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The Rise and Fall of Bystander Recovery for Negligent Infliction of Emotional Distress in North Carolina

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COMMENT

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INTRODUCTION

The tort of negligent infliction of emotional distress (NIED) has developed slowly in the law, and only recently have courts recognized a cause of action for bystanders.[1] Negligently caused emotional distress must be distinguished from emotional distress intentionally or recklessly caused, for which bystanders have long been compensated.[2] Courts traditionally have placed strict limits on recovery for mental injury because of reluctance to compensate a harm that may be temporary or relatively trivial, fear of fraudulent claims, and the perception that an unfair burden would be placed on defendants for consequences that are disproportionate and remote from the negligent act.[3]

This article will give an overview of the various approaches devised by the American courts to address the problems raised by claims of emotional distress. It will then track the development of the tort in North Carolina, including recent supreme court cases that attempt to define the limits of foreseeability. The article will show that the court has established strict requirements, while at the same time asserting that there are no rigid tests for recovery. The law of negligent infliction of emotional distress is not settled in North Carolina; the purpose

1. As used in this article, "bystander" means a person who was not directly injured by the negligent conduct, but who suffered emotional distress as a result of observing an injury to a third person. The typical circumstance is a person who observes a horrific car crash, is not personally injured, but suffers severe mental disturbance as a result of the experience.

2. Intentional infliction of emotional distress arises when the defendant intentionally or recklessly engages in extreme and outrageous conduct that causes severe emotional distress to another. *See* RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The *Restatement* formulation includes liability to a limited class of bystanders:

> Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
> (b) to any other person who is present at the time, if such distress results in bodily harm.

Id., § 46(2).

3. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54 at 360-61 (5th ed., 1984) [hereinafter PROSSER AND KEETON]. *See also* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).

of this article is to provide a framework from which the response of the courts to claims of NIED may be predicted.

STANDARDS FOR RECOVERY FOR EMOTIONAL DISTRESS (PRELUDE)

American courts have devised five basic approaches to address their concerns with emotional injury and bystander recovery.

1. The No Recovery Rule.

Alabama is perhaps the only remaining state that does not recognize a cause of action for negligent infliction of emotional distress.[4] In *Gideon v. Norfolk Southern Corp.*,[5] a railroad train struck the vehicle in which a child was riding, throwing him out of the car. The child's mother was following in a separate car and witnessed the accident, could see her child lying on the ground, but could not reach him until the train had passed. The woman suffered severe emotional distress as a result of witnessing the death of her child. In affirming the trial court's dismissal of the mother's action, the Alabama Supreme Court stated, "We again reject the argument that we should recognize a cause of action that would allow one to recover damages for emotional distress caused by another's mere neglect. Even if we did recognize such a cause of action, we would not extend it to bystanders."[6]

The question of bystander recovery aside, a rule that fails to recognize emotional injury is unduly harsh. Legitimate concerns with establishing monetary damages for emotional injury, eliminating fraudulent claims, and controlling a flood of litigation must be balanced with the individual's interest in having legal recourse for real injury. Courts universally compensate victims with physical injuries for pain and suffering. "Mental suffering is no more difficult to estimate in financial terms, and no less a real injury, than 'physical' pain .... [I]t must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim."[7]

2. The Separate Protected Interest.

The earliest cases permitting recovery for emotional distress imposed liability on defendants who, in addition to the tortious conduct, had assumed a separate legal duty. In *Young v. Western Union Tel.*

4. *See generally* 38 AM. JUR. 2D *Fright, Shock and Mental Disturbance* § 13 (1968); P.G. Guthrie, *Annotation, Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R. 3d 1337 (1970).

5. 633 So.2d 453 (Ala. 1994).

6. *Id.* at 454.

7. PROSSER AND KEETON, *supra* note 3, at 360-361.

Co.,[8] the plaintiff's mental anguish caused by the negligent failure to deliver a telegram was held to be compensable. The court stated, "The company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver."[9] Similarly, courts have permitted recovery for emotional distress caused by the mishandling of corpses. In North Carolina, courts have recognized a possessory interest in dead bodies for the purpose of burial,[10] and recovery in tort has been allowed when emotional distress is caused by the negligent interference with this quasi-property right.[11]

Some courts require the presence of a separate legal relationship when the emotional distress is unaccompanied by physical injury. In *Hammond v. Central Lane Communications Center*,[12] the defendant's negligent response to plaintiff's call to the 911 emergency service caused severe emotional distress to the plaintiff whose husband was suffering a heart attack. The court stated, "Although foreseeability is a prerequisite to liability, plaintiff must first point to some 'legally protected interest' of hers that defendants violated."[13] The court held that a breach of contract does not support purely emotional injury, and plaintiff could show no other legal source to support her NIED claim.[14]

Claims for NIED are often associated with medical malpractice claims. In *Burgess v. Gupta*,[15] a woman was allowed to recover for emotional distress caused by a doctor's negligent injury to her baby during delivery. The court held that by entering into the doctor-patient relationship, the doctor assumed a duty of care towards the mother, and that the mother was a direct victim of the negligence.[16] In *Johnson v. Ruark Obstetrics and Gynecology Assoc.*,[17] a case with similar facts, the court held that emotional distress of expectant par-

8. 107 N.C. 370, 11 S.E. 1044 (1890).

9. *Id.* at 372-73, 11 S.E. at 1044.

10. CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 16.64.3 (1991) [hereinafter DAYE & MORRIS].

11. *Id.*

12. 816 P.2d 593 (Or. 1991).

13. *Id.* at 597.

14. *Id.* at 597. Although a 911 emergency service occupies a similar position relative to the public as a telegraph company, this court did not find the defendant owed a duty of care to the caller, contrary to the court in *Young*. *See also* Boyles v. Kerr, 855 S.W.2d 593, 596 (Tex. 1993) ("Mental anguish damages should be compensated only in connection with defendant's breach of some other duty imposed by law.").

15. 831 P.2d 1197 (Cal. 1992).

16. *Id.* The court, in dicta, stated that the doctor did not assume a duty towards the father of the child, since there was no doctor-patient relationship with the father. To recover, the court suggested that the father would have to meet the requirements of the bystander rule, since he was not a direct victim of the negligence. *Id.* at 1204, n.8.

17. 327 N.C. 283, 395 S.E.2d 85 (1990).

ents caused by concern for the fetus was reasonably foreseeable to the treating physician, and thus compensable.[18]

3. The Impact Rule.

Concern for the genuineness of mental anguish claims has caused some courts to deny recovery unless there has been a physical impact on the plaintiff as a result of the defendant's negligence.[19] This rule is similar to the separate legal interest rule in that the court allows recovery only when there has been an invasion of the plaintiff's interest in freedom from offensive bodily contact. The impact required to satisfy this rule has sometimes been interpreted so leniently that no actual physical injury resulted. In one recent case the court found sufficient impact where the plaintiff was "jostled" when his car ran over the body of a person, which was lying in the road as a result of the defendant's negligence.[20]

Strict application of the impact rule can produce inequitable results. A plaintiff who has suffered severe emotional distress but no impact is denied recovery, while a plaintiff who can show impact, no matter how slight, is compensated. Only a minority of jurisdictions now require an impact to recover for emotional distress.[21]

4. The Zone of Danger Rule.

The zone of danger rule was first enunciated in *Palsgraf v. Long Island R.R.*[22] The rule limits the duty of the defendant to those people within the zone of danger created by his actions. If a person is not within the area of physical risk, his injuries are not foreseeable to the defendant, and no liability attaches. As applied to emotional distress, the zone of danger rule requires that the plaintiff (1) be within zone of physical danger created by the defendant's actions, and (2) as a result, fear for his or her own safety.[23]

While not requiring physical impact, the courts that apply this rule limit the extent of the zone of danger to include only those people who are threatened with physical harm.[24] The rule suffers from some

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

19. PROSSER AND KEETON, *supra* note 3, at 363-65.

20. Stoddard v. Davidson, 513 A.2d 419 (Pa. Super. Ct. 1986).

21. *See* PROSSER AND KEETON, *supra* note 3, at 364.

22. 162 N.E. 99, 100 (N.Y. 1928).

23. Cauman v. George Washington Univ., 630 A.2d 1104, 1106 (D.C. Cir. 1993). *See also*, RESTATEMENT (SECOND) OF TORTS § 313(2).

24. *See* Zea v. Kolb, 613 N.Y.S.2d 88 (N.Y. App. Div. 1994) (denying recovery because plaintiff was never threatened with bodily harm); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (denying recovery to parents for emotional distress caused by defendant's negligence resulting in the development of hemophilia in their child, since parents were never endangered by the negligence).

of the same line-drawing problems as the impact rule. A plaintiff who witnesses a gruesome accident but is not physically threatened may suffer severe mental anguish without compensation, while another person only a few feet closer to the accident is permitted to recover for an otherwise identical injury. The zone of danger rule recognizes only emotional injuries caused by a concern for one's own safety; common experience teaches that emotional injuries often occur by witnessing traumatic events affecting others.[25]

5. The Bystander Rule.

Under the impact rule and the zone of danger rule, the plaintiff is a direct victim of the defendant's negligence. In contrast, the bystander rule focuses on the indirect effect on the plaintiff resulting from an injury to a third person. The first case to recognize a cause of action for a person not within the zone of danger was *Dillon v. Legg*.[26] In *Dillon*, a woman witnessed an accident in which her child was run over and killed. The woman was never in physical danger and did not fear for her own safety. The court rejected the zone of danger rule, and held that a defendant is liable for emotional distress that was the foreseeable consequence of his negligence: "The chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk . . . ."[27] The court offered "guidelines" for courts to take into account in determining foreseeability:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. The evaluation of these factors will indicate the degree of the defendant's foreseeability . . . .[28]

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25. In rejecting the zone of danger rule as applied by the majority of courts, the California Supreme Court stated:

> The concept of the zone of danger cannot properly be restricted to the area of those exposed to physical injury; it must encompass the area of those exposed to emotional injury. The courts, today, hold that no distinction can be drawn between physical injury and emotional injury flowing from the physical injury; indeed, in the light of modern medical knowledge, any such distinction would be indefensible. As a result, in awarding recovery for emotional shock upon witnessing another's injury or death, we cannot draw a line between the plaintiff who is in the zone of danger of physical impact and the plaintiff who is in the zone of danger of emotional impact. The recovery of the one . . . is as much compelled as that of the other.

Dillon v. Legg, 441 P.2d 912, 920, n.5 (Cal. 1968).

26. 441 P.2d 912 (Cal. 1968).

27. *Id.* at 920.

28. *Id.*

Under the pure bystander rule, foreseeability of the resultant emotional injury is the only requirement. Foreseeability does not afford a bright line test, and NIED claims must be determined on a case-by-case basis.[29] The difficulty of applying the pure bystander rule has caused some courts to reject it[30] and others to impose limitations on its application to insure that the emotional distress is genuine and to lessen the danger of a flood of litigation.[31]

Additional restrictions on recovery.

The class of plaintiffs who may recover for negligent infliction of emotional distress expands as a jurisdiction moves from the impact rule to the zone of danger rule and finally to the bystander rule. A jurisdiction that uses the zone of danger rule will most likely find that a plaintiff who suffered an impact as a result of the defendant's negligence was within the zone of danger, and recovery will be allowed for some plaintiffs who did not have an impact. Similarly, a jurisdiction that has adopted the bystander rule will permit recovery for any plaintiff within the zone of danger and others who were not within the zone of physical harm.

Courts often impose further limitations on the ability of a plaintiff to recover for negligent infliction of emotional distress. In jurisdictions that use the zone of danger rule, additional limitations are generally absolute requirements for recovery. Jurisdictions that have adopted the bystander rule are split: some make the limitations a requirement, while others consider them "factors" or "guidelines" to be used in establishing foreseeability.

A) PHYSICAL MANIFESTATION. Many jurisdictions require that the plaintiff manifest some physical injury or symptom of the mental anguish.[32] The requirement of a physical manifestation assures that

29. This was recognized by the *Dillon* court: "All these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case." *Id.* at 921.

30. *See, e.g.*, Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987).

31. The California Supreme Court itself, after two decades of experience under the *Dillon* test, restricted recovery for negligent infliction of emotional distress by making the "guidelines" absolute elements of the claim:

> [T]he societal benefits of certainty in the law, as well as traditional concepts of tort law, dictate limitation of bystander recovery of damages for emotional distress. In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury 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 emotional distress beyond that which would be anticipated in a disinterested witness.

Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989).

32. The traditional rule is expressed in RESTATEMENT (SECOND) OF TORTS § 436A (1965):

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance

the claim of emotional distress is genuine[33] and may be used to limit the class of potential plaintiffs. The Rhode Island Supreme Court succinctly stated the public policy reasons for requiring a physical manifestation:

> [W]hen we established that the existence of physical symptomatology was a prerequisite to stating a valid claim to recover for emotional distress, we sought to guarantee the genuineness of a plaintiff's claim as well as to limit the scope of possible claims so that they will bear a reasonable relation to the defendant's culpability.[34]

B) RELATIONSHIP TO THE VICTIM. Severe emotional distress may be expected when a person witnesses a severe injury to another with whom he has a close relationship. Some courts define the necessary relationship,[35] some require a close family relationship,[36] while other jurisdictions recognize a sufficiently close relationship may exist even if the plaintiff and the victim are not married or within the same immediate family.[37]

C) SEVERITY OF THE INJURY TO THE VICTIM. A few courts require that the direct victim of the defendant's negligence be severely injured or killed.[38] As one court expressed, "The direct victim of the traumatic injury must suffer such harm that it can reasonably be expected that one in the plaintiff's position would suffer serious mental anguish from the experience."[39] This is an objective standard, addressing the foreseeability of the emotional injury.[40]

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alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

33. PROSSER AND KEETON, *supra* note 3 at 363.

34. Marchetti v. Parsons, 638 A.2d 1047, 1051 (R.I. 1994).

35. *See, e.g.*, Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432, 434-35 (Wis. 1994) ("the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild or siblings.").

36. Trombetta v. Conkling, 626 N.E.2d 653 (N.Y. 1993) (limiting recovery for negligent infliction of emotional distress to immediate family member within the zone of danger); Nugent v. Bauermeister, 489 N.W.2d 148 (Mich. Ct. App. 1992) (allowing recovery only for immediate family member who observed negligently inflicted injury may recover). *See also* RESTATEMENT (SECOND) OF TORTS § 436(3) and cmt. f (1965).

37. Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (allowing recovery for a person who cohabited with and was engaged to marry the decedent). *See also* Lejeune v. Rayne Branch Hosp., 556 So.2d 559 (La. 1990): "The test (for recovery) should not be blood or marriage, but rather whether the judge or jury is convinced from all the facts that there existed such a rapport between the victim and the one suffering shock as to make the causal connection between the defendant's conduct and the shock understandable." *Id.* at 570 (quoting 12 F. STONE, LOUISIANA CIVIL LAW TREATISE TORT DOCTRINE § 170 (1977)).

38. *See, e.g.*, Vosburg v. Cenex-Land O'Lakes Agronomy Co., 513 N.W.2d 870, 873 (Neb. 1994) (permitting recovery only if "the foreseeable harm to the plaintiff arose from the death or serious injury of the victim.").

39. Lejeune v. Rayne Branch Hosp., 556 So.2d 559, 570 (La. 1990).

40. *See* Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432, 444 (Wis. 1994) ("A fatal injury or a physical injury that a reasonable person would view as serious can be expected

D) CONTEMPORANEOUS OBSERVATION. Courts are split as to whether the plaintiff must observe the negligent act. This requirement is implicit in the zone of danger test; the plaintiff must fear for his own safety, which is an impossibility unless the plaintiff observes the negligent act.[41] A typical statement of the requirement is that recovery is limited to the plaintiff who "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 . . . ."[42] Some courts take a broader perspective, reluctant to draw the line between one who observes the injury and one who arrives on the scene shortly thereafter.[43] One court even allowed recovery when the plaintiff never saw the accident scene or the victim but learned about the death of her son later.[44]

E) SEVERITY OF THE EMOTIONAL DISTRESS. Every jurisdiction limits recovery to only those plaintiffs who have suffered severe emotional distress, a concept borrowed from the related tort of intentional infliction of emotional distress.[45] The policy for this requirement is expressed in the *Restatement (Second) of Torts* as:

> It is only where [the emotional distress] is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only

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to cause severe distress to a bystander. Less serious physical harm to a victim would not ordinarily result in severe emotional distress to a reasonable bystander of average sensitivity.").

41. "Observation" in most situations will be through the sense of sight. However, there is no reason a plaintiff should be denied recovery when he becomes aware of a severe injury to another through his other senses, for instance, by hearing the screech of tires followed by a violent impact.

42. Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989).

43. The Wyoming Supreme Court, adopting this view, stated:

> The essence of the tort is the shock caused by the perception of an especially horrendous event. . . . The kind of shock the tort requires is the result of the immediate aftermath of an accident. It may be the crushed body, the bleeding, the cries of pain, and in some cases, the dying words which are really a continuation of the event. The immediate aftermath may be more shocking that the actual impact. Therefore, we hold that the plaintiff can recover if he observed the infliction of serious bodily harm or death, or if he observed the serious bodily harm or death shortly after its occurrence but without material change in the condition and location of the victim.

Gates v. Richardson, 719 P.2d 193, 199 (Wyo. 1986). *See also* Lejeune v. Rayne Branch Hosp., 556 So.2d 559, 570 (La. 1990) (holding that the plaintiff must either "view the accident or injury-causing event or come upon the accident scene soon thereafter and before substantial change has occurred in the victim's condition.").

44. Sorrells v. M.Y.B. Hospitality Ventures, 108 N.C. App. 668, 424 S.E.2d 676 (1993). This case was reversed by the North Carolina Supreme Court on this issue. Sorrells v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 435 S.E.2d 320 (1993). *See infra* text accompanying note 109. In a case involving a claim of intentional infliction of emotional distress, a court permitted recovery for emotional injury when the plaintiff learned more than a day after an automobile accident that the plaintiff had dragged her daughter from the wreckage and left her in a ditch to die; the plaintiff never saw the scene where the body was found. Nichols v. Busse, 503 N.W.2d 173 (Neb. 1993).

45. Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432 (Wis. 1994).

> where the distress inflicted is so severe that no reasonable man could be expected to endure it.[46]

In contrast to the "thin-skull" rule applied in other areas of tort law, courts universally apply an objective standard when measuring the severity of the emotional injury. In *Gammon v. Osteopathic Hosp. of Maine*,[47] the court stated, "We do not provide compensation for the hurt feelings of the supersensitive plaintiff—the eggshell psyche. A defendant is bound to foresee psychic harm only when such harm reasonably could be expected to befall the ordinarily sensitive person."[48] The objective standard is an expression of the courts' suspicion of emotional injury and is the same standard as that used for the intentional infliction of emotional distress.[49]

The severity of the emotional distress has been defined by some courts in general terms, such as an "emotional injury that is severe and debilitating, so much so that a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case."[50] Other courts define the severity of the injury in medical terms: "A non-exhaustive list of examples of serious emotional distress includes neuroses, psychoses, chronic depression, phobia and shock."[51]

F) HEIGHTENED NEGLIGENCE. In *Hammond v. Central Lane Communications Center*,[52] the Oregon Supreme Court stated that "[a] plaintiff may recover for severe emotional distress without accompanying physical injury by showing recklessness or a reduced level of intent, *i.e.* 'the intent to do the painful act with knowledge that it will cause grave distress.' "[53] In that case, the negligent act was done in conjunction with a separate responsibility to the plaintiff,[54] and the

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46. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

47. 534 A.2d 1282 (Me. 1987). In *Gammon*, the plaintiff found an amputated leg in a bag which he was told contained the personal effects of his recently deceased father. The court recognized that the plaintiff had stated a valid claim of negligent infliction of emotional distress, relying on the rationale of other courts supporting claims for mishandling of corpses: "the exceptional vulnerability of the family of recent decedents makes it highly probable that emotional distress will result from mishandling the body. [Citations omitted]. That high probability is said to provide sufficient trustworthiness to allay the court's fear of fraudulent claims." *Id.* at 1285.

48. *Id.* at 1285.

49. "The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

50. McCarty v. City of Cleveland Heights, 583 N.E.2d 981, 982 (Ohio Ct. App. 1989).

51. Lejeune v. Rayne Branch Hosp., 556 So.2d 559, 570 (La. 1990). *See also* Johnson v. Ruark Obstetrics and Gynecology Assoc., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

52. 816 P.2d 593 (Or. 1991).

53. *Id.* at 598.

54. The plaintiff negligently responded to a call for emergency services. *See supra* text accompanying notes 11-12.

court did not make it clear on which basis relief was granted. One commentator has suggested that the heightened standard of gross, wanton, or willful negligence used in assessing punitive damages should be applied to claims for emotional distress.[55]

DEVELOPMENT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN NORTH CAROLINA[56] (The Rise)

During the long and tortured development of the tort of negligent infliction of emotional distress, North Carolina courts have applied many of the rules and policy limitations described above. NIED was a subject of first impression when considered by the North Carolina Supreme Court in *Young v. Western Union Tel. Co.*[57] In *Young*, the defendant negligently failed to deliver a telegram to the plaintiff, which stated: "Come in haste; your wife is at the point of death." The plaintiff suffered severe mental anguish because he was unable to be with his wife during her last days and missed her funeral. The court analogized the injury from emotional distress to the injury recognized in the compensable torts of slander, libel, breach of promise to marry, malicious arrest and false imprisonment, in all of which "injury to the feelings be an element to the actual damages."[58] After a review of decisions in other jurisdictions, the court concluded that a plaintiff may recover in tort[59] for mental pain and anguish in the absence of physical injury.[60] In dicta, the court implied that in a proper case, punitive damages would be available for emotional distress suffered as a result of gross negligence.[61] In the absence of an allegation of malice, the court held that damages may be awarded "as compensation to

55. Tracy L. Hamrick, *A Clear Judicial Day in North Carolina* - Johnson v. Ruark Obstetrics *Smooths the Way for Plaintiffs' Claims for Negligent Infliction of Emotional Distress*, 69 N.C. L. REV. 1714, 1735-36 (1991).

56. The development of negligent infliction of emotional distress as a cognizable claim in North Carolina was recounted, if somewhat selectively, in *Johnson v. Ruark Obstetrics and Gynecology Assoc.*, 327 N.C. 283, 395 S.E.2d 85 (1990), and was developed fully in law review articles commenting on *Ruark*. *See, e.g.*, Tracy L. Hamrick, *A Clear Judicial Day in North Carolina* - Johnson v. Ruark Obstetrics *Smooths the Way for Plaintiffs' Claims for Negligent Infliction of Emotional Distress*, 69 N.C. L. REV. 1714 (1991); Julie K. Sandine, *The Wavering Line in Invisible Ink: Negligent Infliction of Emotional Distress in North Carolina* - Johnson v. Ruark Obstetrics and Gynecology Associates, 26 WAKE FOREST L. REV. 741 (1991). Only a minimal outline of the history of the tort prior to *Ruark* will be given in this article.

57. 107 N.C. 370, 11 S.E. 1044 (1890).

58. *Id.* at 375, 11 S.E.2d at 1045.

59. *Id.* at 385, 11 S.E. at 1048. The court also noted that recovery was possible in contract, apparently on the theory that the person who receives a telegram is the intended third party beneficiary of the contract between the sender and the telegraph company.

60. *Id.*

61. *Id.* at 386, 11 S.E. at 1049.

the plaintiff for the wrong he has sustained in the mental anguish needlessly inflicted on him by the negligence of the defendant."[62]

The precursor for the bystander rule was first enunciated in *Bailey v. Long*,[63] where recovery for negligently caused severe emotional distress arising from the plaintiff's concern for the welfare of another was recognized. In *Bailey*, the plaintiff's wife contracted pneumonia and died as a result of her confinement as a patient in defendant's hospital room, which was drafty and leaked water due to defective construction and maintenance. The court stated,

> We see no reason why, 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 not recover for the mental anguish occasioned by witnessing her suffering and death against the alleged author of such suffering and death.[64]

Bystander recovery, apparently recognized in *Bailey*, was denied in *Hinnant v. Tidewater Power Co.*[65] In its place, the court substituted the rule that mental anguish is compensable only in conjunction with an invasion of a separate protected interest. In *Hinnant*, the plaintiff's husband was crushed between two railroad cars. The plaintiff did not witness the accident, but saw her husband later at the hospital and witnessed his suffering in the hours before his death. The plaintiff sued for damages for her severe mental anguish and for loss of consortium. The court denied the loss of consortium claim,[66] then held that "if the plaintiff has no cause of action for loss of consortium, she has none for mental anguish."[67] The court went on to state that as a general rule, "mental suffering, unrelated to any other cause of action, is not alone a sufficient basis for the recovery of substantial damages."[68]

Physical injury or physical manifestation of emotional distress was stated to be a prerequisite for recovery in *Kirby v. Jules Chain Stores Corp.*,[69] where the abusive threats of a debt collector caused a woman to have a miscarriage.[70] The court stated:

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62. *Id.*

63. 172 N.C. 661, 90 S.E. 809 (1916).

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

65. 189 N.C. 120, 126 S.E. 307 (1925). The court stated, "mental anguish is restricted, as a rule, to such mental pain or 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. . . ." *Id.* at 129, 126 S.E. at 312.

66. The court held that loss of consortium requires a direct and intentional invasion of the marital relationship, and was not available in a case involving negligent injury or death of one spouse. *Id.* at 128, 126 S.E. at 311.

67. *Id.*, 126 S.E. at 312.

68. *Id.*

69. 210 N.C. 808, 188 S.E. 625 (1936).

70. Although the defendant's conduct in *Kirby* was intentional, the court stated that recovery was permitted if the injury was either willfully or negligently inflicted. 210 N.C. at 810, 188 S.E at 626. The court relied on the negligence case of Kimberly v. Howland, 143 N.C. 398, 55

> As a general rule, damages for mere fright are not recoverable; but they may be recovered where there is some physical injury attending the cause of the fright, or, in the absence of physical injury, where the fright is of such character as to produce some physical or mental impairment directly or naturally resulting from the wrongful act.[71]

The requirement of a physical injury or physical manifestation appeared to be the settled law[72] to the North Carolina Court of Appeals in *Johnson v. Ruark Obstetrics and Gynecology Assoc.*[73] when it stated that "absent some impact, the emotional distress claimant must manifest some resulting physical injury."[74]

No recovery for mental injury was allowed by the court in *Williamson v. Bennett*[75] for a plaintiff who had a particular susceptibility to mental distress. In *Williamson*, the plaintiff's brother had recently been involved in an accident in which a girl on a bicycle was killed. When a minor accident caused the sound of scraping metal, the plaintiff thought she had hit a child on a bicycle, which triggered a neurosis that resulted in partial paralysis. The court said that the plaintiff's emotional distress was not foreseeable when the plaintiff had a "more than ordinary predisposition to neurosis" due partly to the memory of her brother's earlier accident and partly to the plaintiff's childhood experiences.[76]

Whatever confusion may have existed in the case law about negligent infliction of emotional distress in bystanders, or the necessity of showing physical injury to recover, was removed by *Johnson v. Ruark Obstetrics*.[77] In *Ruark*, the plaintiff parents of a stillborn baby alleged that the negligent diagnosis and treatment of the mother's diabetic

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S.E. 778 (1906), where the plaintiff suffered severe emotional distress when defendant's negligent blasting at a nearby construction site sent a rock crashing through the roof of the plaintiff's house, landing near the bed on which she was lying. The *Kimberly* court stated, "We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether willful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs." 143 N.C. at 404, 55 S.E. at 780.

71. *Kirby*, 210 N.C. at 812-13, 188 S.E. at 627 (quoting Candler v. Smith, 179 S.E. 395, 399 (Ga. Ct. App. 1935)).

72. *See* Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960), in which, after a review of the decisional law of North Carolina and other states, the court stated, "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 impact or genuine physical injury also resulted directly from defendant's negligence." *Id.* at 503, 112 S.E.2d at 52.

73. 89 N.C. App. 154, 365 S.E.2d 909 (1988) [hereinafter *Johnson v. Ruark Obstetrics* or *Ruark*].

74. *Id.* at 165, 365 S.E.2d at 916. North Carolina, at least since the 1890 *Young* decision, has not used the impact rule. As *Williamson* and *Ruark* make clear, however, impact is sufficient to state a claim for NIED.

75. 251 N.C. 498, 112 S.E.2d 48 (1960).

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

77. 327 N.C. 283, 395 S.E.2d 85 (1990), *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

condition caused the death of the fetus, and that as a result the parents suffered severe emotional distress. In reversing the trial court's dismissal of the claims, the court of appeals,[78] following what it believed to be the case law requiring physical injury to support a claim for negligent infliction of emotional distress, held that an injury to a fetus was an injury to the mother[79] and that the forecast of evidence did not preclude the father from proceeding at trial with proof that he suffered physical manifestations of his severe emotional distress.[80]

On appeal, the North Carolina Supreme Court affirmed the court of appeals, but on other grounds. The court returned to the reasoning of *Young* and *Bailey*, expressly overruled *Hinnant*,[81] and disapproved of all other cases to the contrary, stating,

> [N]either 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. Further, a 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.[82]

The *Ruark* court stated that the elements necessary to establish a cause of action for negligent infliction of emotional distress are: (1) negligent conduct by the defendant, (2) reasonable foreseeability that such conduct would cause the plaintiff severe emotional distress, and (3) severe emotional distress suffered by the plaintiff as a result of the conduct.[83] In addition, the court required that the foreseeable emotional distress be severe:

> [M]ere temporary fright, disappointment or regret will not suffice . . . . In this context, the term "severe emotional distress" means 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.[84]

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78. 89 N.C. App. 154, 365 S.E.2d 909 (1988).

79. *Id.* at 168, 365 S.E.2d at 918.

80. *Id.* at 169, 365 S.E.2d at 918.

81. The court stated:

> To the extent that it may be read as barring claims for negligent infliction of emotional distress when such claims are unrelated to any other cause of action, or as totally barring any such claims when based upon emotional distress arising from a plaintiff's concern for another person's condition, *Hinnant* failed to follow our settled common law, was erroneous and is hereby overruled.

327 N.C. 283, 298, 395 S.E.2d 85, 94 (1990).

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

83. *Id.*

84. *Id.*

The court suggested three factors to be considered in determining if the plaintiff's severe emotional distress was foreseeable: (1) the plaintiff's proximity to the negligent act, (2) the relationship between the plaintiff and the person injured by the defendant, and (3) whether the plaintiff observed the negligent act.[85] The court further stated that foreseeability is fact specific, and must be decided on a case-by-case basis;[86] the court intended the "factors" in determining foreseeability to be neither determinative nor exclusive.[87]

The *Ruark* court stated that foreseeability "should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury."[88] However, during the four years following the *Ruark* decision, in every case appealed to the court of appeals, the trial courts' dismissals of negligent infliction of emotional distress claims were reversed and remanded to permit a jury to decided the issue of foreseeability. The first case addressing the extent of foreseeability under the *Ruark* formulation was *Gardner v. Gardner*.[89] In Gardner, the defendant's negligence caused an automobile accident in which his son was seriously injured. The plaintiff mother of the injured child rushed to the hospital upon learning of the accident, where she saw the rescue squad arrive and observed resuscitative efforts being applied to her son. The plaintiff waited in the hospital, and was informed later that day that her son had died. The only question before the court was whether the defendant could have reasonably foreseen that his negligence would cause severe emotional distress to the plaintiff mother of the victim.[90] In reviewing the elements of the claim and the guidelines adopted in *Ruark*, the *Gardner* court concluded that there was no requirement that plaintiff be in "such close proximity to the injury-producing event as to experience a sensory perception of the event."[91] The court held that a parent who sees her seriously injured child soon after an accident may be expected to suffer severe emotional distress similar to that of a parent who actually witnessed the accident.[92] Of the three *Ruark* foreseeability factors, only the relationship of the

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

86. *Id.* This is substantially the same test for NIED that the California Supreme Court enunciated in Dillon v. Legg, 441 P.2d 912, 919 (Cal. 1968). *See supra* text accompanying notes 26-29.

87. *See* Gardner v. Gardner, 334 N.C. 662, 666, 435 S.E. 2d 324, 327 (1993) (stating in reference to the *Ruark* opinion: "Notably, these factors were not termed "elements" of the claim. They were neither requisites nor exclusive determinants in an assessment of foreseeability. . . .").

88. *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98.

89. 106 N.C. App. 635, 418 S.E.2d 260 (1992), *rev'd*, 334 N.C. 662, 435 S.E.2d 324 (1993).

90. For purposes of the appeal, the parties stipulated that their son's death was caused by the negligence of the defendant, and that the plaintiff suffered severe emotional distress as a result. *Id.* at 636, 418 S.E.2d at 261.

91. *Id.* at 638, 418 S.E.2d at 263.

92. *Id.* at 639, 418 S.E.2d at 263.

plaintiff to the victim survived *Gardner* intact. Proximity could include learning of the negligent act after its occurrence and seeing the victim in a hospital many miles away from the site of the accident. Personal observation of the negligent act was completely rejected.

Even the rather loose proximity requirements of *Gardner* were eliminated by the court of appeals in *Sorrells v. M.Y.B. Hospitality Ventures*[93] (hereafter *Sorrells II*[94]). In *Sorrells II*, the defendant restaurant continued to serve alcoholic beverages to the plaintiffs' son despite knowing he was visibly intoxicated and after being informed that he would be driving himself home. After leaving the restaurant, plaintiffs' son was killed in a one-car accident. Plaintiffs did not witness the accident and never saw their son or his body after the accident, but upon hearing later that their son's body had been mutilated in the crash, plaintiffs suffered mental anguish and sued for negligent infliction of emotional distress. The court stated that the trial court should dismiss negligent infliction of emotional distress claims only if "the defendant was legally exempt from foreseeing the plaintiff's injuries,"[95] and that the trial judge should consider:

> whether the injury is reasonably close in both time and location to the defendant's act, the relationship between the plaintiff and the person for whom the plaintiff is concerned, whether the plaintiff actually observed the negligent act, whether recovery would place an unreasonable burden upon those engaged in activities similar to that of the defendant, whether recovery would likely open the way for fraudulent claims, and whether, in retrospect, it is too highly extraordinary that the act of the tort-feasor caused the injury.[96]

Although the court listed these factors, its analysis was limited to the facts that the plaintiffs were parents of the victim and that they learned of the accident "soon" after it occurred. Based on these

93. 108 N.C. App. 668, 424 S.E.2d 676 (1993), *rev'd* 334 N.C. 669, 435 S.E.2d 320 (1993).

94. *Sorrells* has visited the supreme court twice. *Sorrells I* was an action for wrongful death brought by the personal representative of the decedent's estate. The supreme court ruled that the decedent's contributory negligence in driving while intoxicated barred recovery for wrongful death. 332 N.C. 645, 423 S.E.2d 72 (1992), reversing the decision of the court of appeals, 105 N.C. App. 705, 414 S.E.2d 372 (1992). In *Sorrells II*, plaintiffs asserted negligent infliction of emotional distress, and again the defense asserted contributory negligence as a bar to the action. On that issue, the court of appeals stated that contributory negligence could be imputed to a third party only if that party would have been vicariously liable for the actions of the other. In this case, the parents of the 21 year old victim of the accident would not have been vicariously liable for damages caused by the negligent driving of their son, and therefore his contributory negligence in causing the accident could not be imputed to them. 108 N.C. App. 668, 671, 424 S.E.2d 676, 679 (1993). On appeal, the supreme court decided the case based on the foreseeability issue; the contributory negligence issue was not addressed by the supreme court. 334 N.C. 669, 674-75, 435 S.E.2d 320, 323 (1993).

95. 108 N.C. App. at 671, 424 S.E.2d at 679.

96. *Id.* at 671-72, 424 S.E.2d at 679.

alone, the court concluded that the issue of foreseeability was a question for the jury.[97]

After the court of appeals decisions in *Gardner* and *Sorrells II*, the only apparent requirements necessary to survive a motion to dismiss were that the plaintiff's severe emotional distress be caused at least in part by the defendant, and that the plaintiff be related to the victim of the defendant's negligence. In *Andersen v. Baccus*,[98] the defendant swerved to avoid hitting a car that suddenly pulled out in front of her, and struck the car being driven by the pregnant wife of the plaintiff, killing her. The plaintiff arrived upon the scene of the accident before the victim was removed, but did not witness the accident itself. After stating that it did not believe the *Ruark* decision was intended to have such an unlimited effect,[99] the court of appeals held that the family relationship between the defendant and the victim alone was sufficient under the precedent of *Sorrells II* to allow the question of foreseeability to go to the jury, although the result is to "effectively . . . recognize a cause of action based on negligent infliction of emotional distress in every instance where a family member learns, after the fact, of the injury or death of a relative resulting from a negligently caused accident."[100] Just such results were reached in *Hickman v. McKoin*,[101] (where the court of appeals recognized emotional distress claims for two children who saw their seriously injured mother in the intensive care unit of a hospital after she was injured in an automobile accident) and *Butz v. Holder*[102] (where a mother arrived on the scene shortly after her child was struck and killed while riding a bicycle near their home).

THE IMPOSITION OF RESTRICTIONS ON NIED (THE FALL)

The court of appeals' decision in *Sorrells II* was the high water mark for potential plaintiffs claiming emotional distress. The foreseeability "factors" of *Ruark*, as interpreted by the court of appeals in *Sorrells II*, had only succeeded in limiting the class of potential plaintiffs seeking bystander recovery to all the family members of an injured victim. Any restriction on the flood of litigation threatened by that decision

97. *Id.* at 672, 424 S.E.2d at 679-80.

98. 109 N.C. App. 16, 426 S.E.2d 105 (1993), *rev'd*, 335 N.C. 526, 439 S.E.2d 136 (1994).

99. "We believe that the plaintiff's contention goes beyond the holding of the *Ruark* Court . . . . Nonetheless . . . we must follow the precedent as currently set forth by this Court and find that it was error for the trial court to grant summary judgment on this issue." *Andersen*, 109 N.C. App. at 25, 426 S.E.2d at 110.

100. *Id.*

101. 109 N.C. App. 478, 428 S.E.2d 251 (1993), *rev'd*, 337 N.C. 460, 446 S.E.2d 80 (1994).

102. 112 N.C. App. 116, 434 S.E.2d 862 (1993), *rev'd on reh'g*, 113 N.C. App. 156, 437 S.E.2d 672 (1993).

would require the North Carolina Supreme Court to revisit the issue,[103] which it did in the companion cases[104] of *Gardner v. Gardner*[105] and *Sorrells v. M.Y.B. Hospitality Ventures*[106] (*Sorrells II*). Unlike the California Supreme Court's response to the problem of a flood of litigation created by the bystander rule,[107] the North Carolina Supreme Court retained foreseeability as the standard for establishing negligent infliction of emotional distress.

Under the impact rule and the zone of danger rule, the primary focus is on the direct victim of the negligent act. The question is whether the defendant breached a duty owed to the direct victim. If the answer is yes, then the plaintiff may recover if he meets the mechanical requirements of having suffered an impact or having been within the zone of risk of physical injury. Under the bystander rule, however, there are two separate questions of negligence: (1) did the defendant breach a duty owed to the direct victim, and if so, (2) did the defendant breach a separate duty owed to the plaintiff claiming emotional distress.[108] The first question is seldom a problem (in both *Gardner* and *Sorrells II* the defendants stipulated that they were negligent towards the primary victim); the difficult question is whether the defendant was negligent towards the emotionally injured plaintiff.

Foreseeability must be addressed in determining both duty and proximate cause.[109] A duty of care is owed only to those persons who the defendant could reasonably foresee would be injured by his conduct. This "foreseeable plaintiff" question was addressed by the supreme court in *Sorrells II*, where the defendant's negligent act was serving alcoholic beverages to a clearly intoxicated person, knowing

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103. In North Carolina, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re* Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

104. These were the first two cases to reach the supreme court since the *Ruark* decision. The decisions in both cases were announced on October 8, 1993.

105. 334 N.C. 662, 435 S.E.2d 324 (1993).

106. 334 N.C. 669, 435 S.E.2d 320 (1993).

107. Thing v. La Chusa, 771 P.2d 814 (Cal. 1989). *See supra* note 32.

108. The bifurcation of the negligence questions is illustrated in *Sorrells*. *See supra* note 93. In *Sorrells I*, the wrongful death action was barred by the contributory negligence of the victim; wrongful death is an action for the negligently caused injury to the victim, which survives his death and is brought on his behalf by the estate. In *Sorrells II*, the negligent infliction of emotional distress claim was allowed to go forward; the emotional injury was to the parents, who had an action independent of the injury to their son.

109. The dual application of foreseeability has been expressed as:

> [T]he obligation to refrain from . . . particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.

Dillon v. Legg, 441 P.2d 912, 920 (quoting 2 HARPER & JAMES, THE LAW OF TORTS § 18.2 (1956)).

that he would be driving himself home. The plaintiffs were the victim's parents, who were neither present at the time of the negligent act (serving of alcohol) nor at the scene of the resultant accident. While specifically rejecting the mechanical application of rigid tests, and noting that proximity and personal observation were not requirements, the court held that the parents were not foreseeable plaintiffs. Under the facts presented, the court found that "it does not appear that the defendant had any actual knowledge that the plaintiffs existed."[110] Under the holding in *Sorrells II*, a bystander is a foreseeable plaintiff if the defendant has actual knowledge of his existence or constructive knowledge of his existence (occurring when the plaintiff is located in close proximity to or personally observes the act of direct negligence).

If the person claiming emotional distress is a foreseeable plaintiff, the second question is one of proximate cause: was the plaintiff's mental anguish foreseeable to the defendant at the time of the negligent act? This question was addressed in *Gardner*, in which the plaintiff mother of the victim did not observe the accident, although she did witness resuscitative efforts a short while later at the hospital. Unlike the defendant in *Sorrells II*, the defendant in *Gardner* had specific knowledge of the existence of the plaintiff; plaintiff and defendant were the parents of the victim. It was not disputed that the negligently caused death of the victim was the cause-in-fact of the plaintiff's emotional distress,[111] but "[n]evertheless, absent reasonable foreseeability, this is not an injury for which defendant is legally accountable."[112] The dispositive question for the court was whether it was foreseeable that the plaintiff would suffer severe emotional distress as that term was defined in *Ruark*.[113] On this issue the court drew very restrictive boundaries. The court recognized that all parents will suffer mental anguish upon learning of a severe injury to or the death of their child,[114] but a severe and disabling emotional or mental condition resulting from injury to the child is not an expected result of a negligently caused accident.[115] The court held that since the defendant did not have actual knowledge that the plaintiff was

110. *Sorrells II*, 334 N.C. at 674, 435 S.E.2d at 323.

111. For the purpose of the appeal, the parties stipulated that the death of their son was the result of the defendant's negligence. *Gardner*, 334 N.C. at 666, 435 S.E.2d at 327.

112. *Id.* at 667, 435 S.E.2d at 328.

113. *Id. See also supra* text accompanying note 84.

114. *Gardner*, 334 N.C. at 667, 435 S.E.2d at 327. The court uses some unfortunate language in this regard. It is doubtful that many parents would describe the loss of their child as "temporary disappointment . . . or regret", or to pass off the loss with the phrase "[P]art of living involves some unhappy and disagreeable emotions . . . ."

115. *Id.* at 667-68, 435 S.E.2d at 328.

susceptible to a severe emotional or mental condition, the severe emotional distress was not foreseeable.[116]

CURRENT STATUS OF NIED IN NORTH CAROLINA (THE AFTERMATH)

While only affecting one aspect of negligent infliction of emotional distress claims, *Gardner* and *Sorrells II* have effectively eliminated a large percentage of potential plaintiffs; the court has made it clear that a mere familial relationship, standing alone, is insufficient to satisfy foreseeability. Although neither physical injury nor physical manifestation is required, plaintiffs who can show either are substantially more likely to be compensated.[117]

Throughout the cases, the supreme court repeats the mantra that foreseeability cannot be determined by mechanical application of arbitrary rules.[118] Despite the court's protestations to the contrary, however, North Carolina now has essentially a requirement of contemporaneous observation of the negligent act. The *Gardner* court held:

> Given [the plaintiff's] absence from the time and place of the tort and her failure to show that defendant knew she was susceptible to an emotional or mental disorder or other severe and disabling emotional or mental condition as a result of his negligence and its consequences, we hold that plaintiff's injury was not reasonably foreseeable and its occurrence was too remote from the negligent act itself to hold defendant liable for such consequences.[119]

The strong implication is that a closely related person can recover for emotional distress only if the plaintiff contemporaneously observes the act of direct negligence, or if the defendant has specific knowledge of the peculiar susceptibility of the plaintiff.[120] The requirement that the defendant have actual knowledge that his negligence would cause

116. *Id.*

117. *See, e.g.,* Driver v. Burlington Aviation, Inc., 110 N.C. App 519, 430 S.E.2d 476 (1993) (holding that it was reasonably foreseeable to the manufacturer of a small aircraft that severe emotional distress would result from injuries sustained by the passengers when the aircraft crashed due to the pilot's reliance on printed information sent to him by the manufacturer).

118. *See Sorrells II*, 334 N.C. at 672, 435 S.E.2d at 321; *Gardner*, 334 N.C. at 666, 435 S.E.2d at 327; Andersen v. Baccus, 335 N.C. 526, 531, 439 S.E.2d 136, 139 (1994); Hickman v. McKoin, 337 N.C. 460, 462, 446 S.E.2d 80, 82 (1994).

119. 334 N.C. at 667-68, 435 S.E.2d at 328.

120. After *Gardner*, the court of appeals reheard *Butz v. Holder*, *supra* note 101, and reversed its earlier holding that permitted parents to recover when they arrived at the scene of the accident a few minutes after the death of their child, stating:

> It appears from this language in *Gardner* that the Supreme Court has held that in any claim for NIED, the plaintiff must allege and through a forecast of evidence show that defendant *knew* that the plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition to say that the consequences of the alleged tortfeasor's negligence were reasonably foreseeable.

severe emotional distress to the plaintiff is a nearly impossible standard to meet. In *Gardner*, the tortfeasor was the plaintiff's husband.[121] If a husband cannot foresee that his wife would suffer severe emotional distress upon seeing her severely injured child, under what circumstances can a defendant have actual knowledge of particular susceptibility? Apparently actual knowledge requires that the plaintiff has suffered a severe and disabling mental or emotional disorder in the past, and that the defendant knows about it. The circumstances in *Sorrells II*, which are more typical, automatically exclude recovery under this standard. Given the near impossibility of proving knowledge of susceptibility, the only remaining method for the bystander to recover is if he contemporaneously observed the injury-producing conduct.

Although the supreme court discussed the particular knowledge of the defendant as a factor of foreseeability, the defendant's knowledge of the plaintiff's susceptibility to emotional distress actually relates to the standard of care required of the defendant. Under traditional tort concepts, an actor who has superior knowledge is required to exercise that knowledge to avoid risk.[122] Particular knowledge requires the defendant to exercise a higher standard of care *towards the plaintiff*. Because of the bifurcation of the negligent acts relative to the victim and the plaintiff, conduct that is merely negligent under the higher standard applicable to the plaintiff may not be negligent to the primary victim. Conversely, in a situation in which the defendant had knowledge of a plaintiff's susceptibility to severe emotional distress, ordinary negligence to the victim would probably rise to the level of gross, wilful or wanton negligence,[123] or even intentional conduct[124] relative

Butz v. Holder, 113 N.C. App 156, 159, 437 S.E.2d 672, 674 (1993) (reversing its decision in 112 N.C. App. 116, 434 S.E.2d 862 (1993)).

The author believes the court of appeals misread the *Gardner* holding and that contemporaneous observation of the negligent act is an alternative to actual knowledge of susceptibility in establishing foreseeability.

121. Although not explicitly stated in the case, it is implied that the plaintiff and defendant were not living together at the time of the accident that killed their son. Since the child was 13 years old at the time of his death and the parents were not divorced, it can be assumed that the parents had lived together for a substantial period of time and that the husband, if anyone, should have been aware of a particular susceptibility to severe emotional distress.

122. "The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising . . . (b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has." RESTATEMENT (SECOND) OF TORTS § 289 (1965).

123. "Definitions of wilful or wanton conduct generally require that it appear that the defendant (1) had knowledge of existing conditions, and was conscious from such knowledge that injury will likely or probably result from his conduct, and (2) with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result." 57A AM. JUR. 2D, NEGLIGENCE § 263.

124. For intentional infliction of emotional distress "there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional, unless it results from a peculiar suscepti-

to the plaintiff. In essence, the court is requiring a heightened level of negligence when there is no contemporaneous observation of the negligent act.

The *Ruark* court, in listing factors to be considered to determine foreseeability, distinguished between a plaintiff's proximity to the negligent act and whether the plaintiff personally observed the negligent act.[125] The question arises as to whether a plaintiff who was physically present at or near the negligent act, but did not perceive the event through her senses, can recover for negligent infliction of emotional distress. The decisions in *Sorrells II* and *Gardner* imply that the plaintiff must be aware at the time of the negligent act that the welfare of the victim is endangered: "[b]ecause she was not physically present at the time of defendant's negligent act, plaintiff was not able to see or hear or otherwise sense the collision or to perceive immediately the injuries suffered by her son . . . ";[126] and, "these plaintiffs did not personally observe any negligent act attributable to the defendant."[127] The distinction between proximity and perception may only be useful in explaining a situation similar to the facts in *Ruark*. Although the *Ruark* plaintiffs alleged that they personally observed the negligent acts that resulted in the stillbirth of their baby,[128] the facts reveal that the fetus died because of a failure by the defendant to diagnose and treat the mother's diabetic condition.[129] The plaintiffs could not observe or perceive a failure to diagnose a condition, although the plaintiffs were certainly in proximity to the negligent act. In this situation, the court of appeals' finding that an injury to a fetus is also an injury to the mother seems a better analysis than to draw a distinction between proximity and observation.

The *Ruark* "factors" in determining foreseeability include, *but are not limited to*, proximity, relationship to victim, and observation; the *Gardner* court added actual knowledge of susceptibility. A further question is whether there are other factors that could establish a foreseeable emotional injury. Apparently there are not. In *Hickman v. McKoin*,[130] plaintiffs were children of a woman who was seriously injured in an automobile accident. The plaintiffs were told their mother probably would not survive, and were permitted to see her in the in-

bility to such distress of which the actor has knowledge." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

125. *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98.

126. *Gardner*, 334 N.C. at 667, 435 S.E.2d at 328.

127. *Sorrells* II, 334 N.C. at 674, 435 S.E.2d at 323.

128. *Ruark*, 327 N.C. at 306, 395 S.E.2d at 98. The allegations of the plaintiffs were taken by the court to be true in this appeal from the trial court's order granting the defendant's motion to dismiss. *Id.*, 395 S.E.2d at 98-99.

129. *Ruark*, 327 N.C. at 287, 395 S.E.2d at 87.

130. 337 N.C. 460, 446 S.E.2d 80 (1994).

tensive care unit of the hospital shortly after the accident. The court held that, just as the parent-child relationship standing alone was insufficient to support an NIED claim in *Gardner*, so was the child-parent relationship in this case.[131] The court further held that, since the plaintiffs did not witness the accident, "under no state of facts which might otherwise be proved can plaintiffs establish the necessary element of foreseeability,"[132] and affirmed the trial court's dismissal of the action.

Unanswered by *Gardner, Sorrells II* and their progeny, is what relationship between the plaintiff and the direct victim is required to state a claim for NIED. Parent-child (*Gardner, Sorrells II*, and *Hickman*) and spousal (*Butz*) relationships are clearly sufficient. North Carolina has a strong public policy preference for marriage and the traditional family.[133] However, the ability to recover for an NIED claim is not likely to be a factor in a person's decision when considering marriage or other family matters. The courts should look at the foreseeability of the injury given the relationship between the persons, and not base recovery on the plaintiff's choice of lifestyle. Recent governmental recognition of non-traditional living arrangements,[134] and decisions in other jurisdictions[135] indicate a trend towards acceptance of relationships beyond the immediate family. It is consistent with the North Carolina courts' "totality of the circumstances" approach to NIED claims to allow a more distant relationship to be offset by a strong showing of proximity or a particularly horrific injury to the direct victim, making severe emotional distress more foreseeable.

Given the bystander rule's bifurcation of the negligent acts, the question arises as to whether the defendant must be negligent towards the primary victim. A defendant could be shielded from liability because the primary victim was contributorily negligent or because the primary victim assumed the risk of the activity. In *Sorrells II*, the court of appeals held that the victim's contributory negligence in an automobile accident was not imputed to his parents, thereby barring the NIED claim.[136] Since the court of appeals addressed this issue, it

131. *Id.* at 464, 446 S.E.2d at 83.

132. *Id.*

133. As an example of North Carolina's preference for traditional families, a child born out of wedlock cannot inherit through his or her father unless legitimated. Legitimation may occur by the subsequent marriage of the mother and father of the child. N.C. GEN. STAT. §§ 49-11, 12 (1993). *See also* N.C. GEN. STAT. §§ 120-70.70 to 70.75 (creating and enabling a Commission on the Family within the General Assembly).

134. *See, e.g.*, Recognition and Registration of Domestic Partnerships, CARRBORO (N.C.) TOWN CODE, Ch. 3, art. 1, § 3-2.1 (adopted May 10, 1994).

135. *See supra* note 36.

136. *See supra* note 89.

may be inferred that primary negligence is required.[137] Assumption of risk as a defense to the primary negligence might arise if, for example, a professional race car driver was injured while racing on a negligently constructed track; it is entirely likely that the driver's wife could witness a crash and suffer severe emotional distress. Applying an analysis of contributory negligence similar to that used by the court in *Sorrells I*, the NIED claim would belong to the wife who did not assume the risk of driving on the race track; the driver cannot assume the risk of emotional distress to his wife, and the wife's claim should be allowed to proceed. In both contributory negligence and assumption of risk, there is an underlying act of primary negligence to the victim, but the defendant is shielded from liability to the victim by some conduct of the victim. The victim's conduct, however, does not shield the defendant from liability to the bystander plaintiff.

The defendant would also not be liable to the primary "victim" if the "victim" had no damages. The North Carolina courts have never required that the injury to the primary victim be severe or lethal, as have other courts.[138] By extension, may a plaintiff recover in the absence of a primary victim, for example, if a plaintiff suffers severe emotional distress caused when she personally observes an airplane crash, reasonably believing that her husband was on the plane? In a recent South Carolina case, a woman who suffered severe emotional distress when a doctor mistakenly and negligently told her that her father was dead was permitted to proceed with her action against the doctor.[139] In that case, however, the court held that the woman was a direct victim of the doctor's negligence, and she did not have to rely on a theory of bystander recovery.[140] Absent some showing of direct negligence by the defendant in the airplane example, and given the recent restrictions on recovery placed by the North Carolina courts, it is unlikely that the courts would permit such an extension if there were no damages to the primary victim. To paraphrase *Sorrells II*,[141] the possibility that (1) the airplane owner's negligence resulting in a crash, (2) which a ticketed passenger's wife would observe (although the passenger was not on board), (3) which would in turn cause the passenger's wife (if he had one) not only to become distraught, but also to suffer "severe emotional distress" as defined in *Ruark*, simply

137. If no primary negligence is necessary to support a NIED claim, the court of appeals should have dismissed the appeal of the contributory negligence claim as irrelevant to plaintiff's ability to assert NIED.

138. *See supra* text accompanying notes 37-39.

139. Strickland v. Madden, 448 S.E.2d 581 (S.C. Ct. App. 1994) (reversing a summary judgment for the defendant and stating that the plaintiff could recover if she proved that her bodily injury was proximately caused by her emotional trauma).

140. *Id.*

141. 334 N.C. 669, 674, 435 S.E.2d 320, 323 (1993).

is a possibility too remote to permit a finding that it was reasonably foreseeable.

CONCLUSION

The North Carolina Supreme Court has drastically reduced the class of plaintiffs who can potentially recover for negligent infliction of emotional distress by restricting, as a matter of law, the type of conduct that can foreseeably cause severe emotional distress. In the wake of the court's decisions in *Gardner v. Gardner*, *Sorrells v. M.Y.B. Hospitality Ventures*, and subsequent cases relying on those decisions, negligent conduct that causes severe emotional distress is foreseeable to a defendant if:

1) the negligent act causes physical injury to the plaintiff, or the plaintiff suffers physical manifestations as a result of the negligently caused severe emotional distress; or
2) the plaintiff has a close relationship to a third person injured by the defendant, and the plaintiff personally observed the negligent act and immediately perceived the danger to the third person; or
3) the plaintiff has a close relationship to a third person injured by the defendant, and the defendant had actual knowledge of a particular susceptibility of the plaintiff that would cause the plaintiff to suffer severe emotional distress upon learning of the injury to the third person.

Despite the court's statements that there are no mechanistic tests for foreseeability, it is unlikely that a plaintiff will recover without meeting the requirements of one of these categories.

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