The Death of the Ensuing Physical Injury Rule: Validating Claims for Negligent Infliction of Emotional Harm

Ethan Finneran
NOTES

THE DEATH OF THE ENSUING PHYSICAL INJURY RULE: VALIDATING CLAIMS FOR NEGLIGENT INFlictION OF EMOTIONAL HARM

Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion.¹

Why the distinction? My mental anguish is the same accompanied or unaccompanied by physical manifestation. If as a result of someone’s negligent conduct, I suffer the horrors of gut-wrenching, sleepless nights worrying about the well being of myself, my wife and my children, I should be allowed to recover without having to dream up some foundational physical ailment. If I throw up as a result of my emotional distress, I can recover. However, if I am blessed with a strong stomach, then no matter how acute my mental anguish may be, I cannot recover. This distinction is not only gossamer, it is whimsical.²

The law has come a long way towards protecting an individual’s interest in emotional tranquility. While that interest is now broadly protected from intentional invasions, no duty to avoid negligent inflictions has yet been generally recognized. The major remaining obstacle to recovery for the negligent infliction of emotional harm is the requirement that such harm blossom into physical injury—what will be referred to as the “ensuing physical injury rule.”³ Although

³. I have chosen this term merely to simplify the inquiry at hand. The language employed by courts to refer to emotional harm or mental distress and its consequences presents problems of comprehension, both of what the facts of decided cases were and what law was applied. For example, there is disagreement on what a physical injury consists of, even among members of the same court: In Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979), plaintiff alleged “severe depression” and “an acute nervous condition” resulting from her observation of

213
only a few cases explicitly hold that ensuing physical injury is a necessary component of a claim for the negligent infliction of emotional harm, it is evident that many states and the Restatement retain

defendant negligently running down and killing her child with his automobile. The majority characterized her complaint as one for "physical and mental injuries," id. at 146, 404 A.2d at 673, while the dissent stated that "the complaint reveals only a claim for emotional injuries," id. at 176, 404 A.2d at 687 (Roberts, J., dissenting) (citing Restatement (Second) of Torts § 436A, Comment c (1965)). Comment c of the Restatement, however, does not clear up the confusion:

The rule stated in this Section applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem, rather than one of law.

Restatement (Second) of Torts § 436A, Comment c (1965).


Maryland has stubbornly refused to overrule its ensuing physical injury rule but has perhaps achieved the same result by redefinition: "Proof of a 'physical injury' is also permitted by evidence indicative of a 'mental state.' . . . [T]he term 'physical' is not used in its ordinary dictionary sense. Instead, it is used to represent that the injury for which recovery is sought is capable of objective determination." Vance v. Vance, 286 Md. 490, 500, 408 A.2d 728, 733 (1979) (footnote omitted).


6. Restatement (Second) of Torts § 436A (1965):

Negligence Resulting in Emotional Disturbance Alone.

If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily
this requirement. The rule has been directly considered and discarded only a few times in the last decade.\textsuperscript{7} Most recently, the California Supreme Court discarded the requirement of ensuing physical injury in \textit{Molien v. Kaiser Foundation Hospitals}.\textsuperscript{8} That decision will likely be studied by courts confronted with the issue in the future.

Elimination of the ensuing physical injury rule recognizes the legally protected right to the enjoyment of emotional tranquility.\textsuperscript{9} For many years such a right has not been recognized in cases not closely linked to physical occurrences. Liability has been limited by various rules requiring some physical connection to the suffered emotional harm in order for liability to be imposed.\textsuperscript{10} The main reason that these rules were originally employed and persisted for so long was the fear that without them the courts would be inundated with a flood of trivial and fraudulent suits.\textsuperscript{11} Most of the rules have been discarded.\textsuperscript{12}

While they existed there was no need to delimit the right to emotional tranquility because the more difficult cases that might have prompted a definition of that right were excluded at the threshold. Only in exceptional cases was the right to emotional tranquility recognized as a legally protected interest without any physical connection.\textsuperscript{13} With the abandonment of the ensuing physical injury rule, courts will be forced to face more squarely the question the rules allowed them to avoid: What is the extent of the duty to avoid the negligent infliction of emotional harm that is unconnected to physical injuries or events?

This note proposes factors to be considered in evaluating the validity of claims for the negligent infliction of emotional harm. The harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.


8. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).


10. The two most prominent of these are the “impact rule” and the “zone of danger rule.” \textit{See} text accompanying notes 31-33 \textit{infra}.

11. \textit{See} notes 18-20 \textit{infra} and accompanying text.

12. \textit{See} authority cited notes 31-33 \textit{infra} and accompanying text.

factors recognize the expansion of the duty but confine it in a way that is both responsive to judicial apprehension of allowing recovery for emotional harm and consistent with traditional negligence principles. The factors are intended to apply to claims for emotional harm where no physical injury occurred and no risk of physical injury was created.

The three factors proposed to evaluate the authenticity of a claim for emotional harm are 1) the degree to which the plaintiff-defendant relationship is emotionally sensitive; 2) the degree to which the defendant's activity threatens a commonly accepted emotional concern; 3) the degree to which the defendant's conduct departs from accepted standards of behavior. The factors are not intended to apply to cases where defendant creates a risk that physical injury will occur, but only to cases where emotional harm is threatened.

Part One reviews the evolution of liability for emotional harms both connected and unconnected to physical injury. Part Two first considers the practical and policy problems inherent in the ensuing physical injury rule, then presents and analyzes the *Molien* court's rejection of and replacement for the rule. Part Three proposes a set of factors to be applied to claims for the negligent infliction of emotional harm with no ensuing physical injury and attempts to answer some of the questions presented by the recognition of such liability. Part Four analyzes two recent cases in terms of the proposed factors.

**BACKGROUND: THE SLOW GROWTH OF THE RIGHT TO EMOTIONAL TRANQUILTY**

From its beginnings, negligence law has been concerned primarily with physical injury. Compared to emotional harm, physical injury is fairly easy to prove: Simple observation by nonexperts will often suffice to establish the existence of physical injury, and the factfinder will often understand its cause from common experience.

14. Such cases are more properly dealt with by already established tort doctrines. See discussion in note 110 infra.
15. See, e.g., Brown v. Kendall, 60 Mass. 392 (1850); Weaver v. Ward, 134 Hobart 179, 80 Eng. Rep. 284 (K.B. 1616); W. Prosser, Handbook of the Law of Torts § 28 (4th ed. 1971); Green, Foreseeability in Negligence Law, 61 Colum. L. Rev. 1401, 1417 (1961) ("[n]egligence law is designed primarily to protect people against physical hurts to person and property unintentionally inflicted by the dangerous activities of other people").
16. Cf. W. Prosser, supra note 15, § 32, at 158-59 (defendant can be held to base level of knowledge about physical events and their attendant risks). Presumably the jury understands these physical relationships also.
Although problems of causation and proximate causation can be vexing, they are much less so in cases of physical injury than in cases of emotional harm. The main inquiry is usually whether the conduct of the defendant causing the injury was unreasonable.

Establishing the existence and causation of emotional harm can present more difficult questions. Self-perceived incompetence traditionally inhibited courts from delving into the amorphous world of emotional harms and led them to confine their activities and judgments to cases concerning physical harms. Compensation of those who sustained harm due to another's negligence was, when the harm was non-physical, frustrated by the "administrative factor"—a judicial hesitation to "enter upon a course of dealing which it cannot finish, or that may bring down upon it an increase in business or a mass of problems which it is not prepared to handle." Judicial concerns can be generally summarized into five categories:

1. Concern that the volume of litigation will increase drastically (the floodgates concern);
2. Concern that fraudulent claims will be successful (the integrity concern);
3. Concern that emotional harm damages are too remote, too speculative, too trivial to deserve legal redress;
4. Lack of precedent for allowing such claims;
5. Concern that defendants will be subjected to unlimited liability.

As Dean Prosser has observed, however: "It is now more or less generally conceded that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, which has loomed very large in the opinions as an obstacle. The danger is a real one, and must be met." W. PROSSER, supra note 15, § 54, at 328 (footnotes omitted). Prosser concludes: "The very clear tendency of the recent cases is to refuse to admit incompetence to deal with such a problem, and to find some basis for redress in a proper case." Id. An example of this admission of perceived incompetence can be found in one of the much noted early cases imposing the "impact rule" that refused recovery to a plaintiff unless the defendant's negligence resulted in physical contact with the plaintiff:

A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and, if compensation in damages may be recovered for a physical injury so caused, it is hard, on principle, to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests...
noninterventionism was bolstered further by the still current belief that for many minor emotional disturbances there are more appropriate instruments of social control than the law. Against this background it is understandable that the growth of compensation for emotional harm has taken place gradually and has proceeded most rapidly in cases closely connected to physical occurrences. In such cases courts are experienced and consequently feel competent. In limiting liability for unintentional infliction of emotional harm, the ensuing physical injury rule is the least challenged survivor of a group of rules requiring some connection to a physical injury or event. These rules bar recovery of damages for emotional harm unless (1) plaintiff can successfully prove a cause of action distinct from his or her claim for emotional harm (the parasitic damages rule); (2) plaintiff was physically touched as a result of defendant's negligence (the impact rule); or (3) plaintiff reasonably feared that he or she would be physically hurt by defendant's conduct (the zone of danger rule).

Parasitic Emotional Harm Recoveries

Damages for emotional harm caused by negligence were first recoverable in actions for physical injury in the form of "pain and suffering" damages. Such damages, still important in any physical injury suit, are described as parasitic on the "host" cause of action.

---

20. See Magruder, supra note 19, at 1035:
Quite apart from the question how far peace of mind is a good thing in itself, it would be quixotic indeed for the law to attempt a general securing of it. Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.

22. See text accompanying notes 25-30 infra.
23. See text accompanying notes 32-33 infra.
24. See text accompanying notes 33-34 infra.
25. W. Prosser, supra note 15, § 54, at 330; 1 T. Street, The Foundations of Legal Liability 460-75 (1906). Note Street's prophetic comment:
The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, to-morrow 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.

Id. at 470.
Without the primary cause of action there is no recovery for pain and suffering.

Allowing such recovery does not threaten the administration of negligence claims because it increases neither the number of suits nor the ability of dishonest plaintiffs to sustain fraudulent claims. No unique competence problems are presented by parasitic emotional harm recovery because the court need not address issues such as the foreseeability or causation of emotional harm. Liability depends only upon a finding of an unreasonable risk of physical injury. The primary problem presented—proof and valuation of pain and suffering—is outweighed by the desire to compensate a plaintiff who has suffered provable physical injury.

The boundaries of duty are not expanded by recovery for emotional harm as a parasitic item of damages, since the basis of liability remains defendant’s creation of an unreasonable risk of physical injury. Actors have no duty to avoid unreasonable risks of inflicting emotional harm, except insofar as the physical injury they inflict leads to emotional harm. Once emotional harm results from a negligently inflicted physical injury, defendant’s liability is absolute, and no showing of due care to avoid emotional harm can negate it. Defendant’s liability depends solely on the creation of an unreasonable risk of physical injury.

The Impact Rule and the Zone of Danger Rule

The next step in the allowance of damages for the negligent infliction of emotional harm is represented by the impact rule, which permits recovery in cases involving negligent contact with the plaintiff, regardless of whether the contact causes physical injury. This
rule has been generally rejected\textsuperscript{[3]} and has given way to the zone of
danger rule, under which a plaintiff may recover for emotional harm
even without impact—where he or she was close enough to a physi-
cal accident to have been put in actual physical danger and where
his or her emotional harm was caused by fear of that physical
danger.\textsuperscript{[33]}

Neither the impact rule nor the zone of danger rule entails a
duty to avoid inflicting emotional distress unconnected to physical
events. The first requires physical contact, and the second requires a
reasonable fear of physical contact. Neither rule truly protects emo-
tional tranquility, for both fail to compensate invasions of emotional
tranquility unconnected to physical events.

\textit{The Dillon Doctrine}

The move from the impact rule to the zone of danger rule im-
plies increased recognition of a legally protected right that can be
abridged other than by physical invasion. Such recognition is incom-
plete, however, because emotional harm not caused by fear of physi-
cal impact remains unprotected. This gap is theoretically untenable,
because emotional harm may result from causes other than fear of
physical impact.\textsuperscript{[34]} Indeed, witnessing a gruesome event may be even
more likely to cause emotional harm than fear of physical impact.
This inherently false distinction between emotional harm caused by
fear of physical injury and all other emotional harm was brought to
the fore in the case of \textit{Dillon v. Legg}.\textsuperscript{[35]} A mother standing outside
the zone of danger witnessed her child run over and killed by an

\textsuperscript{32}. E.g., Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Battalla v.

\textsuperscript{33}. That is, plaintiff must reasonably fear harmful impact. E.g., Niederman v. Brodsky,
436 Pa. 401, 261 A.2d 84 (1970); \textsc{Restatement (Second) of Torts} § 313(2)(1965); Annot.,

\textsuperscript{34}. See, e.g., Dziokonski v. Babineau, 375 Mass. 555, 564, 380 N.E.2d 1295, 1300
(1978):

The problem with the zone of danger rule... is that it is an inadequate measure of
the reasonable foreseeability of the possibility of physical injury resulting from a
parent's anxiety arising from harm to his child. The reasonable foreseeability of
such a physical injury to a parent does not turn on whether that parent was or was
not a reasonable prospect for a contemporaneous injury because of the defendant's
negligent conduct. Although the zone of danger rule tends to produce more reason-
able results than the [impact] rule and provides a means of limiting the scope of a
defendant's liability, it lacks strong logical support.

\textsuperscript{35}. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
NEGLIGENT INFILCTION OF EMOTIONAL HARM

automobile. Under the zone of danger rule, a sibling within the zone of danger—but not the mother—would be able to recover for emotional harm. Recognizing the anomaly of such a result, the California Supreme Court rejected the zone of danger rule, concentrating instead on the degree of foreseeability that emotional harm might be a result of the plaintiff’s witnessing an injury caused by the driver’s negligence.\(^3\) In such an inquiry, whether plaintiff reasonably feared for her own safety becomes irrelevant. The *Dillon* court held that a duty to use reasonable care to avoid emotional harm arises where it is reasonably foreseeable that emotional harm might occur whether through fearing physical injury to oneself or by observing physical injury to a loved one.\(^3\)

The *Dillon* doctrine advances the law significantly beyond requiring a physical connection to plaintiff’s emotional harm, but even that court retained some vestiges of a physical connection requirement. First, it held there is no liability for emotional harm unless a primary consequence of defendant’s negligence is physical injury, whether to the plaintiff or to a third party.\(^3\) Second, *Dillon* confined its holding to cases in which plaintiff suffered some physical injury as a result of emotional distress.\(^3\) Other states adopting *Dillon* have similarly confined the doctrine.\(^4\)

While liability is vastly increased under the *Dillon* doctrine, duty remains wed to the twin requirements that some physical injury be suffered as a result of emotional harm and that the emotional harm result from observing a physical injury. Thus, even after *Dillon* it cannot be said that emotional tranquility is a truly protected

---

36. *Id.* at 741, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.
37. *Id.* at 739-40, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80.
38. *Id.* at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76. The court stated:

In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tortfeasor’s duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma. *Id.*
39. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
Exceptions to the Physical Connection Requirement

Apart from the rules that emerged from cases involving the bystander or near-miss scenarios, certain other situations have prompted courts to impose a duty to avoid negligent infliction of emotional harm independent of any physical connection, either prior or subsequent. These cases, which allowed recovery for emotional harm without physical injury, consist of two types of occurrences. In one, the defendant negligently mishandles a message informing plaintiff that a loved one has died; in the other, the defendant negligently mishandles the remains of a plaintiff's deceased loved one. These cases recognize that where a carelessly committed act is likely to cause emotional harm, the actor must use ordinary care to guard against that possibility. In such instances, whether plaintiff suffers ensuing physical injury is irrelevant to the question of whether he or she has in fact suffered emotional harm. As Prosser put it, the "especially likelihood of genuine and serious mental distress arising from the special circumstances, . . . serves as a guarantee that the claim is not spurious."

The only remaining area in which courts have been willing to impose liability for emotional harm without requiring some physical injury or event involves cases of intentional infliction.

41. See text accompanying notes 31-40 supra.
42. E.g., Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943). Contra, Corcoran v. Postal Tel.-Cable Co., 80 Wash. 570, 142 P. 29 (1914).

For an entertaining case allowing tort recovery for mental anguish suffered as a result of negligent misplacing of a pet dog's body so as to disrupt a planned funeral ceremony, see Corso v. Crawford Dog and Cat Hosp., Inc., 97 Misc.2d 530, 415 N.Y.S.2d 182 (Civ. Ct. N.Y. 1979) (holding that a pet dog "occupies a special place somewhere in between a person and a piece of personal property," but cautioning that a "pet rock" does not).

44. W. PROSSER, supra note 15, § 54, at 330. The major reason that such cases did not prompt invocation of the "administrative factor" is probably that their occurrence was thought to be so infrequent as to avoid the threat of a flood of litigation. See notes 18-19 supra.
tional harm in such cases must be severe, and the conduct must not only have been intended to cause it but must also have been extreme and outrageous. Such a limited cause of action poses little threat to the efficiency or integrity of the judicial system, because not many false claims are likely to be won. There are few things harder to prove than intent. Even if a plaintiff falsely convinces a jury that severe emotional harm has been suffered, the defendant forced to pay such a judgment is not totally blameless. Thus, a miscarriage of justice is not nearly so objectionable as it would be if the defendant were merely negligent.

**PRACTICAL AND POLICY PROBLEMS OF THE ENSUING PHYSICAL INJURY RULE**

The ensuing physical injury rule is inconsistent with recognizing emotional tranquility as a legally protected interest because physical injury does not necessarily accompany emotional harm. Disallowing recovery where there is no ensuing physical injury unjustifiably eliminates a whole class of harm from the law’s protection. The inconsistent application of the rule, moreover, testifies to its arbitrariness: Ensuing physical injury is required neither in certain negligence cases nor in most intentional cases.

Though arbitrary, the rule might be justified as a rule of administration if it effectively excluded fraudulent or trivial claims. The ensuing physical injury rule, however, is vague and easy to circumvent and thus fails to meet even that minimal requirement of an

---

47. *E.g.,* Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E. 2d 315 (1976); *Restatement (Second) of Torts* § 46, Comment i (1965). Note that the intent is the intent that severe emotional harm will result. It may possibly be met by disregard of a high probability that emotional distress will occur. See Blakeley v. Estate of Shortal, 236 Iowa 787, 20 N.W.2d 28 (1945); *Restatement (Second) of Torts* § 46, Comment i (1965).
49. Not only must his conduct be intentional but it must “go beyond all bounds of decency [so as] to be regarded as atrocious, and utterly intolerable in a civilized community.” *Restatement (Second) of Torts* § 46, Comment d (1965).
51. See authority cited notes 42-44 supra.
52. See authority cited note 45 supra.
53. See discussion in note 3 supra.
administrative rule. Ironically, applying the rule leads to results directly contrary to its purpose: Only unscrupulous plaintiffs willing to fabricate physical symptoms stand any chance of recovery; compensation is effectively denied only to the honest.

Judicial dissatisfaction with the rule may be inferred from a line of cases finding the requirement satisfied by a decreasing severity of physical injury. Withdrawal from society, for example, combined with inability to function normally and continued depression, has been found to satisfy the requirement of a definite physical injury. Such dilution reminds one of earlier courts' strained efforts to find an "impact" under the impact rule before it was generally discarded.

Some forthright courts have simply overruled the ensuing physical injury rule. Others appear ready to do the same. The illogic of the rule and its ineffectiveness as an administrative device have produced a trend suggesting that it may be increasingly rejected by courts presented with the question in the future.

Molien v. Kaiser Foundation Hospitals

Mr. Molien brought a negligence action against a doctor and hospital for mental distress allegedly suffered as a result of a "negligently erroneous diagnosis" of syphilis in his wife. Upon being told that she had syphilis, Mrs. Molien became suspicious that her hus-

56. E.g., Kenney v. Wong Len, 81 N.H. 427, 128 A.343 (1925) (mouse hair in stew touched plaintiff's mouth); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (plaintiff inhaled smoke). Kentucky, which still retains the impact rule, has even gone so far as to hold that x-rays are sufficient physical contact to satisfy the rule. Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980).
58. See Vance v. Vance, 286 Md. 490, 408 A.2d 728 (1979); Dziokonski v. Babineau, 375 Mass. 555, 560 n.6, 380 N.E.2d 1295, 1298 n.6 (1978); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) (court clearly announced intent to discard ensuing physical injury rule, id. at 160, 404 A.2d at 679, but statement is apparently dictum because complaint at issue was one for mental and physical injuries, id. at 149, 404 A.2d at 673); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976).
59. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
60. 27 Cal. 3d at 920, 616 P.2d at 814, 167 Cal. Rptr. at 832. Mr. Molien also stated a cause of action for loss of consortium that was upheld in the same case. Since that cause of action is only tangentially related to the issue of the ensuing physical injury rule, this note confines analysis to that part of the opinion that deals with the cause of action for the negligent infliction of emotional harm.
band had been engaging in extramarital sex. Her suspicion and hostility towards Mr. Molien led to the destruction of their marriage. Mr. Molien did not allege any physical injury but claimed that the negligent misdiagnosis had caused him severe emotional distress and loss of consortium.61

The trial court sustained defendant's demurrer, and the Court of Appeal affirmed the decision on two grounds.62 First, Mr. Molien's emotional harm was held "unforeseeable" because it failed to satisfy the foreseeability criteria set out in Dillon v. Legg.63 Second, his complaint was held insufficient for failure to allege ensuing physical injury.64

The California Supreme Court reversed on both grounds.65 As to foreseeability of mental distress, the court found the Dillon factors inapplicable to a case not involving a bystander's mental distress66 and applied instead only Dillon's "general principle of foreseeability."67 Because marital discord is a predictable result of an erroneous syphilis diagnosis, and because the defendant knew Mrs. Molien was married, the risk of harm to Mr. Molien was held "reasonably foreseeable."68 Consequently, the court held, the defendant owed him a duty of care in diagnosing his wife's condition.69

The court next turned to the issue of whether a claim can be stated for negligent infliction of emotional harm not resulting in physical injury.70 The court assessed the rule requiring physical injury contemporaneous with or as a consequence of emotional harm

63. 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968). The Dillon court stated that three factors must be considered when determining whether emotional harm is reasonably foreseeable. The California Court of Appeal summarized them in Molien as follows: whether the plaintiff and victim were closely related; whether the plaintiff was present at the scene of the accident; and whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with hearing of the accident from others, after its occurrence.
64. 158 Cal. Rptr. at 110-11 (citing Dillon v. Legg, 68 Cal.2d 728, 740-41, 69 Cal. Rptr. 72, 80, 441 P.2d 912, 920 (1968)).
65. 27 Cal. 3d at 923, 930, 616 P.2d at 817, 821, 167 Cal. Rptr. at 835, 839.
66. Id. at 922-23, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.
67. Id. at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.
68. Id., 616 P.2d at 817, 167 Cal. Rptr. at 835.
69. Id.
70. Id. at 927, 616 P.2d at 819, 167 Cal. Rptr. at 837.
from the perspective of the need to assure the validity of a claim. A like function, it noted, is performed by requiring extreme and outrageous conduct to warrant recovery for emotional distress unaccompanied by physical injury where the defendant acts intentionally.71 The court then gave its reasons for discarding the “venerable”72 rule requiring ensuing physical injury. First, it found the rule “both overinclusive and underinclusive” as a means of detecting false claims: On the one hand allowing recovery where even a trivial injury ensues, the rule on the other hand “mechanically denies court access to claims that may well be valid.”73 Second, the rule both encourages exaggerated pleading and rewards ingenious quests for some evidence of physical harm in order to satisfy the rule’s technical requirement.74 Third, the ensuing physical injury rule fails to address the issue of whether plaintiff has in fact suffered emotional harm, a question properly determined by the jury.75 Hereafter, the court held, the screening function of the ensuing physical injury rule would be served by requiring claims for emotional harm to possess “‘some guarantee of genuineness in the circumstances of the case.’”76 Jurors should determine whether defendant’s conduct caused emotional harm by “referring to their own experience.”77 The emotional harm must be “serious” to be compensable.78 In reaching this result Molien implicitly raises a generalized

71. Id.
72. Id.
73. Id. at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.
74. Id. at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838. Mr. Molien was given leave to amend his complaint but declined to do so. Id. at 920, 616 P.2d at 815, 167 Cal. Rptr. at 833.
75. Id. at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.
76. Id. at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 520 (1970)).
77. Id.
78. “[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” Id. at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38 (1980) (quoting Rodrigues v. State, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970)). The two dissenting judges argued that the “standards” enunciated by the majority are meaningless and that fraudulent claims are now much more possible than they were under the ensuing physical injury rule. The attack focused on the majority’s faith that the jury will be able to evaluate claims for emotional harm by referring to their own experiences. The dissenters argued that such an evaluation is inapposite in a case of negligence where the primary inquiry should be into the existence of emotional harm and that that is a difficult medical question on which jurors would be forced to speculate. Allowing jurors such latitude, the dissenters urged, is improper in the case of a negligent tort as opposed to an intentional tort, because it would create liability of defendants disproportionate to their culpability. The dissent also posited the interesting possibility that this cause of action may subsume that of slander by allowing recov-
duty to avoid creating risks of emotional harm even when it is un-
connected to physical events simultaneous with or subsequent to
plaintiff’s distress. A cause of action cannot be proved, however,
where there is no guarantee of genuineness in the circumstances of
the case. Thus, the important inquiry in determining liability is what
constitutes a guarantee of genuineness.

The Molien court did not clearly state where it found a guaran-
tee of genuineness in the case before it. The nearest approximation is
its statement that “the negligent examination of Mrs. Molien and
the conduct flowing therefrom are objectively verifiable actions by
the defendants that foreseeably elicited serious emotional responses
in the plaintiff and hence serve as a measure of the validity of plain-
tiff’s claim for emotional distress.” Hence, the implication in
Molien is that the guarantee of genuineness is to be found in the
nature of the defendant’s conduct, not in its effect on the plaintiff.
That is the same area examined by a court evaluating a claim for
the intentional infliction of emotional distress when it seeks a
validator of the cause of action. There is no indication, however,
that the defendant in Molien was anything more than negligent in
his actions. Thus, it is hard to conclude that the court found a guar-
tee of genuineness solely in the defendant’s conduct, or, if it did,
what such a guarantee might be.

The Molien court could have found a guarantee of genuineness
in the eventual disintegration of the Moliens’ marriage. It is sounder
to look toward plaintiff than toward defendant’s conduct for a guar-
tee that the claim is not spurious, for harm may not necessarily
result even from extreme conduct. Additionally, such a conception of
a guarantee of genuineness provides a logical replacement for the
ensuing physical injury rule, which attempted to insure that plaintiff
had in fact been emotionally harmed. It seems unlikely, however,
that the *Molien* court intended to link the destruction of the mar-
riage to the guarantee-of-genuineness standard, since doing so would
render superfluous the other requirement of the *Molien* rule—that
the plaintiff suffer "serious" mental distress.  

**PROPOSED FACTORS**

Once the ensuing physical injury rule is discarded, the possible
extent of new kinds of claims for negligent infliction of emotional
harm increases strikingly. Incorrect laboratory tests indicating can-
cer or pregnancy may create mental distress. An aspiring attorney
told that he has failed his bar examination or a relative informed
that a certain airline flight has crashed killing all aboard may ex-
perience emotional distress. Even a funeral home owner may be se-
verely upset when the telephone company lists his business under
"Frozen foods—Wholesale" in its yellow pages. A new car buyer
who purchases a "lemon" may suffer mental harm. So too may a
mother who is informed one day that her newborn infant has died,
then told the next day that the hospital is not sure whether the child
is alive, then kept in a state of uncertainty for three weeks.

Evaluating such claims is more difficult than evaluating physical
injury cases. Some kind of rational standard must be employed in
order to define the limits of liability. Few questions about the basis
or extent of liability for the negligent infliction of emotional harm
are answered by requiring merely a guarantee of genuineness as a
basis of compensability for emotional harm without ensuing physical
injury. That standard suggests merely that if a case has a "special
factual pattern," plaintiff may properly recover. It says little about
the specific characteristics necessary for a case to qualify as a vali-

83. See discussion in note 78 supra.
84. This is suggested by the recent misnotification of bar applicants in New York. See
85. This situation is suggested by an obiter dictum in Wood v. United Airlines, 404 F.2d
162, 166 (10th Cir. 1968).
86. A suit has been brought under those facts seeking, *inter alia*, $50,000 in damages
for "mental anguish." "Some guy even called and asked what meat was on special for the day
87. This is roughly what happened in Lemaldi v. De Tomaso of Am., Inc., 156 N.J.
Super. 441, 383 A.2d 1220 (Super. Ct. Law Div. 1978), discussed at text accompanying notes
124-133 infra.
88. These are the abbreviated facts of Muniz v. United Hosps. Medical Center Presby-
accompanying notes 112-123 infra.
dated claim. The idea of a guarantee of genuineness has in common with the concept of duty the requirement that there be a fair probability that harm will occur at the time the defendant acts. Reasonable foreseeability—a shorthand definition of duty—is judged by determining what the defendant could reasonably have foreseen at the time he or she acted. A guarantee of genuineness is judged by determining what occurred and asking whether the harm was sufficiently likely to support a conclusion that it did in fact occur. Both inquiries necessarily involve assessing the probability of emotional harm. The duty inquiry asks whether harm was so probable at the time the defendant acted that he or she should have exercised reasonable care; the guarantee-of-genuineness inquiry asks whether what actually occurred probably caused emotional harm.

Because assessing suits for negligent infliction of emotional harm often involves identical inquiries about the probability of emotional harm resulting from certain conduct, courts may be tempted to collapse guarantee of genuineness into reasonable foreseeability. The former standard, however (at least as employed by the Molien court), is intended as a standard of proof for the jury, whereas reasonable foreseeability is intended as an element of the cause of action. In practical terms, there may be little difference between the two, for plaintiffs must still offer proof of a guarantee of genuineness. The only real difference is that the determination at trial whether a guarantee exists is for the factfinder, while duty is determined by the judge as a matter of law. The guarantee-of-genuineness issue can still be decided on appeal as a matter of law.

Whether the judge or jury decides the issue, the guarantee-of-genuineness standard provides inadequate guidance, especially since such little content was given to the phrase by the Molien court. The term has been interpreted as "‘an especial likelihood of genuine and serious mental distress,’" and has been construed as requiring that the plaintiff's reaction was "entirely plausible." These expres-

90. See generally Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).
91. Molien v. Kaiser Foundation Hosp., 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980). The court concluded: "To repeat: this is a matter of proof to be presented to the trier of fact. The screening of claims on this basis at the pleading stage is a usurpation of the jury's function." Id.; see W. PROSSER, supra note 15, § 54, at 328.
92. See text accompanying notes 80-83 supra.
94. Ferrara v. Gaffuchio, 5 N.Y.2d 16, 22, 152 N.E.2d 249, 253, 176 N.Y.S.2d 996,
sions mean little more than that the particular court has been sufficiently impressed with all the evidence (and perhaps the demeanor of parties) to allow the claim.

Beyond the narrow holdings of cases that have allowed recovery for the negligent infliction of emotional harm without ensuing physical injury, several factual similarities suggest a set of factors that should be considered in evaluating whether a case contains a guarantee of genuineness. Because these factors are indistinguishable from the duty formulation of reasonable foreseeability, their discussion necessarily involves considerations identical to those the judge will assess to determine whether the case should even be given to the jury.

One risk of enumerating factors to be considered in evaluating negligence claims is that future courts may apply them too rigidly and convert them into requirements. Such a fear may have restrained the Molien court from listing the considerations that should determine whether a guarantee of genuineness exists. Though qualified by that caveat, these factors are offered as considerations that may be helpful in guiding future decisions.

First, as is evident in many of the cases, a situation is ripe for imposing liability for negligently inflicted emotional harm even in the absence of ensuing physical injury where the defendant has taken action directed at the plaintiff with full knowledge that any error was likely to result in emotional upset. Often the defendant's

1000 (1958).

95. See Lemaldi v. De Tomaso of Am., Inc. 156 N.J. Super. 441, 445, 383 A.2d 1220, 1222 (Super. Ct. Law Div. 1978). There the court observed: “Plaintiff was a personable young man...” Id.

96. See Miller, The Scope of Liability for Negligent Infliction of Emotional Distress: Making “The Punishment Fit the Crime,” 1 U. HAWAII L. REV. 1(1979): “[The three Dillon factors have tended to be converted into requirements of foreseeability, imposed with only slight flexibility and used to deny recovery as a matter of law in cases where, under ordinary negligence principles, a court could reasonably find that the risk of emotional shock to plaintiff was reasonably foreseeable.” Id. at 5 (footnote omitted) (emphasis in original).

action consists of conveying information that is virtually certain to produce emotional distress. The act of communicating is particularly likely to present as its sole risk a high probability of emotional harm as compared with physical acts that may present dual risks. Communication is also conduct in which the defendant is likely to be aware of the plaintiff’s existence, thereby eliminating the problem that the plaintiff’s presence may have been unforeseeable.

Second, liability seems particularly appropriate where the plaintiff’s concern or the object of plaintiff’s emotional distress is one commonly regarded as worthy of emotional attachment. The continued fidelity and the continued existence of a loved one are universal emotional keystones. Cases where emotional harm recoveries have been allowed without requiring ensuing physical injury also generally involve widely shared emotional concerns. This factor is included in the calculus not to exclude claims involving disfavored attachments or concerns, but to insure a high probability that the plaintiff in fact suffered emotional harm. The more commonly accepted plaintiff’s concern, the more likely the harm is genuine.

The third factor is the degree of disregard for the concerns of others demonstrated by the defendant’s actions, which may be so

100. See Portee v. Jaffee, 84 N.J. 88, 97, 417 A.2d 521, 526 (1980). In allowing a mother bystander recovery for harm caused her by witnessing her son’s death, the court observed:

The task in the present case involves the refinement of principles of liability to remedy violations of reasonable care while avoiding speculative results or punitive liability. The solution is close scrutiny of the specific personal interests assertedly injured. The knowledge that loved ones are safe and whole is the deepest well-spring of emotional welfare. Against that reassuring background, the flashes of anxiety and disappointment that mar our lives take on softer hues.

Id.
careless that they transform a situation not otherwise emotionally charged into one where emotional harm will foreseeably result.\(^{102}\) Such cases border on the separate tort of intentional infliction of emotional distress by extreme and outrageous conduct,\(^{108}\) which encompasses reckless behavior.\(^{104}\)

These three factors, which assess whether the facts of a particular case possess a guarantee of genuineness, may be applied equally to an analysis of whether a defendant was negligent in the first place. That is, while the factors address the genuineness of plaintiff's emotional harm, they also help determine whether defendant took an unreasonable risk that such harm would be caused. Thus, in giving any content to the guarantee-of-genuineness standard, one necessarily increases the standard of misconduct required to create liability. In simplistic terms this might be reducible to a jury instruction that reads: "In order to find for plaintiff you must find that defendant knew or should have known that his actions were very likely to cause emotional harm to plaintiff and that under the circumstances of the case the action was unreasonable." Vague as such an instruction is, it does indicate that defendant must be something more than negligent for liability to be imposed. Yet there is still no requirement that defendant acted intentionally or recklessly.

It would be a mistake to treat the three factors as invariable requirements of a guarantee of genuineness,\(^{109}\) for there may be other indicators that insure against fraudulent suits. Further, it should be recognized that the three factors are interdependent. For example, conduct will be considered increasingly extreme as the legitimacy of the plaintiff's emotional concern increases.\(^{108}\) At the very least, the factors help guide the inquiry as to whether liability should be imposed and thus serve to bring some predictability to claims for the direct negligent infliction of emotional harm.


\(^{103}\) See authority cited notes 45-48 supra.

\(^{104}\) See authority cited note 47 supra.

\(^{105}\) See authority cited note 96 supra.

\(^{106}\) See, e.g., Muniz v. United Hosps. Medical Center Presbyterian Hosp., 153 N.J. Super. 79, 379 A.2d 57 (Super. Ct. App. Div. 1977). Had the plaintiffs' concern in Muniz been over something less weighty than the existence of their newborn baby, a three week delay would not have seemed as severe or extreme.
The Continued Sufficiency of Ensuing Physical Injury

The abandonment of the ensuing physical injury rule presents an additional question: whether ensuing physical injury, though not required to state a cause of action, should be sufficient in and of itself to validate a claim for the negligent infliction of emotional harm. The *Molien* decision seems to support an affirmative answer to that question.\(^{107}\)

If ensuing physical injury continues to be sufficient to prosecute a claim for the negligent infliction of emotional harm, unscrupulous plaintiffs will be no less tempted than they were before to fabricate physical injuries. In short, where it is questionable whether the circumstances of a case demonstrate a guarantee of genuineness, the plaintiff would be well advised to plead and prove physical injury.

The continued sufficiency of ensuing physical injury would perpetuate two of the faults that the *Molien* court attempted to correct by abandoning the rule. First, plaintiffs would still be able to recover for emotional distress where they have suffered even trivial physical harm.\(^{108}\) Second, unscrupulous plaintiffs would have just as much incentive to fabricate testimony\(^{109}\) as they did under the ensuing physical injury rule. Even a middle ground approach— that ensuing physical injury is not itself sufficient to validate a claim but is one factor to be considered in evaluating genuineness—would fail to resolve these faults.

A more radical resolution of the question would treat the physical injury as parasitic on the cause of action for negligent infliction of emotional harm. In that case proof of physical injury would be relevant only to the extent of damages, not to liability itself. Such an approach would distinguish the negligent infliction of emotional harm from the negligent infliction of physical injury.\(^{110}\) It might also help disengage this area of negligence law from physical connectors, thus leaving courts free to focus on the difficult questions concerning

---

107. See, *Molien v. Kaiser Foundation Hosp.*, 27 Cal. 3d 916, 926-27, 616 P.2d 813, 819, 167 Cal. Rptr. 831, 837 (1980) (citations omitted): “Our courts have... devised various means of compensating for the infliction of emotional distress, provided there is some assurance of the validity of the claim. As we have seen, physical injury, whether it occurs contemporaneously with or is a consequence of emotional distress, provides one such guarantee.”

108. See generally id. at 925, 616 P.2d at 820, 167 Cal. Rptr. at 838.

109. Id.

110. An act likely to cause bodily harm through mental disturbance could still create liability independent of the tort of negligent infliction of emotional harm, and proof of physical injury would be *sufficient* to establish such a claim. See *Restatement (Second) of Torts* § 306 & Comment b (1965).
the foreseeability and the scope of liability for emotional harm.\textsuperscript{111}

**APPLYING THE FACTORS**

Two recent New Jersey cases dramatically point up the difficulty that courts will have in determining liability in the absence of content for the guarantee-of-genuineness standard.

*Muniz v. United Hospitals Medical Center Presbyterian Hospital*\textsuperscript{112}

Mrs. Muniz's premature son was taken from her at birth and transferred to the defendant hospital to be treated for respiratory problems. Two days later, while Mrs. Muniz was still in the hospital, she received a telephone call from an unidentified employee of the defendant informing her that her son was dead. Mrs. Muniz became hysterical and was given a sedative. Over the next three weeks, Mr. and Mrs. Muniz attempted to ascertain whether their son was in fact dead. For unknown reasons the hospital was unable to confirm or deny the report or to locate the infant. Finally, it confirmed the death and produced the body.\textsuperscript{113}

The first part of the *Muniz* complaint alleged three negligent acts: the manner of notification; the subsequent failure to confirm the child's death or to make formal notification; and the misplacement of the child's body.\textsuperscript{114} The second part of the complaint alleged that defendant's conduct "constitute[d] outrageous conduct by means of the gross and wanton negligence of the defendant as constituting an intentional infliction of mental and physical suffering to both plaintiffs [sic]."\textsuperscript{115} The first count did not allege any ensuing physical injury but specified "unrelenting emotional anguish, distress and anxiety."\textsuperscript{116} The Superior Court dismissed the complaint for failure to state a claim because no physical injury was alleged.\textsuperscript{117} After reviewing *Dillon* and its progeny, the court concluded that "[n]one of them made a new kind of conduct tortious. They simply

\textsuperscript{111} For a good recent treatment of the problem of the scope of liability for the negligent infliction of emotional harm, see Miller, *supra* note 96.


\textsuperscript{113} 146 N.J. Super. at 514, 370 A.2d at 77.

\textsuperscript{114} *Id.* at 514-15, 370 A.2d at 77-78.

\textsuperscript{115} *Id.* at 515, 370 A.2d at 78.

\textsuperscript{116} *Id.*

\textsuperscript{117} *Id.* at 530, 370 A.2d at 86.
expanded the scope of damages in universally recognized torts.”

The court then considered the "tort of 'outrage,'" concluding that "[defendant's telephone call] is not actionable as 'outrage' for lack of deliberateness. It is not actionable as negligence because no physical hurt or other compensable damage resulted." The court recognized that the facts of the case might make it fall into the dead body or telegraph exceptions to the ensuing physical injury rule but declined to "broaden this area of tort law to sustain the complaint."

The Appellate Division reversed, holding that Mr. and Mrs. Muniz ought to be allowed to amend their complaint and have discovery in order to try to state a claim. It offered, as possible but not exclusive bases for a claim, "outrage" or the negligent mishandling of a corpse.

The Muniz claim would be valid when evaluated under the proposed factors, since Mrs. Muniz probably did suffer serious mental distress, even though she did not have any resulting physical injuries. First, the hospital acted—and failed to act—with full awareness both of the plaintiff's identity and of the emotionally sensitive nature of the information that it first communicated and then failed to confirm. The communication, whether tortious or not, was of a type certain to cause Mr. and Mrs. Muniz some emotional suffering. Second, Mr. and Mrs. Muniz's concern for their child falls within a class of commonly legally protected rights.

Third, the hospital's failure to confirm or deny the child's death for three weeks could easily be viewed as extreme conduct.

Lemaldi v. De Tomaso of America, Inc.

Mr. Lemaldi bought a $12,000 imported sports car from the defendant auto dealer. The steering pulled to the right the first day that he drove it, and the car broke down totally after three weeks. During the warranty period, the air conditioner fell out of the car.
into the street, and the car was plagued with numerous less serious problems. The car required more than $4,000 in repairs after the warranty period was over. Mr. Lemaldi experienced various unsatisfactory contacts with the defendant’s employees.\textsuperscript{126}

The \textit{Lemaldi} court relied on the Appellate Division’s apparent “willingness to conceive of claims for relief for emotional distress arising out of deviation from a standard of care”\textsuperscript{126} to allow Mr. Lemaldi a cause of action for his “mental anguish” suffered as a result of defendant’s apparent inattentiveness and unresponsiveness to his complaints. The court denied defendant’s contention that it could not be liable unless Mr. Lemaldi showed that it had engaged in “willful malicious conduct.”\textsuperscript{127} The court also denied defendant a judgment \textit{n.o.v.} after the jury awarded plaintiff $8,000 for mental anguish, but granted a new trial on the issue of damages because of plaintiff’s lack of adequate proof of his headaches.\textsuperscript{128} The \textit{Lemaldi} court held that the jury could reasonably have found that the auto dealer’s inaction would “aggravate an ordinary man to the point of ‘mental anguish’”\textsuperscript{129} and that the “unique circumstances of this case afford sufficient guarantee that we are not dealing with a frivolous or fraudulent claim.”\textsuperscript{130} It apparently found that guarantee in the prolonged period during which the defects were not corrected and in the relatively high cost of the auto and its repair.\textsuperscript{131}

The proposed factors would not validate Mr. Lemaldi’s claim for emotional harm. First, a relationship between a customer and a car dealer is not normally emotionally charged, and the dealer’s action or inaction would not normally lead to serious emotional harm. Second, the object of Mr. Lemaldi’s emotional harm—the state of repair of his automobile—is clearly not commonly regarded as producing emotional attachment.\textsuperscript{132} The third factor probably is more pronounced in the \textit{Lemaldi} case than the other two, but the opinion gives little indication of severe misconduct by the defendant auto

\begin{itemize}
  \item \textsuperscript{125} \textit{Id.} at 446-47, 383 A.2d at 1223.
  \item \textsuperscript{126} \textit{Id.} at 447-48, 383 A.2d at 1223.
  \item \textsuperscript{127} \textit{Id.} at 447, 383 A.2d at 1223.
  \item \textsuperscript{128} \textit{Id.} at 450, 383 A.2d at 1224-25.
  \item \textsuperscript{129} \textit{Id.} at 447, 383 A.2d at 1223.
  \item \textsuperscript{130} \textit{Id.} at 449, 383 A.2d at 1224.
  \item \textsuperscript{131} The car cost $12,000 and the repair bill was $4,000. \textit{Id.} at 446-47, 383 A.2d 1222-23.
\end{itemize}
Perhaps the long period of time during which Mr. Lemaldi was inconvenienced contributed to the severity of the defendant's misconduct. At best the *Lemaldi* case would show only some evidence of meeting only one of the factors proposed to evaluate such claims; thus it would probably not qualify for the imposition of liability.

**CONCLUSION**

The emerging duty to avoid negligent inflictions of emotional harm has a somewhat confused history. Linkages to physical injuries and physical events have obscured the emergence of a legally protected interest in emotional tranquility. As more and more states adopt the doctrine of *Dillon v. Legg*, the connection of emotional harm liability to physical events tends to disappear. The last link to break will be the requirement of ensuing physical injury.

The demise of the ensuing physical injury rule is a step forward in recognizing emotional tranquility as a legally protected interest. The expansion of litigation that is likely to occur in this area as a result of the relaxation of the technical requirements of pleading will force courts to consider more closely than ever before the basis of liability for negligently inflicted harms. Judicial uneasiness with an apparently boundless cause of action and the great variety of new claims that will be presented for resolution has prompted the requirement that the facts of a case contain a guarantee of genuineness to validate the authenticity of a claim for negligently inflicted emotional harm. Although the parameters of that validator have not yet been clearly identified, cases allowing recovery for pure emotional harm unconnected to physical events or injuries suggest factors that should be taken into account in determining liability. Although these factors are intended primarily to be applied to the facts of a case by juries as they seek to determine the probability of plaintiff's having suffered serious emotional harm, they are also relevant to the judge's inquiry into whether a duty should be recognized in any given case. The factors are grounded on the principle that defendants should be held liable only for consequences which were reasonably foreseeable to them at the time they acted.

The first factor is the extent to which the plaintiff and the de-

---

133. Mr. Lemaldi had a "number of unsatisfactory contacts with various [defendant] personnel" who responded "varyingly from open hostility to inattention." 156 N.J. Super. at 446-47, 383 A.2d at 1223.
fendant were involved in a highly sensitive, emotionally charged prior relationship. The second factor is the extent to which the arena in which the defendant undertook to act is commonly regarded as worthy of emotional attachments. The third factor is the extent to which defendant's conduct represents an extreme departure from normal standards of behavior. Applying these three factors to claims for negligent infliction of emotional harm should assist in validating such claims by supplying content for the guarantee-of-genuineness standard.

Ethan Finneran