316 N.C. 550, 342 S.E.2d 523 (1986) (*per curiam*); *Craven v. Chambers*, 56 N.C. App. 151, 287 S.E.2d 905 (1982); and *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E.2d 855, *disc. rev. denied*, 301 N.C. 239, 283 S.E.2d 136 (1980).

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

5. *Id.*

6. *Id.* at 291, 395 S.E.2d at 89. The court explained that "our law includes no arbitrary requirements to be applied mechanically to claims for the negligent infliction of emotional distress." *Id.*

claim to go to a jury, and recommends different standards of recovery for directly injured victims and for bystanders. The Note proposes alternative limitations for each; specifically, the Note argues that in order to state a claim for negligent infliction of emotional distress, directly injured plaintiffs should be required to forecast evidence that, if believed, would support an award of punitive damages.⁷ This standard emphasizes the nature of the defendant's conduct rather than the extent of the plaintiff's emotional injury. The Note agrees with the *Johnson* court's affirmation of bystanders' ability to recover for negligently inflicted emotional distress, but suggests that they should be permitted to do so only in accordance with a modified version of the test recently established by the California Supreme Court in *Thing v. La Chusa*.⁸

From March through October of 1983, expectant parent Barbara Johnson received prenatal medical care from Ruark Obstetrics and Gynecology Associates, P.A.⁹ Mrs. Johnson's pregnancy progressed normally through the morning of October 3, 1983;¹⁰ later that afternoon, she began experiencing contractions and was admitted to Wake Medical Center.¹¹ Testing undertaken at the hospital revealed the absence of any fetal heart tones, and the Johnsons were informed of the fetal death at approximately 8:00 p.m.¹² Mrs. Johnson remained in labor and delivered the stillborn fetus in the early hours of October 4, 1983.¹³

On behalf of the fetus, Glenn Johnson filed a wrongful death action against defendants.¹⁴ Included in the complaint were claims for negligent infliction of emotional distress, brought by both Glenn and Barbara Johnson "in their individual capacities as father and mother of the fetus."¹⁵ The complaint alleged, in sum, that Mrs. Johnson's doctors negligently failed to treat Mrs. Johnson's diabetic condition properly, thereby causing the fetus to die of malnutrition.¹⁶

Defendants denied any negligence and moved to dismiss for failure to state

7. See *infra* notes 167-71 and accompanying text. A "directly injured plaintiff" is any party who brings suit to recover for mental injury negligently inflicted upon her by the defendant.

8. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989). See *infra* notes 173-80 and accompanying text. Discussions of "bystander" recovery refer to recovery by a plaintiff who alleges mental suffering brought about by the plaintiff's concern for a third party who was directly injured by defendant's negligent conduct.

9. *Johnson*, 327 N.C. at 286, 395 S.E.2d at 87. Glenn and Barbara Johnson brought suit against Ruark Obstetrics and Gynecology Associates, P.A. (formerly The Ruark Clinic), and against the four individual doctors employed by the defendant who managed Mrs. Johnson's prenatal health care program.

10. *Id.* at 286-87, 395 S.E.2d at 87. Mrs. Johnson reported feeling fetal movement during the evening of October 2, 1983. *Id.* According to the complaint, defendant Dr. Edgerton reported the presence of a fetal heart tone at 9:30 a.m. on October 3, 1983, when Mrs. Johnson visited The Ruark Clinic to report contractions. Plaintiffs' Brief at 5, *Johnson* (No. 8610SC942).

11. *Johnson*, 327 N.C. at 286-87, 395 S.E.2d at 87.

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

13. *Id.*

14. *Id.* Mr. Johnson was authorized by statute to bring the action as administrator of the fetal estate. N.C. GEN. STAT. § 28A-18-2 (1984).

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

16. *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 89 N.C. App. 154, 156, 365 S.E.2d 909, 910 (1988), *aff'd on other grounds*, 327 N.C. 283, 395 S.E.2d 85 (1990). The infant's death

a claim upon which relief could be granted.¹⁷ Defendants also requested, and received, summary judgment as to all claims.¹⁸ The court of appeals reversed the trial court's dismissal of both the wrongful death and the negligent infliction of emotional distress claims.¹⁹ In so doing, the court rejected defendants' contention that North Carolina prohibits recovery for mental anguish prompted by concern for another person.²⁰ The court relied on *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*²¹ to hold that "where some intimate relationships are affected, there is no longer any *absolute* prohibition against compensating emotional distress damages arising from injuries to others."²² The court recognized, however, that availability of the claim must be tempered by the policy interest in limiting negligence liability.²³

Having determined that the claim was not barred as a matter of law, the court of appeals considered defendants' argument that plaintiffs still had no standing to sue, not having suffered any physical injuries themselves.²⁴ Citing *Williamson v. Bennett*,²⁵ the court found that "absent some [physical] impact, the emotional distress claimant must manifest some resulting physical injury."²⁶ The court held that both Glenn and Barbara Johnson had alleged proper claims because Barbara Johnson did in fact suffer physical injury and because the court could not say as a matter of law that Glenn Johnson had not suffered physical manifestations of his mental distress.²⁷

certificate listed the cause of death as "placental insufficiency." Plaintiffs' Record on Appeal to the North Carolina Court of Appeals, Exhibit B at 10, *Johnson* (No. 8610SC942).

In relevant part, the complaint alleged:

Past, present and future pain and suffering and emotional distress of enduring the labor, with the knowledge that their unborn child was dead, and the delivery of a dead child.

Past, present and future mental distress and anguish resulting from the dramatic circumstances surrounding the stillbirth of their child.

Plaintiffs' Complaint at 7, *Johnson* (No. 8610SC942).

17. *Johnson*, 327 N.C. at 287, 395 S.E.2d at 87; see N.C.R. Civ. Pro. 12(b)(6).

18. *Johnson*, 89 N.C. App. at 156-57, 365 S.E.2d at 911; see N.C.R. Civ. Pro. 56(e).

19. *Johnson*, 89 N.C. App. at 171, 365 S.E.2d at 919.

20. *Id.* at 163, 365 S.E.2d at 915. The defendants relied on *Williamson v. Bennett*, 251 N.C. 498, 508, 112 S.E.2d 48, 55 (1960), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85, and *Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E.2d 307 (1925), *overruled on other grounds in Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980), and *overruled in Johnson*, 327 N.C. 283, 395 S.E.2d 85.

21. 300 N.C. 295, 266 S.E.2d 818 (1980).

22. *Johnson*, 89 N.C. App. at 163, 365 S.E.2d at 915.

23. *Id.* at 164, 365 S.E.2d at 915. The court explained that the policy issues involved generally relate to questions of remoteness and proximate cause. *Id.* According to the court, "the definition of proximate cause necessarily includes . . . whether the tort-feasor's liability should as a matter of public policy extend to [the] injuries." *Id.*

24. *Id.* at 162, 365 S.E.2d at 914.

25. 251 N.C. 498, 112 S.E.2d 48 (1960), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85. In *Williamson* the North Carolina Supreme Court held that "[i]t is almost the universal opinion that recovery may be had for mental or emotional disturbance in ordinary negligence cases where, coincident in time and place with the occurrence producing the mental stress, some actual physical impact or genuine physical injury also resulted directly from defendant's negligence." *Id.* at 503, 112 S.E.2d at 52.

26. *Johnson*, 89 N.C. App. at 165, 365 S.E.2d at 916.

27. *Id.* Barbara Johnson alleged two physical injuries, the first resulting from the negligent treatment of her diabetes and the second resulting from the injury to the fetus; the court observed that since "the fetus is normally attached to the mother's uterine wall, we fail to see how a physical

The North Carolina Supreme Court affirmed the court of appeals' reinstatement of the Johnsons' claims, albeit on very different grounds.²⁸ Writing for the majority, Justice Mitchell described the physical injury requirement as a miscategorization of North Carolina law and acknowledged that "varying and at times inconsistent analyses used by our courts have apparently buttressed such misconceptions."²⁹ Overruling or disapproving a number of North Carolina cases that had included such a requirement,³⁰ the court held that "neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort of negligent infliction of emotional distress."³¹

In its review of the tort's "long and winding history in every state,"³² including North Carolina, the court considered the theories at work in other jurisdictions. The court resolved, however, to base any final conclusions exclusively on North Carolina law.³³ To state a valid claim for negligent infliction of emotional distress, the court concluded that "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable³⁴ that such conduct would cause the plaintiff severe emotional distress (often referred to as mental anguish), and (3) the conduct did in fact cause the plaintiff severe emotional distress."³⁵ Thus, the North Carolina courts' treatment of such traditional concepts as foreseeability and proximate cause drew much of the *Johnson* court's attention. The application of these concepts, the court said, "must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury."³⁶

The court drew a distinction between mere "fright," which by itself is not compensable,³⁷ and "severe emotional distress," for which a plaintiff might re-

impact or injury to the fetus would not normally be an injury or impact to the mother." *Id.* at 167, 365 S.E.2d at 917.

Regarding Glenn Johnson's claim, the court concluded that the pleadings revealed no facts that would necessarily "prohibit him from later more specifically forecasting or introducing evidence that his alleged mental distress resulted in the necessary physical injury." *Id.* at 168-69, 365 S.E.2d at 918.

28. *Johnson*, 327 N.C. at 286, 395 S.E.2d at 86-87.

29. *Id.* at 291, 395 S.E.2d at 89.

30. See cases cited *supra* note 3.

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

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

33. The dissent characterized as error the majority's reluctance to "[seek] guidance from the experience of other jurisdictions with less expansive doctrines of recovery." *Id.* at 308, 395 S.E.2d at 99 (Meyer, J., dissenting). For a survey of several other jurisdictions' attempts to define the required elements of the tort, see cases cited *infra* note 59.

34. The differing interpretations of "foreseeability" and its usefulness as a restrictive aspect of the claim are discussed thoroughly by the court and debated vigorously in Justice Meyer's dissent. For a summary of Justice Meyer's concerns, see *infra* notes 43-62 and accompanying text. For a collection of foreseeability standards applied by other jurisdictions, see *infra* note 59.

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

36. *Id.* at 305, 395 S.E.2d at 98 (citing *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E.2d 296 (1968); *Toone v. Adams*, 262 N.C. 403, 137 S.E.2d 132 (1964)).

37. *Id.* at 303-04, 395 S.E.2d at 97. This restriction is consistent with the court's prior holdings, reviewed in detail by the majority. *Id.* at 294, 395 S.E.2d at 91-92. For example, in *Kimberly v. Howland*, 143 N.C. 399, 403, 55 S.E. 778, 780 (1906), the court observed that "[a]ll the courts agree that mere fright, unaccompanied by or followed by physical injury, cannot be considered as an element of damage." Although the *Kimberly* statement was dictum because the plaintiff had suffered contemporaneous physical injury, later cases often cited it. See, e.g., *Williamson v. Bennett*,

cover.³⁸ The court recognized that severe emotional distress could encompass a wide range of disorders so long as the condition alleged by the plaintiff was of a sort generally recognized as a genuine disorder by trained medical personnel.³⁹

The *Johnson* court rejected any requirement of heightened negligence.⁴⁰ The court also established identical standards for the plaintiff who brings an action based upon a mental or emotional injury inflicted directly upon him by the defendant, and for the "bystander" plaintiff who alleges mental suffering brought about by the plaintiff's concern for another party injured by the defendant's negligent conduct.⁴¹ Applying these standards, the court concluded that the Johnsons' allegations of emotional distress were sufficient to support their cause of action.⁴²

The *Johnson* decision was accompanied by a vigorous dissent,⁴³ which characterized the Johnsons' alleged injuries as the understandable distress occasioned by the loss of a child rather than as anguish caused by any specific acts of negligence on the part of the defendants.⁴⁴ Condemning the rule adopted by the

251 N.C. 498, 503-04, 112 S.E.2d 48, 52 (1960) ("mere fright caused by ordinary negligence does not give a cause of action and may not be considered an element of damages"), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85; Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 812, 188 S.E. 625, 627 (1936) ("fright alone is not actionable," but allegations of ensuing "nervous disorders of serious proportions" will preclude dismissal or nonsuit); Arthur v. Henry, 157 N.C. 438, 439, 73 S.E. 211, 212 (1911) ("mere fright is not actionable"); see Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. REV. 435, 437-45 (1980).

For a discussion of the North Carolina courts' treatment of fright as an element of a claim for the negligent infliction of emotional distress, see *infra* notes 81-85 & 87 and accompanying texts.

38. *Johnson*, 327 N.C. at 303-04, 395 S.E.2d at 97.

39. *Id.* at 304, 395 S.E.2d at 97. Specifically, the court spoke to "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." *Id.*

40. *Id.*

41. *Id.* Recovery for emotional injury to directly injured victims is qualitatively different from recovery for emotional injury to bystanders. Standards of recovery should reflect that difference. See *infra* notes 166 & 172-80 and accompanying texts.

42. *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. In the instant case, both Glenn and Barbara Johnson were within the generally recognized definition of "bystanders" insofar as their claim was related to the injury to their child (a third party). Alternatively, Mrs. Johnson's claim could have been based upon mental and emotional injuries that she herself endured while undergoing labor. See *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 89 N.C. App. 154, 166-67, 365 S.E.2d 909, 916-17 (1988), *aff'd on other grounds*, 327 N.C. 283, 395 S.E.2d 85 (1990).

43. Justice Meyer authored a lengthy dissent that included a survey of standards applied by other jurisdictions and a critical examination of the court's definition of foreseeability. See *infra* notes 44-62 and accompanying text.

Justice Webb dissented separately on grounds that the case represented a marked departure from precedent, as evidenced by the number of cases overruled, and that the cases overruled were in fact accurate interpretations of valid law. *Johnson*, 327 N.C. at 318, 395 S.E.2d at 106 (Webb, J., dissenting). Despite the admittedly "arbitrary" nature of the physical injury requirement, Justice Webb argued that the rule served valid policy purposes by providing a needed limitation on liability. *Id.* (Webb, J., dissenting). Justice Webb would hold that the plaintiffs did not state claims for negligent infliction of emotional distress. *Id.* (Webb, J., dissenting).

44. *Id.* at 307, 395 S.E.2d at 99 (Meyer, J., dissenting). For an interesting early discussion of the need to distinguish between these two sources of injury, see *Young v. Western Union Tel. Co.*, 107 N.C. 370, 382, 11 S.E. 1044, 1048 (1890). See also *Hancock v. Western Union Tel. Co.*, 137 N.C. 498, 501, 49 S.E. 952, 953 (1905) (expressing concern that jurors "may possibly confound the mental anguish naturally arising from the loss of a near relative with that which grows from the defendant's negligence"); *Cashion v. Western Union Tel. Co.*, 123 N.C. 267, 274, 31 S.E. 493, 494 (1898) (same).

court as "overbroad,"⁴⁵ Justice Meyer criticized the majority for "go[ing] beyond even *Dillon's*⁴⁶ broad approach"⁴⁷ without adequate justification and for failing to provide practical standards or workable restrictions to the lower courts.⁴⁸ Specifically, Justice Meyer expressed strong reservations concerning the court's treatment of the concepts of duty,⁴⁹ foreseeability,⁵⁰ and proximate cause.⁵¹

The dissent interpreted the majority's opinion as holding that "a defendant has a duty not to cause serious emotional distress in any person who might foreseeably suffer such distress from proximate negligence. This duty is limited only by the foreseeability that such harm may occur."⁵² Justice Meyer argued that this theory presumes the existence of a duty without first providing any analysis of the duty's foundation.⁵³ In particular, Justice Meyer questioned whether defendants' alleged negligent failure to treat, thereby causing the death of the fetus, created any duty not to cause serious emotional distress flowing from the defendants to the Johnsons.⁵⁴

Further, Justice Meyer observed that without more specific restrictions on the standards of recovery the *Johnson* decision "stands for the proposition that no risk of serious emotional distress is acceptable."⁵⁵ This premise, he contended, would be contrary to such well-established axioms of tort law as Judge Learned Hand's famous cost-benefit equation⁵⁶ and would have detrimental effects on the availability and price of social necessities, including medical care

45. *Johnson*, 327 N.C. at 313, 395 S.E.2d at 102 (Meyer, J., dissenting).

46. *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc). For a description of the *Dillon* test, see *infra* notes 144-45 and accompanying text.

47. *Johnson*, 327 N.C. at 308, 395 S.E.2d at 99 (Meyer, J., dissenting).

48. *Id.* at 312-13, 395 S.E.2d at 102 (Meyer, J., dissenting). Justice Meyer criticized the court for failing to establish "any limitations whatsoever on this duty not to negligently inflict foreseeable serious emotional distress," because "[i]n adopting a rule, it should not be so vague that it provides no guidance to the judges and juries that must implement it." *Id.* (Meyer, J., dissenting).

49. See *infra* notes 52-54 and accompanying text.

50. See *infra* notes 58-62 and accompanying text.

51. *Johnson*, 327 N.C. at 309-14, 395 S.E.2d at 100-03 (Meyer, J., dissenting). For Justice Meyer's discussion of the majority's treatment of proximate cause, see *infra* notes 55-62 and accompanying text.

52. *Johnson*, 327 N.C. at 309, 395 S.E.2d at 100 (Meyer, J., dissenting).

53. *Id.* (Meyer, J., dissenting).

54. *Id.* (Meyer, J., dissenting).

55. *Id.* at 312, 395 S.E.2d at 102 (Meyer, J., dissenting).

56. *Id.* (Meyer, J., dissenting). Judge Hand suggested an equation that evaluates the sensibility of taking certain risks in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

[Judge] Hand described the duty of an actor to protect against the resulting injuries as being a function of three variables: (1) the probability (*P*) of injury occurring, (2) the gravity (*L*) of resulting injury, and (3) the burden (*B*) of adequate precautions. Hand described this relationship algebraically as an inquiry as to whether $B < PL$.

Johnson, 327 N.C. at 312 n.3, 395 S.E.2d at 102 n.3 (Meyer, J., dissenting) (construing *Carroll Towing*, 159 F.2d at 173).

Justice Meyer observed that "[v]irtually all conduct is risk creating" and argued that the *Johnson* court failed to differentiate between acceptable and unacceptable risks. *Id.* at 312, 395 S.E.2d at 102 (Meyer, J., dissenting). He concluded: "Today's decision, drawing no such distinction, stands for the proposition that no risk of serious emotional distress is acceptable." *Id.* (Meyer, J., dissenting).

and insurance.⁵⁷

Stating that "the universe of plaintiffs contemplated by the majority's rule is infinite indeed,"⁵⁸ the dissent also called for more circumscribed definitions of foreseeability and proximate cause based upon "the relationship of the plaintiff, the proximity of perception, and the severity of the injury that would give rise to a bystander's cause of action for serious emotional distress."⁵⁹ These standards resemble the factors enumerated in *Dillon v. Legg*, an oft-cited California case which established the threshold requirements for recovery for negligently inflicted emotional distress later imposed by several jurisdictions.⁶⁰ Justice Meyer

57. Justice Meyer said:

[T]he impact of this rule on the availability of medical care, particularly that of obstetrics, will be to further discourage qualified physicians from practicing. The risk of liability and the escalated premium for insurance to cover the liability are already seriously affecting the delivery of obstetrical care to this state, particularly to the rural areas and to the poor. . . . I cannot think that our state will benefit from a rule that discourages such risk-taking activity without regard to the costs society might pay or the benefits society might derive therefrom.

Johnson, 327 N.C. at 312, 395 S.E.2d at 102 (Meyer, J., dissenting).

58. *Id.* at 311, 395 S.E.2d at 101 (Meyer, J., dissenting). Justice Meyer concluded that "[l]iability without limitation adversely affects three distinct groups: tort-feasors, the physically injured primary and secondary victims, and society as a whole." *Id.* at 311, 395 S.E.2d at 101-02 (Meyer, J., dissenting).

59. *Id.* at 313, 395 S.E.2d at 102-03 (Meyer, J., dissenting). For the requirement that the bystander plaintiff have a specific relationship to the victim, see, e.g., *Thing v. La Chusa*, 48 Cal. 3d 644, 667-68, 771 P.2d 814, 829-30, 257 Cal. Rptr. 865, 880 (1989) (mother of victim is "closely related"); *Elden v. Sheldon*, 46 Cal. 3d 267, 273, 758 P.2d 582, 586-87, 250 Cal. Rptr. 254, 258 (1988) (unmarried cohabitant denied recovery); *James v. Leib*, 221 Neb. 47, 55, 375 N.W.2d 109, 117 (1985) (child who witnessed death of sibling could recover; court placed greatest weight on relationship between victim and bystander and required marital or close familial relation); *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986) (limiting recovery to spouses, children, parents, and siblings for social policy purposes).

For limitations based on the proximity of perception or the plaintiff's location in the "zone of danger," see, e.g., *La Chusa*, 48 Cal. 3d at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881 (denied recovery to victim's mother, who was neither present at scene nor aware son was being injured); *Kelley v. Kokua Sales & Supply, Ltd.*, 56 Haw. 204, 209, 532 P.2d 673, 676 (1975) (physical proximity to scene of tort is determinative of liability); *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983) (child who witnessed serious injury to brother on escalator required to prove that he too was in zone of danger); *Stadler v. Cross*, 295 N.W.2d 552, 553, 555 (Minn. 1980) (parents witnessed severe injury to their child but denied recovery because not within zone of danger); *Wilder v. City of Keene*, 131 N.H. 599, 604, 557 A.2d 636, 639 (1989) (no recovery for plaintiff who did not show geographic and temporal proximity to accident). *But cf.* *Dillon v. Legg*, 68 Cal. 2d 728, 733, 441 P.2d 912, 915, 69 Cal. Rptr. 72, 75 (1968) (en banc) (relief should not be conditioned on plaintiff's location within a matter of yards of accident; case "exposes the hopeless artificiality of the zone-of-danger rule").

For the requirement that the bystander plaintiff witness a severe injury to the victim, see, e.g., *Portee v. Jaffee*, 84 N.J. 88, 100-01, 417 A.2d 521, 527-28 (1980) (severe mental distress not a usual result when bystander perceives only less serious harm); *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986) (injury to victim must be objectively severe; court reasoned that "people recover from serious shock quickly if it turns out to be a false alarm").

For the requirement that the bystander plaintiff himself suffer severe emotional distress as a result of the injury to the victim, see, e.g., *La Chusa*, 48 Cal. 3d at 668, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81 (requiring "serious emotional distress"); *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559, 570 (La. 1990) (mental distress must be severe and debilitating). The *Johnson* court required the plaintiff's mental distress to be "severe." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97.

60. The *Johnson* factors are comparable to the factors enumerated in *Dillon*, discussed *infra* in text accompanying note 145. *Dillon* itself was restricted recently by the California Supreme Court in

dismissed the *Johnson* court's requirements as "low hurdles"⁶¹ and called for "limits on the class of bystander plaintiff[s]."⁶²

The *Johnson* court devoted a great deal of its attention to an extensive review of North Carolina's treatment of claims alleging negligent infliction of emotional distress. The effects of conflicting policy goals and varying fact patterns turned what was originally a fairly clear doctrine into a confusing hybrid characterized, the court observed, by "erroneous" and "unfortunate" misstatements of law.⁶³ Because a sequential presentation of the cases would serve only as a literal illustration of this confusion, this Note orders the discussion of the cases according to their thematic rather than chronological development.⁶⁴

The North Carolina Supreme Court first confronted the question whether a plaintiff could recover for the negligent infliction of emotional distress at all in *Young v. Western Union Telegraph Company*.⁶⁵ This case and others like it⁶⁶

Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989). The *La Chusa* court concluded that *Dillon* was unworkable; see *infra* notes 146-49 and accompanying text.

For scholarly measurements of the success of the *Dillon* test, see generally Diamond, *Dillon v. Legg Revisited: Towards a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477, 504 (1984) (criticizing *Dillon* for "using foreseeability to limit compensation in the first instance"); see also Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 490-501 (1982) (characterizing *Dillon* as at least as arbitrary and unsatisfactory as the zone-of-danger rule, if not more so); 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, 803-17 (1988) (detailed discussion of many jurisdictions' treatments of *Dillon*); Note, *Bystander Recovery: A Policy Oriented Approach*, 32 N.Y.L. SCH. L. REV. 877, 888-98 (1987) (discussing difficulties encountered by California courts interpreting *Dillon*).

61. *Johnson*, 327 N.C. at 310, 395 S.E.2d at 101 (Meyer, J., dissenting). Justice Meyer said the court's implication that psychiatric testimony might be required to substantiate or verify that the plaintiff suffered severe mental distress was a "totally ineffective barrier" because diagnosable responses to traumatic events are common, and possibly even a statistical likelihood. *Id.* (Meyer, J., dissenting).

For a listing of the various elements often cited in support of medical diagnoses of severe mental distress, see DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236-38 (3d rev. ed. 1987) [hereinafter DIAGNOSTIC AND STATISTICAL MANUAL]. See *infra* note 119 for a short listing of elements.

62. *Johnson*, 327 N.C. at 311, 395 S.E.2d at 101 (Meyer, J., dissenting).

63. *Id.* at 294-95, 395 S.E.2d at 91-92. (The "Kimberly opinion was the first opinion of this Court to characterize, unfortunately, emotional injury as a type of physical injury . . . Such mischaracterizations of emotional distress [are now recognized to be] unnecessary and erroneous terminology.").

64. First, the Note discusses the North Carolina Supreme Court's initial recognition of negligent infliction of emotional distress claims when the claims were coupled with other causes of action. See *infra* notes 65-79. The Note then addresses the development of the physical injury requirement and attempts to clarify the often overlooked distinctions between mere fright and genuine mental anguish, and the differing standards applicable to each. See *infra* notes 80-92. The Note also analyzes the cases pertaining to the collateral issue of bystander recovery. See *infra* notes 93-108.

65. 107 N.C. 370, 11 S.E. 1044 (1890). The *Young* court noted that the issue was one of "first impression in this State." *Id.* at 383, 11 S.E. at 1048.

The *Young* decision was also the first of many "negligent delivery of a telegram" cases in which the court routinely allowed recovery for mental distress occasioned by a late or missing message. In this context, the court stated in *Hancock v. Western Union Tel. Co.*, 137 N.C. 498, 500-01, 49 S.E. 952, 953 (1905), that "[t]he right to recover damages for purely mental anguish, not connected with or growing out of a physical injury, is the settled law of this State, and it is too late now to question it."

66. The cases that first established the tort of negligent infliction of emotional distress in North Carolina generally date to the period between 1800 and 1920. For a comprehensive survey of the

focused not only on the injuries for which a plaintiff could recover, but also on the nature of the cause of action itself. Plaintiffs generally brought claims for negligent infliction of emotional distress in conjunction with other claims,⁶⁷ in tort or in contract. In *Young*, for example, plaintiff alleged that he had "suffered great pain, mental anguish, and distress by reason of the [defendant's] gross negligence and delay in transmitting . . . [a] telegram"⁶⁸ that, if delivered, would have given plaintiff notice of his wife's impending death and afforded him the opportunity to be with her and to attend her funeral.⁶⁹ Confirming that these mental injuries were indeed compensable, the court cited Cicero's Eleventh Philippic against Anthony as instructive: "For, as the power of the mind is greater than that of the body, in the same way the sufferings of the mind are more severe than the pains of the body."⁷⁰

The *Young* court also emphasized the importance of defendant's status as a public servant and of the duties it owed to the public as a result of that relationship.⁷¹ Though plaintiff's cause of action was based in contract, the court also recognized that the claim was "in reality in the nature of tort for the negligence, and that . . . the plaintiff is entitled to recover . . . for the actual damages done him, and that mental anguish is actual damage."⁷²

In other early cases alleging mental anguish, the court also routinely recognized a right to recover for mental distress occasioned by negligent transportation or mishandling of dead bodies where the plaintiff was a close relative of the deceased person.⁷³ In allowing these plaintiffs to recover, the court frequently

tort of negligent infliction of emotional distress and its development in North Carolina, see Byrd, *supra* note 37.

67. For example, plaintiffs sought recovery for negligent infliction of emotional distress in connection with missing or late telegraphs, negligent actions by common carriers, negligent mishandling of dead relatives' bodies, and the negligent termination of telephone services. Byrd, *supra* note 37, at 452-55 & n.17.

68. *Young*, 107 N.C. at 371, 11 S.E. at 1044.

69. *Id.*

70. *Id.* at 385, 11 S.E. at 1048-49. Cicero, the court observed, "certainly may be quoted as an authority among lawyers." *Id.* at 385, 11 S.E. at 1048.

The severity of mental injuries and their genuine ability to incapacitate has been recognized consistently by the North Carolina courts. See, e.g., *Hargis v. Knoxville Power Co.*, 175 N.C. 31, 34, 94 S.E. 702, 703 (1917) ("As all pain is mental and centers in the brain, it follows that as an element of damage for personal injury the injured party is allowed to recover for actual suffering of mind and body"); *Kimberly v. Howland*, 143 N.C. 398, 404, 55 S.E. 778, 780 (1906) ("[T]he general principles of the law of torts support a right of action for physical injuries resulting from negligence . . . none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85; *Hunter v. Western Union Tel. Co.*, 135 N.C. 458, 467, 47 S.E. 745, 748 (1904) (Clark, C.J., concurring) ("[m]ental suffering is as real as physical").

71. *Young*, 107 N.C. at 383, 11 S.E. at 1048. The court explained that

[i]n failing to promptly deliver [a] telegram the telegraph company negligently fails to perform a duty which it owes to the sender of [the] telegram, and should be held liable for whatever injury follows as the proximate result of its negligent conduct. It is not a mere breach of contract, but a failure to perform a duty which rests upon it as a servant of the public.

Id. at 377, 11 S.E. at 1046.

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

73. *Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 138 S.E.2d 214 (1964) (denying recovery but recognizing a quasi-property right in the body); *Stephenson v. Duke Univ.*, 202 N.C. 624, 163 S.E.

relied on the "rationale that the cause of action [was] based on a quasi-property right in the body."⁷⁴

In 1916, the court held in *Bailey v. Long*⁷⁵ that a plaintiff-husband could recover not only the medical expenses he incurred as a result of the defendant-doctor's negligent breach of a contract to provide skillful medical care for plaintiff's wife, but also could recover damages for the mental anguish he sustained when she died as a result of the doctor's negligence.⁷⁶ *Bailey* suggested that the underlying contract claim might not be crucial to plaintiff's cause of action for negligent infliction of emotional distress; in short, it suggested that the tort claim could stand alone. The court reasoned that "if the husband can recover damages from a telegraph company for mental anguish for delay in delivering a telegram informing him of his wife's illness, he should . . . recover for the mental anguish occasioned by witnessing her suffering and death against the alleged author of such suffering and death."⁷⁷

A number of decisions that emphasized the related or underlying claims present in the successful early negligent infliction of emotional distress cases, however, quickly curtailed *Bailey*'s suggestion that a negligent infliction of emotional distress claim might be valid even without an underlying claim based in contract or on a breach of public duty. After holding that the basis for liability in *Bailey* was a contractual duty owed to plaintiff by defendant,⁷⁸ the North Carolina Supreme Court began to scale back the availability of the negligent infliction of emotional distress claim by returning to its earlier emphasis on the presence of separate underlying tort or contract claims.⁷⁹

The physical injury requirement itself was first identified as a valid underlying cause of action in *Kimberly v. Howland*.⁸⁰ In *Kimberly*, plaintiff brought an action for negligently inflicted emotional distress to recover for the fright she sustained when defendants negligently conducted blasting operations near her home, causing a large rock to come crashing through the roof.⁸¹ The North Carolina Supreme Court observed: "All the courts agree that mere fright, unac-

698 (1932) (recovery limited to next-of-kin); *Floyd v. Atlantic Coast Line Ry. Co.*, 167 N.C. 55, 83 S.E. 12 (1914) (same); see Byrd, *supra* note 37, at 454-55 & nn.120-27.

74. Byrd, *supra* note 37, at 455.

75. 172 N.C. 661, 90 S.E. 809 (1916).

76. *Id.* at 661-62, 90 S.E. at 809. For further discussion of the *Bailey* facts and its significance in the context of bystander recovery, see *infra* notes 94-98 and accompanying text.

77. *Bailey*, 172 N.C. at 663, 90 S.E. at 810. For a discussion of the many cases allowing recovery for negligent infliction of emotional distress caused by a late or missing telegraph, see Byrd, *supra* note 37, at 452-54.

78. "The foundation of liability in *Bailey's Case* was the contractual relation existing between the plaintiff and the defendant; the action was not prosecuted by a stranger or a third party." *Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 125, 126 S.E. 307, 310 (1925), *overruled on other grounds in* *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980), and *overruled in* *Johnson*, 327 N.C. 283, 395 S.E.2d 85. The *Johnson* court characterized this interpretation of *Bailey* as "erroneous" and "simply . . . wrong." *Johnson*, 327 N.C. at 297, 395 S.E.2d at 93.

79. See *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960), *disapproved in* *Johnson*, 327 N.C. 283, 395 S.E.2d 85; *Hinnant*, 189 N.C. 120, 126 S.E. 307.

80. 143 N.C. 398, 55 S.E. 778 (1906), *disapproved in* *Johnson*, 327 N.C. 283, 395 S.E.2d 85.

81. *Id.* at 401-02, 55 S.E. at 779.

accompanied by physical injury, cannot be considered as an element of damage."⁸² When the fright became manifested physically, however, the plaintiff could recover for the physical injury; the court held that "the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."⁸³

The *Kimberly* decision precipitated much of the later confusion regarding a "requirement" of physical injury either occurring contemporaneously with the event causing the emotional distress or appearing as a later physical manifestation of the distress before a plaintiff could recover for its negligent infliction. The *Kimberly* court faced only a claim based on fright, not emotional distress, and allowed recovery for fright only upon a showing that the fright resulted in some physical injury.⁸⁴ In dictum, the court went on to discuss mental upsets generally, which may have sparked the application of a physical injury requirement to cases for severe mental distress as well as those for fright. *Kimberly* also recast the claim by characterizing the mental upset itself as a distinct type of physical injury, rather than as an emotional injury and an additional, separate physical injury.⁸⁵ The decision presumably would allow recovery for pure mental anguish, absent any actual physical injury caused directly by defendant's negligence, so long as that anguish was manifested in such a way as to prove its authenticity.⁸⁶

In contrast, a plaintiff could recover for distress arising from negligent infliction of fright only if the plaintiff could show a literal physical injury either occurring contemporaneously with, or as a direct result of, the negligent act. The differences between mere fright and mental distress gradually became blurred,⁸⁷ however, and the requirement of an accompanying physical injury in claims that arose out of negligently inspired fright was attributed to mental

82. *Id.* at 403, 55 S.E. at 780. The court went on to note that "where the fright occasions physical injury, not contemporaneous with it, but directly traceable to it, the courts are hopelessly divided." *Id.*

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

84. The *Kimberly* court confirmed that although fright and nervousness could not themselves be considered an injury within the court's usage of the term, any detrimental health effects brought about "naturally and directly" by the fright or nervousness would be compensable. *Id.* (quoting unreported opinion of court below).

85. *Id.* at 403-04, 55 S.E. at 780. For example, the *Kimberly* court held that a physical injury may consist of a "wrecked nervous system." *Id.* Professor Byrd notes that

[p]hysical injury, as incorporated in the rule, is not used in the sense of an injury to a specific part of the body, such as a cut, broken bones, or damage to an internal organ. . . .

Impairment of health, loss of bodily power, or sickness, without proof of any specific injury, has been held to constitute a physical injury.

Byrd, *supra* note 37, at 458.

86. The physical injury requirement originally served as a "vehicle used by the court to distinguish harm of [great] magnitude from less serious interferences which, if a multitude of suits are to be avoided, everyone must be left to absorb to some degree." Byrd, *supra* note 37, at 458.

87. See, e.g., *Williamson v. Bennett*, 251 N.C. 498, 507, 112 S.E.2d 48, 54 (1960) (court characterized case as belonging to "category [of] cases of fright, anxiety, and other emotional distress, unaccompanied by physical injury"), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85.

Even when claims for mental anguish are distinguished from those for fright, the mental anguish claims often receive generalized treatment. "There is a tendency in the decisions to treat all mental anguish claims alike, and as a result distinctions are seldom made between intentional con-

anguish claims as well.⁸⁸ Eventually, the courts came to apply a "physical injury requirement"⁸⁹ to almost all cases involving some form of unquantifiable emotional distress.⁹⁰

By this time, a crucial distinction had been lost. Though the courts later returned to *Bailey's* early suggestion that negligently inflicted emotional distress warranted compensation even when unaccompanied by an underlying claim, they retained the physical injury requirement. Claims prompted by the negligent *frightening* of a plaintiff could not succeed without a contemporaneous or resultant physical injury, the claim itself being founded upon the physical injury. Although claims for negligently inflicted emotional distress once had been considered qualitatively different from claims prompted by "mere fright," the separation between the two faded away. In *Williamson v. Bennett*,⁹¹ the court held that "it is almost the universal opinion that recovery may be had for mental or emotional disturbance in ordinary negligence cases where, coincident in time and place with the occurrence producing the mental stress, some actual physical injury also resulted directly from the defendant's negligence."⁹²

Other cases addressed the collateral issue of bystander recovery, as differentiated from a mental or emotional injury inflicted by the tortfeasor directly upon the victim.⁹³ In *Bailey v. Long*⁹⁴ the court allowed plaintiff-husband to recover for the "great pain and mental anguish . . . to his feelings and sympathies"⁹⁵ induced by "witnessing the agony and suffering of his said wife,"⁹⁶ when his wife

duct and negligence, or between the determination of the extent of liability and the decision if a cause of action exists at all." Byrd, *supra* note 37, at 442.

88. See, e.g., *Stanback v. Stanback*, 297 N.C. 181, 198-99, 254 S.E.2d 611, 623 (1979) ("clear that plaintiff must show some physical injury resulting from the emotional disturbance caused by defendant's alleged conduct"), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85; *King v. Higgins*, 272 N.C. 267, 269, 158 S.E.2d 67, 69 (1967) (citing *Williamson*, 251 N.C. 498, 112 S.E.2d 48, and disallowing recovery absent evidence of "any disfiguring injury"); *Williamson*, 251 N.C. at 503, 112 S.E.2d at 52 (recovery for mental or emotional distress allowed when accompanied by simultaneous physical impact or injury), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85; *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 232, 336 S.E.2d 716, 718 (1985) (explaining that "non-permanent discomfort (physical pain and suffering, mental anguish and emotional distress) with no physical injury [is not compensable]"), *aff'd*, 316 N.C. 550, 342 S.E.2d 523 (1986) (per curiam), *overruled in Johnson*, 327 N.C. 283, 395 S.E.2d 85; *Wesley v. Greyhound Lines*, 47 N.C. App. 680, 690, 268 S.E.2d 855, 862 (1980) (requiring physical impact or injury in conjunction with mental trauma or emotional disturbance); *McDowell v. Davis*, 33 N.C. App. 529, 537, 235 S.E.2d 896, 901 (applying *Williamson* standard), *disc. rev. denied*, 293 N.C. 360, 237 S.E.2d 848 (1977), *overruled in Johnson*, 327 N.C. 283, 395 S.E.2d 85.

89. See *Williamson*, 251 N.C. 498, 112 S.E.2d 48, *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85; *Wyatt v. Gilmore*, 57 N.C. App. 57, 290 S.E.2d 790 (1982).

90. See, e.g., cases cited *supra* note 3.

91. 251 N.C. 498, 112 S.E.2d 48 (1960), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85.

92. *Id.* at 503, 112 S.E.2d at 52.

93. For a discussion of cases involving relational interests or "bystander recoveries," see Byrd, *supra* note 37, at 448-452. See also cases cited *supra* note 59 (listing the major restrictions and standards applicable to bystander recovery in other jurisdictions).

94. 172 N.C. 661, 90 S.E. 809 (1916). The *Bailey* decision may be read as bridging the gap between permitting recovery for limited factual situations in which plaintiff's claim arose from a contractual relationship with defendant, and more liberal reasoning that focuses more specifically on the nature of the injury itself, instead of its source. For a discussion of the contractual relationship in *Bailey*, see *supra* notes 75-78 and accompanying text.

95. *Bailey*, 172 N.C. at 662, 90 S.E. at 809.

96. *Id.* at 663, 90 S.E. at 810.

died from illnesses traceable to defendant-doctor's negligent failure to provide a habitable room for her.⁹⁷ The court held that plaintiff could recover not only the sums he expended on her medical services but also for his own mental distress.⁹⁸

The *Bailey* decision was followed by *Hipp v. E.I. Dupont de Nemours & Co.*,⁹⁹ in which the court reviewed *Bailey* and confirmed that a spouse could recover for her own personal mental injuries caused by a third party's negligent physical injury to the other spouse.¹⁰⁰ The court limited availability of the claim to spouses and placed it in the context of damages relating to loss of consortium; "children or other dependent relatives" could not have access to the claim because "[t]he wife's cause of action [arose] from the nature of the relationship created by the contract of marriage."¹⁰¹

The court sharply abridged this apparent ability of a bystander to recover for his own mental injuries, albeit occasioned by a more direct injury to another person, in *Hinnant v. Tide Water Power Co.*¹⁰² In *Hinnant* the North Carolina Supreme Court addressed both the general standards for recovery for negligently inflicted emotional distress and the availability of the claim to a third-party bystander. The court held that plaintiff-wife could not recover for the mental distress and "serious nervous shock" she experienced after seeing her husband in a "broken [and] mashed" condition after a train collision caused by the defendant's negligence.¹⁰³ The husband died of his injuries, causing plaintiff's nervous system to be "permanently impair[ed] and weaken[ed]."¹⁰⁴ The *Hinnant* court conclusively denied the availability of bystander damages, holding that

[i]n the law mental anguish is restricted, as a rule, to such mental pain and suffering as arises from an injury or wrong to the person himself, as distinguished from that form of mental suffering which is the accompaniment of sympathy or sorrow for another's suffering, or which

97. *Id.* at 661-62, 90 S.E. at 809.

98. *Id.* at 663, 90 S.E.2d at 810. The plaintiff in *Bailey* was a "bystander" in the sense that the physical injury negligently and directly inflicted upon his wife caused his mental distress.

99. 182 N.C. 9, 108 S.E. 318 (1921).

100. *Id.* at 19, 108 S.E. at 322-23. The plaintiff-wife's husband became permanently incapacitated while working for defendant. Plaintiff alleged that due to her increasing indebtedness and the despair she felt while watching her husband suffer, "her own nerves and health [were] seriously and permanently shocked, weakened, and impaired; and that by reason of the physical and mental condition of her husband she still continue[d] to suffer in mind and body." *Id.* at 11, 108 S.E. at 319.

101. *Id.* at 19, 108 S.E. at 323.

102. 189 N.C. 120, 126 S.E. 307 (1925), *overruled on other grounds* in *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980), and *overruled* in *Johnson*, 327 N.C. 283, 395 S.E.2d 85.

103. *Id.* at 120, 126 S.E. at 308. The majority of the court's later decisions refused to allow such recovery. See *Helmstetter v. Duke Power Co.*, 224 N.C. 821, 824, 32 S.E.2d 611, 613 (1945) (Married Women's Act of 1913 eliminated right of either spouse to recover for injury to the other; without a cause of action for loss of consortium, "there is none for mental anguish"), *overruled* in *Nicholson*, 300 N.C. 295, 266 S.E.2d 818; *Michigan Sanitarium & Benevolent Ass'n v. Neal*, 194 N.C. 401, 403, 139 S.E. 841, 841-42 (1927) (mother could not recover for her mental anguish occasioned by injuries to her son because damages "too remote").

104. *Hinnant*, 189 N.C. at 120, 126 S.E. at 308. The claim can be read as alleging a physical injury, but the court apparently did not find the allegation sufficient.

arises from the contemplation of wrongs committed on the person of another.¹⁰⁵

As a general rule, the court said, "mental suffering, unrelated to any other cause of action, is not alone a sufficient basis for the recovery of substantial damages."¹⁰⁶ More recently, in *Williamson v. Bennett*,¹⁰⁷ the North Carolina Supreme Court refused to allow a plaintiff to recover for mental distress brought on by her fright and fear that she had driven over a child, noting that "this Court has held that there can be no recovery for fright and anxiety, and resultant neurosis, which arises for the safety and well-being of another."¹⁰⁸

In *Johnson* the North Carolina Supreme Court took stock of all the confusion and conflict in this area of law and chose to define a plaintiff's ability to recover by principles and standards of foreseeability and proximate cause without additional limitation.¹⁰⁹ The holding is arguably in accord with prior North Carolina case law, insofar as the earliest cases are concerned; however, by discounting several decades of subsequent case law as erroneous or unfounded, the court adopted a markedly revisionist approach to precedent.¹¹⁰ The court

105. *Id.* at 129, 126 S.E. at 312.

106. *Id.* The *Hinnant* court went on to list a number of exceptions to this rule under which plaintiffs could bring claims for mental or emotional damages without an underlying or supporting cause of action; among these exceptions were claims for a breach of a promise to marry, and the negligent delivery of a telegram. *Id.*

107. 251 N.C. 498, 112 S.E.2d 48 (1960), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85.

108. *Id.* at 508, 112 S.E.2d at 55. The *Williamson* court denied recovery to the plaintiff because the mental injury was not proximately caused by any negligent act of the defendant. While the defendant did negligently collide with plaintiff's car, the injury itself was caused by plaintiff's unfounded fear that she had injured a child; "[i]n short, she was not frightened by what actually happened but by what might have happened," and the defendant was under no duty to guard against such an unlikely reaction. *Id.*

109. *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. The application of these standards, without more, has been criticized extensively by numerous courts and scholars. *See, e.g.,* *Thing v. La Chusa*, 48 Cal. 3d 644, 662, 771 P.2d 814, 826, 257 Cal. Rptr. 865, 877 (1989) (foreseeability "not a realistic indicator of potential liability and does not afford a rational limitation on recovery"); *see also* Diamond, *supra* note 60, at 493 ("It is apparent that the use of a foreseeability standard to assess non-physical damages often is inconsistent with the kinds of injuries that courts, and society, are prepared to compensate. . . . [The courts are] not willing to 'open the floodgates' by compelling compensation for all foreseeable mental distress.").

110. Interview with Robert G. Byrd, Professor of Law, University of N. C. School of Law, in Chapel Hill, N.C. (Oct. 5, 1990). In its attempt to mold its prior decisions into a more cogent and logical progression, the court adopted what could be termed a "historical revisionist" view, according to Professor Byrd.

For example, the court explained the physical injury requirement enunciated in *Stanback v. Stanback* as follows:

While we said in *Stanback* that a showing of "physical injury" was required, we also relied upon our earlier statement in *Kimberly*, indicating that emotional distress is *one type* of physical injury, and held that the trial court's dismissal of the plaintiff's claim must be reversed. Thus, the statement in *Stanback* is, to some extent at least, at odds with its holding. Further, the awkward two-step analysis of *Stanback* and *Kimberly* — by which we implied that physical injury was required, but then defined emotional distress as a *type* of physical injury for which a plaintiff could recover — was entirely unnecessary in light of the analyses contained in our prior cases which reached the same result in a more straightforward and less cumbersome fashion. . . . [O]ur earlier cases did *not* require any physical impact or injury in addition to the mental or emotional injury itself; instead, our earlier cases simply treated emotional distress as any other type of injury — compensable if the plaintiff shows that the injury was foreseeably and proximately caused by the defendant's negligence.

aligned *Johnson* with North Carolina's earliest cases on the issue,¹¹¹ and accurately "reinstated" the original principles applied by the first courts allowing recovery.¹¹²

The court contended, in essence, that *Johnson* is not new law. "While admittedly some of our opinions have suggested contrary results," the court observed, "the overwhelming weight of this Court's opinions for the past one hundred years leads us to the conclusion that neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort of negligent infliction of emotional distress."¹¹³ The implications of this view are far reaching. A practicing North Carolina attorney observed:

Since *Ruark* held that this holding has been the law in North Carolina since the *Hancock* decision in 1905, it must be understood that the holding and reasoning was that this had been our law for quite some time, despite court decisions to the contrary. Accordingly, every lawyer handling tort claims must now look into the past to determine how many emotional distress claims have had life breathed into them through the decision in *Ruark*. . . . My opinion is that there are emotional distress claims which have been revived by *Ruark* which are now buried in our "retired" files.

This raises issues of legal malpractice. . . . If our clients have had new claims occur because of *Ruark*, or have had an old claim that we did not prosecute revived, it is our ethical obligation to review our old files to the extent necessary and to determine which of our clients have emotional distress claims which now ethically must be prosecuted.¹¹⁴

Insurance companies are likely to feel keenly the problems occasioned by dormant claims for negligent infliction of emotional distress if the companies believe they had addressed and settled the claims of minors or, indeed, any party for whom the applicable statute of limitations has not yet run.¹¹⁵

Johnson, 327 N.C. at 302, 395 S.E.2d at 96 (discussing *Stanback v. Stanback*, 297 N.C. 181, 198-99, 254 S.E.2d 611, 623 (1979), *disapproved in Johnson*, 327 N.C. 283, 395 S.E.2d 85 (citations and footnote omitted)).

111. See cases cited *supra* note 65.

112. See cases cited *supra* note 70.

113. *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. The court suggested:

Such misstatements have led some to believe that an action for negligent infliction of emotional distress may not be maintained absent some physical impact, physical injury or subsequent physical manifestation of the emotional distress, and also that recovery may not be had for emotional distress caused by a plaintiff's concern for another person.

Id. at 290-91, 395 S.E.2d at 89. This observation probably is understated; see *McCain, Johnson v. Ruark Obstetrics: Land Mine For The Unwary*, 9 LML TODAY, Nov. 1990, at 2, 2.

114. *McCain*, *supra* note 113, at 2.

115. *Id.* The statute of limitations for actions based on personal injury is three years, commencing on the date on which the claim accrues. N.C. GEN. STAT. § 1-15 (1983). When a minor is involved, the statute does not begin to run until the minor reaches the age of 18. *Id.* § 1-17(a)(1) (Supp. 1990).

McCain warned that *Johnson* "also raises a spectre as to whether these insurance companies will look to their defense counsel for failure to obtain releases of all claims," when the insurance companies believed they had "bought their peace in previous settlements." *McCain*, *supra* note 113, at 2.

Read literally, *Johnson* appears to invite a flood of litigation,¹¹⁶ if the physical injury requirement in fact operated to exclude many cases in the first place.¹¹⁷ *Johnson* held, however, that plaintiffs must allege severe mental distress of the sort generally recognized by professionals trained in the diagnosis and treatment of mental disorders.¹¹⁸ Given that such diagnoses in all probability would depend on the presence of the physical ailments that commonly accompany severe mental distress,¹¹⁹ the rejection of a physical injury requirement may have only limited effect.¹²⁰

Johnson's most significant impact probably will be in the area of bystander recovery.¹²¹ The *Johnson* court held both that "the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned"¹²² is relevant to the question of foreseeability and that the plaintiff may "recover for his or her severe emotional distress arising due to concern for another person, if the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and foreseeable result of the defendant's negligence."¹²³ Ques-

116. The *Johnson* decision sparked a great deal of public interest, to say the least. *Johnson* was interpreted as "a ruling likely to increase the liability woes of doctors and enable plaintiffs to win damages for mental anguish in a variety of cases." Raleigh News & Observer, Aug. 30, 1990, at B1, col. 2. An attorney for the North Carolina Association of Defense Attorneys suggested: "What they may have done is open a Pandora's box for all sorts of tort actions, not just medical malpractice actions." *Id.* at B2, col. 3.

The criticism of *Johnson* took on partisan tones as November elections approached; in the running for Supreme Court judgeships were incumbent Justices Exum, Webb, and Whichard. Republican Governor James G. Martin "criticized Democratic judges for being too eager to rewrite state law and to make it too easy for plaintiffs to win large civil verdicts." *Id.*, Oct. 17, 1990, at B1, col. 2. News reports observed that "Mr. Martin also has singled out specific decisions [*Johnson* and a death penalty case] by the Democratic incumbents and has complained that the court has a liberal, activist approach to the law." *Id.*, Oct. 18, 1990, at B3, col. 1.

117. Plaintiffs have satisfied the physical injury requirement by alleging, for example, general "[i]mpairment of health, loss of bodily power, or sickness, without proof of any specific injury." Byrd, *supra* note 37, at 458 (citing *Sparks v. Tennessee Mineral Prods. Corp.*, 212 N.C. 211, 212, 193 S.E. 31, 32 (1937) (plaintiff suffered from loss of weight, nervousness, and other ailments); *Kimberly v. Howland*, 143 N.C. 398, 403, 55 S.E. 778, 780 (1906) (plaintiff affected with shocked nervous system), *dissapproved in Johnson*, 327 N.C. at 295, 302, 395 S.E.2d at 92, 96); *see also* *Arthur v. Henry*, 157 N.C. 438, 439, 73 S.E. 211, 212 (1911) (plaintiff "suffered in body and mind" and was "made sick"); *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 538, 42 S.E. 983, 984 (1902) (plaintiff became "almost helpless" and "could not go about her daily duties"). *But cf.* *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 232, 336 S.E.2d 716, 718 (1985) (neither nonpermanent discomfort nor physical pain satisfies physical injury requirement), *aff'd*, 316 N.C. 550, 342 S.E.2d 523 (1986) (per curiam), *overruled in Johnson*, 327 N.C. at 301, 395 S.E.2d at 95.

Professor Byrd observed that "[u]nder these holdings it is probable that a 'physical' injury can be shown in any case in which significant mental or emotional harm has occurred." Byrd, *supra* note 37, at 458.

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

119. *See* DIAGNOSTIC AND STATISTICAL MANUAL, *supra* note 61, at 235-39. Post traumatic stress disorders may be manifested by such things as nightmares, hyperalertness, difficulty in concentrating, sleep disorders, and diminished responsiveness to external stimuli. *Id.* at 248.

120. Interestingly, the language of *Johnson* suggests that although expert psychiatric testimony is not required in order to substantiate a claim, its use might well become the accepted standard. Thus, plaintiffs could be obligated to incur the additional expenses of psychiatric examination and testimony, which might also serve to curb any potential increase in fraudulent claims.

121. The dissent contended that *Johnson* represented the "addition of [a] new layer of liability to bystanders." *Johnson*, 327 N.C. at 312, 395 S.E.2d at 102 (Meyer, J., dissenting).

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

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

tions of foreseeability traditionally are reserved to the trier of fact; thus, unless a claim is so unsound on its face as to warrant dismissal by the trial judge, the case is potentially assured of reaching a jury.¹²⁴ Prior to *Johnson*, the "physical injury requirement" served as a clearly defined, if merely arbitrary, screening device.¹²⁵

Given the widespread perception that *Johnson* opened new doors to more extensive liability,¹²⁶ the decision may prompt an increased effort to recover for negligent infliction of emotional distress and, naturally, a corresponding increase in litigation.¹²⁷ Because claims must be examined on their facts, plaintiffs must overcome few preliminary obstacles.¹²⁸ Plaintiffs need allege only that a defendant acted negligently, that the foreseeable result was severe emotional distress or mental anguish on the part of the plaintiff, and that the plaintiff did suffer severe emotional distress as a result.¹²⁹

Characterizing *Johnson* as exemplary of the "[new] policy of this jurisdiction to extend an infinite responsibility to everyone who has suffered,"¹³⁰ Justice Meyer noted in dissent that an increase in litigation and a heightened awareness of liability on the part of service providers, and insurance companies in particular, could impose severe societal costs.¹³¹ The danger of escalating insurance premiums and decreasing availability of obstetric care are valid concerns. In addition, the risk of an excessive recovery by plaintiffs is real.¹³² Damages for emotional distress are regularly compensated in wrongful death actions, even if not specifically requested as an element of damages and despite instructions to

124. The court held that "[q]uestions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by the jury." *Id.* at 305, 395 S.E.2d at 98. As a result of *Johnson*, plaintiffs who bring negligent infliction of emotional distress claims may have enhanced bargaining power during settlement negotiations.

125. As one commentator noted:

[The] so-called "physical manifestation" requirement served two major purposes. First, it served to limit the potential liability of defendants since a cause of action was only available in those cases where physical injury could be established. Second, it operated as an element of proof that the plaintiff suffered actual mental distress, and thus that the suit was not trivial or fraudulent.

Comment, *supra* note 60, at 795.

126. The North Carolina legal community's reaction to *Johnson* was dominated by concerns that the case ushered in unlimited liability on the part of defendants. The decision became a popular topic for various political campaigns underway in October and November of 1990; critics frequently pointed to *Johnson* as an example of the need for judicial reform in North Carolina and as a reason to elect new justices to the North Carolina Supreme Court. See news articles cited *supra* note 116.

127. For a discussion of the potential revival of negligent infliction of emotional distress claims that were left unlitigated due to the absence of physical injury, see *supra* notes 113-15 and accompanying text.

128. As discussed earlier, however, the severity of the mental distress may be subject to expert psychiatric evaluation. See *supra* notes 118-19 and accompanying text.

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

130. *Id.* at 312, 395 S.E.2d at 102 (Meyer, J., dissenting).

131. *Id.* (Meyer, J., dissenting). See *supra* notes 55-57 and accompanying text.

132. In his dissent, Justice Meyer suggested that when a plaintiff brings an action for both emotional distress and wrongful death, the claims should be joined to curtail the risk of "inconsistent verdicts and double recoveries for the same loss." *Johnson*, 327 N.C. at 314-15, 395 S.E.2d at 103 (Meyer, J., dissenting).

the jury not to include them.¹³³ Assuming that *Johnson* does represent a significant expansion of liability, the financial burden on defendants may be increased if plaintiffs are permitted to bring negligent infliction of emotional distress claims independently of other related claims they may have.¹³⁴

Fortunately, *Johnson's* rejection of the physical injury requirement will promote more honest pleadings. The requirement originally evolved as the courts sought a means of differentiating between serious and trivial claims.¹³⁵ When a plaintiff genuinely does suffer serious physical effects as a result of negligent infliction of emotional distress, the plaintiff will continue to allege such factors to demonstrate the extent of his emotional harm. Such "physical manifestations" as sleeplessness, irritability, and inability to concentrate, however, have been found to satisfy the physical injury requirement when the plaintiff's claim was otherwise valid.¹³⁶ These allegations were often only tangentially related to the basis of the claim and were included in the pleadings for the sole purpose of fulfilling the physical injury requirement. *Johnson*, then, may curb the artificiality formerly involved in alleging negligent infliction of emotional distress. Repudiation of the physical injury requirement should have little, if any, effect on the risk of fraudulent claims; at the very least, its absence should not increase their likelihood.¹³⁷

The long-term import of *Johnson* is less clear. By conclusively rejecting a physical injury requirement and dismissing it as "arbitrary," the majority left the lower courts with no specific threshold requirements or rules of law by which to screen claims for validity. The majority reviewed the tests followed by other jurisdictions¹³⁸ and noted the absence of any "single clear doctrine to which it can be said that a majority of states adhere."¹³⁹ A number of states, however, reject the approach of the "new" North Carolina standard in favor of more definitive guidelines.¹⁴⁰

Illustrative of states that have rejected a standard similar to that established in *Johnson* is a recent California case, *Thing v. La Chusa*.¹⁴¹ In *La Chusa* the

133. *Id.* (Meyer, J., dissenting). Several supreme court opinions have addressed the possibility of "double recovery" in light of the difficulties faced by juries as they try to apportion damages between the distress caused by negligence and the distress caused by the loss of, or injury to, a relation. See cases cited *supra* note 44.

134. Because any award for negligent infliction of emotional distress must first be predicated on a finding of negligence, joinder of these related claims would be eminently sensible. See N.C.R. Civ. PRO. 18(a); see also C. WILSON, NORTH CAROLINA CIVIL PROCEDURE § 18-2, at 356 (1989) ("[Rule 18(a) does not] permit claim-splitting in violation of the common law principle that all damages incurred as a result of a single injury must be recovered in one lawsuit.").

135. See Byrd, *supra* note 37, at 458.

136. See, e.g., cases cited *supra* note 117.

137. One commentator addressed the risk of fraudulent claims as follows: "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 damage that the defendant's conduct caused. Further, the judicial system would not be overburdened by administering fair and proper claims." Comment, *supra* note 60, at 819.

138. *Johnson*, 327 N.C. at 288-90, 395 S.E.2d at 88-89.

139. *Id.* at 290, 395 S.E.2d at 89.

140. For a listing of common restrictions applied in other jurisdictions, see, e.g., cases cited *supra* note 59.

141. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

California Supreme Court declared the *Dillon v. Legg*¹⁴² test unworkable due to its tendency to create "ever widening circles of liability."¹⁴³ The *Dillon* decision spawned the "foreseeable plaintiff" test, which facilitated recovery on the basis of "the neutral principles of foreseeability, proximate cause and consequential injury that generally govern tort law."¹⁴⁴

The *Dillon* test required the California courts to take certain factors "into account" to determine foreseeability: specifically, (1) whether the plaintiff was in close proximity to the scene of the accident, (2) whether the plaintiff's emotional distress was the result of the "sensory and contemporaneous observance of the accident," and (3) whether the plaintiff was "closely related" to the victim.¹⁴⁵ The *Dillon* test did not call for a physical injury to the plaintiff, but was otherwise more restrictive regarding the class of plaintiffs eligible to recover than is *Johnson*.

In place of *Dillon*, the *La Chusa* court set forth a list of requirements that could be waived or excused only under "exceptional circumstances."¹⁴⁶ The court held that

a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury to a third person if, but only if, said plaintiff: (1) is closely related to the injured victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.¹⁴⁷

The court explained that reliance on the concepts of foreseeability and proximate causation was unsatisfactory because "reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury."¹⁴⁸ Significantly, the *Dillon* test condemned as unworkable by the *La Chusa* court held that the plaintiff's right to recover was limited only by the "general rules of tort law . . . long applied to all other types of injury."¹⁴⁹ The abandoned *Dillon* standards are generally consistent with those recently adopted in *Johnson*.¹⁵⁰

The *Johnson* court attempted to rest a controversial holding on undeniable

142. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc).

143. *La Chusa*, 48 Cal. 3d at 653, 771 P.2d at 819, 257 Cal. Rptr. at 870.

144. *Dillon*, 68 Cal. 2d at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78.

145. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

146. *La Chusa*, 48 Cal. 3d at 668 n.10, 771 P.2d at 829 n.10, 257 Cal. Rptr. at 880 n.10.

147. *Id.* at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81 (footnotes omitted).

148. *Id.* at 664, 771 P.2d at 826, 257 Cal. Rptr. at 877.

149. *Dillon*, 68 Cal. 2d at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

150. *Johnson*, 327 N.C. at 304-05, 395 S.E.2d at 97-98. The *Johnson* standard is as follows:

[T]o state a claim for negligent infliction of emotional distress, 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 (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress.

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

principles of fairness. Under traditional and certainly well-established tort principles of recovery, any party that shows his injury to be the foreseeable or proximate result of the unreasonable negligence of another is entitled to be compensated for that injury.¹⁵¹ Under this doctrine, the mental anguish caused by the stillbirth of a child and attributable to the negligence of professionals entrusted to provide competent medical care qualifies as a compensable injury.¹⁵² Against this precept, however, the courts should have weighed the interests of society in being free from unreasonable liability and in being permitted to undertake activities that may involve risk.¹⁵³ In that obligation, the *Johnson* decision falls short. The repercussions of the case range far beyond the limited holding warranted by the narrow facts before the *Johnson* court; indeed, the same standards apply to a mother who loses her unborn child to professional negligence as to a bystander who suffers emotional distress as a result of an injury to a third party caused by only ordinary negligence.

The very nature of the tort of negligent infliction of emotional distress mandates a limitation on the ability to recover.¹⁵⁴ Standards of "foreseeability" and "proximate cause" are rarely applied in their purest sense, but traditionally are tempered by policy considerations and the common-sense notion that after the reaching of an admittedly arbitrary line, forcing defendants to assume the risk of liability simply becomes unfair. When the chain of causation is real but nonetheless grossly attenuated, no principles of deterrence may be served, and the ability to guard against causing injury to another is so negligible as to be reduced to a question of luck. The experience of other jurisdictions warns that standards of foreseeability and proximate cause in negligent infliction of emotional distress cases foster uncertainty:

It is apparent that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury. In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is to be spread, the right to recover for negligently caused emotional distress must be limited.¹⁵⁵

The need for fact-specific restrictions is made all the more compelling by the court's assurance that "ordinary negligence will suffice."¹⁵⁶ Further, the

151. W. PROSSER, LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

152. The Johnsons' claim was dismissed prior to trial, and at the time of this writing no finding of negligence or other wrongdoing has yet been lodged against defendants as a result of the trial.

153. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). In *Carroll Towing*, Judge Learned Hand introduced his famous equation distinguishing those risks that are worth taking from those that are not. For the text of the equation and Justice Meyer's application of the principle to *Johnson*, see *supra* notes 55-57.

154. This is particularly true with respect to bystander recovery cases that turn on the relational interest between the bystander plaintiff and the directly injured victim; such situations "create the possibility of liability to a large number of people Under these circumstances the fear of an indefinite liability is a legitimate one, and the need to impose reasonable limits upon the extent of a defendant's responsibility clearly exists." Byrd, *supra* note 37, at 448.

155. *Thing v. La Chusa*, 48 Cal. 3d 644, 664, 771 P.2d 814, 826-27, 257 Cal. Rptr. 865, 877-78 (1989).

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

court stipulated that the validity of negligent infliction of emotional distress claims must be determined case by case;¹⁵⁷ however, an ad hoc approach surely will foster further uncertainty in this area of law, resulting in the disparate treatment of cases.¹⁵⁸ The *Johnson* court also explained that "our trial courts have adequate means available to them for disposing of improper claims for negligent infliction of emotional distress and for adjusting excessive or inadequate verdicts."¹⁵⁹ The court quoted *Chappell v. Ellis*:¹⁶⁰

But it is urged that the principle [of recovery for mental anguish,] . . . if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering. It may be, but we feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles.¹⁶¹

The experience of other jurisdictions suggests that the court is overly optimistic. *Dillon v. Legg*¹⁶² enumerated specific factors to be considered by the trial judges just as the *Johnson* court did, but in practice the standard proved to be too expansive. The recent *La Chusa*¹⁶³ decision recognized the failings of *Dillon*, and spoke to the very hazards that the North Carolina Supreme Court invites in *Johnson*:

The *Dillon* court anticipated and accepted uncertainty in the short term in application of its holding, but was confident that the boundaries of this [negligent infliction of emotional distress] action could be drawn in future cases. In sum . . . the *Dillon* court was satisfied that trial and appellate courts would be able to determine the existence of a duty because the court would know it when it saw it. Underscoring the questionable validity of that assumption, however, was the obvious and unaddressed problem that the injured party, the negligent tortfeasor, their insurers, and their attorneys had no means short of

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

158. This approach is consistent with the North Carolina Supreme Court's traditional treatment of negligent infliction of emotional distress claims. Professor Byrd writes that

a tendency exists to view cases involving mental anguish claims on an ad hoc basis, an approach that the court itself suggested in the *Williamson* case. Apart from the general unsatisfactory nature of this approach in deciding important legal issues, it involves a real danger that the sensible and sound development in the law that has occurred will unintentionally be undermined in later decisions, and the uncertainties that arise out of the *Stanback* case illustrate this danger.

Byrd, *supra* note 37, at 468. The "danger" predicted by Professor Byrd was realized in *Johnson*, which disapproved both *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), *disapproved on other grounds* in *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981), and *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960). *Johnson*, 327 N.C. at 299-304, 396 S.E.2d at 94-97.

159. *Johnson*, 327 N.C. at 306, 395 S.E.2d at 98.

160. 123 N.C. 259, 31 S.E. 709 (1898).

161. *Johnson*, 327 N.C. at 306, 395 S.E.2d at 98 (quoting *Chappell*, 123 N.C. at 263, 31 S.E. at 711). *Contra* *Thing v. La Chusa*, 48 Cal. 3d 644, 673, 771 P.2d 814, 833, 257 Cal. Rptr. 865, 884 (1989) (Kaufman, J., concurring). The *La Chusa* court observed that "*Dillon's* confident prediction that future courts would be able to fix just and sensible boundaries on bystander liability has been found to be wholly illusory—both in theory and in practice." *Id.* (Kaufman, J., concurring).

162. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc). For a listing of the *Dillon* factors, see *supra* text accompanying note 145.

163. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

suit by which to determine if a duty such as to impose liability for damages would be found in cases other than those that were "on all fours" with *Dillon*.¹⁶⁴

The *Johnson* decision suggests that bringing every case to trial is acceptable; because the case offers no rules or standards by which a claim might be challenged, the effect of *Johnson* may be to discourage the worthwhile goal of out-of-court settlement.¹⁶⁵

Moreover, the *Johnson* court erroneously elected to recognize the same standards for recovery for both directly injured plaintiffs and bystander plaintiffs.¹⁶⁶ The court should have examined the two issues separately and imposed reasonable judicial limits on claims for negligent infliction of emotional distress. The court declined to develop viable alternatives to the rejected physical injury requirement, although other options would permit recovery without opening the door to indeterminate liability. For example, the court could have held that the standards applicable to recovery for punitive damages apply by analogy to recovery for directly injured plaintiffs. Further, the court could have used a modified version of the *La Chusa* test for bystander plaintiffs.

Although imposing meaningful limitations on the right of directly injured victims of negligently inflicted emotional distress to recover for merely part of their injuries rather than to be fully compensated is nearly impossible, an alternative does exist. Instead of focusing the standards of recovery on the nature of the plaintiff's injury, the nature of the defendant's harmful and injurious conduct should be determinative.¹⁶⁷ A standard allowing extensive liability for "ordinary negligence"¹⁶⁸ is too easily met; instead, the court should require plaintiffs to forecast evidence that, if believed, would prove defendant's conduct to be gross, wanton, or willful negligence.¹⁶⁹ Trial courts are already familiar with this standard. Indeed, the standards for recovery for punitive damages are set forth in the North Carolina pattern jury instructions:

[Punitive damages] may only be awarded when the jury finds that the

164. *Id.* at 655, 771 P.2d at 821, 257 Cal. Rptr. at 872.

165. An alternative argument could be made that the absence of a physical injury requirement will in fact encourage settlement by making trial more likely, and summary judgment for defendants less likely. *Contra La Chusa*, 48 Cal. 3d at 655, 771 P.2d at 821, 257 Cal. Rptr. at 872 (discussing the "problem that the injured party, the negligent tortfeasor, their insurers, and their attorneys had no means short of suit by which to determine if a duty such as to impose liability for damages would be found" in cases falling under *Dillon*).

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

167. Interview with Samuel O. Southern, Esq., Poyner & Spruill, in Raleigh, N. C. (Jan. 28, 1991). Mr. Southern, expressing the concerns of many practicing attorneys, advocated adoption of a more reasonable limitation to the scope of this tort. Mr. Southern's suggestion: "Plaintiff states a claim for negligent infliction of emotional distress only where the facts alleged in the complaint, if believed, would give rise to a claim for punitive damages." *Id.*

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

169. For example, suppose plaintiff brings a claim for negligent infliction of emotional distress on grounds that she suffered severe mental distress after being "almost struck" by defendant's automobile. "One result: if [plaintiff's] claim alleged that she suffered emotional injury when she was 'almost struck' by [defendant's] automobile which he was negligently operating, she would not get to the jury. But if the pleadings and evidence established that [defendant] was drunk and doing 80 mph in a school zone, she would carry her case to the jury." Letter from Samuel O. Southern, Esq. to Tracy L. Hamrick (Jan. 30, 1991).

conduct of the defendant is so outrageous as to justify punishing *him* or making an example of *him*. In a case of alleged negligence, punitive damages may be awarded upon a showing that the negligence was gross, willful, or wanton. Negligence is gross, willful or wanton when the wrongdoer acts with a conscious and intentional disregard of, and indifference to, the rights and safety of others.

Upon a showing of gross, willful or wanton negligence, whether to award punitive damages and, within reasonable limits, the amount to be awarded are matters within the sound discretion of the jury.¹⁷⁰

As a result, the trial courts could apply this standard easily and consistently.

Professor Prosser provides further comment on the nature of gross, wanton, or willful negligence. He would apply the terms to "conduct which is still, at essence, negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended."¹⁷¹ This standard strikes a workable balance between plaintiffs' interests in recovering for emotional injury and the simple inability of the average citizen to proceed through life without ever doing the sort of negligent acts that will, under *Johnson*, permit recovery by emotionally injured plaintiffs.

In the area of bystander recovery, the physical injury requirement was equally ineffective, although the need for a better, more consistent limitation on liability was apparent.¹⁷² The *Johnson* court, by refusing to recognize either the qualitatively different nature of bystander recovery or its very real potential to foster liability beyond all reasonable bounds, leaves to the state courts a complex question and no clues to the answer.

The standards recently adopted by the California Supreme Court in *La Chusa* are reasonable and fair, and offer a valuable blueprint for liability limitation as it pertains to bystander recovery. At the least, they offer a more sensible launching point, if the perimeters of the tort are to be redefined.¹⁷³ The *La Chusa* court recounted the difficulties brought about by *Dillon's* broad rule and concluded that plaintiffs may recover damages for emotional distress incurred during the observation of a negligently inflicted injury to a third person if the bystander plaintiff (1) is "closely related" to the directly injured victim; (2) is "present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim"; and (3) personally suffers

170. NORTH CAROLINA PATTERN INSTRUCTIONS — CIVIL 810.01 (Feb. 1986).

171. W. PROSSER, *supra* note 151, § 34, at 212-13.

172. See *supra* notes 154-58 and accompanying text.

173. One commentator observed that:

The failure of the common law courts to recognize and utilize their ability to change procedural rules and to adjust remedies may contribute significantly to the difficulties they encounter when called upon to expand or contract substantive rights. In such situations they tend to act as if their only choice is between full recovery or none at all, with the burden of proof remaining the same as in most other civil actions. The effect may well be to retard needed reform, to prevent the courts from experimenting with techniques designed to allay fears of the catastrophes changes might bring, and sometimes . . . to replace old problems with equally troubling new ones.

Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 HAW. L. REV. 35, 36 (1979).

serious emotional distress as a result of the event.¹⁷⁴

The *La Chusa* court would limit recovery to "[close] relatives residing in the same household, or parents, siblings, children, and grandparents of the victim," unless "exceptional circumstances" otherwise justify recovery.¹⁷⁵ The legal relationship between the parties, however, should be given a more generous interpretation than that allowed by the *La Chusa* court. Instead, non-family members should be permitted to overcome the presumption against their recovery if they can conclusively establish the presence of a relationship between themselves and the directly injured victim that is essentially equivalent to familial or marital ties.

The additional requirement that the bystander plaintiff apprehend the injury to the victim while present at the scene of the injury derives from the need to assure that a bystander plaintiff who recovers for negligent infliction of emotional distress does so as a result of his personal reaction to the distressing event, as differentiated from grief or suffering prompted solely by sympathy for the victim. The *La Chusa* court pointed out that "[t]he impact of personally observing the injury . . . [is likely to] distinguish[] the plaintiff's resultant emotional distress from the emotion felt when one learns of the injury or death of a loved one from another, or observes pain and suffering but not the traumatic cause of the injury."¹⁷⁶ In a sense, a bystander plaintiff is compensated for being forced by a defendant's negligence to share in the distressing experience itself. The requirement does not limit a bystander plaintiff's ability to pursue any other tort claims that may arise on the facts.¹⁷⁷

In sum, trial courts deserve more than ambiguous "factors,"¹⁷⁸ although they should be allotted enough discretion to validate claims brought by the bystander plaintiff who may not squarely meet the *La Chusa* requirements but whose claim is nonetheless compelling. Insofar as the physical injury requirement limited recovery by bystander plaintiffs, as it did by directly injured plaintiffs, the added "protection" of the physical injury requirement was so unfairly arbitrary as to outweigh any beneficial function the rule might have served.

The *Johnson* court discredits these concerns and imposes on the trial courts

174. *Thing v. La Chusa*, 48 Cal. 3d 644, 667-68, 771 P.2d 814, 829-30, 257 Cal. Rptr. 865, 880-81. The *La Chusa* court defined serious emotional distress as "a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." *Id.*

175. *Id.* at 667 n.10, 771 P.2d at 829 n.10, 257 Cal. Rptr. at 880 n.10. The *La Chusa* court limited bystander recovery to persons related by blood or marriage on the presumption that they are more likely to sustain severe emotional distress as a result of the injury to their loved one than would a disinterested witness. The court conceded that "[s]uch limitations are indisputably arbitrary since it is foreseeable that in some cases unrelated persons have a relationship to the victim or are so affected by the traumatic event that they suffer equivalent emotional distress" but argued that "drawing arbitrary lines is unavoidable if we are to limit liability and establish meaningful rules for application by litigants and lower courts." *Id.* at 666, 771 P.2d at 828, 257 Cal. Rptr. at 879.

176. *Id.* at 666 & n.9, 771 P.2d at 828 & n.9, 257 Cal. Rptr. at 879 & n.9.

177. The facts may support a wrongful death claim, for example. For the argument that negligent infliction of emotional distress claims should be joined to related tort claims, see *supra* note 134 and accompanying text.

178. *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98. The "factors" named by the court are readily understandable, but their relative weight is left undefined. *Id.*

the duty to establish new, more meaningful standards for recovery as the tort of negligent infliction of emotional distress develops. The court offers no reason why the most relevant limitations are still to be discovered, or why the job falls to the trial courts. This lack of explanation is particularly disturbing given that the North Carolina Supreme Court's experience with the tort of negligent infliction of emotional distress is extensive.¹⁷⁹

The *Johnson* court's conclusion that the physical injury requirement operated in an arbitrary fashion is supported on varying grounds. The most obvious source of support is the disproportionality between allowing recovery for mental distress damages when accompanied by an insignificant injury as compared to the denial of recovery for truly severe mental anguish when a plaintiff neglected to characterize the symptoms of his distress as "physical" injury.¹⁸⁰ Though the physical injury requirement promoted a valid evidentiary purpose in that it helped to distinguish severe mental distress from momentary or insignificant emotional upsets, its tendency to validate or invalidate emotional distress claims on unfairly arbitrary grounds greatly outweighed its usefulness. The court should be commended for rejecting such a rule, but faulted for not replacing it with a better one.

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179. Justice Meyer observed: "The majority opinion is exceedingly (and in my view unnecessarily) critical of the care this Court has previously exercised in this area. Besides being inaccurate, these statements do nothing to instill confidence in this Court's opinions." *Johnson*, 327 N.C. at 315, 395 S.E.2d at 104 (Meyer, J., dissenting). Justice Webb expressed the same view: "I do not believe the Court of Appeals has been wrong in the way it has interpreted our cases." *Id.* at 318, 395 S.E.2d at 106 (Webb, J., dissenting).

The tone of the majority opinion is surprisingly censorious in its discussion of what it repeatedly identified as miscategorizations of North Carolina law. In light of the court's concession that this area of law is not clear, its insistence on deciding negligent infliction of emotional distress cases on an ad hoc basis without any threshold requirements, and its own multiple contributions to the prevailing uncertainty, this posture is unwarranted.

180. The disproportionality of the requirement has often been criticized in scholarly journals. For example, one commentator noted that "[t]he physical manifestation requirement has been criticized as being overinclusive, in that it permits recovery for demonstrably trivial mental distress accompanied by physical symptoms, and underinclusive, since serious distress is noncompensable absent the happenstance of subsequent physical symptoms." Comment, *supra* note 60, at 801-02.

This criticism has been emphasized by the jurisdictions that have declined to adopt a physical injury requirement. See, e.g., *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982) (physical injury requirement is over- and underinclusive); *James v. Leib*, 221 Neb. 47, 58, 375 N.W.2d 109, 116 (1985) (same). For other criticisms of the requirement, see, e.g., *Taylor v. Baptist Medical Center, Inc.*, 400 So. 2d 369, 374 (Ala. 1981) (rejecting requirement because current medical technology allows assessment of mental injury without reliance on "procrustean principles which have little or no resemblance to medical realities"); *Sinn v. Burd*, 486 Pa. 146, 159, 404 A.2d 672, 678 (1979) (same; medical advances have "discredited these hoary beliefs").