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No Pain, No Gain: The Third Circuit's "Sufficient Indicia of Genuineness" Approach to Claims of Negligent Infliction of Emotional Distress Under the Federal Employers' Liability Act, *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir), cert. granted, 62 U.S.L.W. 3264, 62 U.S.L.W. 3272 (U.S. Oct. 12, 1993).

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CASE COMMENT

NO PAIN, NO GAIN: THE THIRD CIRCUIT'S "SUFFICIENT INDICIA OF GENUINENESS" APPROACH TO CLAIMS OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

Gottshall v. Consolidated Rail Corp., 988 F.2d 355 (3d Cir.),
cert. granted, 62 U.S.L.W. 3264, 62 U.S.L.W. 3272 (U.S. Oct.
12, 1993).

In *Gottshall v. Consolidated Rail Corp.*,¹ the United States Court of Appeals for the Third Circuit concluded that the Federal Employers' Liability Act (FELA)² permits railroad workers³ to recover for negligent infliction of emotional distress if they state a claim that, under the totality of the circumstances, has "sufficient indicia of genuineness."⁴

On a hot and humid August day,⁵ Consolidated Rail Corp. (Conrail),

1. 988 F.2d 355 (3d Cir.), *cert. granted*, 62 U.S.L.W. 3264, 62 U.S.L.W. 3272 (U.S. Oct. 12, 1993).

2. Federal Employers' Liability Act, ch. 149, 135 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1988)).

3. FELA provides in relevant part:

Every common carrier by railroad while engaging in [interstate or foreign] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51 (1988).

In a 1939 amendment, Congress made clear that FELA applied to railway workers whose duties are "in the furtherance of interstate or foreign commerce." Act of Aug. 11, 1939, ch. 685, 53 Stat. 1404. Congress extended FELA's coverage to seamen in the Jones Act, 46 U.S.C. app. § 688(a) (1988). *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523 (1957).

4. *Gottshall*, 988 F.2d at 382-83. The Third Circuit reversed the district court's order of summary judgment for the railroad. *Id.* at 383.

This Case Comment focuses on the elements required to recover for negligent infliction of emotional distress under FELA. For a discussion of the state of the common law governing negligent infliction of emotional distress, see Douglas B. Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781 (1988).

5. The men began work at noon. The temperature was 95 degrees and the temperature of the rail was 118 degrees. *Gottshall*, 988 F.2d at 358. There was no shade at the work site. *Id.*

employed James Gottshall, his friend Richard Johns,⁶ and seven other men on a track repair job.⁷ Conrail worked the men hard,⁸ and Johns died of a heart attack on the worksite.⁹ Conrail ordered the men back to work after Johns' death, keeping his body covered near the work site.¹⁰ Gottshall became extremely upset over the incident, took sick leave, and ultimately never returned to work.¹¹ He was admitted to a psychiatric hospital and two doctors diagnosed him as suffering from "major depression and post-traumatic stress disorder."¹²

Gottshall filed suit under FELA alleging that Conrail negligently created the circumstances which caused his friend's death. Gottshall also sought damages for emotional and physical injuries caused from being forced to watch and participate¹³ in Johns' death. The district court granted Conrail's motion for summary judgement.¹⁴ The Third Circuit reversed

6. They had known each other for fifteen years, and Conrail knew they were "personal friends." *Id.* at 359.

7. The court noted: "Most of the men were in their fifties and overweight. Conrail knew that one worker had suffered a serious heart attack. It also knew Johns was overweight, had high blood pressure and athero- or arteriosclerotic cardiovascular disease, and was taking medication." *Id.* at 358.

8. Conrail needed to repair these tracks because they were being used in violation of a safety regulation and Conrail was scheduled for inspection. *Id.* The men were discouraged from taking rest breaks, although they were allowed water, and it was difficult to take unscheduled breaks because the men worked in teams. *Id.* The supervisor stated, "We aren't going to stop our maintenance work because of the heat." *Id.*

9. Johns collapsed twice during the day. After Johns' first collapse, the supervisor did not send for medical help. Instead, the supervisor ordered the men back to work after Johns regained consciousness. *Id.* The second time Johns collapsed, it was obvious that he was having a heart attack, and the supervisor sent for help. Because Conrail's communications equipment was down for maintenance, it took between thirty minutes and an hour for help to arrive. *Id.* at 359. During this time, Gottshall administered cardiopulmonary resuscitation (CPR), but to no avail. *Id.* at 358. By the time paramedics arrived, Johns had died. *Id.* at 359.

A Conrail supervisor later reprimanded Gottshall for administering CPR. *Id.*

10. *Id.* The supervisor kept the body by the tracks for three hours, until the coroner arrived. *Id.* The supervisor ordered the men back to work because an empty coal train needed to use the line. *Id.* When the men finished the work, the supervisor ordered them to stay at the worksite. *Id.*

11. *Id.* Although Gottshall returned to work the next day, he took time off after Johns' funeral. *Id.* He went to his basement and stayed there until his father found him several days later. *Id.* He became sick, lost his appetite, and became preoccupied with Johns' death. *Id.*

12. *Id.* at 360. Gottshall was having "suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and a fear of leaving home." *Id.*

13. The court noted: "[Gottshall] was among the first to run to Johns' assistance. He gave mouth-to-mouth resuscitation and CPR to Johns for a full forty minutes. He carried the body of his friend to the ambulance parked two thousand feet away." *Id.* at 373.

14. *Id.* The district court reasoned, *inter alia*, that Gottshall's allegations did not allow recovery under any common law theory of liability for negligent infliction of emotional distress, including the

and held that Gottshall had stated a claim with "sufficient indicia of genuineness" to warrant a trial on the merits.¹⁵

In enacting FELA, Congress intended to liberalize negligence law to make it easier for railroad employees to recover against their employers.¹⁶ Congress recognized that railroads were in a better position than their workers to both prevent accidents and to bear the costs of employee injuries resulting from accidents.¹⁷ Responding to congressional intentions, courts have liberally construed the statute¹⁸ and have extended remedies under the statute to meet "changing conditions and changing concepts of industry's duty toward its workers."¹⁹

bystander and zone of danger tests. *Id.* See *Gottshall v. Consolidated Rail Corp.*, 773 F. Supp. 778, 781 (E.D. Pa. 1991).

For a summary of common law tests for negligent infliction of emotional distress, see *infra* notes 31-55 and accompanying text.

15. *Gottshall*, 988 F.2d at 382-83. The major concern with claims alleging negligent infliction of emotional distress is whether the claims are genuine. See *infra* notes 26-30, 47, 91 and accompanying text. The court declined to rely exclusively on traditional common-law doctrines to test the claim's "genuineness," but instead used a fact-based "totality of the factors" test. *Gottshall*, 988 F.2d at 371-74.

16. See *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 561 (1987); *Shenker v. Baltimore & O.R.R.*, 374 U.S. 1, 10-11 (1963); *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 507-08 (1957); H.R. REP. NO. 1386, 60th Cong., 1st Sess. 1 (1908). FELA allows a federal cause of action for negligence, but eliminates certain common-law defenses including the doctrine of fellow servants, 45 U.S.C. § 51 (1988), assumption of risk, 45 U.S.C. § 56 (1988), and contributory negligence, 45 U.S.C. § 53 (1988). FELA nullifies contracts between employer and employee absolving the employer of liability for work-related injuries, 45 U.S.C. § 55 (1988), and imposes a rule of comparative negligence, 45 U.S.C. § 53 (1988).

17. *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958); H.R. REP. NO. 1386, *supra* note 16, at 2; S. REP. NO. 460, 60th Cong., 1st Sess. 2 (1908). For a history of the developments leading up to the enactment of FELA, see generally Melvin L. Griffith, *The Vindication of A National Public Policy Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROBS. 160, 160-69 (1953).

18. *Buell*, 480 U.S. at 562 (citing *Rogers*, 352 U.S. at 506 and *Urie v. Thompson*, 337 U.S. 163, 180 (1949)).

19. *Kernan*, 355 U.S. at 432.

FELA has been criticized as outmoded because today railway workers could be covered by state workers' compensation statutes which are administered more cheaply than a negligence tort-based system. See generally *Federal Employers' Liability Act: Hearings Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989); *FELA in Relation to Amtrack: Hearing Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science, and Transp.*, 100th Cong., 2d Sess. (1988); Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act*, 29 HARV. J. ON LEGIS. 79 (1992); Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49 (1988). Indeed, recently there was movement in Congress to amend the statute. See Gary Taylor, *Is FELA a Runaway Train?*, NAT'L L.J., April 30, 1990, at 1. See also H.R. 5853, 101st Cong., 1st Sess. (1990). However, no proposals to amend FELA have been introduced in Congress since 1990.

In *Atchison, Topeka & Santa Fe Railway v. Buell*,²⁰ the Supreme Court addressed the question whether emotional injuries were cognizable under FELA.²¹ While refusing to decide the question,²² the Court noted that the issue should be resolved by reference to the particular facts of each case, rather than by reference to abstract principals of law or statutory construction.²³ Further, the Court “assumed” that FELA looks, at least in part, to common-law developments in determining whether an injury is actionable.²⁴ Thus, the Court left the lower courts to determine, on a case-by-case basis, whether wholly mental injuries are compensable.²⁵

Because emotional injuries, unlike physical injuries, are difficult to see, courts often voice policy concerns to limit the availability of recovery for such injuries at common law.²⁶ Courts are wary of recognizing actions for emotional distress because of the dangers of: (1) allowing recovery for relatively ephemeral mental injuries;²⁷ (2) permitting redress for false or imagined injuries;²⁸ and (3) subjecting defendants to potentially unlimited

20. 480 U.S. 557 (1987).

21. *Id.* at 567-71.

22. The appeal came from a motion for summary judgment, and the record was incomplete on “the exact nature of the allegedly tortious activity, or the extent of the injuries that respondent claims to have suffered.” *Id.* at 567.

23. *Id.* at 568.

24. *Id.* (citing *Urie v. Thompson*, 337 U.S. 163, 174 (1949)). See also *Chesapeake & O. Ry. v. Stapleton*, 279 U.S. 587, 589-90 (1929).

25. See 480 U.S. at 567-71; *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 360 (3d Cir.), cert. granted, 62 U.S.L.W. 3264, 62 U.S.L.W. 3272 (U.S. Oct. 12, 1993); *Gaston v. Flowers Transp.*, 866 F.2d 816, 818 (5th Cir. 1989).

26. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 54, at 360-61 (5th ed. 1984). Keeton lists four considerations that have been raised, but are generally regarded as inadequate, to limit relief. These factors state that: (1) mental disturbance cannot be adequately measured in monetary terms; (2) mental injury is too remote of a consequence from a negligent action; (3) there is a lack of precedent; and (4) recognizing an action for emotional distress would allow for a vast increase in litigation. *Id.* at 360.

Keeton answers the first of these concerns by noting that it is no more difficult to estimate damages for mental injury than physical pain. *Id.* Addressing the second concern, Keeton argues that mental injury can be directly related to a tortfeasor’s negligent act and that there is no a priori reason to posit an intervening cause in the case of mental injury. *Id.* On the third policy objection, Keeton suggests that it is the business of the courts to create precedent and redress wrongs. *Id.* Finally, Keeton notes that in states that give compensation for negligent distress, there has been no noticeable increase in litigation. *Id.* See also *Marlowe*, *supra* note 4, at 788.

27. KEETON ET AL., *supra* note 26, at 361. This policy limitation seeks to avoid compensating plaintiffs for trivial or insignificant injuries.

28. *Id.*

liability.²⁹ To meet these concerns, courts have formulated a number of threshold tests to guarantee the genuineness of a claim.³⁰ Briefly, courts have required a plaintiff to establish: (1) that the plaintiff was physically impacted by the tortfeasor (physical impact);³¹ (2) that the plaintiff was in the zone of danger surrounding the negligent act (zone of danger);³² (3) that the plaintiff's mental injury produced physically observable effects

29. *Id.* Courts fear that if traditional negligence principles alone rule recovery for emotional distress, there might be no limit to the number of people to whom a tortfeasor would be liable. See *Tobin v. Grossman*, 249 N.E.2d 419, 423 (N.Y. 1969) ("The problem of unlimited liability is suggested by the unforeseeable consequence of extending recovery for harm to others than those directly involved in the accident. If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined.")

30. There is extensive law review commentary evaluating these tests and, in some instances, proposing others. See, e.g., Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333 (1984) (arguing for a general foreseeability test); David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 24 ARIZ. L. REV. 439 (1992) (arguing in favor of the zone of danger and *Dillon* bystander recovery rules); Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1 (1992) (arguing against the zone of danger and foreseeability approaches and proposing a limited duty rule); John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984) (arguing for a general foreseeability test with limitations on the types of damages plaintiffs can recover); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136 (1992) (arguing that "ethereal torts," i.e., violations of intangible interests such as emotional security, breach of good faith, and interference with economic advantage, should be recognized as causes of action allowing full compensation); Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime"*, 1 U. HAW. L. REV. 1 (1979) (arguing for a general foreseeability approach, but limiting damages to economic losses); Virginia E. Nolan and Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1982) (arguing for a general foreseeability approach when accompanied by "serious injuries"); Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982) (arguing for the zone of danger test); Mark A. Beede, Comment, *Duty, Foreseeability, and the Negligent Infliction of Mental Distress*, 33 ME. L. REV. 303 (1981) (arguing for a case-by-case approach "balancing the danger of unlimited liability against the need for compensation of serious injury"); Terri Krivosha Herring, Note, *Administering the Tort of Negligent Infliction of Emotional Distress: A Synthesis*, 4 CARDOZO L. REV. 487 (1983) (suggesting a court-appointed medical expert render opinions on the issues of proximate cause, foreseeability, and damages); Howard J. Kaplan, Note, *Bystander Recovery: A Policy Oriented Approach*, 32 N.Y.L. SCH. L. REV. 877 (1987) (arguing for a modified version of the *Dillon* criteria for bystander liability); Marlowe, *supra* note 4 (arguing for a definition of foreseeable injury which measures the subjective distress against objective level of stress); Claudia J. Wrazel, Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases*, 54 S. CAL. L. REV. 847 (1981) (arguing for an action which would recognize negligent infliction of emotional distress for bystanders who are emotionally unprepared for the accident).

31. See *infra* notes 38-42 and accompanying text.

32. See *infra* notes 43-48 and accompanying text.

(physical manifestation);³³ or (4) that the plaintiff satisfied the three criteria enunciated by the California Supreme Court in *Dillon v. Legg*³⁴ (*Dillon* factors).³⁵ Alternatively, some courts simply apply general negligence principles to injuries involving emotional distress (general foreseeability).³⁶

The “physical impact” test evolved from the traditional notion that emotional distress is only compensable if sustained as a result of the violation of some other protected interest.³⁷ The test requires a plaintiff to suffer a physical injury before the plaintiff may recover for an emotional injury.³⁸ Courts justify the test on the grounds that it avoids compensating plaintiffs for false or trivial claims and that it avoids problems of unlimited liability.³⁹ The physical impact test, however, has been criticized as overly arbitrary.⁴⁰ The physical impact requirement, while once viable, has eroded to a mere formality⁴¹ and been abandoned altogether in most jurisdictions.⁴²

After abandoning the physical impact test many states adopted either the “zone of danger” or the “physical manifestation” tests, or both.⁴³ To recover for emotional injury under the zone of danger, plaintiff must show he was in imminent apprehension of physical harm.⁴⁴ Under the physical manifestation test, the plaintiff must show the emotional injury caused some physical injury.⁴⁵ These tests limit the number of potential defendants by allowing recovery only in certain circumstances where emotional injury is

33. See *infra* notes 43-48 and accompanying text.

34. 441 P.2d 912, 920 (Cal. 1968) (en banc).

35. See *infra* notes 49-54 and accompanying text.

36. See *infra* note 55 and accompanying text.

37. Marlowe, *supra* note 4, at 782-83.

38. *Id.*

39. *Id.* at 784; Beede, *supra* note 30, at 307.

40. See Marlowe, *supra* note 4, at 793-94; Pearson, *supra* note 30, at 488-89. The test is arbitrary because it is both over- and underinclusive. It is underinclusive because it refuses recovery if real emotional distress has been incurred, but the plaintiff was not physically touched. Marlowe, *supra* note 4, at 793-94. The test is overinclusive because it allows recovery for relatively inconsequential mental injury if accompanied with a physical impact. See Beede, *supra* note 30, at 307-08 & n.29.

41. KEETON ET AL., *supra* note 26, at 363-64 (noting cases which held that slight blows, trivial jolts or jars, dust in the eye, or inhalation of smoke satisfy the physical impact requirement).

42. See KEETON ET AL., *supra* note 26, at 364; Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 569 n.20 (1987).

43. Marlowe, *supra* note 4, at 796-98. The Restatement adopts a physical manifestation test. RESTATEMENT (SECOND) OF TORTS §§ 313, 436, 436A (1965).

44. Marlowe, *supra* note 4, at 794.

45. *Id.*

plausible,⁴⁶ and help to guarantee the legitimacy of the claim.⁴⁷ However, courts and commentators criticize these tests as inadequate because like the physical impact test, they too are arbitrary.⁴⁸

Several jurisdictions further liberalized their rules for recovery by allowing bystanders to recover for negligent infliction of emotional distress. In *Dillon v. Legg*,⁴⁹ the California Supreme Court enunciated three factors sufficient for a bystander claim: (1) the plaintiff must be located near the scene of the accident; (2) the plaintiff's shock must result from a "direct emotional impact upon [the] plaintiff from the sensory and contemporaneous observa[tion] of the accident"; and (3) the plaintiff and the victim must be closely related.⁵⁰ The *Dillon* court relied on negligence principles to avoid subjecting defendants to unlimited liability,⁵¹ and rejected the possibility of fraudulent claims as a basis for denying recovery for an entire class of actions.⁵² Many states have adopted these criteria wholesale, or to supplement other requirements.⁵³ Again, critics claim these criteria are

46. The tests limited recovery to only those cases in which the defendant was in peril of physical injury from the defendant's negligent act or those in which the defendant subsequently manifested physical symptoms of her injury. Marlowe, *supra* note 4, at 795-96.

47. The fact that the plaintiff was exposed to physical harm or manifested verifiable physical symptoms was evidence that the injury was, in fact, genuine. *Id.* See RESTATEMENT (SECOND) OF TORTS, § 436A, cmt. b. (1965) ("[I]n the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned . . .").

48. Marlowe, *supra* note 4, at 801-03; *Dillon v. Legg*, 441 P.2d 912, 915-16 (Cal. 1968) (en banc). The physical manifestation requirement is overinclusive because it allows for recovery in trivial situations if the distress is accompanied by a physical manifestation. The test is underinclusive because it denies recovery in situations in which, despite real mental injury, no physical symptoms are manifested. Marlowe, *supra* note 4, at 801-02. Courts and commentators have asserted that the physical manifestation requirement is unnecessary in light of medical developments which allow reliable diagnosis of true emotional injury. See Marlowe, *supra* note 4, at 802; *cf.* Bell, *supra* note 30, at 351-52.

The zone of danger test is underinclusive because it denies recovery to bystanders who, although they are not in the zone of danger, nonetheless suffer real emotional injury from a tortfeasor's negligence. Likewise, it is overinclusive because it allows recovery in instances in which a plaintiff has incurred no real harm. *Dillon*, 441 P.2d at 915-16; Paugh v. Hanks, 451 N.E.2d 759, 763 (Ohio 1983).

49. 441 P.2d 912 (Cal. 1968) (en banc).

50. *Id.* at 920.

51. *Id.* at 919.

52. *Id.* at 917. The court emphasized that the relation between the plaintiff and the victim would guarantee the veracity of the claim. *Id.*

53. Marlowe, *supra* note 4, at 807. Other jurisdictions have added the requirement that the plaintiff witness an "objectively serious injury" to the third party. *Id.* For a list of jurisdictions adopting the *Dillon* test, see *id.* at 806 n.139.

The *Dillon* court was concerned with fashioning a cause of action for bystanders whose emotional injuries were reasonably foreseeable, and in fact propounded these criteria merely as "guidelines" for Washington University Open Scholarship

both over- and underinclusive.⁵⁴ This criticism has led a few courts to reject the *Dillon* criteria and embrace a general foreseeability requirement, essentially treating emotional injury as any other injury and applying traditional negligence law.⁵⁵

The circuits are split on the question of what test to use for claims of negligent infliction of emotional distress under FELA.⁵⁶ In a series of cases, the Fifth Circuit, while rejecting most of the common-law tests, left open the question whether a plaintiff in the zone of danger may recover for

use in the determination of foreseeability. *Dillon*, 441 P.2d at 920. However, most jurisdictions which have adopted the criteria have applied them mechanically, interpreting the approach set forth in *Dillon* as a rigid test to be satisfied, rather than focusing on reasonable foreseeability. See *Bell*, *supra* note 30, at 339-40. Indeed, California itself, while limiting the *Dillon* factors to bystander situations, *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 816 (Cal. 1980), has resorted to mechanical applications of these criteria. See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989).

54. These criteria do not circumscribe, to a reasonable degree of exactness, all potential plaintiffs with genuine emotional injuries. *Marlowe*, *supra* note 4, at 814; see also *Bell*, *supra* note 30, at 338-40; *Diamond*, *supra* note 30, at 483-93; *Pearson*, *supra* note 30 at 494-500.

55. *Marlowe*, *supra* note 4, at 814-17. *KEETON ET AL.*, *supra* note 26, at 364-65. Basically these courts have assumed that proof of the traditional negligence elements of duty, breach, and proximate cause would effectively prevent fraudulent claims and protect defendants from unlimited liability. See, e.g., *McLoughlin v. O'Brian* [1982] 2 All E.R. 298, 311-13 (Lord Bridge); *Marlowe*, *supra* note 4, at 815-16. However, some courts advocating this approach require a showing of severe emotional distress. See, e.g., *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983); *Rodriguez v. State*, 472 P.2d 509, 520 (Haw. 1970).

56. See *Gottshall*, 988 F.2d 355 (rejecting common law tests and embracing a "totality of the circumstances" test); *Plaisance v. Texaco, Inc.*, 966 F.2d 166, 169 (5th Cir.) (en banc) (rejecting all tests but zone of danger, but refusing to pass on the issue of whether that test was appropriate), *cert. denied*, 133 S. Ct. 604 (1992); *Elliot v. Norfolk & W. Ry.*, 910 F.2d 1224 (4th Cir. 1990) (dictum) (requiring outrageous conduct); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 540 (6th Cir. 1990) (dictum) (requiring outrageous conduct or unconscionable abuse); *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 97 (7th Cir. 1988) (requiring physical contact or threat of physical contact), *cert. denied*, 489 U.S. 1032 (1989); *Taylor v. Burlington N.R.R.* 787 F.2d 1309, 1313 (9th Cir. 1986) (pre-*Buell* decision stating that "wholly mental injuries" are cognizable under FELA). See also *Moody v. Maine Cent. R.R.*, 823 F.2d 693, 694 (1st Cir. 1987) ("We discern from the *Buell* opinion an attempt to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open.").

The dicta expressed by the Fourth and Sixth Circuits, in *Elliot* and *Adams*, respectively, appear to be based on an erroneous interpretation of the law. First, outrageous conduct has traditionally been required in proving intentional infliction of emotional distress. See *KEETON ET AL.*, *supra* note 26, § 12, at 60-61; RESTATEMENT (SECOND) OF TORTS, § 46 (1965). Indeed, the very concept of outrageousness entails a notion of intentional or, at least, reckless behavior. Second, the courts rely on the Fifth Circuit case, *Netto v. Amtrak*, 863 F.2d 1210 (1990), which concerned the intentional infliction of emotional distress. *Id.* at 1214 n.4. See *Elliot*, 910 F.2d at 1229; *Adams* 899 F.2d at 540. Third, these courts rely on an incorrect interpretation of *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 566 n.13 (1987). In *Buell*, the court referred to claims filed under the Railway Labor Act for intentional infliction of emotional distress. See *Gottshall*, 988 F.2d at 362-63 n.3.

mental injury. In *Hagerty v. L & L Marine Services*,⁵⁷ the Fifth Circuit ruled that a seaman who had been soaked with toxic chemicals may sue for mental injuries suffered on account of his fear of contracting cancer.⁵⁸ While the plaintiff satisfied the physical impact and physical manifestation tests,⁵⁹ the court eschewed these tests as “unrealistic,” and decided that the circumstances surrounding the incident supplied “sufficient indicia of genuineness.”⁶⁰ In its denial of a hearing en banc, the court stated that it had offered “no opinion as to the nature of the injury required to give rise to an actionable claim.”⁶¹

In *Gaston v. Flowers Transportation*,⁶² the Fifth Circuit denied recovery for purely emotional injuries to a bystander.⁶³ In *Gaston*, a seaman sought damages for mental injuries resulting from witnessing his half-brother being crushed to death between two vessels.⁶⁴ Implicitly rejecting the *Dillon* criteria,⁶⁵ the court argued that there was little precedent to support recovery in a bystander case.⁶⁶ The court claimed that imposing liability in such a case would not further FELA’s purpose of providing incentives to employers to operate more safely.⁶⁷ Moreover, to find for the plaintiff in such a case would expose employers to virtually unlimited liability.⁶⁸ The *Gaston* court, however, was careful to limit its holding to recovery for bystanders.⁶⁹

57. 788 F.2d 315 (5th Cir. 1986).

58. *Id.* at 319. The plaintiff sued under the Jones Act, which extended the protections of FELA to seamen. See *supra* note 3.

59. Plaintiff suffered “dizziness, leg cramps and a persistent stinging sensation in feet and fingers,” although he suffered no symptoms of cancer. *Hagerty*, 788 F.2d at 317. Thus, his claim satisfied the physical manifestation test. Because he was physically contacted by the chemicals, his claim also satisfied the physical impact test.

60. *Id.* at 318. The court also noted that other courts had “long allowed plaintiffs to recover for psychic and emotional harm” both in FELA and Jones Act cases, as well as in other contexts. *Id.*

61. *Hagerty v. L & L Marine Servs.*, 797 F.2d 256 (1986).

62. 866 F.2d 816 (5th Cir. 1989).

63. *Id.* at 821.

64. *Id.* at 816-17.

65. Plaintiff was near to the accident, exposed to sensory and contemporaneous observation of the accident, and closely related to the victim. *Id.* at 816. Thus, despite the fact his claim met the *Dillon* test, the court denied recovery.

66. *Id.* at 817. For criticism of this rationale, see *supra* note 26.

67. 866 F.2d at 820. While FELA is concerned with creating incentives for employers to operate more safely, it is based on other rationales as well, such as shifting costs to the better cost bearer. See *supra* notes 16-19 and accompanying text.

68. 866 F.2d at 819-20. For criticism of this rationale, see *supra* notes 51, 55 and accompanying text.

69. 866 F.2d at 821.

Finally, in *Plaisance v. Texaco, Inc.*,⁷⁰ the Fifth Circuit sitting en banc upheld a panel decision dismissing a tugboat captain's suit for emotional distress incurred after rescuing the crew of a barge that had exploded and caught fire.⁷¹ The court held that the plaintiff's injury was not a reasonably foreseeable consequence of the defendant's negligence and, therefore, the plaintiff had not stated a prima facie case of negligence.⁷² The court did not reach the question of when recovery for emotional injuries was permissible.⁷³ However, the court affirmed that *Gaston* was still controlling in the Fifth Circuit, implicitly refusing to recognize the *Dillon* criteria or general foreseeability tests, but leaving open the question whether a plaintiff could recover under the zone of danger test.⁷⁴

The Seventh Circuit also considered the issue of recovery for negligently inflicted emotional injuries in *Lancaster v. Norfolk and Western Railway*.⁷⁵ In *Lancaster*, the court determined whether the Railway Labor Act⁷⁶ supplants FELA for mental injuries. The court found that FELA does not create a cause of action for injuries caused about by actions which lack physical contact or the threat of physical contact.⁷⁷ The court did not go so far as to embrace the zone of danger test, however, because it predicated FELA liability on actions which constitute a traditional tort, such as assault, battery, and negligent infliction of physical injury.⁷⁸ Thus, it appears that the Seventh Circuit has implicitly embraced a physical contact requirement to recover for negligent infliction of emotional distress. After

70. 966 F.2d 166 (5th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 604 (1992).

71. *Id.* at 167.

72. *Id.* at 168-69.

73. *Id.* at 169.

74. *Id.*

75. 773 F.2d 807 (1985).

76. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-88 (1988)). The Railway Labor Act requires workers with minor disputes to resolve their claim through arbitration. 45 U.S.C. § 151 (1988). For a discussion of the interaction of the Railway Labor Act and FELA for claims of emotional distress, see C. Sue Barnett, *The Railway Labor Act and the Federal Employers' Liability Act: Naming a "Minor Dispute" "FELA Emotional Distress" and Making it Sweeter*, 823 A.L.I.-A.B.A. 391 (1993).

77. *Id.* at 813.

78. *Id.* at 815. Although the language of FELA only addresses negligence explicitly, the Supreme Court ruled that FELA encompasses intentional torts as well if the intentional action was reasonably foreseeable by the employer. *Harrison v. Missouri Pac. R.R.*, 372 U.S. 248, 249 (1963); *Lillie v. Thompson*, 332 U.S. 459, 461-62 (1947). *But see* *Davis v. Green*, 260 U.S. 349, 351-52 (1922) (holding an employer was not liable for damages arising from "a willful and wanton killing" of an employee by another employee when caused by acts performed outside the employee's scope of employment).

the Supreme Court's decision in *Buell*, the Seventh Circuit reaffirmed Lancaster in *Hammond v. Terminal Railroad Ass'n*.⁷⁹

Since the Supreme Court's decision in *Buell*, which vacated the Ninth Circuit's holding that wholly emotional injuries are compensable under FELA,⁸⁰ the Ninth Circuit has not clearly adopted a standard applicable in FELA negligent infliction of emotional distress cases involving purely emotional injuries. In *Pierce v. Southern Pacific Transportation Co.*,⁸¹ the Ninth Circuit was confronted with a negligent infliction of emotional distress claim brought under FELA. The court affirmed a judgment awarding damages to a plaintiff who sustained a heart attack as a result of his employer's negligence.⁸² The court, in a footnote, observed that it did not need to decide whether a claim stating "purely emotional injuries" was compensable under FELA because Pierce suffered a heart attack—a physical manifestation of his emotional distress.⁸³ Thus, at a minimum, the Ninth Circuit's ruling lends support to a physical manifestation test for FELA claims.⁸⁴

In *Gottshall v. Consolidated Rail Corp.*,⁸⁵ the Third Circuit looked to whether the totality of the facts stated a claim for emotional injury with "sufficient indicia of genuineness."⁸⁶ The court first examined the language of FELA and noted that, on its face, the statute does not distinguish between physical and emotional injury.⁸⁷ The court then determined that the Supreme Court's holding in *Buell* left federal courts free to determine whether "negligent infliction of emotional distress is actionable under FELA."⁸⁸ The *Gottshall* court also noted that *Buell* required it to look to

79. 848 F.2d 95, 97 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989). *Hammond*, the Seventh Circuit affirmed the dismissal of a claim for negligent infliction of emotional distress under FELA because it was "clearly barred by *Lancaster*." *Id.*

80. *See supra* notes 18-23 and accompanying text.

81. 823 F.2d 1366 (9th Cir. 1987).

82. The jury found the defendant guilty of inflicting "mental anguish" on plaintiff by "pulling him out of service" and subjecting him to an investigation. *Id.* at 1368 & n.1.

83. *Id.* at 1372 n.2.

84. This ruling is further supported by an earlier Ninth Circuit decision. In *Taylor v. Burlington N.R.R. Co.*, 787 F.2d 1309 (9th Cir. 1986), the court stated that it had reservations about its holding that wholly mental injuries are cognizable under FELA. *Id.* at 1313. Nevertheless, the court stated that the presence of physical injury justified its conclusion. *Id.*

85. 988 F.2d 355 (3d Cir.), *cert. granted*, 62 U.S.L.W. 3264, 62 U.S.L.W. 3272 (U.S. Oct. 12, 1993).

86. *Id.* at 382-83. The court reversed the district court's order of summary judgment for Conrail and remanded for further proceedings. *Id.* at 358.

87. *See supra* note 3.

88. *Gottshall*, 988 F.2d at 360. *See supra* notes 21, 25 and accompanying text.

the common law for guidance in this inquiry.⁸⁹

The Third Circuit then surveyed the various common-law requirements for negligent infliction of emotional distress.⁹⁰ The court stated that while the common-law tests create arbitrary rules, they all address the same consideration: because genuine mental injuries are much more difficult to recognize than genuine physical injuries, the tests help courts to winnow meritorious claims from frivolous ones.⁹¹ However, the Third Circuit decided that the result of this approach was to focus courts' attention on the mechanical application of these tests, blinding courts to circumstances in which a claim is indeed meritorious even though it does not fit any accepted test.⁹²

After surveying the decisions of the circuit courts, the Third Circuit determined that no common view exists among the circuits concerning the elements required to state a claim for negligent infliction of emotional distress under FELA.⁹³ The court then examined the history and purpose of FELA⁹⁴ and found that FELA had a broad remedial scope designed to hold carriers to a higher standard of conduct than the common law.⁹⁵ Further, the court commented that the federal courts' adherence to the common law when interpreting FELA could "create fifty versions of what should be unified federal law."⁹⁶ Thus, the court rejected the common law as controlling in FELA determinations.⁹⁷

The Third Circuit concluded that the inquiry as to whether a claim had been stated was not exclusively rooted in rules of law, but was also a fact-specific inquiry which relied on the liberal policies underlying FELA.⁹⁸ The court found that because Gottshall's complaint satisfied the bystander⁹⁹ and physical manifestation¹⁰⁰ common-law tests, because he was an

89. *Gottshall*, 988 F.2d at 360. See *supra* note 24 and accompanying text.

90. *Gottshall*, 988 F.2d at 361-62. For a summary of these tests, see *supra* notes 26-49 and accompanying text.

91. *Gottshall*, 988 F.2d at 361. See *supra* notes 26-27, 47 and accompanying text.

92. 988 F.2d at 361-62.

93. *Id.* at 365. See *supra* notes 56-83 and accompanying text.

94. 988 F.2d at 366-69. See *supra* notes 16-19 and accompanying text.

95. 988 F.2d at 369.

96. *Id.*

97. *Id.*

98. *Id.* at 371 (citing *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568 (1986)).

99. *Id.* at 371-73. The court here found that Gottshall's claim satisfied the general foreseeability test and the reasonable foreseeability requirement embedded in the *Dillon* criteria. See *supra* notes 53, 55 and accompanying text.

100. *Gottshall*, 988 F.2d at 373-74. The court noted he had manifested such symptoms as weight loss, institutionalization, insomnia, cold sweats, loss of appetite, nausea, and physical weakness. *Id.*

active participant in his friend's death,¹⁰¹ and because there was sufficient evidence of an emotional injury,¹⁰² Gottshall met the threshold burden of showing a claim for negligent infliction of emotional distress.¹⁰³ The court answered common-law concerns of unlimited liability and permitting redress for trivial and fraudulent claims by asserting that traditional negligence principles would constrain these problems. In any event, the court reasoned that the policies behind FELA required the railroads to bear these risks.¹⁰⁴ The court concluded that under the totality of the facts, viewed in the light most favorable to the plaintiff, Gottshall had stated a cognizable claim under FELA.¹⁰⁵

The court in *Gottshall* reached the correct result. Congress intended FELA to be a broad remedial statute, which imposes a higher duty on employers than they bear at common law.¹⁰⁶ Indeed, the state of the common law under negligent infliction of emotional distress is analogous to the state of the negligence law which Congress intended to reform through FELA. At the turn of the century, many plaintiffs were prevented from recovering for injuries resulting from their employers' negligent acts due to arbitrary and outmoded common-law defenses.¹⁰⁷ Likewise, today, in many jurisdictions potential plaintiffs are barred from recovering for mental injuries because arbitrary rules prevent them from presenting meritorious claims.¹⁰⁸ The Third Circuit took an appropriate path by avoiding the arbitrary results of the common-law tests, while protecting potential defendants from fraudulent claims and unlimited liability.¹⁰⁹

The Third Circuit struck an appropriate balance between the traditional

101. *Id.* at 373. The court relied on the holding in *Althoff v. Consolidated Rail Corp.*, No. 87-4384, 1988 WL 61734 (E.D. Pa. June 13, 1988), endorsed by the Third Circuit in *Oутten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir. 1991), that an active participant in an accident could state a claim for emotional injuries under FELA. *Gottshall*, 988 F.2d at 373.

102. *Id.* at 374.

103. *Id.*

104. *Id.* at 379-82.

105. *Id.* at 382-83. The court also found that the claim asserted sufficient facts to find breach of a duty, injury, and causation. *Id.* at 374-79.

Judge Roth, concurring in part and dissenting in part, disagreed with the court on whether *Gottshall* had stated a cognizable claim of negligent infliction of emotional distress under FELA. *Id.* at 383. His dissent was based on his finding that the plaintiff had not specified a negligent act attributable to Conrail, and any injury that he did suffer was simply not a foreseeable consequence of any of Conrail's actions. *Id.* at 383-86 (citing *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928)).

106. *See supra* notes 16-19, 95 and accompanying text.

107. *See supra* note 16 and accompanying text.

108. *See supra* notes 37-55 and accompanying text.

109. *See supra* notes 98-104 and accompanying text.

purposes of FELA and the common-law reservations regarding negligent infliction of emotional distress. The court's interpretation requires that claims state sufficient facts that, under the totality of the circumstances, show the emotional injury to be genuine.

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