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Torts: Where to Now? Negligent Infliction of Emotional Distress in Ohio

Doris A. Harvey
University of Dayton

CASENOTES

TORTS: WHERE TO NOW? NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN OHIO—*Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

INTRODUCTION

Although Ohio has long been laggard in the recognition of recovery for emotional distress,[1] it recently bolted into accord with current notions of tort recovery with the Ohio Supreme Court's decision in *Schultz v. Barberton Glass Co.*[2] In *Schultz*, a near unanimous court[3] obliterated Ohio's seventy-five-year-old impact rule for emotional distress recovery.[4] By implication, the court followed the lead of other jurisdictions[5] which have abandoned not only the impact rule, but also the requirement of physical manifestation of fright—a requirement designed to protect against simulated personal injury claims.[6]

While Ohio tort law has needed direction, an abrupt shift to the extreme left[7] may leave the Ohio courts off balance and result in some emotional distress claims receiving undue judicial recognition. Although *Schultz* may seem to offer generous guidelines for the injured plaintiff,[8] other jurisdictions which have expanded the bounds of emo-

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1. For an example of Ohio's cold objectivity, see Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936) (plaintiff was denied recovery for emotional distress absent an impact, even when plaintiff viewed her dead sister's mangled body abandoned by the murderer).

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

3. The decision was six to one. The sole dissenter was Justice Holmes.

4. The impact rule originated in Miller v. Baltimore & Ohio S.W.R. Co., 78 Ohio St. 309, 85 N.E. 499 (1908). *See infra* notes 46-48 and accompanying text.

5. The court particularly considered Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970) and Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970). Both cases relied upon the ability of the jury to spot dishonest claims and held that the judicial system itself provides safeguards against contrived claims.

6. For a thorough judicial evaluation of such a position, see Molien v. Kaiser Found. Hosp., 27 Cal. 3d 925, 927-31, 616 P.2d 813, 819-21, 167 Cal. Rptr. 831, 837-39 (1980); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970).

7. The propriety of such boldness will subsequently be evaluated as the benefits gained from avoiding the inherent pitfalls of the zone of danger rule are balanced against the judicial results of a haphazard adoption of the genuineness of proof standard. For a discussion of the zone of danger rule, see *infra* text accompanying notes 48-52. The genuineness of proof concept originated in Battalla v. State, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731, 219 N.Y.S.2d 32, 38 (1961).

8. The Ohio Supreme Court fails to address the defendant's right to freedom of action and society's right to advancement. The court does not espouse the position that "the right to absolute peace and quiet must be foregone so that the business of life may be carried on." Note, *Right to Recover for Injuries Resulting from Negligence without Impact*, 50 AM. L. REG. 141, 142

tional distress law have tended to refine the parameters of recovery.[9]

Part I of this note will present the facts of the case. Part II will discuss the common-law approach to emotional distress claims. Part III will examine *Schultz's* impact on the components of an emotional distress cause of action and the ramifications for subsequent emotional distress claims.

I. FACTS & HOLDING

As Elliott Schultz followed a truck owned and operated by the Barberton Glass Company,[10] a sheet of glass[11] fell from the truck, hit the highway, and rebounded directly into Mr. Schultz's windshield. Although glass struck his face as he drove, Schultz managed to retain control of his vehicle and bring it to a stop on the shoulder of the highway.[12] Schultz promptly sought medical attention,[13] but hospital personnel did not discover any physical injury.[14]

Schultz and his wife Barbara filed suit against Barberton Glass Company and its employee-driver in the Court of Common Pleas of Summit County,[15] alleging that the defendants negligently allowed the sheet of glass to fall from the truck.[16] Schultz claimed permanent injuries necessitating continued medical and psychiatric treatment[17] and set his demand at $200,000.[18]

The jury awarded Schultz $50,000.[19] Pursuant to defendants'

(1902).

9. Hawaii is such a jurisdiction. In *Rodrigues*, 52 Hawaii 156, 472 P.2d 509 (1970) (plaintiffs suffered distress from the flooding of their house) and Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974) (bystander case), the Hawaii Supreme Court allowed the jury to conclude that emotional distress results from the nature of the negligence. In Kelly v. Kokua Sales & Supply Ltd., 56 Hawaii 204, 532 P.2d 673 (1975), the court denied the plaintiff recovery for a heart attack caused by a telephone call in which the plaintiff learned about the deaths of his daughter and grandchildren. The court concluded that Mr. Kelly was located an unreasonable distance from the scene of the accident so as to preclude recovery. This limitation seems to result in a hybrid of the zone of danger rule discussed *infra* notes 48-52. Ensuing physical injury also remained relevant in Hawaii: see *infra* notes 114-119 and accompanying text.

10. 4 Ohio St. 3d at 132, 447 N.E.2d at 110.

11. The sheet was eight feet square and one-quarter inch thick. *Id.*

12. *Id.*

13. Schultz received treatment at the emergency room of Akron General Medical Center. *Id.*

14. Schultz's family physician examined him the next day and found no evidence of eye trauma. *Id.*

15. *Id.* The Schultz's filed the action on February 1, 1980.

16. *Id.*

17. *Id.*

18. Barbara Schultz apparently alleged that the accident resulted in loss of consortium. *See infra* note 19.

19. The jury also awarded Schultz's wife $10,000 for loss of consortium. The award was not contested on appeal. *Id.*

timely appeal, the Court of Appeals for the Ninth District reversed and remanded the case to the trial court with an order to determine whether Schultz incurred contemporaneous physical injury as required in *Miller v. Baltimore & Ohio Southwestern Railroad Co.*[20] Upon a motion to certify the record, the Ohio Supreme Court faced the formidable question of whether contemporaneous physical injury would continue to be a condition precedent to recovery for the negligent infliction of serious emotional distress.[21]

The court, led by Chief Justice Celebrezze, could have followed precedent and disallowed Schultz's recovery entirely.[22] Contrarily, the court could have overruled precedent and either followed the physical manifestation of fright requirement[23] or expressly deferred to established parameters of recovery relied upon in other jurisdictions.[24] Instead, the court held that a contemporaneous physical injury is not mandatory to maintain a cause of action for negligent infliction of emotional distress. The court, however, only tacitly adopted the standards of proof developed in more progressive jurisdictions[25] while overlooking such issues as Barberton's duty of care, proximate cause, and an explanation of serious emotional distress.[26]

The majority opinion focused upon a discussion of impact rule justifications and proof of damages.[27] The court noted that the predicted torrent of litigation resulting from the abolition of the impact rule had not materialized.[28] It reasoned that the flood of litigation would have

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20. 78 Ohio St. 309, 85 N.E. 499 (1908).

21. 4 Ohio St. 3d at 132, 447 N.E.2d at 110.

22. *See Koontz*, 52 Ohio App. 265, 3 N.E. 694; *see also* Wolfe v. A. & P. Tea Co., 143 Ohio St. 643, 56 N.E.2d 230 (1944) (plaintiff allowed to recover for shock resulting from eating from a can contaminated with worms, if physical injury was proven); 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 a fire).

23. A similar result was urged by the dissent, relying on Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982). The RESTATEMENT (SECOND) OF TORTS § 436 A (1965), also advances the position that, "if the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

24. *See Molien*, 27 Cal. 3d 925, 616 P.2d 813, 167 Cal. Rptr. 881 (1980); *Rodrigues*, 52 Hawaii 156, 472 P.2d 509 (1970); *Leong*, 55 Hawaii 398, 520 P.2d 758 (1974); *see also* Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 428 N.E.2d 596 (1981) (bystander case).

25. "We agree with these courts. Judges and juries will consider the credibility of witnesses and the genuineness of the proof as they do in other cases. In most instances, expert medical testimony will help establish the validity of the claim . . . ." 4 Ohio St. 3d at 135, 447 N.E.2d at 112 (1983) (citing *Rodrigues*, 52 Hawaii at 172, 472 P.2d at 525; *Niederman*, 436 Pa. at 407, 261 A.2d at 90).

26. *See infra* text accompanying notes 65-81, 88-99 & 99-110.

27. 4 Ohio St. 3d at 134, 447 N.E.2d at 111-12.

already passed its peak, considering the Ohio cases predicating recovery upon any slight injury.[29] Finally, the court concluded that the plaintiff's right to recovery predominated over judicial convenience.[30]

Reasoning that the hazard of illusory claims for emotional distress is no greater than that for minor physical injury claims, the majority summarily dismissed the assertion that an impact requirement moderates fraudulent claims.[31] Further, the court held that the same evidentiary system which protects the integrity of tort litigation would likewise protect the integrity of emotional distress claims.[32]

A discussion of feigned claims revolves around the issue of proof of damages—the final bastion of the impact rule proponents. The Ohio court, among other jurisdictions,[33] expressed faith in the ability of the judge and jury to spot both dishonesty and self-deception in litigants.[34] As a result of *Schultz*, the court apparently intends to place primary reliance upon the jury's perception of subjective elements of proof, since expert medical testimony,[35] in the majority's words, will "[i]n *most* instances . . . *help* establish the validity of the claim of serious emotional distress."[36] The opinion implies that the standard of proof will vary from case to case. The jury must hear the testimony and evaluate it against standards of propriety.[37]

Justice Holmes, the sole dissenter,[38] objected to the paucity of guidelines in the majority opinion purporting to preclude unlimited liability.[39] The dissent advocated the continued use of objective symptomatology of fright,[40] traditionally a filter to feigned claims. Justice Holmes cited *Payton v. Abbott Labs*,[41] which held that evidence of plaintiff's physical injury from fright must be offered to maintain an action for the negligent infliction of emotional distress.[42]

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29. *Id.*

30. *Id.*

31. *Id.* at 134, 447 N.E.2d at 112.

32. *Id.*

33. *See infra* note 111.

34. "The judicial system and evidentiary requirements have proven to be safeguards against ficticious claims in other personal injury cases and will function similarly in emotional distress cases." 4 Ohio St. 3d at 134, 447 N.E.2d at 112.

35. Medical testimony is in fact the sole objective measure advocated by the majority.

36. 4 Ohio St. 3d at 135, 447 N.E.2d at 112 (emphasis added).

37. Both judges and juries are to consider the credibility of witnesses and genuineness of proof.

38. Justice Holmes was the sole dissenter in both *Schultz* and Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

39. Justice Holmes stated that the majority's framework presented an "ever widening legal horizon" on which to found claims. 4 Ohio St. 3d at 139, 447 N.E.2d at 115.

40. *Id.*

41. 386 Mass. 540, 437 N.E.2d 171 (1982).

42. Justice Holmes recommended objective symptomatology because other jurisdictions

II. COMMON-LAW EVOLUTION OF EMOTIONAL DISTRESS

An examination of the historical perception of mental disturbance reveals an area shrouded with prejudice, fear, and misconception. Society's ignorance has tainted the treatment of the mentally infirm[43] and has inhibited the realization that emotional distress constitutes a legitimate evil worthy of judicial protection.[44] Unlike other torts, emotional distress has inherited a stigma from its traditionally disdained cousin, mental disturbance. The stumbling block to emotional distress recovery continues to center upon proof of injury; emotional distress can be easily fabricated while psychosis or serious physical injury cannot be denied.[45] The overemphasis on possible feigned claims resulted in artificial limitations on recovery as the historical norm.

Originally, compensation for emotional distress hinged upon its relationship to a separate, actionable injury.[46] Thus, emotional distress was parasitic to the parent action. The impact rule, by mandating physical contact with the plaintiff as a condition precedent to recovery for the accompanying mental distress, falls within a parasitic scheme of damages.[47]

Courts gradually shifted the arbitrary distinction between recovery and demurrer from a physical impact requirement to a presence in the ordinary range of physical peril requirement.[48] The zone of danger rule, as it is more commonly known, represents a clever distortion of the

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have already set the course and because fright not resulting in an external condition offers no guarantee of genuineness. 4 Ohio St. 3d at 139-40, 447 N.E.2d at 116 (1983).

43. L. BELL, TREATMENT OF THE MENTALLY ILL (1980). Also, in August of 1943, General George E. Patton became incensed at two soldiers hospitalized for traumatic neurosis; as reported by General Eisenhower, General Patton cuffed one soldier until his helmet rolled onto the floor. Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 114 (1943) (quoting Dallas Morning News, Nov. 27, 1943, at 7, col. 1).

44. Mental distress connotes either insanity or evanescent subjective moods. Lord Wensleydale remarked, "[m]ental pain or anxiety the law . . . does not pretend to redress, when the unlawful act complained of causes that alone." Lynch v. Knight, 11 Eng. Rep. 854, 863 (1861).

45. All common-law schemes attempt to ensure the genuineness of claims by establishing conditions for recovery which the plaintiff would presumably be unwilling to endure in order to fabricate a claim; examples include physical impact, presence in the zone of danger, the *Dillon* guidelines, and the ensuing physical injury requirement. *See infra* text accompanying notes 54, 111-120.

46. Such is the typical origin of any legally protected interest. For an excellent discussion of the law's developmental recognition of any interest, see Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339, 340-46 (1963).

47. Note, *Recovery for Negligent Infliction of Emotional Distress: Changing the Impact Rule in Indiana*, 54 IND. L.J. 467 (1979). Ohio traditionally demanded not only physical impact, but physical injury from the impact, as a prerequisite to recovery. Davis v. Cleveland Ry. Co., 136 Ohio St. 401, 21 N.E.2d 169 (1939) (where plaintiff was denied recovery for emotional distress when trapped between padded coach doors because the battery did not result in physical injury), *overruled*, Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

48. Note, *supra* note 47, at 471.

impact rule, as presence in the zone of physical peril means that the plaintiff fears physical impact.[49]

The California case of *Dillon v. Legg*[50] focused sharp attention on the fundamental absurdity of the zone of danger rule. In that case, a mother was unable to recover for shock sustained by seeing her minor child struck by a negligent motorist, while, ironically, the victim's sister—who stood between the victim and the mother—could recover under the rule.[51] The court discarded the zone of danger rule in outrage and resolved to evaluate each case under the standard rules of tort law, "including the concepts of negligence, proximate cause, and foreseeability."[52] Thus, the crux of evaluating the defendant's range of duty became the reasonable foreseeability of injury to the plaintiff.[53]

Notwithstanding its sympathy for the *Dillon* mother, the California court recognized the need for standards in evaluating when emotional distress recovery would be appropriate. The *Dillon* court held relevant, in conferring liability,

(1) the plaintiff's strategic location at the accident site,
(2) whether the shock resulted from plaintiff's sensory perception of the event or from information obtained after the fact, and
(3) plaintiff's relationship to the victim.[54]

In spite of the court's effort to devise a framework under which recovery for emotional distress hinges upon equity and not mechanical "cookbook" requirements, subsequent courts have converted the guidelines into prerequisites so that reasonably foreseeable fright goes uncompensated.[55] Such convolutions revive the arbitrary rules that *Dillon* allegedly disposed of.

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49. Logically, plaintiffs who receive a slight impact are no more deserving than plaintiffs who are merely in the zone of danger. Expanding the scope of defendant's liability via the zone of danger rule merely manipulates the artificial barrier to recovery.

50. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

51. *Id.* at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85. *Dillon* overruled the five-year-old case of Amaya v. Home Ice Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), which involved facts similar to those in *Dillon*. *Amaya* relied on earlier decisions which held that even where a child, sister, or spouse is the object of plaintiff's apprehension, no cause of action is stated unless the complaint alleges that the plaintiff suffered emotional distress, fright, or shock as a result of fear for his or her own safety. Reed v. Moore, 156 Cal. App. 2d 43, 45, 319 P.2d 80, 82 (1957).

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

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

54. *Id.*

55. Unless the facts of the claim are custom fitted to the *Dillon* guidelines, recovery is unlikely. Subsequent California decisions are surveyed in Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

III. ANALYSIS

Recovery for emotional distress finally reached maturity upon the advent of the *Schultz* decision. The Supreme Court of Ohio decided that a plaintiff's claim for emotional distress predominates over a defendant's liability for the unintentional infliction of emotional distress by providing the plaintiff with the benefit of every judicial doubt.[56] While in virtual agreement that the impact rule needed revision, the majority and dissenting justices deadlocked on the proper parameters for recovery.[57] The majority's decision complacently leaves the question of liability to the jury, naively ignoring the tendency to measure foreseeability by hindsight,[58] while the dissent summarily solves the issue by relying upon evidence of objective symptomatology resulting from the fright.[59] The majority concerns itself with ideals of fairness and humanitarianism, while the dissent embraces a pragmatic, application-oriented approach.

The *Schultz* decision resulted from a fact pattern wherein the events could possibly be classified within the categories that carry a presumption of emotional distress.[60] Ohio courts will eventually face

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56. The tone of the majority opinion is extremely plaintiff-oriented, in that the court provides no parameters for a defendant's scope of duty, pays only minimal attention to proximate cause, and abandons the physical manifestation of fright requirement. *See* text accompanying notes 65-86, 88-99, & 99-110.

57. The majority relied on the genuineness of proof standard without recommending an analysis to determine if the proof *is* genuine. 4 Ohio St. 3d at 135, 447 N.E.2d at 112. *See* Note, *Recovery for Negligent Infliction of Emotional Distress Absent Physical Injury*, 10 CAP. U.L. REV. 851, 865 n.80 (1981). The dissent relied upon *Payton*, 386 Mass. 540, 437 N.E.2d 171 (1982), where DES daughters were not allowed to recover for the negligent infliction of emotional distress resulting from the increased statistical chance that the plaintiffs would suffer serious illness in the future.

58. Although foreseeability seems obvious when viewing the wreckage, many actors do not appreciate the risks of their conduct. The law should encourage evaluation of a behavior's likely results and the prevention of those risks should remain with the bench. *See* Blackmer, *infra* note 71, at 1162.

59. The dissent focused almost exclusively upon proof of damages, omitting judicial controls such as duty and proximate cause.

60. One such category is the negligent transmission of a death message. *See* SaRelle v. Western Union Tel. Co., 55 Tex. 308 (1881); Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943); Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Western Union Tel. Co. v. Crumpton, 138 Ala. 632, 36 So. 517 (1903).

The second group of cases involves the negligent mishandling of corpses. *See* Renihan v. Wright, 125 Ind. 536, 25 N.E. 822 (1890) (misdelivery); Torres v. State, 34 Misc. 2d 488, 228 N.Y.S.2d 1005 (1962) (autopsy and unauthorized burial); Lott v. State, 32 Misc. 2d 296, 225 N.Y.S.2d 434 (1962) (confusion of bodies); Weingast v. State, 44 Misc. 2d 824, 254 N.Y.S.2d 952 (1964) (confusion of bodies). For extensive list of cases, see W. PROSSER, LAW OF TORTS § 54 (4th ed. 1971). *See also* Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (negligent diagnosis of syphillis in spouse created presumption of emotional distress).

cases in which recovery is not so clearly appropriate, and this category of cases will suffer from the lack of evaluative criterion in *Schultz*.[61]

The only express parameters for recovery for mental distress provided by the *Schultz* holding are that the shock be "serious" and that the evidence pass muster under the jury's scrutiny of credibility of witnesses and the genuineness of proof.[62] The majority deals with the issues of duty of care and foreseeability only to the extent that it defers to other jurisdictions. This section will examine the impact of the *Schultz* decision on the elements of an ordinary negligence action[63] and the likely trend for subsequent emotional distress claims.

A. Establishing Both a Duty & a Breach

Schultz is the culmination of the Ohio courts' struggle with the classic emotional distress issue: when, and under what circumstances the value of the plaintiff's emotional tranquility exceeds the defendant's burden of potentially unlimited liability.[64] More specifically, when does a defendant have a *legal duty* to refrain from negligent conduct which could result in a plaintiff suffering emotional distress?

A legal duty can best be defined as "the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[65] Policy considerations have traditionally included an evaluation of which party can most efficiently bear the loss,[66] the utility of the proscribed conduct, the seriousness of the plaintiff's harm, the possibility of contrived claims, the administrative workability of the decision, the foreseeability of the harm,[67] and the deterrence of

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61. Indeed, a clerk who inadvertently misschedules a wedding, or a bank teller who mistakenly transmits an insufficient funds notice, might well wonder as to their liability under *Schultz*.

62. 4 Ohio St. 3d at 132, 447 N.E.2d at 110. For a discussion of seriousness requirements, see *infra* text accompanying notes 103-110. Subsequently in *Paugh*, 6 Ohio St. 3d at 80, 451 N.E.2d at 767, the Ohio Supreme Court indicated that jurors may defer to their own experience in determining if the defendant's conduct resulted in serious emotional distress. Such a scheme is unwise in that it introduces material beyond the control of the court, and therefore, proof of injury becomes subjective. *See* Blackmer, *infra* note 71, at 1166-67.

63. The elements of a negligence action are, of course, a duty to adhere to a standard of care to avoid subjecting others to an unreasonable risk, a breach of that duty, a causal connection between the substandard behavior and plaintiff's injuries, and proof of actual injury. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

64. The concept of unlimited liability was first addressed in the case of Winterbottom v. Wright, 152 Eng. Rep. 631 (Ex. 1842), which denied recovery in a product liability case for lack of privity. *See* Note, *infra* note 110, at 547-48 for an analogy to fright cases.

65. W. PROSSER, LAW OF TORTS § 54, at 325-26 (4th ed. 1971).

66. Chief Justice Learned Hand advanced his famous formula for economic analysis in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

67. Foreseeability should be but one factor in the duty analysis. *See infra* text accompanying notes 66-72.

tortious conduct.[68]

All too often, American courts have followed the trend of English courts by restricting the essence of duty to a question of foreseeability.[69] This limitation results in the judge relinquishing control of the related policy decisions, since foreseeability is a question of fact for the jury which must be abandoned to its discretion.[70] If the judge determines as a matter of law that a reasonable juror *might* find that the emotional distress was a foreseeable result of the defendant's deficient conduct, the issue must go to the jury for an *ad hoc* determination.[71]

The *Schultz* court's intention regarding a defendant's legal duty must be ascertained by inference from the case's facts and decision.[72] The harrowing fact pattern specific to this case leaves in doubt the precedential value of the decision. Had the court faced a situation wherein the emotional tug was less towards the plaintiff, the decision would have represented a resolution of a social dilemma instead of lip service to liberalizing tort standards.[73]

The Ohio Supreme Court made several policy decisions in its opinion. First, the court recognized emotional tranquility as a legally protected interest.[74] Although the court states that emotional injury is on a par with physical injury, its requirement that an emotional injury be serious—while any *minor physical* injury can be compensated—indicates that emotional injuries will continue to be measured against a longer yardstick.[75]

Second, the court found that the possibility of fabricated claims

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68. For an evaluation of methods to achieve deterrence for the negligent infliction of emotional distress, see Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making the Punishment Fit the Crime*, 1 U. HAWAII L. REV. 1, 23 (1979). For a general discussion of the policies involved in an adequate duty analysis, see Note, *supra* note 47, at 474-79.

69. English cases using foreseeability as a test of duty include Hambrook v. Stokes Bros., 1 K.B. 141, 148-51, 162-63 (1925); Bourhill v. Young, A.C. 92, 98, 101-02, 104-05, 111, 116-17 (1943); Boardman v. Sanderson, 1 W.L.R. 1317 (C.A. 1964).

70. *See* D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975). The court here stressed that whether there exists a duty of care running from the defendant to the plaintiff is a question for the court and not the jury.

71. A jury verdict does not create precedential law. Blackmer, *Negligence Actions for Emotional Distress and Loss of Consortium Without Physical Injury*, 69 CALIF. L. REV. 1142, 1161 (1981).

72. The court's opening sentence implies a duty: "A cause of action may be stated for the negligent infliction of serious emotional distress . . . ." 4 Ohio St. 3d at 131, 447 N.E.2d at 109.

73. Liberation will only be complete when the court adopts a system whereby both parties must present objective, credible evidence of their positions.

74. 4 Ohio St. 3d at 135, 447 N.E.2d at 112.

75. 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. 52 Hawaii at 172-73, 472 P.2d at 520.

did not justify denying recovery for an entire class of claims. Emotional distress was equated with physical injury, in that the social value of recovery predominates over the possibility of feigned claims.[76]

Finally, the court considered the judicial economy of its decision. The court attempted to present a framework under which claims could be evaluated,[77] and created what it believed to be a workable scheme for the presentation of proof of emotional distress cases.[78]

Theoretically, then, emotional harmony is a legally guarded interest whose general protection predominates over the danger of false recovery. The court attempted to protect the integrity of the tort system by imposing the seriousness requirement and the evidentiary standards to be weighed by the jury.[79] Although *Schultz* holds that a defendant has a duty to refrain from negligently causing a plaintiff to suffer mental shock from an unsecured glass sheet smashing through his windshield, the scope of the duty requirement cannot be gleaned from the *Schultz* decision. No hint was given as to the shifting value of the protected interest of emotional tranquility, as the utility of the defendant's conduct increases or the foreseeability of the harm decreases.[80]

As litigation in the field increases, the court will have to incorporate into its duty requirement all of the policy considerations mentioned above to offer guidance to potential litigants. The court will also have to address the issue of what constitutes deficient conduct breaching that duty of care.

Prosser holds that conduct which foreseeably places the plaintiff at risk of suffering serious emotional harm will not support liability: the defendant's conduct must create an *unreasonable* risk of resulting in emotional damage to the plaintiff.[81] In determining whether a defendant created such an unreasonable risk, a jury will examine the useful-

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76. *See* 4 Ohio St. 3d at 134, 447 N.E.2d at 111-12.

77. A flood of litigation and administrative unworkability are major arguments in support of the impact rule. *See* Note, *supra* note 47, at 468-69; *see also* Note, *Damages for Fright*, 34 HARV. L. REV. 260, 265, 270 (1921).

78. *See* 4 Ohio St. 3d at 135, 447 N.E.2d at 112-13.

79. Justice Holmes followed the trend of dissenters in other jurisdictions which abandoned the ensuing physical injury requirement by scorning the parameters for recovery as too open-ended. 4 Ohio St. 3d at 140, 447 N.E.2d at 116; *see also Molien*, 27 Cal. 3d at 935, 616 P.2d at 824, 167 Cal. Rptr. at 842 (Clark, J., dissenting and labeling parameters "non-standards, opening wide the door to abuse").

80. The cost-benefit analysis is discussed in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (the burden of precautions must be less than the probability of the injury times its severity to allow efficient economic recovery). *See also* Moisan v. Loftus, 178 F.2d 148 (2d Cir. 1949) (Learned Hand discussed the limitations of his formula); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060-61 (1972) (discusses the possibility of placing cost-benefit analysis into private hands).

81. W. PROSSER, LAW OF TORTS § 31 (4th ed. 1971).

ness and social acceptability of the proscribed conduct versus the risk of the resulting harm.[82] As drivers have always been liable to their fellow motorists for their negligence,[83] *Schultz* offers little precedential value for claims outside the motorist sphere.[84]

Thus far, the value of mental tranquility has not been judicially evaluated against any activity other than one in which liability had previously been established. However, the tone of *Schultz* suggests that the true hurdle to recovery lies in convincing a judge that emotional harm *might* be reasonably foreseeable so that the case is sent to a jury for a factual determination. Once a duty is found, a breach will probably be inferred.[85]

B. Proximate Causation & Proof of Injury

Evidence of proximate cause may be either direct and dramatic, as a bullet killing an otherwise healthy person, or confounded by preexisting conditions,[86] delayed reactions,[87] and intervening factors.[88] Although psychiatry can now accurately detect the *existence* of emotional distress,[89] medical science cannot yet trace psychic trauma to its exact *causes*.[90] As a result, medical guidance, even when expressly required, may be of little actual value to jurors.

The jury must typically resolve the issue of proximate cause by reference to a sequence of events and often unclear medical testimony.[91] The *Schultz* majority found that the defendant's negligence caused the glass sheet to crash into Schultz's vehicle, thereby resulting in his traumatic neurosis.[92] The court relied upon three medical doctors

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82. Blackmer, *supra* note 71, at 1168.

83. *Id.* at 1163.

84. Ironically, Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983), involved three negligent motorists in three separate events, so claims other than the automobile variety have not yet been adjudicated in Ohio.

85. *See* Blackmer, *supra* note 71, at 1149; *Molien*, 27 Cal. 3d at 936, 616 P.2d at 825, 167 Cal. Rptr. at 843 (Clark, J., dissenting); *see also* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 24 (1953).

86. A preexisting condition is, of course, indicated when the plaintiff reacts violently to a minor stimulus. *See* Smith & Solomon, *supra* note 43, at 121.

87. It has been suggested that proof of causation becomes too obscure in traumatic neurosis cases when a symptom-free span of a few days separates the focal event and the onset of the neurosis. Smith & Solomon, *supra* note 43, at 126.

88. Traumatic neurosis is greatly aggravated by the stress of approaching litigation. *See* Smith & Solomon, *supra* note 43, at 125.

89. "Today, the prevailing position of the medical world is that mental injury can be accurately diagnosed." Note, *Recovery for Negligent Infliction of Emotional Distress Absent Physical Injury*, 10 CAP. U.L. REV. 851, 857 (1981).

90. "Causation is obscure enough, at the best, in traumatic neurosis cases . . . ." *See* Smith & Solomon, *supra* note 43, at 126.

91. *See* Blackmer, *supra* note 71, at 1148.

92. 4 Ohio St. 3d at 135, 447 N.E.2d at 112. "Three medical doctors and a doctor of

and a psychologist to establish proximate cause.[93]

By at least treating the issue of proximate cause in passing, the Ohio Supreme Court avoided the pitfall of allowing a jury to presume causality when presented with a negligent defendant and an injured plaintiff. By not capitalizing on the issue, however, the court missed an opportunity to set standards which could moderate unwarranted claims and protect the defendant from draconian liability. Specifically, the court could have required that at least the majority of the plaintiff's symptoms appear within a reasonable time after the focal event.[94] If the court perceives the traumatic event as minor in proportion to the plaintiff's reaction, then the court should require psychiatric examination for signs of preexisting susceptibility to injury.[95] The plaintiff's activities prior to trial but after the incident should be examined to ensure that the plaintiff has sought and followed appropriate treatment. Finally, intervening events, such as the stress accompanying trial preparation, should be considered, as the plaintiff's unrelated activities often confound causation and are far too remote to be compensable.[96] As the jurors must ultimately resolve issues of fact by incorporating a commonsense approach, the court should provide directions on proximate cause theories and the factors discussed above.[97]

The *Schultz* court's ultimate reliance on the jury's discretion without a requirement of evidence stronger than that required in ordinary negligence actions may result in proximate cause depending on likelihood, which always seems greater in retrospect. The defendant will find himself or herself at a strategic disadvantage on the issue of proximate cause if the court subsequently fails to address the issue, as the tendency is to attach moral blame to a negligent defendant and presume causality. Such a presumption will result in the defendant bearing an unreasonably heavy burden, as injury is difficult to refute after the fact. Care should be taken so as not to attach unwarranted liability to a merely negligent defendant.[98] A passing indiscretion could subject a de-

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psychology testified to the effect that appellant suffers from traumatic neurosis, which was directly caused by the collision." *Id.*

93. The court deferred to the experts' opinions but evidently saw no purpose in expressly requiring medical evidence in subsequent cases. " In *most* instances, expert medical testimony will help establish the validity of the claim . . . ." *Id.* (emphasis added).

94. *See supra* note 88.

95. A competent psychiatrist can usually identify characteristics of instability by examining the patient's prior history. *See* Smith & Solomon, *supra* note 43, at 121.

96. A plaintiff who escapes an accident which would not have caused serious injury cannot recover for anxiety incurred from brooding about what *might* have happened. Smith & Solomon, *supra* note 43, at 126.

97. Blackmer, *supra* note 71, at 1165. (the author concedes that the court probably must accept the jury's commonsense judgment on the issue of proximate cause).

98. *See* Miller, *supra* note 68, at 1167. The author urges a resolution of the emotional distress

fendant to financial ruin when a mere touch of a vulnerable plaintiff becomes an overwhelming liability in court.[99]

Of the four elements of an ordinary negligence action,[100] *Schultz* focused its main attention on proof of damages. By requiring that the emotional distress be serious, the court encouraged direct and specific pleadings.[101] Unfortunately, however, a workable definition of "serious" emotional distress has not yet been formulated.

In *Rodrigues v. State*,[102] the Hawaii Supreme Court abrogated the physical manifestation of fright requirement and limited "serious" emotional distress to cases in which "a reasonable man, normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case."[103] Likewise, in *Molien v. Kaiser Foundation Hospital*,[104] a California court abandoned the physical manifestation of fright requirement[105] and mandated that "serious" distress be "severe and debilitating."[106] Both cases were cited in *Schultz* and were subsequently adopted in *Paugh v. Hanks*,[107] decided three months after *Schultz*. Once again, the harrowing fact patterns in *Schultz* and *Paugh*[108] obscure the usefulness of the definitions, as any theoretical definition of "serious" is overridden by its application to specific facts. As jurors flesh out the requirements of serious emotional distress as defined in *Paugh*, 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

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issue imposing a duty upon the defendant to avoid subjecting a plaintiff to reasonably foreseeable distress provided that the dollar amount of his liability be adjusted downward.

99. Smith & Solomon, *supra* note 43, at 97.

100. *See supra* note 63.

101. Blackmer, *supra* note 71, at 1165.

102. 52 Hawaii 156, 472 P.2d 509 (1970).

103. *Id.*

104. *Molien*, 27 Cal. 3d 925, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

105. Reasons for rejection of the ensuing physical injury requirement include that it permits recovery for trivial physical injury while mechanically denying recovery in potentially valid claims without physical injury, that it encourages inflated claims, and that the border between physical and emotional injury is indistinct. *See Molien*, 27 Cal. 3d at 927-31, 616 P.2d at 819-21, 167 Cal. Rptr. at 837-39, which held that the essential issue is one of adequacy of proof and not fine distinctions regarding physical injury.

106. Symptoms of serious emotional distress include phobias, traumatic neurosis, psychosis, and chronic depression. *See Molien*, 27 Cal. 3d at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841.

107. 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983) (mother allowed to recover for anxiety over the safety of herself and her family when defendants' cars crashed into her living room).

108. An example of a fact pattern wherein emotional distress was inferred is *Wallace*, 269 A.2d 117 (Me. 1970) (where plaintiff discovered a used prophylactic in a Coca-Cola bottle he was drinking from). The court affirmed the jury's verdict, stating "[t]he ordinary knowledge acquired from everyday experience by the jurors justifies [the jurors'] conclusion. No expert medical testimony on the point was necessary." *Id.* at 122.

stigma attached to the plaintiff's disability.[109] Subsequent decisions will offer the true parameters of serious emotional distress.

Relying upon the established skill of the judicial system in spotting meritorious claims and the genuineness of proof standards used in ordinary tort cases,[110] *Schultz* rejected the physical manifestation of fright requirement relied upon in other jurisdictions.[111] Although sound arguments have been advanced against the requirement,[112] courts which have rejected it have still generally attached importance to evidence of physical injury resulting from fright.

While the Supreme Court of Hawaii rejected the physical manifestation of fright requirement in *Rodrigues v. State*,[113] physical injury remains a key consideration in proof of injury from serious emotional distress.[114] The court found that emotional distress can result in either a primary mental reaction or a secondary mental reaction.[115] Secondary reactions are of extended duration, usually include a physical injury, and lend themselves with ease to the judicial process, in that the causal relationship can be established to a high degree of certainty.[116] Primary reactions, on the other hand, are characterized by grief, shock, or fear and are instinctual and temporal. Primary reactions often have no accompanying physical reaction and thus the causal link is more conjectural.[117] The psychological systems are so broad that medical testimony becomes clouded by subjectivity.[118] A prima facie case in favor of the plaintiff, therefore, largely hinges upon the occurrence and documentation of physical impairment.[119]

Justice Holmes, the sole dissenter in *Schultz*, urges that proof of

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109. Blackmer, *supra* note 71, at 1166.

110. Courts abandoning the ensuing physical injury requirement typically express such confidence in the judicial system. "The judicial system and evidentiary requirements have proven to be safeguards against fictitious claims in other personal injury cases and will function similarly in emotional distress cases." 4 Ohio St. 3d at 134, 447 N.E.2d at 112; *see also* 8 PEPPERDINE L. REV. 534, 547 n.80 (1980) (discusses the optimism apparent in progressive jurisdictions).

111. For an extensive survey of jurisdictions requiring physical manifestations of fright, see *Payton*, 386 Mass. at ____, 437 N.E.2d at 175 n.5.

112. *See supra* note 106. The underlying rationale for the ensuing physical injury requirement has been that it assures genuineness of claims. RESTATEMENT (SECOND) OF TORTS § 54 (1965).

113. *Rodrigues*, 52 Hawaii 156, 472 P.2d 509 (1970).

114. *See* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974) (ten-year-old plaintiff, outside the zone of personal danger, recovered for emotional distress *not* culminating in physical injury upon witnessing the negligent running down and killing of his step-grandmother).

115. *Id.* at 411, 520 P.2d at 766. *See* 50 U. CIN. L. REV. 200, 208 (1981).

116. *Rodrigues*, 55 Hawaii at 412, 520 P.2d at 767. Secondary reactions include headaches, backaches, nausea, weight loss, traumatic neurosis, nightmares, and loss of sight or hearing.

117. *See* Note, *supra* note 115, at 208.

118. *Id.*

119. *Id.*

damages be evidenced by objective symptomatology.[120] He maintains that the seriousness requirement must be refined to be of any practical assistance to a jury.[121] Such a scheme may well represent a viable compromise between the physical manifestation requirement and the broad standards of proof used in ordinary negligence actions. A requirement of evidence which objectively documents symptoms of emotional distress neither predicates recovery upon an uncertain physical injury nor overburdens a jury with unlimited discretion. Objective symptomatology will admit claims where physical trauma from fright is present, while not precluding an entire class of claims which must rely upon non-physical evidence as proof of genuineness. In close cases, objective symptomatology offers a workable scheme of proof whereby neither party is favored.

The jury must face one final hurdle in the disposition of a *Schultz* emotional distress case, which produces difficulties in even the clearest of tort claims: how an injury, once established, can be translated into a specific dollar value. *Schultz* offers no guidelines, other than the jury's traditional common sense and good faith.

Although the issue of dollars and cents is problematic, it is not insurmountable. Some cases will yield an easier valuation by the degree of the defendant's culpability, while others may be influenced by dramatic presentation. In any event, the court may resort to traditional methods of control, such as the directed verdict and remittitur, when the jury yields an untenable figure.[122]

CONCLUSION

As Ohio has long been reluctant to advance emotional distress recovery, its propulsion into the forefront of tort theory via the *Schultz* decision has startled the legal community. Ohio repudiated both the impact rule and the ensuing physical injury requirement and tacitly adopted a broad cause of action previously unrecognized for plaintiffs suffering serious mental distress.

By focusing its comments upon the deficiencies of the impact rule and the validity of emotional as well as physical injury, however, the

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120. Justice Holmes clouded the issue in his dissent in Paugh v. Hanks, 6 Ohio St. 3d 72, 81, 451 N.E.2d 759, 768 (1983), where he indicated that mental stress should culminate in "some resulting physical injury" to be compensable. He then stated that he adhered to his opinion as it appeared in *Schultz*. However, in *Schultz*, he had stated that "it is my view that for practical purposes the question should probably not be whether the consequences are physical in nature but whether they are objectively ascertainable." 4 Ohio St. 2d at 136, 447 N.E.2d at 116. Whether Justice Holmes prefers the ensuing physical injury approach or the objective symptomatology requirement is therefore unclear.

121. 4 Ohio St. 3d at 139, 447 N.E.2d at 116.

122. Smith & Solomon, *supra* note 43, at 130.

Ohio Supreme Court failed to establish proper parameters for recovery. The *Schultz* decision rejects traditional justifications for the impact rule but fails to design a scheme which avoids the evils that the justifications were designed to prevent. Although the court's compassion is laudable, a failure to control the boundaries of emotional distress recovery may result in a trend every bit as unacceptable as the rejected impact scheme.

Doris A. Harvey