

The New English Approach to Emotional Distress: Should American Courts Declare Their Independence

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THE NEW ENGLISH APPROACH TO EMOTIONAL DISTRESS: SHOULD AMERICAN COURTS DECLARE THEIR INDEPENDENCE?

INTRODUCTION

For over a century, England and the United States have relied on the use of formalistic legal rules to determine liability in emotional distress cases. In the 1983 decision of *McLoughlin v. O'Brian*,¹ the House of Lords rejected the further use of mechanical rules and adopted a new English approach.² According to the new approach, the infliction of emotional distress is analyzed on an ad hoc basis with liability determined under a pure foreseeability test.³

The American approach to emotional distress continues to be grounded in formalism, with the majority of jurisdictions adhering to the zone-of-danger doctrine.⁴ The symbiotic nature of the Anglo-

1. [1982] 2 All E.R. 298.

2. *Id.* at 302.

3. *Id.* at 299.

4. The majority adherence to the zone-of-danger doctrine is supported by the Restatement (Second) of Torts which provides in relevant part:

313: Emotional Distress Unintended

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

RESTATEMENT (SECOND) OF TORTS § 313 (1965).

436: Physical Harm Resulting From Emotional Disturbance

(1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

(3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.

Caveat:

American legal systems and the continued expansion of liability in negligence suggests that American courts might adopt the new English approach. In fact, the foundation for such an adoption has already been laid in a minority of jurisdictions.⁵

This Note will examine the consequences of this prospective development and determine whether American courts would be well-advised to adopt the English foreseeability test. Part One defines emotional distress and examines why this injury has traditionally posed problems of proof and causation. Part Two discusses the symbiotic nature of the American and English legal systems in the area of emotional distress. Historically, both countries have borrowed heavily from one another in developing their respective legal rules governing the limits on liability. Part Three discusses relevant legal process considerations and argues that explicit rules of law are inextricably entwined with fundamental policy concerns of the English and American legal systems. The Section also suggests that the American legal system is significantly less suited for the new English approach and examines those systemic differences that reinforce this hypothesis. The Note concludes that the American legal system requires a formalistic approach to emotional distress and should therefore maintain an independent body of law to cover this specialized area.

I. DEFINING EMOTIONAL DISTRESS

The scope of legal recovery for emotional distress is considerably narrower than is generally believed.⁶ Courts in both England and the United States agree that the law should not readily compensate momentary sensations of fright, anger, or feelings of grief, anguish, or sorrow.⁷ These primary responses are typically transient sensations

The Institute expresses no opinion as to whether the rule stated in Subsection (2) may apply where bodily harm to the other results from his shock or fright at harm or peril to a third person who is not a member of his immediate family, or where the harm or peril does not occur in his presence.

RESTATEMENT (SECOND) OF TORTS § 436 (1965).

5. See *infra* note 54 and accompanying text.

6. Tef, *Liability for Negligently Inflicted Nervous Shock*, 99 LAW Q. REV. 100, 105 (1983).

The law has traditionally refused to compensate pure mental disturbance without accompanying physical symptoms. Where negligence resulted directly in physical injury, policy considerations did not prevent the courts from awarding compensation for accompanying elements of pure mental damage, including fright at the time of the accident, anxiety as to its effects, nervousness, or embarrassment as to disfigurement. Once a cause of action was established by the physical injury, courts felt confident that the mental harm was genuine in nature. W. PROSSER, LAW OF TORTS 327, 330 (4th ed. 1971). Early common law exceptions to the physical injury requirement included cases involving intentional torts, the negligent transmission of telegrams, and the negligent handling of corpses. *Id.* at 52, 58.

7. Some courts have rejected a formal distinction between primary and secondary responses as they pertain to recovery for emotional distress, substituting a test which

and may be "experienced by 'any normal person . . . when someone he loves is killed or injured.'"⁸ Anxiety and depression, normal human emotions, are considered part of the risk of living.⁹

In contrast to primary responses are the more serious secondary responses which are generally eligible for recovery.¹⁰ These responses are "longer-lasting reactions caused by an individual's continued inability to cope adequately with a traumatic event."¹¹ Secondary responses generally result in either a recognized medical condition, such as a heart attack, or a recognized psychological illness, such as a serious neurosis.¹² The most typical neuroses include various anxiety reactions such as nervousness, nausea, weight loss, stomach pains and backache.¹³ Thus, "the first hurdle which a plaintiff claiming damages [for infliction of emotional distress] must surmount is to establish that he is suffering from, not merely grief, distress, or any other normal emotion, but a positive psychiatric illness."¹⁴ Although courts generally agree on this medically-based definition, more complex problems arise when the plaintiff attempts to "establish the necessary chain of causation in fact between his psychiatric illness and the death or injury

focuses on the "seriousness" of the injury. *See, e.g.,* *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758, 767 (1974).

8. McLoughlin, [1982] 2 All E.R. at 311.

9. *Id.* It is less clear what role an unusual susceptibility to mental disturbance should play in imposing defendant liability. 38 AM. JUR. 2D *Fright, Shock, and Mental Disturbance* § 27 (1968). The general rule does not impose liability where the defendant's misconduct would not have caused emotional distress to a normal person. *E.g.,* *Knierim v. Izzo*, 22 Ill.2d 73, 86 (1961), 174 N.E.2d 157. Hence, damages were denied by an American court where the emotional distress appeared to be the product of an overly "sensitive mind or morbid imagination." *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688, 696 (D.C. Ark. 1959) (citing 15 AM. JUR. *Damages* § 184 (1938)).

The overall problem remains that "normality in psychic tolerance is a standard both scientifically untenable and impractical to apply." J. FLEMING, *THE LAW OF TORTS* 149 (6th ed. 1983). Although a prior English decision recognized an objective standard of "normalcy" applicable to both the plaintiff and defendant, *Bourhill v. Young*, [1942] 2 All E.R. 396, [1943] A.C. 92, 109-110 (Lord Wright), normality is no longer accepted as the proper test. In cases involving an individual's physical handicaps, such as blindness or allergies, a subjective standard has been adopted in both England and the United States. *See, e.g.,* *Mount Isa Mines v. Pusey*, [1970] 125 C.L.R. 383.

The following factors are considered when dealing with a plaintiff predisposed to injury: (1) whether the defendant acted negligently or intentionally, (2) whether the defendant had knowledge of the plaintiff's sensitivity, (3) whether the susceptibility is extraordinary, or is one common to a large number of persons, and (4) whether the defendant's actions would have distressed a normal person. This last factor narrows the question to one of liability for the aggravation of harm caused by the individual's hypersensitivity. 38 AM. JUR. 2D *Fright, Shock, and Mental Disturbance* § 27 (1968).

10. *Leong*, 520 P.2d at 767.

11. *Id.*

12. Teff, *supra* note 6, at 105.

13. *Id.*

14. McLoughlin, 2 All E.R. at 311 (Lord Bridge).

of one or more third parties negligently caused by the defendant."¹⁵ Courts, historically inundated with fictitious personal injury suits, have been reluctant to risk exposure to a more dubious area of claims.¹⁶ It is far more difficult to ascertain the extent and the source of emotional injury than to identify the cause and severity of a physical injury, such as a broken arm.¹⁷

The symptoms of emotional distress can be easily feigned, and the judiciary remains skeptical about medical science's ability to diagnose effectively mental trauma and its causes.¹⁸ Many courts fear that "unscrupulous lawyers with the aid of equally unscrupulous doctors [would] obtain from sympathetic juries verdicts upon purely fabricated evidence."¹⁹ Hence, claims of emotional distress are particularly likely to produce complex litigation.²⁰ Such litigation challenges the factfinder's ability to distinguish accurately meritorious claims.²¹ The American approach, through the use of formalistic rules, minimizes the factfinder's opportunity to err in the performance of this task.²²

II. HISTORICAL DEVELOPMENT

Early common law permitted recovery for mental suffering only as "parasitic damages" accompanying an award for separate physical injury.²³ The judicial expansion of liability beyond parasitic damages, however, opened a legalistic Pandora's box—creating the need for legal mechanisms designed to control liability.²⁴ Thus, courts in both

15. *Id.* The *McLoughlin* decision distinguishes between the use of experts on the issue of causation versus the issue of foreseeability. While the court endorsed the use of such testimony on the former, it considered expert testimony on the latter as "too large an innovation in the law." *Id.* at 312 (Lord Bridge). It is procedurally unclear how this distinction would be implemented within the American system. *See infra* text accompanying notes 99-107.

16. W. PROSSER, *supra* note 6, at 328, 330. Examples of judicial anxiety over increased litigation and fraudulent claims may be found in a large number of earlier opinions. *See, e.g.,* *Spade v. Lynn & Boston R.R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897); *Miller v. Baltimore & O.S.W.R.R.*, 78 Ohio St. 309, 85 N.E. 499 (1908); *Huston v. Freemansburgh Borough*, 212 Pa. 548, 61 A. 1022 (1905).

17. W. PROSSER, *supra* note 6, at 328.

18. J. FLEMING, *supra* note 9, at 146.

19. Bohlen, *Fifty Years of Torts*, 59 HARV. L. REV. 725, 733 (1937), and cases cited therein.

20. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 515-19 (1975-76).

21. Margolis, *The Case Against Trial by Jury in Complex Civil Litigation*, 7 LITIGATION 19, 22 (Fall 1980).

22. *See infra* text accompanying notes 98-106.

23. Diamond, Dillon v. Legg Revisited: *Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477, 480 (1984). Parenthetically, it is noted that wrongful death statutes in several American jurisdictions allow for an award of damages for emotional distress suffered by a close relative.

24. Henderson, *supra* note 20, at 515-16, and cases cited therein.

England and the United States have endorsed the use of formal legal rules in cases of emotional distress.²⁵ The formalism of these rules limiting liability promotes the important policy goals of predictability and consistency.²⁶

The common legal heritage shared by England and the United States has established a symbiotic relationship between the two countries. Each system has monitored the development of its counterpart's doctrine within this vexing area of tort law. As can be seen from the following examination of relevant case law, courts in both countries have readily embraced the other's precedent in order to support their own opinions.

A. THE IMPACT RULE

The 1888 English landmark decision of *Victorian Railway Commissioners v. Coultas*²⁷ predicated recovery for emotional distress on an implicit requirement of physical contact.²⁸ By limiting liability for emotional distress to those instances where a plaintiff was physically touched by the defendant, or an instrumentality within his control, the court kept recovery within manageable dimensions. The impact rule also represented a judicial attempt to solve the problem of causation.²⁹ By identifying physical contact as the causal link between a defendant's conduct and a plaintiff's subsequent emotional distress, the rule theoretically guaranteed the genuineness of the plaintiff's mental injury.³⁰ Courts in the United States, equally concerned with limiting liability, were quick to adopt the impact rule.³¹

25. Lambert, *Tort Liabilities for Psychic Injuries: Overview and Update*, 37 J.A. TRIAL LAW. AM. 1 (1978).

26. See *infra* text accompanying notes 81-90.

27. [1888] 13 A.C. 222 (P.C.). In *Coultas*, the defendant and her husband approached a railroad crossing in a horse-drawn carriage. A gatekeeper opened the gate allowing them to cross the tracks. When the Coultases were half-way across the tracks, a train approached. Ignoring the order of the gatekeeper to turn back, the Coultases continued toward the far gate, insisting that it be opened. The negligent gatekeeper refused to comply, and the Coultases remained stranded between the closed gate and the passing train. Although the train passed without hitting the carriage, Mary Coultas was terrified by the danger and sued for emotional distress. Both she and her husband were initially successful in obtaining damages for mental distress; however, their victory proved to be short-lived. On appeal, the Privy Council rejected the viability of any claim for emotional distress absent the additional requirement of physical impact on the plaintiff. *Id.*

28. *Id.* The *Coultas* court phrased its decision in terms of the "remoteness" of the damage, holding that the plaintiff's harm was too remote to compensate. *Id.* at 226. Nevertheless, the absence of physical contact was the underlying *ratio decidendi* of the case. E.g., J. FLEMING, *supra* note 9, at 147.

29. *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896) (recovery denied for miscarriage allegedly caused by fright because not proximate result of defendant's negligence).

30. W. PROSSER, *supra* note 6, at 331.

31. The impact rule appeared in the 1896 New York case of *Mitchell v. Rochester Ry. Co.*, *supra* note 29, and soon was adopted in many other jurisdictions. The plaintiff in

The inflexibility of this early rule often yielded idiosyncratic results, leaving many injured plaintiffs without legal recourse.³² This rigidity contributed to the rule's demise in England only thirteen years after its inception.³³ American courts, confronted with the rule's inflexibility and an increasing body of medical knowledge challenging the rule's validity, initially attempted to salvage the rule through the use of semantics. Thus, the judicial definition of "impact" was expanded to include a trivial blow,³⁴ a superficial burn,³⁵ an electric shock,³⁶ a minor jostling,³⁷ dust in the eye,³⁸ or the inhalation of smoke.³⁹ When the utility of these attempts to broaden the definition of "impact" became increasingly suspect, the majority of American courts followed the English lead and rejected the impact rule.⁴⁰

Mitchell, while waiting in a cross-walk, was confronted by a runaway horse-drawn van. The negligently controlled horses failed to stop until the plaintiff stood between the horses' heads. Shocked by the incident, the plaintiff collapsed and thereafter suffered a miscarriage. The court, noting the lack of any physical impact, labelled the emotional injury to the plaintiff as too remote and denied recovery. One year later, the courts of Massachusetts embraced the impact rule in *Spade v. Lynn & Boston R.R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897). In *Spade*, the Massachusetts Supreme Court denied recovery for emotional distress to a plaintiff who, although severely disturbed by a streetcar incident, failed to prove physical impact.

32. This draconian doctrine transformed a plaintiff's good fortune in escaping injury into a legal misfortune. *E.g.*, *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958) (recovery denied to a plaintiff seeking damages for a heart attack because no physical contact occurred between the plaintiff and defendant's trespassing bull).

33. *Dulieu v. White & Sons*, [1902] 2 K.B. 669.

34. *Spade v. Lynn & Boston R.R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897); *cf.* *Homans v. Boston Elevated Ry. Co.*, 180 Mass. 456, 62 N.E. 737 (1902) (recovery allowed for nervous shock where it accompanied slight injury, whether shock due to visible injury or merely accompanied it).

35. *Kentucky Traction & Terminal Co. v. Roman's Guardian*, 232 Ky. 285, 23 S.W.2d 272 (1929).

36. *Hess v. Philadelphia Transp. Co.*, 358 Pa. 144, 56 A.2d 89 (1948).

37. *Zelinsky v. Chimics*, 196 Pa. Super. 312, 175 A.2d 351 (1961).

38. *Porter v. Del., L. & W.R.R. Co.*, 73 N.J.L. 405, 63 A. 860 (1906).

39. *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930). In 1928 the absurdity of the definitional expansion of "impact" was underscored by a circus case in which impact was defined to include a defendant's horse defecating into the lap of the plaintiff. *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928).

40. The impact rule retained a surprising vitality in a minority of American jurisdictions. New York adhered to the rule until 1961, when it was rejected in *Battalla v. N.Y.*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). The plaintiff-infant in *Battalla* was negligently placed in an unsecured chair-lift at a ski resort. As a result, the child became frightened and hysterical and subsequently suffered emotional distress. The court, critical of the policy arguments previously used to support the rule, noted that "mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one." *Id.* at 731 (citing *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 81, 73 A. 688, 692 (1909)).

Seventeen years later, the Massachusetts court reached a similar conclusion in *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978). The *Dziokonski* opinion not only repudiated the impact rule, but within Massachusetts, hurled the discredited doctrine into the "ash heap of [legal] history." Lambert, *supra* note 25, at 7.

B. THE ZONE-OF-DANGER DOCTRINE

The zone-of-danger doctrine filled the void created by the rejection of the impact rule. The doctrine, first articulated in the English case of *Dulieu v. White & Sons*,⁴¹ permits recovery for emotional distress suffered when a plaintiff is within the radius of risk of physical contact but no impact occurs. Any emotionally distressed plaintiff outside the zone of danger is denied recovery as a matter of law.⁴²

The elimination of the physical impact requirement increased the likelihood of litigation, including emotional distress claims brought by third parties. The zone-of-danger doctrine has proved particularly proficient at limiting the number of these claims by providing a facile determination of those eligible to recover.⁴³

When the doctrine was first formulated, medical evidence suggested that, absent impact, lasting nervous shock occurred only in situations where an individual feared for his or her own personal safety.⁴⁴ Although subsequent medical knowledge has largely discredited this initial premise, the doctrine has failed to evolve accordingly. Moreover, when applied to a particular genre of cases, the doctrine's logical underpinnings rapidly deteriorate.⁴⁵ For example, the doctrine fails to recognize the enhanced likelihood that a parent outside the zone of danger, fearing for the safety of his or her child, will suffer emotional distress.⁴⁶ Similarly, an individual could experience emo-

As recently as 1980, however, Indiana adhered to the impact rule. *Indiana Motorcycle Ass'n v. Hudson*, 399 N.E.2d 775 (Ind. App. 1980) (recovery denied for mental suffering caused by injury to real estate).

41. [1901] 2 K.B. 669. The plaintiff in *Dulieu* was tending bar in her husband's public house. A negligently operated horse-drawn van was driven into the building and the terrified plaintiff subsequently suffered a miscarriage. Sustaining her claim for mental distress and consequential physical injury, the *Dulieu* court held that fear, capable of producing actual physical injury even without physical impact, was sufficient to support a cause of action. *Id.* at 674, 682 (Kennedy, J.).

42. *Id.* at 675 (Kennedy, J.). Compare, e.g., *Okrina v. Midwestern Corp.*, 282 Minn. 400, 165 N.W.2d 259 (1969) (the defendant's negligent construction work caused a wall to collapse next to a shop in which the plaintiff was purchasing clothing; although untouched by the wall, the plaintiff suffered severe shock from the sound of the crashing structure which resulted in physical illness; the court, rejecting the requirement of impact, focused instead on the plaintiff's proximity to the source of danger) with, e.g., *Rickey v. Chicago Transit Auth.*, 98 Ill.2d 546, 457 N.E.2d 1 (1983) (the plaintiff witnessed his brother being strangled when his clothing became entangled in a negligently operated escalator; as a result, the plaintiff allegedly suffered severe psychiatric trauma; the plaintiff, outside of the sacrosanct zone of danger, was denied recovery).

43. In an important caveat, the *Dulieu* court explicitly excluded bystander recovery for those outside the zone of danger. [1901] 2 K.B. at 675 (Kennedy, J.); see also J. FLEMING, *supra* note 9, at 147.

44. *Dulieu*, [1901] 2 K.B. at 675 (Kennedy, J.); see also Harvard, *Reasonable Foresight of Nervous Shock*, 19 MOD. L. REV. 478 (1956).

45. *Dziokonski*, 380 N.E.2d at 1300.

46. Recognizing the special relationship of parent and child, and in the interest of equity, judges on occasion have departed from a literal formulation of the doctrine. See

tional distress resulting from fear for the safety of a friend, co-worker, or even a total stranger.⁴⁷ Notwithstanding these medical and conceptual shortcomings, the zone-of-danger doctrine remains the American majority rule in cases concerning emotional distress.⁴⁸

C. BYSTANDER RECOVERY: BEYOND THE ZONE OF DANGER

The typical situation in a bystander recovery case involves a plaintiff, outside the zone of danger, who witnesses an accident to another individual, usually a close family member.⁴⁹ As a result of the defendant's negligence, the plaintiff-witness suffers emotional distress, often resulting in physical illness. Because the plaintiffs in these cases are in no danger of physical injury, a traditional application of the zone-of-danger doctrine would preclude recovery.

The legal barrier to bystander recovery imposed by the zone-of-danger doctrine was surmounted in the 1924 English decision of *Hambrook v. Stokes Brothers*.⁵⁰ The *Hambrook* court held that a fear of immediate injury, either to oneself, or one's children, created a valid claim for emotional distress. Although language in the opinion suggested a willingness to expand recovery to include all accident witnesses and bystanders, the court limited its holding to similar fact patterns involving mothers and their children. Moreover, the decision introduced an additional limiting factor: the plaintiff's emotional distress must result from that which he either saw or perceived through his "own unaided senses."⁵¹

The permissive attitude toward bystander recovery underlying the decision in *Hambrook* resurfaced in the 1968 American decision of *Dillon v. Legg*.⁵² Challenging the necessity of formalistic rules, the

Hambrook v. Stokes, [1925] 1 K.B. 141 (C.A.). See also *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); see *infra* notes 52-54 and accompanying text.

47. See *Mount Isa Mines v. Pusey*, [1970] 125 C.L.R. 383; *Dooley v. Cammell Laird & Co.*, [1951] Lloyd's Rep. 271; see also J. FLEMING, *supra* note 9, at 151; *Lambert*, *supra* note 25, at 11.

48. *Lambert*, *supra* note 25, at 7, and cases cited therein.

49. *Id.* at 11.

50. [1925] 1 K.B. 141 (C.A. 1924). In *Hambrook*, the defendant negligently left the engine running in his parked truck. The unattended vehicle rolled down a street on which the plaintiff's three children were walking. The plaintiff's wife, aware of the presence of her children on the street, spotted the runaway truck and suffered nervous shock. Her fear for the safety of her children caused a hemorrhage, resulting in her death.

51. *Id.* at 152. See *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.) (during a picnic, while the plaintiff-mother was picking flowers across the road, a negligent driver hit her family's van; she turned to view the accident at the sound of the crash; recovery was granted).

52. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In *Dillon*, a mother was about to cross the street with her two daughters. A negligently driven automobile struck one daughter as she stepped off the curb. Both the mother and remaining daughter sued for emotional distress caused by witnessing the fatal accident. The lower court allowed the daughter's claim but rejected the plaintiff-mother's claim, considering the mother to be outside the zone of danger. On appeal, the California Supreme Court reversed, rejecting

California Supreme Court in *Dillon* recommended a flexible approach based on foreseeability. The court suggested three relevant guidelines for measuring foreseeability—proximity, contemporaneous observance, and relationship to the victim—each to be considered on a case-by-case basis.⁵³ A minority of American courts have chosen to follow the foreseeability approach in *Dillon*, thus rejecting the traditional formalistic American approach.⁵⁴

the zone-of-danger doctrine, and thus, significantly expanding the boundaries of recovery for emotional distress.

53. 441 P.2d at 920-21. In an effort to impose some limits on recovery, the court restricted claims for emotional distress to those accompanied by physical symptoms. 441 P.2d at 920.

54. Prior to *Dillon*, the conceptual expanse between the formalistic zone-of-danger doctrine and the new English approach based on foreseeability may have seemed too great for American law to traverse in a single step. *Dillon*, however, may well represent a conceptual stepping stone, creating the illusion that what previously appeared to be an impossible leap is now a manageable move forward.

A number of post-*Dillon* decisions have further expanded recovery beyond the requirement of accompanying physical symptoms suggested in *Dillon*. In *Leong v. Takasaki*, 55 Hawaii 369, 520 P.2d 758 (1974), a ten-year-old boy was crossing the street with his step-grandmother when he spotted an approaching car. The woman, failing to notice the car, was struck and killed. Shocked by the accident, the plaintiff, manifesting no physical symptoms, subsequently returned to school and resumed his normal activities. In awarding damages for emotional distress, the decision analogized the requirement of physical symptoms to the prerequisite of physical impact. The court rejected both requirements, viewing them as artificial barriers to recovery. Thus, according to *Leong*, physical symptoms are merely "admissible as evidence of the degree of . . . emotional distress suffered." *Id.* at 762.

An interesting twist on expanded liability appeared in the case of *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1982). On no less than three separate occasions, negligently driven automobiles crashed into the living room of the Paughs' home. Although the plaintiff and her family escaped physical injury, the court upheld a cause of action:

[W]hile some may view our decision . . . as an unsettling quantum leap into this difficult area of the law, the situation is one of paramount necessity in fitting the law to the dynamics . . . of . . . twentieth century society. We view our decision today as a bold and promising step in ensuring *an individual's right to emotional tranquility*.

Id. at 762-63 (emphasis added).

One year later, the *Paugh* court decided *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 447 N.E.2d 109 (1983). In this case, the plaintiff was driving his car behind a truck which was negligently carrying sheets of glass. One of the sheets dislodged, bounced off the highway, and shattered against the plaintiff's windshield. Although a medical examination revealed no physical manifestations of shock, the plaintiff's claim for emotional distress was successful. The Ohio court, acknowledging the trend of recent California decisions, held that a plaintiff may state a cause of action for emotional distress without accompanying physical symptoms, provided that the distress was foreseeable and "serious." *Id.* at 111-12 n.4.

In contrast, some post-*Dillon* cases have transformed the purportedly flexible guidelines into rigid rules for denying recovery. Indicative of this genre is *Kelley v. Kokua Sales & Supply Ltd.*, 56 Hawaii 204, 532 P.2d 673 (1975). The plaintiff in *Kelley* sued for emotional distress after receiving a long distance telephone call. The caller informed him of the accidental deaths of his daughter and granddaughter in Hawaii. In denying the claim, the court refused to allow recovery for shock-induced injuries suffered by plaintiffs not "located within a reasonable distance from the scene of the accident." *Id.* Hence, the concept of "proximity" to an accident, originally recommended as a measure of foreseeability, *Dillon*, 441 P.2d at 920, was used instead to measure miles and to set arbitrary boundaries of

D. THE AFTER-MATH DOCTRINE

The English after-math doctrine expands both the temporal and spatial definition of "accident" beyond its literal moment of occurrence.⁵⁵ Prior to the formulation of this expansive theory, legal authority in England and the United States predicated recovery upon a contemporaneous witnessing of the accident's actual occurrence.⁵⁶ The doctrine permits recovery for absentee plaintiffs by redefining the requirement of contemporaneous observance to include the witnessing of the post-accident after-math.⁵⁷ As discussed below, the new English approach to emotional distress was adopted in the context of an after-math case.⁵⁸

E. THE NEW ENGLISH APPROACH: REASONABLE FORESEEABILITY

Under the current American approach, application of the zone-of-danger doctrine remains a two-step process. First, the court uses

liability. See Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. OF HAWAII L. REV. 1, 2-3 (1979).

Culbert v. Sampson's Supermarkets Inc., 444 A.2d 433, 437 (Me. 1982), represents a hybrid among the *Dillon* progeny. While recognizing pure psychic injury without accompanying physical symptoms, the Maine court used a constricted interpretation of *Dillon* as a prophylactic device to limit liability. In stressing that the plaintiff's claim satisfied the requirements of proximity, contemporaneous observance and a close relationship of the victim, the court treated the *Dillon* "guidelines" as an all-or-nothing proposition. *Id.* at 438.

The *Dillon* court itself later limited its holding in the case of *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977). The case involved a father who suffered shock as a result of watching the negligent delivery of his stillborn child. In dismissing the claim, the California Supreme Court defined a "contemporaneous observance" as "contemporaneous perception." 19 Cal.3d at 584. See Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 594 (1982) ("*Justus* appears to require understanding by the plaintiff of the nature of the injuries being suffered by the victim *while* they are initially being suffered." (Emphasis in original)).

See also *Krouse v. Graham*, 562 P.2d 1022, 137 Cal. Rptr. 863 (Cal. 1977) (en banc) (although plaintiff-husband did not see his wife's accident, his presence at the scene and his perception of his wife's death warranted the award of damages); *Hathaway v. Superior Ct.*, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (Ct. App. 1980) (mother discovered her child moments after it had been electrocuted but was denied recovery because she had not witnessed the actual moment of electrocution).

55. The doctrine was first formally recognized by the House of Lords in *McLoughlin*, [1982] 2 All E.R. 298; see *Lambert*, *supra* note 25, at 22.

56. See *supra* notes 49-54 and accompanying text.

57. See *McLoughlin*, [1982] 2 All E.R. at 304 (Lord Wilberforce). The term "after-math" can be judicially expanded or contracted to include virtually any period of time or series of post-accident events. Compare *Benson v. Lee*, [1972] Vict. R. 879 (Vict.) (recovery for damages due to nervous shock permitted on foreseeability grounds for a mother who neither heard nor saw her son's accident but ran to the scene immediately afterwards), with *Chester v. Council of the Municipality of Waverly*, 62 C.L.R. 1 (Austl. 1939) (recovery for damages due to nervous shock denied for a mother who neither heard nor saw her son's accident but was present when his body was recovered; recovery denied because of a lack of duty owed to the mother).

58. See *infra* notes 61-75 and accompanying text.

objective criteria to determine which claims are allowable as a matter of law. If a claim clears this legal hurdle, foreseeability then becomes a question of fact for the jury. In contrast, the new English approach enunciated in *McLoughlin v. O'Brian*⁵⁹ collapses this traditional bifurcated inquiry into a question solely of fact. Within the English system, however, this purported transformation is largely semantic, since the English judge is also the factfinder.⁶⁰

In *McLoughlin*, the negligent defendant severely injured the plaintiff's husband and three children in a road accident. One child subsequently died, and the other victims suffered critical injuries. When the tragedy occurred, the plaintiff was at home two miles away. Arriving at the hospital, she heard of her child's death, witnessed her remaining family's extensive injuries, and consequently suffered from "severe and persistent" emotional distress.⁶¹

The Court of Appeal sustained the lower court's dismissal,⁶² denying recovery for the plaintiff despite recognition that the plaintiff's shock was foreseeable.⁶³ Stephenson, L.J., concluded that although the defendant owed a duty of care to the plaintiff, policy considerations precluded an award of damages.⁶⁴ Influenced by precedent, Stephenson argued that "commercial sense and practical convenience" should limit relief to those on or near the highway at the time of the accident.⁶⁵ Griffiths, L.J., reasoned that although the injury was foreseeable, the defendant did not owe the plaintiff a duty of care.⁶⁶ Also influenced by the authority of prior case law, Griffiths stated that the duty of care owed by motor vehicle drivers was "limited to persons and owners of property on the road or near to it who might be directly affected. . . ."⁶⁷

The House of Lords reversed the Court of Appeal and adopted a reasonable foreseeability test to determine liability in emotional dis-

59. [1982] 2 All E.R. 298.

60. See *infra* note 91 and accompanying text.

61. [1982] 2 All E.R. 298. The plaintiff's plight in *McLoughlin* is similar to that of a rescuer, who is normally considered foreseeable by traditional tort law. J. FLEMING, *supra* note 9, at 151; see also J. HENDERSON, *THE TORTS PROCESS* 543-45 (1981). In fact, *Chadwick v. British Ry. Bd.*, [1967] 1 W.L.R. 912, specifically involved emotional distress encountered in a rescue situation. The plaintiff in *Chadwick* volunteered his assistance in the aftermath of a train disaster and later recovered for the emotional distress triggered by the traumatic experience.

62. [1981] 1 All E.R. 809 (C.A.).

63. [1982] 2 All E.R. 298, 302 (per Lord Wilberforce).

64. [1981] 1 All E.R. 809, 820 (Stephenson, L.J.).

65. *Id.*

66. *Id.* at 824 (Griffiths, L.J.).

67. *Id.* at 827. Griffiths also expressed concern over the increased anxiety likely to be experienced by a plaintiff suffering shock when faced with the prospect of prolonged litigation. *Id.*

tress cases.⁶⁸ The majority denied the existence of any policy reasons sufficient to justify a narrower limit on liability.⁶⁹ Writing the lead opinion, Lord Bridge of Harwich stated that liability for emotional distress must be decided on the facts of each case under the reasonable foreseeability test.⁷⁰ Significantly, Lord Bridge's conclusion was based on his confidence in the ability of English judges to discern legitimate claims of emotional distress "with an eye enlightened by [a] progressive awareness of mental illness."⁷¹ His Lordship viewed a "consensus of informed judicial opinion" as the best measure for determining whether emotional distress was reasonably foreseeable in any given case.⁷²

Thus, under the majority view in *McLoughlin*, foreseeability is ultimately a question of fact with the factfinder unconstrained by arbitrary rules of law predetermining the boundaries of liability.⁷³ Factors such as space, time, distance, the nature of injuries sustained, and the plaintiff's relationship to the victim, although relevant to the inquiry, would no longer act as legal limitations on recovery.⁷⁴ Liability would end "[w]here in the particular case the good sense of the judge . . . decides" it should.⁷⁵

The *McLoughlin* decision relied on a number of explicit assumptions in expanding the boundaries of permissible liability. First, in the court's view, the need for continual development of the law outweighed the need for predictability.⁷⁶ Second, the *McLoughlin* court stated that, under its new approach, both the number of successful claims and the amount of damages will be "moderate."⁷⁷ While each of these assumptions is arguably valid with respect to the English legal system, their validity is subject to serious challenge when viewed in the context of its American counterpart.⁷⁸

68. [1982] 2 All E.R. at 320.

69. [1982] 2 All E.R. at 304, 307, 310-11, 320 (Lords Wilberforce, Edmund-Davies, Russell, Scarman, and Bridge). Lord Scarman believed any curtailment on the basis of policy must come from the legislature. *Id.* at 310-11. Lords Wilberforce and Edmund-Davies believed sufficient public policy reasons did exist. *Id.* at 303, 308-09.

70. *Id.* at 320.

71. *Id.* at 312-13.

72. *Id.* at 312.

73. *Id.*

74. *Id.* at 311 (Lord Scarman). See *id.* at 318-20 (Lord Bridge) (referring to *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).

75. *McLoughlin*, [1982] 2 All E.R. at 320.

76. *Id.*

77. *Id.* at 319.

78. See *infra* text accompanying notes 92-98.

III. COMPARATIVE ANALYSIS

The *McLoughlin* decision rejects the use of explicit rules of law in cases of emotional distress. To appreciate fully the implications of this new approach, it is necessary to briefly examine the nature of legal rules and their traditional role within the Anglo-American legal system.⁷⁹ This Section begins with some observations concerning the need for explicit rules and the relationship of rules to the concepts of consistency and predictability.⁸⁰ Next, this Section examines the relative capability of the English and American systems to function properly in the absence of explicit rules of law. Finally, this Section considers the consequences and the costs likely to be incurred by each system upon the elimination of rules of law.

A. THE FUNCTION OF RULES

The zone-of-danger doctrine, although seemingly an obsolete, arbitrary rule, provides a degree of specificity essential to the proper functioning of the American legal system. As one commentator has noted, "[l]aw without rules . . . would not be a system of law as we know it."⁸¹

An important distinction must be drawn between a rule and a standard. A rule, such as the zone-of-danger doctrine, may be defined as a tool for implementing one or more predetermined policy objectives.⁸² In contrast, a standard, such as reasonable foreseeability, although lacking the specificity of a rule, allows for greater discretion in its application.⁸³ In a given fact situation, the use of an inherently flexible standard may produce more "just" results on an individual basis. A rule, however, serves the broader legal process concerns of predictability and consistency, which must be balanced against concerns for substantive fairness.⁸⁴

79. It is important to distinguish between two issues raised by any inquiry into the desirability of a rule. The first, discussed in this Section, concerns the broad question of whether a legal system genuinely requires concrete rules of law as opposed to flexible standards. Assuming this initial inquiry is answered affirmatively, the second issue, largely beyond the scope of this Note, concerns the extent to which a particular rule is the appropriate one.

80. For purposes of this Note, an efficient legal system is one in which social and economic costs are minimized and social and economic benefits are maximized. A complete discussion of this concept appears in Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

81. R. SUMMERS & P. ATIYAH, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 1-1 (1985) (unpublished, available from authors).

82. *Id.*

83. Ehrlich & Posner, *supra* note 80, at 258.

84. *See id.* at 275. A "perfectly detailed and comprehensive set of rules brings society nearer to its desired allocation of resources." *Id.* at 262.

A simple analogy, proposed by Professor James Henderson, Cornell Law School, illustrates the benefit of rules from a process perspective and emphasizes the inherent limita-

Predictability is a fundamental goal of any legal system.⁸⁵ In general terms, predictability results in an efficient society where costs are minimized and benefits maximized. Moreover, in the specific context of emotional distress, explicit rules define the parameters of permissible behavior: they increase the probability of penalizing those engaged in socially undesirable activities and protecting those engaged in desirable behaviors.⁸⁶ The consistent and thus predictable treatment of similar claims minimizes the danger of offending the community's sense of fairness and in turn reinforces society's respect for the law.⁸⁷ The ability to predict the outcome of litigation also increases the rate of out-of-court settlement, thereby reducing the cost of litigation and further increasing efficiency.⁸⁸

Conversely, flexible standards of liability foster ambiguity, which may, in turn, "chill" productive social conduct.⁸⁹ Hence, in an atmosphere of expanded liability for emotional distress, "a rational individual, especially if he is risk averse, may incur heavy costs to avoid even a slight risk of [liability]"⁹⁰

Thus, explicit rules, as opposed to general standards, tend to maximize the social goals of predictability and consistency. The discussion below analyzes the relative capacity of English and American courts to adjudicate effectively without explicit rules.

tions of a standard-based approach. Presently, only those American citizens eighteen years of age or older are eligible to vote. The voting rule denies an important privilege to many under the age of eighteen who are otherwise qualified to handle this responsibility. In this regard, the rule is clearly underinclusive: it automatically precludes all those who fail to satisfy its objective parameters and leaves no opportunity for exceptions based on a subjective appraisal of individual voter capability. Likewise, the overinclusiveness of the voting rule permits many citizens to vote who might be denied the right if evaluated under a subjective standard. If process concerns are ignored, a compelling argument can be made that the voting age requirement should be replaced by a procedure that individually appraises the capability of each person desiring to vote. Viewed from this extreme, it becomes apparent that the abolition of formal rules controlling voting is untenable. Although a subjective process of evaluating voters would likely result in a fairer and more just composite, the selection process itself would exhaust such time and resources that the election would be postponed indefinitely.

The above analogy is not intended to argue that the zone-of-danger doctrine is the ideal rule for handling cases of emotional distress; nor does the analogy suggest that eighteen is the ideal majority age for voting. The analogy does, however, underscore the importance of formal rules in the efficient functioning of the legal system. Specifically, in the context of emotional distress, American adherence to the zone-of-danger doctrine provides a desirable degree of consistency and predictability that the foreseeability standard does not provide.

85. See generally Ehrlich & Posner, *supra* note 80, *passim*.

86. *Id.* at 264.

87. G. CALABRIESI, *THE COST OF ACCIDENTS* 294 (1970).

88. Ehrlich & Posner, *supra* note 80, at 265.

89. *Id.* at 263.

90. *Id.*

B. RELATIVE CAPABILITY TO FUNCTION WITHOUT EXPLICIT RULES

Two characteristics arguably allow the English legal system to function without an explicit rule of law governing cases of emotional distress. First, English judges share a common background that increases the likelihood of consistent results. Second, England has virtually eliminated jury trials in all personal injury cases.⁹¹

English judges are members of a relatively homogeneous group. Typically, they share a common educational background and similar social and moral values.⁹² Equally important in the context of this discussion, they possess as a group an accurate awareness of the policy concerns which shape the current body of English law and have an enduring respect for precedent resulting in a substantial reluctance to depart from prior law.⁹³

Due to these common attributes, the *McLoughlin* decision's elimination of explicit rules poses a minimal threat to consistency. In all likelihood, English judges, despite *McLoughlin's* grant of greater discretion, will apply implicitly shared notions of appropriate legal policy. Consequently, within the English system, lower courts may continue to produce consistent results. Although an occasional case may be decided anomalously, the system as a whole should continue to function consistently and predictably.⁹⁴

American judges, particularly at the state level, form a far more heterogeneous group than their English counterparts.⁹⁵ In the United States, the judicial selection process promotes diversity among judges, resulting in a panorama of socioeconomic, political, and legal backgrounds. In addition, the judiciary in any particular region of the

91. Margolis, *supra* note 21, at 19. In England, jury trials are granted only in rare civil cases involving "personal reputation such as libel, slander, malicious prosecution, false imprisonment, and fraud." *Id.* The discretionary power of the judge to order a jury trial was effectively eliminated in *Ward v. James*, 1 Q.B. 273 (1966).

92. R. SUMMERS & P. ATIYAH, *supra* note 81, at 2-22. With regard to the legal expertise of the English judiciary, "the judge is invariably a former barrister of high standing at the bar and thus brings all of that experience to the fact finding process." *Id.* at 5-10.

93. English judges are often reluctant to regard themselves as entitled to create exceptions to a "firm" rule laid down in a somewhat dogmatic manner by a higher court. Unless the rule is laid down in a way that acknowledges that exceptions or departures are permissible in special circumstances, lower court judges may be inclined to think that the statement of a rule means that it must be applied without exceptions, or that the function of exceptions should be left to higher courts. And higher courts themselves may be disinclined to modify firm rules by the introduction of exceptions creating "uncertainty."

Id. at 2-31.

94. "[E]ven in the absence of any rules at all . . . in England, customary norms or homogeneity of values among decisionmakers may in fact operate to make decisions more structured, more uniform and more formal . . ." *Id.* at 2-22.

95. *Id.* at 5-10.

country may be influenced by local custom and values. This lack of homogeneity does not argue against the competence of any individual judge. Rather, it suggests the improbability of achieving a uniform legal consensus absent explicit rules of law.⁹⁶ Hence, regardless of the procedural role ultimately reserved for the American judiciary under the new English approach,⁹⁷ the removal of explicit rules of law would diminish predictability within the American system.⁹⁸

A second reason why the English legal system may continue to function predictably in the area of emotional distress—despite the absence of a formal rule of law—is that England has virtually eliminated jury trials in personal injury cases. Since American courts have continued to use juries in such cases, an American importation of the English approach would necessitate a shift in the traditional allocation of functions between judge and jury. Because foreseeability is usually a question of fact rather than one of law, a jury would theoretically be responsible for determining liability.⁹⁹ From a practical standpoint, however, it seems unlikely that the American system would tolerate the wholesale removal of the judge from the adjudicative process.

Regardless of how the responsibility for determining liability would be allocated, the proper functioning of the American jury, like the American judiciary, is dependent upon the presence of explicit rules of law.¹⁰⁰ As previously discussed, the ability of a system to produce consistent results without explicit rules is primarily a function of

96. *But see generally* Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982). Professor Twerski argues that even in the absence of explicit rules, American judges are capable of screening cases through the expanded use of the directed verdict.

97. *See infra* text accompanying note 99.

98. The problem of predictability is further complicated within the United States by its multi-state jurisdictional system. Under the American approach, the jurisdictional problem remains manageable. Although the majority of states now adhere to the zone-of-danger doctrine, others have chosen to maintain or develop their own formalistic approaches. Nonetheless, the United States remains uniform in its current approach to emotional distress insofar as every state bases recovery on some type of formalistic approach. The overall American legal system may be described as yielding results which are "predictably divergent." Thus a plaintiff, although required to meet varying prerequisites for recovery in various states, can predict where he stands legally in any given state.

Should a majority of states adopt the English approach, a significant drop in the existing level of predictability could be anticipated. State courts would lack a formal doctrine articulating their own legal policy, and findings of liability would vary with individual fact patterns and individual judges and juries. At such a point, the aggregate system would only be capable of producing what may be termed "unpredictably divergent" results.

99. Currently under the American approach, the judge initially establishes which claims are appropriate for jury consideration. He may refuse to permit the claim as a matter of law or, alternatively, he may defer to the jury for a decision of fact. Thus, the judge is in a position to use the jury on those matters "towards which the law is relatively neutral and where the layman's sense of values is deemed to be as good" as his own. Malone, *Ruminations on Cause in Fact*, 9 STAN. L. REV. 60, 65 (1956).

100. Henderson, *supra* note 20, at 515-19.

its ability to substitute shared notions of implicit policy concerns.¹⁰¹ The characteristics of the jury which enable it to perform its traditional role as factfinder argue against its ability to implement these policy concerns.

Jury members are selected in part because of their ignorance of the law as opposed to their legal expertise.¹⁰² Due to this lack of technical knowledge, juries base their verdicts largely on their sense of subjective fairness and the sympathy felt for a particular plaintiff or defendant.¹⁰³

Concededly, the idea of approaching emotional distress cases on the basis of fairness possesses superficial appeal. Such an approach, however, would substantially diminish predictability and consistency, thus transforming the American legal system into a "thinly disguised lottery."¹⁰⁴ Plaintiffs confronted with nothing more than a subjective standard of fairness would be forced to wager on the emotional whims of a jury in evaluating the chance of successful litigation.

Casting additional doubt on the wisdom of a subjective fairness approach is the distinction between the interests of an individual in a particular case and the interests of society as a whole. The jury, being fact-sensitive and responsive to instant equities, may favor the interests of the individual. In the extreme, the jury may even "find 'facts' that are not really facts because [it] wants . . . the plaintiff to recover damages because [it] feels *justice* really demands as much in the case involved."¹⁰⁵ Explicit rules, which when viewed subjectively seem to result in the denial of individual justice, nonetheless serve the objective needs of a system dependent upon predictability and consistency. Jurors who view a given case subjectively rarely analyze the objective concerns of predictability and consistency prior to rendering a verdict.¹⁰⁶

Even with explicit rules, the subjective nature of the jury process interjects a degree of unpredictability into the legal system. For exam-

101. See *supra* text accompanying notes 86-90.

102. R. SUMMERS & P. ATIYAH, *supra* note 81, at 5-26.

103. One recent study analyzed approximately 19,000 jury verdicts over a 20-year period (1960-1980). In addition to concluding that juries are more sympathetic, the report suggested that this characteristic significantly increases the amount of damages awarded. Clifford, *Study of Jury Verdicts Yields Interesting Overview*, *Legal Times*, Nov. 22, 1982, at 15, col. 1.

104. Henderson, *supra* note 20, at 468.

105. R. SUMMERS & P. ATIYAH, *supra* note 81, at 5-3.

106. Assuming, *arguendo*, that a jury is inclined to premise its decision-making on notions of objective community fairness, rather than on a subjective standard, its task remains formidable. Such an ability assumes that juries are able to discern what the community standards of fairness are. "[T]he increased complexity and interdependence of modern society [however,] renders an . . . analysis based upon a concept of community [fairness] . . . exceedingly difficult." Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 549 n.46 (1972).

ple, a jury may either fail to understand the law as charged or choose to "nullify" the law.¹⁰⁷ Nonetheless, by pre-determining a class of plaintiffs whose cases are eligible to reach the jury, explicit rules significantly enhance the predictability of the system.

The elimination of explicit rules in England or the United States would result in a greater number of decisions which fail to adequately serve traditional process concerns. The nature of the English judiciary may minimize the number of these decisions in England relative to those generated in the United States. Hence, all other things being equal, England may be better suited to operate under the open-ended approach endorsed in *McLoughlin*.

C. SYSTEMIC DIFFERENCES

The relative inability of the United States to effectively implement the *McLoughlin* decision is further diminished by various systemic differences between the two countries. These systemic differences affect both the number of decisions which fail to adequately serve process concerns and their attendant costs.

Because legally-defined boundaries no longer limit the number of potential plaintiffs, the *McLoughlin* decision potentially increases the number of claims seeking redress for emotional distress. Mere considerations of administrative convenience, of course, do not justify the use of a formalistic legal doctrine.¹⁰⁸ Nonetheless, assuming that the elimination of explicit rules would increase the percentage of American decisions inimical to process concerns, the total number of detrimental decisions will increase proportionately with the number of claims brought.

The problem of increased litigation may be aggravated within the United States by contingent fee arrangements which provide an incentive for a segment of the legal profession to pursue potential claimants who otherwise would not be seeking legal redress.¹⁰⁹ Attorney-initiated litigation is particularly problematic in emotional distress cases due to the amorphous nature of mental injury.¹¹⁰ This problem is likely to become more pronounced if the United States adopts the

107. See R. SUMMERS & P. ATIYAH, *supra* note 81, at 5-25.

108. Thus, the floodgates argument against a flexible standard of recovery for emotional distress has largely been discredited. See, e.g., *McLoughlin*, [1982] 2 All E.R. 298, 304; *Paugh*, 6 Ohio St.3d at 75. *Contra Rickey*, 98 Ill.2d at 555 (1980).

109. J. HENDERSON, *supra* note 61, at 543.

110. The inherent difficulty in defining emotional distress has been exacerbated by a number of recent decisions. In an effort to demonstrate an acceptance of expanded liability, several courts have included under the term emotional distress vague notions of "mental and emotional well-being" and "pure psychic injury." See Chesley, *The Increasingly Disparate Standards for Recovery for Negligently Inflicted Emotional Injury*, 52 U. OF CINN. L. REV. 1017, 1034-35 (1983).

English approach, because aggressive attorneys will no longer be limited to a legally prescribed class of plaintiffs eligible to recover.

Considerably less potential for increased litigation exists in England. In addition to disallowing contingent fees, the English system requires the losing litigant to pay all court costs including his opponent's legal fees.¹¹¹ This system of cost allocation provides an important disincentive to frivolous litigation, which is conspicuously absent from the American system.

The disparate treatment of damages by the two countries raises additional doubt regarding the suitability of the English approach for the United States. Militating against large damage awards in England is a comprehensive social welfare system which ensures that those in need are provided with assistance.¹¹² More significantly, because the English judiciary assesses damages, their "calculation . . . has become a much more precise and mathematical exercise"¹¹³ than in the United States. Hence, the determination in England of "discount rates for future earnings, pre-judgment interest rates, and even the fixing of damages for non-pecuniary loss"¹¹⁴ are more consistent and predictable.

In contrast, American damage awards under the English approach might be inflated. Injured plaintiffs in the United States may be more likely to rely on the judicial system to provide the largest portion of their compensation.¹¹⁵ Furthermore, even if a plaintiff receives substantial social welfare payments for injuries sustained, the collateral-source rule prohibits American juries from considering these payments.¹¹⁶

Higher damages in emotional distress cases are not inherently wrong. Damages for emotional distress awarded without regard for process concerns, however, decrease the predictability of the legal system and thereby generate indirect social costs otherwise minimized by the use of explicit rules.¹¹⁷ In addition to the greater number of decisions anticipated within the United States under *McLoughlin* that

111. J. FLEMING, *supra* note 9, at 579.

112. Double recovery is permitted by statute in certain instances. In such cases, the general disparity between English and American social welfare programs becomes less significant. J. FLEMING, *supra* note 9, at 219-21.

113. R. SUMMERS & P. ATIYAH, *supra* note 81, at 5-31.

114. *Id.* at 5-31 to -32.

115. J. FLEMING, *supra* note 9, at 219-21.

116. The rule finds conceptual support at common law to the extent that the tort system has never hesitated to redress in full economic loss regardless of disparities in income levels. A defendant has never been able to argue that his damages should be reduced because the plaintiff's income was unseemingly high. Tort law, engaged in corrective justice, traditionally has left matters of distributive justice for other branches of the law. Blum, *Ceilings, Costs and Compulsion in Auto Compensation Legislation*, UTAH L. REV. 341, 359 (1973).

117. See *supra* notes 85-88 and accompanying text.

would ignore process concerns, the potential for greater damage awards in the United States suggests that the direct dollar cost of these decisions would be significantly greater as well.

CONCLUSION

Since the first claim for emotional distress, common law limits on liability have continued to expand. For over a century, both England and the United States have moved toward more liberal recovery, periodically redefining their legal doctrine to reflect changing attitudes toward emotional injury.

Currently, the majority of American courts continue to rely on a formalistic rule limiting liability. The historical interdependence of the English and American legal systems, together with the growing number of American courts experimenting with expanded liability, suggests that the *McLoughlin* decision might be a logical extension of existing law. A blind adoption of *McLoughlin*, however, is ill-advised.

Within the English judicial system, the reasonable foreseeability approach may prove workable. The English elimination of jury trials in personal injury cases assures that all claims of emotional distress will be adjudicated from the bench.¹¹⁸ Thus, despite the apparent open-endedness of the new approach, English judges remain capable of collectively and uniformly screening claims which conflict with the process concerns of predictability and consistency.¹¹⁹ Additionally, the increased costs associated with ambiguous cases are likely to be minimized in England.¹²⁰

Although a reasonable foreseeability approach may prove feasible in England, legal process considerations suggest that implementation of that approach in the United States would not be successful. Unlike its English counterpart, the American judiciary represents an amalgam of diverse backgrounds, training, and values.¹²¹ Absent explicit rules of law, American judges are unlikely to produce a consensus sufficient to promote the goals of predictability and consistency. Similarly, the proper functioning of American juries is dependent upon the presence of explicit rules of law. These rules ensure that jury decisions fairly reflect the interests of society in addition to those of the individual plaintiff or defendant.¹²²

Due to the above factors, the number of decisions that fail to promote predictability and consistency would be higher in the United

118. See *supra* note 91.

119. See *supra* notes 92-94 and accompanying text.

120. See *supra* note 111 and accompanying text.

121. See *supra* text accompanying note 95.

122. See *supra* text accompanying note 100.

States than in England under the new English approach. Moreover, systemic differences including varying incentives to litigate and the disparate treatment of damages between the two systems would result in the cost of these decisions being significantly higher in the United States as well.¹²³ In conclusion, a combination of legal process concerns and systemic differences argue against an American adoption of the new English approach.

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123. *See supra* notes 108-17 and accompanying text.

