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Administering Ohio's Newly Recognized Tort: The Negligent Infliction of Serious Emotional Distress

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ADMINISTERING OHIO'S NEWLY RECOGNIZED TORT: THE NEGLIGENT INFLICTION OF SERIOUS EMOTIONAL DISTRESS

I. INTRODUCTION

ON APRIL 13, 1983, the Ohio Supreme Court decided the case of *Schultz v. Barberton Glass Co.*,[1] becoming the ninth state to recognize the negligent infliction of emotional distress as an independent tort.[2] While the *Schultz* decision was in accord with new trends in the law and advancements in medical science, it left the administration of this new tort undefined. Justice Holmes, the sole dissenter in *Schultz*, stated that the majority decision established

> an unduly liberalized statement of the law with no attendant standards, which in the syllabus travels well beyond the periphery of reasonable application . . . I disagree with the majority's failure to replace the former rule with one that provides bench and bar sufficient insight into reasonable limitations of recovery,[3] . . . I conclude that the majority has established an unfortunately boundless rule of law with absolutely no guidelines or standards to aid the judge, jury, or counsel in their travels over these newly established way.[4]

In response to the criticism of Justice Holmes and the concerns of the legal community, the Ohio Supreme Court on July 27, 1983, decided the case of *Paugh v. Hanks*,[5] stating that this decision is a "unique opportunity to establish standards in this ever evolving area of tort law . . . [and] upon remand we wish to guide the trial court, as well as the bench and bar, as to the limitations and scope of Ohio's recognition of the tort of negligent infliction

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[1]4 Ohio St. 3d 131, 447 N.E. 2d 109 (1983).

[2]Those jurisdictions now recognizing negligent infliction of emotional distress are: Alabama, Taylor v. Baptist Med. Center, Inc., 400 So. 2d 369 (Ala. 1981); California, Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); Connecticut, Montinieri v. Southern New England Tel. Co., 175 Conn. 337, 398 A.2d 1180 (1978); Hawaii, Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Louisianna, Chappetta v. Bowman Transp. Inc., 415 So. 2d 1019 (La. Ct. App. 1982); Maine, Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Missouri, Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); Ohio, Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109, (1983); Washington, Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

[3]*Schultz*, 4 Ohio St. 3d at 136, 447 N.E.2d at 113.

[4]*Id.* at 140, 447 N.E.2d at 116.

[5]6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

of serious emotional distress."[6]

Before examining the standards set forth by the Ohio Supreme Court in *Paugh*, a brief overview of the history and treatment of emotional distress in other jurisdictions is necessary because Ohio has borrowed from the experiences and illustrations of several states in delineating the standards for administration of this new tort.

II. OVERVIEW

As the court in *Paugh* notes, "the first step that courts took in the evolutionary cycle of defining the boundaries of liability for emotional distress in negligence actions was to allow recovery for mental distress as only 'parasitic' or 'pain and suffering' damages which were grounded in a traditional tort cause of action."[7] Generally, if no independently protected right was violated, the courts did not consider mental distress alone as sufficient to create a cause of action. Compensation for mental suffering was viewed as only one element of the damages awarded for violation of an already protected right.[8] Early cases refused all remedy for mental injury unless it could be brought within the scope of some already recognized tort such as assault,[9] battery,[10] false imprisonment,[11] trespass,[12] or seduction.[13] A prophetic early commentator stated:

> The treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic and industrial needs as those needs are reflected in the organic law.[14]

While courts have generally allowed recovery for mental distress only as consequential damages to an otherwise actionable tort, two areas have been carved out in which courts allow recovery for mental distress alone. An increasing minority of states allow recovery where there has been a negligent

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[6]*Id.* at 74, 451 N.E.2d at 762

[7]*Id.* at 75, 451 N.E.2d at 763.

[8]F. HARPER, A TREATISE ON THE LAW OF TORTS § 67 (1983); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55 (4th ed. 1971); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1048 (1936); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1238 (1971) [herinafter cited as Comment, *Independent Tort*]; *See, e.g.*, Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948) (No recovery for emotional distress because one must be in a situation where he is entitled to protection).

[9]Allen v. Hannaford, 138 Wash. 423, 244 P. 700 (1926).

[10]Draper v. Baker, 61 Wis. 450, 21 N.W. 1085 (1884).

[11]Fisher v. Rumler, 239 Mich. 224, 214 N.W. 310 (1927).

[12]M.J. Rose Co. v. Lowery, 33 Ohio App. 488, 169 N.E. 716 (1929).

[13]Haeissig v. Decker, 139 Minn. 422, 166 N.W. 1085 (1918).

[14]T. STREET, FOUNDATIONS OF LEGAL LIABILITY 460, 470 (1906); For discussions of parasitic damages, *see generally* W. PROSSER, *supra* note 8 at §12.

transmission of a telegram causing emotional distress.[15] However, the federal rule, which controls interstate messages,[16] and the majority of states including Ohio, deny recovery.[17]

The second area in which courts have generally allowed recovery for mental distress alone is in cases involving the negligent handling of corpses.[18] Ohio's inroad into recovery for the mishandling of dead bodies is found in the case of *Brownlee v. Pratt.*[19]

Dean Prosser concludes that liability is imposed in these types of cases because "an especial likelihood of genuine and serious mental distress, arising from the special circumstances . . . serves as a guarantee that the claim is not spurious.[20]

The inventiveness of the courts and the need to compensate some forms of mental distress led to the development of the impact rule or the contemporaneous physical injury rule. The impact rule provides that there can be no recovery for emotional distress when there has been no immediate physical impact.[21] The impact rule requires some direct impact or trauma as a condition precedent to recovery for negligently caused emotional distress.[22]

The contemporaneous physical injury rule is virtually indistinguishable from the impact rule except that it does not require that impact precede mental anguish. All that is required is accompanying physical injury regardless of whether it causes the mental anguish or is caused by the mental anguish.[23]

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[15]*See, e.g.*, Western Union Tel. Co. v. Crumpton, 138 Ala, 632, 36 So. 517 (1903); Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895); Johnson v. State, 37 N.Y.2d 378, 334 N.E. 2d 590, 372 N.Y.S.2d 638 (1975); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943); Relle v. Western Union Tel. Co., 55 Tex. 308 (1881).

[16]*See, e.g.*, Western Union Tel. Co. V. Speight, 254 U.S. 17 (1920); *See also* 20 TEX. L. REV. 210 (1942); 34 TEX L. REV. 487 (1956); However the federal rule allows recovery where there is resulting physical illness. *See, e.g.*, Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir.) *cert. denied* 350 U.S. 947 (1956).

[17]*See, e.g.*, Seifert v. Western Union Tel. Co., 129 Ga. 181, 58 S.E. 699 (1907); Morton v. Western Union Tel. Co., 53 Ohio St. 433, 41 N.E. 689 (1895): Western Union Tel. Co. v. Choteau, 28 Okla. 664, 115 P. 879 (1911); Corcoran v. Postal Tel. Cable Co., 80 Wash. 570, 142 P. 29 (1917). *See generally* W. PROSSER, *supra* note 8, at § 54; Comment, *Administering the Tort of Negligent Infliction of Mental Distress: A Synthesis,* 4 CARDOZO L. REV. 487, 500-01 (1982-83) [hereinafter cited as Comment, *Synthesis*]; 52 O. JUR. 2d, *Telegraphs and Telephones* §79 (1962).

[18]*See e.g.*, Brown Funeral Homes & Ins. Co. v. Baughn, 226 Ala. 661, 148 So. 154 (1933); St. Louis S.W.R. Co. v. White, 192 Ark. 350, 91 S.W.2d 277 (1936); Louisville & N.R. Co. v. Hull, 113 Ky. 561, 68 S.W. 433 (1902); Weingast v. State, 44 Misc. 2d 824, 254 N.Y.S.2d 952 (1964) *See generally* W. PROSSER, *supra* note 8 at § 54; RESTATEMENT (SECOND) OF TORTS § 868 (1979); *See also* Annot., 48 A.L.R. 3d 240 (1973).

[19]77 Ohio App. 533, 8 N.E.2d 798 (1946). *See* 19 OHIO ST. L.J. 455 (1958); *See also* 16 O. JUR. 2d *Dead Bodies* § 16 (1971).

[20]W. PROSSER, *supra* note 8 at §54.

[21]*Id.* at § 54; *See also* Note, *Recovery for Negligent Infliction of Emotional Distress: Changing the Imapact Rule in Indiana,* 54 IND. L.J. 467 (1979); Note, *Mental Distress — The Impact Rule,* 42 UMKC L. REV. 234 (1973).

[22]Garod, *Recovery for Negligently Inflicted Intangible Damages,* 56 FLA. B.J. 708 (1982).

[23]*See, e.g., Heid v. Red Malcuit, Inc., 12 Ohio Misc. 158, 230 N.E.2d 674 (1967); Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960); Jines v. City of Norman, 351 P.2d 1048 (Okla. 1960); See also* Note, *Duty, Foreseeability, and the Negligent Infliction of Mental Distress, 33 ME. L. REV. 303, 304 (1981) [hereinafter cited as Note, Duty].*

The traditional rule in tort law came to require that infiction of emotional distress was not compensable unless such infliction results in physical injury to the plaintiff or an objective manifestation thereof.[24] This requirement was an expression of a strong judicial reluctance to impose liability for subjective injuries such as mental distress, when occasioned only by mere negligence.[25]

The impact requirement has been vigorously criticized by commentators and courts since its inception,[26] which has led to its abandonment in at least thirty-five jurisdictions.[27] Despite the criticism of the impact rule, Ohio remained a bastion for this limitation to recovery until the recent Ohio Supreme Court decision in *Schultz*. The rule in Ohio established seventy-six years ago in *Miller v. Baltimore & Ohio S.W.R. Co.*[28] was that there is no liability for causing merely fright, shock, or other emotional disturbance when such emotional disturbance is unaccompained by contemporaneous physical injury, even though subsequent illness results.[29]

Although Ohio retained the impact rule it became famous for its courts creativity in sidestepping the requirement, an example of which is found in the celebrated case of *Morton v. Stack*,[30] where the Court of Appeals of Cuyahoga County found inhalation of smoke sufficient impact to allow recovery.[31]

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[24]*See* Handford, *Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort,* 8 ANGLO-AM. L. REV. 1, 21 (1979). *See also* Leong v. Takaski, 55 Hawaii 398, 400, 520 P.2d 758, 761 (1974).

[25]Russo, *Malicious, Intentional and Negligent Mental Distress in Florida,* 11 FLA. ST. U.L. REV. 339, 363 (1983).

[26]*See* F.H. BOHLEN, RIGHT TO RECOVERY FOR INJURY RESULTING FROM NEGLIGENCE WITHOUT IMPACT, IN STUDIES IN THE LAW OF TORTS 252 (1926); Throckmorton, *Damages for Fright,* 343 HARV. L. REV. 260 (1921); Amdursky, *The Interest in Mental Tranquility,* 13 BUFFALO L. R.EV. 339, 353 (1964); Campbell, *Injury Without Impact,* INS. L.J. 654 (1951); Goodrich, *Emotional Disturbance As Legal Damage,* 20 MICH. L. REV. 497 (1922); Note, *Negligent Infliction of Emotional Distress as an Independent Cause of Action in California: Do Defendants Face Unlimited Liability?,* 22 SANTA CLARA L. REV. 181 (1982); Comment, *Campbell v. Animal Quarantine Station: Negligent Infliction of Mental Distress,* 4 U. HAWAII L. REV. 207 (1982); Comment, *Torts: The Impact Rule — Nuisance or Necessity?* 25 U. FLA. L. REV. 368, 369 (1973). *See also* Steward v. Gilliam, 271 So. 2d 466 (Fla. Dist. Ct. App. 1972), *rev'd,* 291 So. 2d 593 (Fla. 1974) (Court condemned impact rule as anachronistic and contrary to modern public policy); Wallace v. Coca-cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Bosley v. Andrews, 393 Pa. 161, 183, 142 A2d 263, 274 (1958) (Musmanno, J., dissenting); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); *See generally,* Annot., 64 A.L.R. 2d 100 (1959).

[27]*See* Note, *Duty, supra* note 23, at 303 n.8. *See also* Champion v. Gray, 420 So. 2d 348 n.l2 (Fla. Dist. Ct. App. 1972).

[28]78 Ohio St. 309, 85 N.E. 499 (1908).

[29]*Id. See also* 16 O. JUR 2d Damages § 78 (1971); For subsequent adherance to impact rule see Bartow v. Smith, 149 Ohio St. 301, 78 N.E. 2d 735 (1948); Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936); Tuttle v. Meyer Dairy Products Co., ___ Ohio App. ___, 138 N.E.2d 429 (1956); Held v. Red Malcuit, Inc., 12 Ohio Misc. 158, 230 N.E.2d 674 (1967); Iskander v. Ford Motor Co., 59 Ohio App. 2d 325, 394 N.E.2d 1017 (1978) (did not require impact but demanded physical manifestation of emotional injury).

[30]122 Ohio St. 115, 170 N.E.869 (1930).

[31]For other examples, see Wolfe v. Great Atlantic & Pacific Tea Co., 143 Ohio St. 643, 56 N.E. 2d 230 (1944) (eating from a can contaminated with worms); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (invasion of privacy); Clark Restaurant Co. v. Rau, 41 O. App. 23, 179 N.E. 196 (1931) (swallowing glass). For further discussion of the types of cases, in Ohio and elsewhere, wherein recovery is allowed for emotional disturbance without a contemporaneous physical injury see Mauger v. Gordon, 22 Ohio Op. 436 (C.P. Stark 1941). *See also* 16 O. Jur 2d *Damages* §79 (1971).

The nation's courts became increasingly dissatisfied with the impact rule and developed a replacement theory of recovery known as the zone of danger rule. Under this rule, a plaintiff-bystander to an accident need not have been physically injured, but was required to be in close enough proximity to an accident to have been placed in actual physical danger. Thus, as a minumum prerequisite to recovery, plaintiff must have been within the range of ordinary physical peril.[32] The zone of danger rule also became the position currently held by the Restatement of Torts.[33]

Some courts were still not satisfied with the limited scope of a defendant's liability for the negligent infliction of emotional distress; limits they considered to be arbitrarily drawn and emanating from artificial tests. In the case of *Dillon v. Legg*,[34] the California Supreme Court took the lead in disposing of the zone of danger rule. By applying general tort principles such as negligence, proximate cause and foreseeability, the court established a new theory of recovery referred to as the bystander rule. The *Dillon* court recognized the right of a third-party bystander, even if not within the zone of danger or injurious impact, to recover for emotional trauma and physical harm resulting from witnessing an accident in which a closely-related person is injured or killed by the negligent act of the defendant.[35] The bystander rule thus embraces a form of foreseeability test or zone of emotional danger rule, which predicates recovery upon whether the defendant should have foreseen fright or shock severe enough to cause substantial injury in a normally constituted person.[36]

The next and final step in this evolutionary process was the decision by a number of state courts to recognize the negligent infliction of emotional distress as an independent cause of action.

III. Departure From Impact Requirement *(Schultz v. Barberton Glass Co.)*

The Ohio Supreme Court's decision in *Schultz* marked a departure from the ancient epitaph still followed by some states, that "mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."[37]

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[32]*See* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d (1969). Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 1935).

[33]RESTATEMENT (SECOND) OF TORTS § 313 (Supp. 1981). For an excellent review of the Restatement position on the negligent infliction of emotional distress see Annot., 29 A.L.R.3d 1337 (1970).

[34]68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[35]Note, *Molien v. Kaiser Foundation Hospitals: California's New Tort of Negligent Infliction of Serious Emotional Distress,* 18 CAL. W.L. REV. 101, 104, (1982).

[36]*See Dillon,* 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72. *See also* Note, *Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation,* 15 IND. L. REV. 617 (1982); Comment, *Negligent Infliction of Emotional Distress: Liability to the Bystander — Recent Developments,* 30 MERCER L. REV. 735 (1979).

[37]Lynch v. Knight, 11 Eng. Rep. 854, 863 (1861).

Until the recent decision of *Yeager v. Local Union 20*,[38] Ohio was the only jurisdiction in the country that refused to recognize the independent tort of the intentional infliction of emotional distress.[39] This position received severe criticism from commentators[40] and has led more than one distinguished law review article to refer to Ohio as "distinctly and inexcusably retrogressive."[41]

The Ohio Supreme Court responded to this obloquy in *Schultz*, stating that "a cause of action may be stated for the negligent infliction of serious emotional distress without a contemporaneous physical injury."[42] The adoption of this cause of action resulted from an incident in which plaintiff was driving his car along an interstate, when the truck in front of him, operated by defendant, dropped a large sheet of glass which hit the highway and then smashed into plaintiff's windshield. The plaintiff was hit by glass fragments when the windshield shattered but he did not suffer any physical injury.[43]

While the majority in *Schultz* set forth a very liberal form of recovery for mental distress in tune with modern medical concepts, the decision failed to develop any tangible standards for recovery.[44] The impact of *Schultz* left a void in Ohio law which was not to be tolerated for an extended period of time. Three months later, the Ohio Supreme Court supplemented the *Schultz* decision and explained in detail the parimeters of liability and standards for recovery in the case of *Paugh v. Hanks*.[45]

IV. GUIDELINES FOR ADMINISTRATION *(Paugh v. Hanks)*

Plaintiff, Mrs. Paugh, lived with her husband and two small children in

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[38]6 Ohio St. 3d 369, 453 N.E.2d 666 (1983) (One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and is bodily harm to the other results from it, for such bodily harm.).

[39]*See* W. PROSSER, *supra* note 8, at § 12 n.81.

[40]Prosser, *Insult and Outrage,* 44 CALIF. L. REV. 40 (1956).

[41]47 MICH. L. REV. 436 (1949); 27 TEX. L. REV. 730, 732 (1949). These articles are in response to Bartow where the Court allowed no recovery to a pregnant woman who had been reviled on a public street; (expressly overruled in Yeager v. Local Union 20, 6 Ohio St. 3d, 369). Professor Prosser notes that Ohio compensates for distress at the discovery of ransacked furniture, M.J. Rose Co. v. Lowery, 33 Ohio App. 488, 169 N.E. 716, but not for distress at seeing the body of one's murdered sister, Koontz v. Keller, 52 Ohio App. 265, 3 N.E. 2d 694. *See also* Barnett v. Sun Oil Co., 113 Ohio App. 449, 172 N.E. 2d 734 (1961) (Plaintiff denied recovery for death of spouse and mother who died from fright while trying to escape from fire); *See* W. PROSSER, *supra* note 8 at § 54.

[42]4 Ohio St. 3d at 136, 447 N.E.2d at 113.

[43]*Schultz,* 4 Ohio St. 3d at 132, 447 N.E.2d at 110.

[44]*See Id.* at 136, 447 N.E.2d at 113 (Holmes, J., dissenting). The majority opinion centers around the main objections to recovery for mental distress, and why these objections are no longer valid to limit recovery. The main objections are as follows: (1) mental distress cannot be measured in terms of money; (2) the physical consequences of mental distress are too remote, (3) there is a lack of precedent; (4) a vast increase in mental distress claims would result, and (5) there is a danger of vexatious suits and ficticious claims. W. PROSSER, *supra* note 8 at §54). *See* RESTATEMENT (SECOND) OF TORTS §436A comment b (1965); Note, *Negligent Infliction of Emotional Distress Absent Physical Impact or Subsequent Physical Injury,* 47 MO. L. REV. 124, 125 n.9, (1982). *See also* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). For complete analysis of Shultz decision see Note, *Where to Now? Negligent Infliction of Emotional Distress in Ohio,* 9 U. DAYTON L. REV. 113 (1983) [hereinafter cited as Note, *Where to Now?*].

[45]*Paugh,* 6 Ohio St. 3d at 72, 451 N.E.2d at 761.

a house directly across from an exit ramp of an interstate. During a period of eight months, three separate automobiles collided with the Paugh household, causing Mrs. Paugh great consternation and anxiety regarding the safety of her children. The third incident happened approximately two weeks after the second, both occurring in an area in which her children were usually at play during the day. It brought on fainting and hyperventilating spells which continued until she was admitted into the Akron General Psychiatric ward suffering from an anxiety trauma.[46]

This fact pattern presented the supreme court with an ideal opportunity to expand on its decision in *Schultz*, to set out guidelines as well as delineate the limitations and scope of Ohio's recognition of the tort of negligent infliction of serious emotional distress. This was the goal of the Paugh court,[47] whose opinion serves well as a supplement to *Schultz* and explains the outer boundaries of liability where emotional illness, unaccompanied by physical injury, is alleged and proven.[48] While the court attempts to provide detailed guidelines for the bench and bar, it must be remembered that these are just that, guidelines, and by definition are general and somewhat vague. The admonishment of the court in this case, also proposed by other courts and commentators, is that the determination of the factors set forth must be accomplished on a case-by-case basis because no fixed or immutable rule is capable of resolving all the cases brought under an action for the negligent infliction of serious emotional distress.[49] As a result of this built-in ambiguity, several important questions concerning the administration of this new tort remain unanswered.[50]

A. What is Meant by Serious Emotional Distress and How is it to be Proven?

> One of the standards established by *Paugh* is that
> where a bystander to an accident states a cause of action for negligent infliction of serious emotional distress, the emotional injuries sustained must be found to be both serious and reasonably forseeable, in order to allow a recovery. . . . Serious emotional distress describes emotional injury which is both severe and debilitating.[51]

Emotional distress is defined as "any traumatically induced reaction which is medically detrimental to the individual."[52] However, Ohio has chosen to

[46] *Id.* at 73, 451 N.E.2d at 761-62.

[47] *Id.* at 74, 451 N.E.2d 652.

[48] Kent, *Negligence and Emotional Distress,* 55 CLEVE. B.J. 2 (Nov. 1983).

[49] *Paugh,* 6 Ohio St. 3d at 80, 451 N.E.2d at 767; *See also Dillon,* 68 Cal. 2d 728, 441 P.2d 912, 69 Cal Reptr. 72; Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos,* 33 HASTINGS L.J. 583, 618-21 (1981).

[50] A note of caution is in order in that both *Paugh* and *Schultz* involve negligent motorists, who have always been liable for the negligent operation of a car. Since claims other than the automobile variety have not yet been adjudicated in Ohio, it is questionable what precedential value these decisions will have for claims outside the motorist sphere.

[51] *Paugh,* 6 Ohio St. 3d at 78, 451 N.E. 2d at 765.

[52] Schwartz, *Neurosis Following Trauma,* TRAUMA, 32 (Dec. 1959). *See also* Comment, *Independent Tort, supra* note 8, at 1248-50, 1255 and 1248-50 for a concise discussion of the medical aspects of mental distress.

compensate only for emotional distress which is both "severe and debilitating,"[53] which keeps intact the old adage that "a certain toughening of the mental hide is a better protection than the law could ever be."[54] It has been suggested that "the seriousness criterion thus refers to severe and debilitating emotional injury with its attendant painful mental suffering and anguish, injury of grave intensity and duration, as opposed to injury of a trivial and transient nature."[55] A means of determining whether emotional distress is severe and debilitating under the *Paugh* standard is to inquire whether "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case."[56]

Examples usually associated with severe and debilitating emotional injury include an inability to return to a normal routine, which includes an inability to adequately perform usual work, household chores, or childrearing duties.[57] "Psychic manifestations of serious emotional distress might include severe depression, suicidal tendencies, nightmares, and neurotic fears of something connected with the victim's injuries."[58] Ohio specifically includes traumatically induced neurosis, psychosis, chronic depression and phobia.[59]

The serious criterion in Ohio permits at least four separate means of proof. Ohio provides that a court, at the outset, *may* decide whether a plaintiff-bystander has stated a cause of action by ruling on whether the emotional distress alleged is serious as a matter of law.[60] Secondly, the introduction of expert medical testimony may be used to prove that plaintiff suffers from a serious recognizable psychiatric illness of a severe and debilitating nature.[61] Thirdly, the seriousness of emotional distress may be established through the circumstances of the case by introducing objectively verifiable facts enabling the jury to conclude that plaintiff suffers from genuine and serious mental distress.

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[53]*Paugh,* 6 Ohio St. 3d at 78, 451 N.E.2d at 765. *See also Rodrigues,* 52 Hawaii at 172-73, 472 P.2d at 520. The court in *Rodrigues* presented four reasons for limiting recovery to claims of serious emotional distress. First, minor shock is a consequence of civilized society. Second, social controls may more adequately deal with infliction of minor distress than legal controls, Third, some types of shock may be beneficial. Fourth, the law should not reinforce the neurotic patterns of society. *Id.*

[54]Magruder, *supra* note 8, at 1035.

[55]Nolan & Ursin, *supra* note 49, at 615. (This article is cited in *Paugh* on two separate occasions and should be consulted as it may serve as an accurate guideline on the intent of the Ohio Supreme Court in coining the phrase "severe and debilitating" as its serious criterion. *See also id.* at 615-16 n.187 for a discussion of what medical profession considers serious emotional injuries) *See generally* Laughlin, *Neuroses Following Trauma,* in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 76 (P. Cantor ed. 1962). For criticism of the use of serious criterion, Kelley v. Kohua Sales & Supply, LTD, 56 Hawaii 204, 208, 532 P.2d 673, 626 (1975) ("Merely requiring the proof of serious mental distress, rather than minor mental distress, does not realistically and reasonable limit the liability of the appellees").

[56]*Paugh,* 6 Ohio St. 3d at 78, 451 N.E.2d at 765. This is the standard adopted by the courts in *Rodriguez,* 52 Hawaii 156, 472 P.2d 509; and in *Molien,* 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831.

[57]Nolan & Ursin, *supra* note 49, at 617.

[58]*Id.*

[59]*Paugh,* 6 Ohio St. 3d at 78, 451 N.E.2d at 765.

[60]*Id.* (Courts will probably be most reluctant to take this determination away from the jury).

[61]*Id.* at 80 451 N.E.2d at 767. *Schultz,* 4 Ohio St. 3d at 135, 447 N.E.2d at 112.

This may be provided by lay witnesses who were acquainted with the plaintiff, testifying as to any marked changes in the emotional or habitual makeup that they discern in the plaintiff after the accident has occurred.[62] Finally, Ohio provides that "proof of a resulting physical injury is admissible as evidence of the degree of emotional distress suffered."[63]

Some guidelines for jurors as they "flesh out the requirements of serious emotional distress as defined in *Paugh*, is that they should consider the plaintiff's continuing treatment requirements, the daily restrictions on his ordinary activities, recurring physical and mental reactions, and finally, the social stigma attached to the plaintiff's disability."[64]

B. What Factors Determine Reasonable Foreseeability of Emotional Injuries?

Consistent with prior Ohio law,[65] the first consideration in determining the foreseeability of a negligent injury is that "it is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in injury to someone."[66] In adopting a foreseeability approach to determine the basis of liability, Ohio law now seems to embrace the position that a plaintiff should be able to recover for mental injuries which were derivative from defendant's actions because resultant emotional distress caused by negligently created peril is foreseeable and reasonably to be expected.

The Ohio Supreme Court in *Paugh* delegates the task of determining foreseeability, in the first instance, to the judges of this state.

> It is the court [who] will determine whether the accident and harm was reasonably foreseeable. Such reasonable foreseeability does not turn on whether the particular plaintiff as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected.[67]

To assist the trial courts in this endeavor the *Paugh* decision promulgates

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[62] *Paugh*, 6 Ohio St. 3d at 80, 451 N.E.2d at 767. *See also, Molien*, 27 Cal. 3d at 960, 616 P.2d at 821, 167 Cal. Rptr. at 839; *Rodriguez*, 52 Hawaii 156 at 178, 472 P.2d at 520.

[63] *Paugh*, 6 Ohio St. 3d at 77 451 N.E.2d at 765. *See generally*, Comment, *Independent Tort, supra* note 8; Nolan & Ursin, *supra* note 49, at 618-19; *See also* P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 78 (2d ed. 1975). It should be noted however, that traumatic neurosis is greatly aggravated by the stress of approaching litigation. *See* Smith & Solomon, *Traumatic Neurosis in Court*, 30 VA. L. REV. 87, 125 (1943).

[64] Note, *Where to Now?, supra* note 44, at 125; Blackmer, *negligent Actions for Emotional Distress and Loss of Consortium without Physical Injury*, 69 CALIF. L. REV. 1142, 1161 (1981).

[65] *Id.* While courts will probably be most reluctant to take this determination away from the jury, it would appear that the Ohio Supreme Court included this seperate means of proof to encourage the trial courts to dispose of the issue of the *seriousness* of emotional distress by way of summary judgment or directed verdict.

[66] *Paugh*, 6 Ohio St. 3d at 78, 451 N.E.2d at 766.

[67] *Id.* at 79, 451 N.E.2d at 766 (quoting Dillon v. Legg, 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

several factors, to be used concomitantly with the foreseeability test, which the court should consider in determining the reasonable foreseeability of a negligently inflicted emotional injury.[68]

The factors to be considered in order to determine whether a negligently inflicted emotional injury was reasonably foreseeable include:

> 1) [W]hether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away;
> 2) [W]hether the shock resulted from a direct emotional impact upon the plaintiff from sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and
> 3) [W]hether the plaintiff and victim (if any) were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[69]

The Ohio Supreme Court warns that these factors are not requirements and are by no means exclusive, adding that "all these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case."[70] Thus, the difficult hurdle for recovery is convincing the trial court that serious emotional injury was reasonably foreseeable.

"With respect to the first factor, the closer in proximity a plaintiff is to the accident, the more likely it will be that the plaintiff's injury is foreseeable."[71] The second factor, stated by the court, suggests that a "contemporaneous observance" of the accident will enhance the possibility that the emotional injury was reasonably foreseeable. Under the "contemporaneous observance" guideline, it is not necessary for the plaintiff to actually see the accident. A mother hearing her child scream or the screeching of brakes before turning and seeing her child injured is a sufficient guarantee of the genuineness of an emotional injury; moreover, if a defendant's negligent act injures a child it is reasonably foreseeable that the child's mother is close by and will suffer emotional injury.[72] The second criterion is also justifiable in light of supporting medical evidence that the one independent feature which plays a large role in plaintiff's ultimate reaction is the degree to which the plaintiff was prepared for the intense stimulus. Abnormal reactions are rare in normal people if they have sufficient time to prepare for death or severe injury, but if the psychic

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[68] *Id.*

[69] *Id.*, quoting Dillon v. Legg, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[70] *Id.*

[71] *Id.* For an explanation of why nearness to accident is a proper criterion for recovery, see A. KAPLAN, M. FREEDMAN & G. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY III 690 (3d ed. 1980); Lindeman, *Symptomatology And Management Of Acute Grief, 101 AM. J. PSYCHIATRY 1414 (1944). See also* Nolan & Ursin, *supra* Note 49, at 616.

[72] *See Paugh,* 6 Ohio St. 3d at 79, 451 N.E.2d at 766. This "contemporaneous observance" guideline has been recently expanded in California. *See* Nevels v. Yeager, No. 69772 (Calif. 2d Dist. Ct. App. Feb. 29, 1984).

trauma is sudden and unexpected, the likelihood of an abnormal reaction increases almost to a virtual certainty.[73]

The third factor considers the closeness of the relationship between victim and plaintiff. However, the court does not require consanguinity as a prerequisite to foreseeability. Nevertheless, the closer the relationship, the more likely it is that the emotional injury was reasonably foreseeable.[74] To ensure consistency in administering this tort, a standard jury instruction should be drafted by the courts that adopts a medically accepted guideline such as:

> [T]he degree in which the victim impinged upon the life of the survivor in a constructive and loving way, so that the loss of the victim would leave such a great void in the life of the surviving person that it is reasonably foreseeable that such survivor will experience a normal grief reaction.[75]

Adoption of this guideline to establish foreseeability will in most instances concern immediate family members, but would not foreclose an aunt, uncle, grandparent, close friend, or fiancee, whose relationship with the victim is shown to be so special as to place him or her within the class of persons that the defendant could foresee.[76] However, these individuals should assume a heavier burden of proof in establishing a sufficiently close relationship to the victim to allow recovery.[77]

This foreseeability approach adopted in Ohio is gaining increasing recognition by other courts.[78] The Ohio approach averts the dangers of unlimited liability by requiring that mental anguish be foreseeable.[79] However, this foreseeability approach has also been criticized by many commentators and courts because "by emphasizing foreseeability to the exclusion of other factors which could aid in determining whether a duty exists, courts have laid the basis for an arbitrary requirement much like the older impact, contemporaneous physical injury, and zone of danger rules."[80] One suggestion made to eliminate this state of confusion in the law among our nation's courts is to use a broader

[73]Parkes, *The Nature Of Grief,* 3 INT'L J. PSYCHIATRY, 435 (1965); Leibson, *Recovery of Damages for Emotional Distress Caused By Physical Injury to Another,* 15 J. FAM. L. 163, 204 (1976-77).

[74]*Paugh,* 6 Ohio St. 3d at 80, 451 N.E.2d at 767 (the court considered a fiancee of the victim eligible for recovery).

[75]Leibson, *supra* note 73, at 196.

[76]*Id.* at 199. For an example of a special relationship found, see Mobaldi v. Board of Regents of the University of California, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976) (foster mother).

[77]Leibson, *supra* note 73, at 199.

[78]Dillon, 68 Cal. 2d 728 441 P.2d 912, 69 Cal. Rptr. 72; Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973); Corso v. Merrill, 199 N.H. 647, 406 A.2d 300 (1979); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978). For additional information regarding the foreseeability approach, see Russo, *supra* note 25, at 366 n.209-212.

[79]Comment, *Refining the Traditional Theories of Recovery for Consumer Mental Anguish,* 1979 B.Y.U. L. REV. 81, 87.

[80]Note, *Duty, supra* note 23, at 305; W. PROSSER, *supra* note 8, § 53, Tobin b. Grossman, 24 N.Y. 2d at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558; D'Ambra v. United States , 114 R.I. 643, 650-51, 338 A.2d 524, 528 (1975).

foreseeability test which limits liability. "The foreseeability test could be expressed as 'should the defendant have foreseen the danger of injury?' rather than the more restrictive negligence question, 'would a reasonable man have foreseen the danger of injury in the particular situation?'"[81]

C. How Are Damages to be Established?

While the court in *Paugh* does not specifically address this issue, it seems apparent that damages are to be established by the application of general tort principles for a negligence action. If the defendant's conduct is determined as the proximate cause of plaintiff's injury, the defendant is liable for any damages arising from the consequences of his or her negligent act.[82]

Probably the most essential criterion for the recovery of damages is whether the emotional harm requires medical attention.[83]

> The general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case . . . In judging the genuineness of a claim for mental distress, courts and juries may look to the quality and genuineness of proof and rely to an extent on contemporary sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims.[84]

These passages from the court in *Schultz* place heavy emphasis on the use of expert medical witnesses to establish proof of damages. The court in *Paugh* continues to rely on expert medical testimony as the primary proof of damages; "with respect to questions of proof, expert medical testimony can assist the judicial process in determining whether the emotional injury is indeed, serious."[85]

The use of partisan medical experts to establish damages is the standard in the legal community involving the negligent infliction of emotional distress. However, their use has shortcomings, the most common of which is that it

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[81]Note, *Duty, supra* note 23, at 320.

[82]*Paugh,* 6 Ohio St. 3d at 81, 451 N.E.2d at 767. *See also* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974).

[83]Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases,* 35 U. CHI. L. REV. 512, 517 (1968); for a subsequent application of *Paugh* by an appellate court, see Smith v. National Home Life Assurance Co., No. 1168 (12th Dist. Ct. App. Aug. 31, 1983) (available in App. Dec. on Fiche 83-18-12d) (establishing as a criterion for recovery that the financial condition of plaintiff is admissibl to determine damages).

[84]*Schultz,* 4 Ohio St. 3d at 134, 447 N.E.2d at 112 (quoting *Rodriguez v. State,* 52 Hawaii at *172,* 472 P.2d at 519).

[85]*Paugh,* 6 Ohio St. 3d at 80, 451 N.E.2d at 767; *See generally,* Comment, *Independnet Tort, supra* note 8; Note, *An Independent Tort Action for Mental Suffering and Emotional Distress,* 7 DRAKE L. REV. 53 (1957). For determination of damages, see Street, *supra* note 14; Throckmorton, *supra* note 26, Garod, *supra* note 22; Leibson, *supra* note 73; Annots., 11 A.L.R. 1119; (1921); 40 A.L.R. 983 (1926); 76 A.L.R. 681 (1932); 98 A.L.R. 402 (1935); *See also* Sinn v. Burd, 486 Pa. 146 404 A.2d *672* (1979); For damages determination in Ohio before *Schultz* and *Paugh,* see 16 O. JUR. 2d Damages § 77-86 (1971). It should be noted that Ohio allows lay witnesses to testify as the the link between the plaintiff's injury and the defendant's actions, *Paugh,* 6 Ohio St. 3d at 80, 451 N.E.2d at 767, but a biased witness presents the same or similar concerns as the paid expert dilemma.

turns a trial into a battle of paid experts.[86] It has been suggested that a court-appointed expert who would impartially render his opinion in the form of an amicus brief would partially solve the battle of the experts dilemma.[87] This method has been used with some success in New York City and in various other communities around the country.[88]

The courts are fearful that because this action presents evidence that is of an illusory character, recovery for future damages will be speculative at best.[89] However, plaintiff's attorneys should be mindful that when attempting to recover future damages, the fact that plaintiff has recovered emotionally at the present time does not insure subsequent mental tranquility. The defendant's negligent act may have left the plaintiff much weaker emotionally, and much more susceptible to emotional illness in the future. Proof of such future damages is best established by medical testimony. Doctors, however, cannot be absolutely sure that a particular plaintiff will suffer acute reactions in the future. Nevertheless, this fact should not be a restraint, nor prevent recovery for future pain and suffering. "If within reasonable medical certainty future damages can be expected, then recovery should be allowed just as if a physical injury, such as a broken leg or back, were involved."[90]

Most courts still fear that artificial claims will abound, and since proof of damages is very difficult they continue to deny recovery. A safeguard of genuineness suggested by commentators is to raise the standard of proof and require clear and convincing evidence of mental distress.[91]

One question that remains unanswered is whether there can be a separate recovery for the negligent infliction of serious emotional distress in an action for wrongful death under Ohio's new wrongful death statute.[92] Another is whether the comparative negligence of the victim will diminish the recovery sought by the plaintiff under this cause of action.

One of the criticisms of *Paugh* is that the court allows jurors to defer to their own experiences in determining if the defendant's conduct resulted in serious emotional distress. It is said that such a scheme is unwise in that it introduces material beyond the control of the court, with the result that proof of

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[86]For criticism of the use of partisan experts see Comment, *Synthesis, supra* note 17, at 511; Peck, *Impartial Medical Testimony,* 22 F.R.D. 21, 22 (1959).

[87]Comment, *Synthesis, supra* note 17, at 512.

[88]Wick & Knightlinger, *Impartial Testimony Under the Federal Civil Rules: A Tale of Three Doctors,* 34 INS. COUNS. J. 115, 118 (1967).

[89]Comment, *Synthesis, supra* note 17, at 490 n.10. *See also* W. PROSSER, *supra* note 8 §52.

[90]Leibson, *supra* note 73, at 209. *See also* Benjamin, *Bereavement And Heart Disease,* 3 J. BIOSOCIAL SCI. 61-67 (1971); Krant, *A Death in the Family,* J.A.M.A. 195-96 (1975); E. GUNDERSON & R. RAHE, LIFE, STRESS AND ILLNESS (1974). For suggested trial techniques in proving future damages *see* Leibson, *supra* note 73, at 206-209; Garod, *supra* note 22; Annot., 71 A.L.R.2d 338 (1960).

[91]F. HARPER & F. JAMES, LAW OF TORTS § 18.4 (1956); Note, *Duty, supra* note 23, at 312.

[92]OHIO REV. CODE ANN. § 2125.01 (Page 1981).

injury becomes subjective.[93] This argument should not be considered as persuasive, for the court can still use its traditional powers of jury control, such as a directed verdict, remittitur, judgment N.O.V., or the granting of a motion for a new trial.

D. What is the Applicable Statute of Limitations?

The supreme court in *Schultz* and in *Paugh* did not address the applicable statute of limitations for the tort of negligent infliction of serious emotional distress. Since *Paugh*, the Ohio Supreme Court has decided that the applicable statute of limitations for the *intentional* infliction of serious emotional distress will be four years.[94] The reasoning of the court, coupled with its statement that "our approach in identifying the scope of a cause of action pleading intentional infliction of emotional distress is similar in some respects to that which we set forth in *Paugh*,"[95] suggests that the applicable statute of limitations for the negligent infliction of serious emotional distress is also four years. In deciding this issue, the *Yeager* court looked to section 2305.09 of the Ohio Revised Code which provides in pertinent part:

> An action for any of the following causes shall be brought within four years after the cause thereof accrued . . .
> D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.[96]

Since this reasoning also applies to the negligent infliction of serious emotional distress the analysis seems to be applicable for this tort as well.

However, a persuasive argument can be made that mental injury should be compensable in an equivalent manner to that of bodily injury thus invoking the two year statute of limitations provided in section 2305.10 of the Ohio Revised Code.[97] Likewise, section 2305.11[98] provides a one year statute of limitations for libel and slander which can arguably be considered a mental injury similar in nature to the cause of action set forth in *Paugh*.

The Ohio Supreme Court will probably answer this specific issue in the near future, but until then the reasoning in *Yeager*, which suggests by inference a four year statute of limitations for the tort of negligent infliction of serious emotional distress, should be followed.

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[93]Note, *Where to Now?, supra* note 44 at 120 n.62.

[94]*Yeager*, 60 Ohio St. 3d at 375, 452 N.E.2d at 672.

[95]*Id.* at 374, 453 N.E.2d at 671.

[96]OHIO REVISED CODE ANN. § 2305.09 (Page 1981);

[97]OHIO REV. CODE ANN. § 2305.10 (Page 1981 & Supp.).

[98]OHIO REV. CODE ANN. § 2305.11 (Page 1981 & Supp.).

V. CONCLUSION

While most commentators advocate for recovery of negligent infliction of emotional distress as an independent tort, the majority of courts are still reluctant to recognize it apparently adhering to the statement by Dean Prosser that "it does not lie within the power of any judicial system to remedy all human wrongs."[99] "The motivation underlying denial of recovery has been one of public policy, with the courts continuing to express fears that unlimited and undeserved liability will result from the extension of independent protection to mental equilibrium."[100]

These reasons have no place in today's enlightened and dynamic society. If mental distress damages are foreseeable and are the natural and probable consequence of the defendant's negligence, they should be recoverable. In light of both medical knowledge and the knowledge and expectations of the reasonable man, the Ohio Supreme Court's decisions in *Schultz* and *Paugh* are proper in bringing the law of Ohio in step with the needs of present day society.

Few jurisdictions that have allowed an independent cause of action for the negligent infliction of emotional distress have adequately solved the problems in administering the tort. But just because this tort will be difficult to administer is not a valid reason to deny access to our judicial system. The concepts of seriousness and foreseeability should enable the courts to protect against fraud, multiple claims, and unlimited liability without the arbitrariness encountered under the impact rule formerly followed in Ohio. If lines must be drawn restricting recovery, lines based on seriousness and foreseeability are preferable. These concepts provide the necessary flexibility for administration of this new tort.

The courts of Ohio must still be careful in defining these concepts or they will evolve into the rigidness of practice experienced in California after the *Dillion* decision.[101] History has shown that:

> [A]lthough the Dillon court appeared to be flexible by permitting liability to be determined on a case-by-case basis, its guidelines have since evolved into requirements which, if not met, spell doom for the complainant. Instead of being merely tools to help the court determine whether a duty exists, the Dillon criteria have become obstructions to plaintiffs who may well have incurred substantial and real injury. Once again, as with previous attempts to set forth tests and lasting standards, what originally were

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[99]W. PROSSER, *supra* note 8 § 4.

[100]Comment, *Independent Tort, supra* note 8, at 1244.

[101]*Dillon*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72.

intended as guides in a flexible system have been fixed as rigid requirements that deny recovery.[102]

If the Ohio courts take heed of this warning regarding the administration of the tort of the negligent infliction of serious emotional distress, they have the opportunity to develop an important and workable cause of action.

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[102]Note, *Duty, supra* note 23, at 316-17. *see* Nevels v. Yeager, No. 69772 (Calif. 2d Dist. Ct. App. Feb. 29, 1984), which is the most recent attempt by California Appellate Court to clarify the issues raised since Dillon, stating:

> The courts have applied the guidelines [of Dillon] with a Draconian adherence to form over substance. . . we must return reason to the Dillon guidelines and conclude that when a close relative arrives at the scene of an accident soon after its occurrence. . . and sees the victim, who has sufferedsevere injury with all its attendant gore, and suffers shock. . . that relative has experienced shock contemporaneous with the accident.