

10-1-1978

The Infliction of Emotional Distress as an Independent Tort: The Necessity of Physical Injury - McDowell v. Davis, 33 N.C. App. 529, 235 S.E. 2d 896 (1977)

Wayne O. Clontz

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>

 Part of the [Courts Commons](#), [Legal Remedies Commons](#), and the [Torts Commons](#)

Recommended Citation

Clontz, Wayne O. (1978) "The Infliction of Emotional Distress as an Independent Tort: The Necessity of Physical Injury - McDowell v. Davis, 33 N.C. App. 529, 235 S.E. 2d 896 (1977)," *North Carolina Central Law Review*: Vol. 10 : No. 1 , Article 7.
Available at: <https://archives.law.nccu.edu/ncclr/vol10/iss1/7>

This Note is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

The Infliction of Emotional Distress as an Independent Tort: The Necessity of Physical Injury—McDowell v. Davis, 33 N.C. App. 529, 235 S.E. 2d 896 (1977)

INTRODUCTION

In an action brought against the Durham County Sheriff, (two deputies and an insurance company were also named as co-defendants) the plaintiffs, James and Mary McDowell, sought to recover for mental distress without any evidence of physical injury or physical consequences.¹ The plaintiffs, tenants of the Durham Housing Authority (DHA),² sued the defendants in their individual and official capacity.³ The plaintiffs, being in arrears for the payment of rent, became subject to an ejectment order that was served on them on June 20, 1974⁴. The DHA decided to delay execution on the judgment through a condition that the plaintiffs pay \$50 per week until all of the unpaid rent was satisfied.⁵ The Durham County Sheriff was given personal notice not to execute the judgment.⁶ After a misunderstanding with the DHA, the Deputy Sheriff was told to execute the judgment.⁷ The Deputy performed exactly as he had been instructed, and removed the plaintiffs' belongings from the housing unit.⁸ The plaintiffs accused the defendants of gross negligence in the performance of their duties, and claimed the ejectment to be unduly insensitive, causing them "shame, humiliation, and mental anguish."⁹ From a judgment allowing no recovery, the plaintiffs appealed.¹⁰ The Court of Appeals, in affirming, found the trial court to be free of prejudicial error.¹¹

THE HISTORY AND DEVELOPMENT OF THE IMPACT RULE

The common law was hesitant to regard mental distress resulting from a negligent act as a violation of a protected interest.¹² The common law's reluctance to remedy the emotional distress caused by fright or shock was supported primarily by the incomplete medical knowledge of the times.¹³ A standard known as the impact rule evolved in the leading case of *Victorian Railways Commissioners v. Coultas*.¹⁴ The impact rule can simply be stated as the "proposition that there can be no recovery for physical results of mental anguish without

1. 33 N.C. App. 529, 530, 235 S.E.2d 896, 897 (1977).

2. *Id.* at 529, 235 S.E.2d at 896.

3. *Id.*

4. *Id.*

5. *Id.* at 530, 235 S.E.2d at 897.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 533, 235 S.E.2d at 899.

11. *Id.* at 537, 235 S.E.2d at 901.

12. *Lynch v. Knight*, 11 Eng. Rep. 854, 863 (H.L. 1861).

13. Note, *Torts—Negligent Infliction of Mental Distress—Maine and Michigan Abolish the "Impact Rule"*, 20 DEPAUL L. REV. 1029, 1033-35 (1971).

14. 13 App. Cas. 222 (P.C. Canada 1888).

impact.”¹⁵ The *Coultas* decision, being criticized and eroded somewhat by subsequent cases, was overruled in England only thirteen years later by *Dulien v. White and Sons*,¹⁶ where the court gave the plaintiff a recovery for fright caused plaintiff to suffer an illness and to give premature birth to an idiot child. The court stated: “That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority.”¹⁷

The American courts wrestled with the dichotomy of various formulas to proscribe to the emotional distress cases. The early majority of states required a contemporaneous physical impact.¹⁸ However, a powerful minority made its existence known by applying the principles of foreseeability and proximate cause to ascertain liability for mental distress.¹⁹ In any event, the justifications for the rule were based on the fact that medical science could not clearly show that the subjective symptoms could not have been caused by the aggravation of emotional distress.²⁰ Also, there was a fear of fictitious injuries and fraudulent claims.²¹ Finally, there existed an apprehension that recovery for emotional distress without an impact would open a Pandora’s box of undeserving litigants seeking damages that for so long were thought of as unrecoverable.²²

It is within this setting that *McDowell v. Davis*²³ is to be examined. In *Flake v. Greensboro News Co.*,²⁴ the North Carolina courts long ago established the principle that plain embarrassment or hurt are not recoverable. In that case there was evidence that through a mistake the picture of the plaintiff dressed in a bathing suit was published in a newspaper advertisement. The picture was supposed to be one of a member of a vaudeville troupe. The accompanying print indicated that the person depicted in the picture was to stage a performance in the city. According to the advertisement, the plaintiff recommended the bread manufactured by one of the defendants for the preservation of a slim figure. She was described as an “exotic red-haired Venus!”²⁵ The North Carolina Supreme Court held that the publication was not libelous per se. In so holding the court concluded: “The law seeks to compensate for damage to the person, the reputation or the property of an individual. It cannot and does not undertake to compensate for mere hurt or embarrassment alone.”²⁶

15. *Daley v. LaCroix*, 384 Mich. 4, 10, n. 6, 179 N.W.2d 390, 393 n. 6 (1970).

16. 2 K.B. 669 (1901).

17. *Id.* at 673-74.

18. *See e.g.*, *St. Louis, I. M. and S. R. R. v. Bragg*, 69 Ark. 402, 64 S.W. 226 (1901); *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898); *Kalen v. Terre Haute & IRR*, 18 Ind. App. 202, 47 N.E. 694 (1897).

19. *See, e.g.*, *Alabama Fuel and Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916); *Lindley v. Knowlton*, 179 Cal. 298, 176, P. 440 (1918).

20. *Niedermaier v. Brodsky*, 436 Pa. 401, 405, 261 A.2d 84 (1970).

21. *Id.* at 408, 261 A.2d at 87.

22. *Id.* at 411, 261 A.2d at 89.

23. 33 N.C. App. 529 (1977).

24. 212 N.C. 780, 195 S.E. 55 (1938).

25. *Id.* at 788, 195 S.E. at 58.

26. *Id.*

Other North Carolina cases are completely in accord with the holding in the *Flake* case. Among these cases are *Williamson v. Bennett*,²⁷ and *Alltop v. J.C. Penney Co.*²⁸ The *Williamson* case involved an action arising out of an automobile collision. The plaintiff, Mrs. Williamson, allegedly suffered physical disability resulting from a supposed vision that she had collided with a child on a bicycle rather than with another automobile.²⁹ The plaintiff did not see the actual contact with her car, but she reportedly heard a "grinding sound on the left side" of her car.³⁰ Later on during the same day, the plaintiff became upset.³¹ She eventually visited her own family physician and a psychiatrist at Memorial Hospital, Chapel Hill, North Carolina.³² The North Carolina Supreme Court, after addressing the issue of personal injury damages resulting from the defendant's negligence,³³ concluded that the defendant was not operating under any duty to exercise care against the possibility that the plaintiff might imagine a situation that did not exist, and that the plaintiff could not recover for a physical condition of nervousness since she suffered no physical injury.³⁴ The court held that the accident was not the proximate cause of the plaintiff's disturbance and that the plaintiff's anxiety was not based on anxiety for her own safety; instead the plaintiff's anxiety was for the safety of a non-existent child on an imaginary bicycle.³⁵ On these grounds the court denied recovery.³⁶ The North Carolina Supreme Court is, in effect, following the general principle that recovery is most often disallowed where the upset emotions causing nervousness flow from a concern for the welfare or safety of a person other than the plaintiff.³⁷ Mere fright which is a product of ordinary negligence is not a sufficient ground to give rise to a cause of action and is not to be considered as an element of damages.³⁸ Although the particular significance of this case is directed primarily at situations involving fright rather than embarrassment, its holding is not to be construed as applying only to "fright" cases. In order to recover for mental or emotional distress in an ordinary negligence action, the plaintiff must conclusively show that the mental distress is proximately caused by the negligence of the defendant.³⁹

Although these N.C. cases give an indication that compliance with the rule (permitting recovery for physical harm resulting from emotional disturbance) is a difficult task, recovery is readily allowed where the harm goes beyond one's feelings to affect the personal mental tranquility in a manner that produces physical consequences.⁴⁰ In *Crews v. Provident Finance Co.*⁴¹ the rule allowing

27. 251 N.C. 498, 112 S.E.2d 48 (1960).

28. 10 N.C. App. 692, 179 S.E.2d 885 (1971), *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971).

29. 251 N.C. at 498, 112 S.E.2d at 48.

30. 251 N.C. at 500, 112 S.E.2d at 49.

31. *Id.*

32. *Id.*

33. 251 N.C. at 503, 112 S.E.2d at 51-52.

34. *Id.* at 507, 112 S.E.2d at 55.

35. *Id.*

36. *Id.*

37. *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925).

38. *Kirby v. Stores Corp.*, 210 N.C. 808, 812, 188 S.E. 625, 627 (1936).

39. *Williamson v. Bennett*, 251 N.C. 498 at 507-08.

40. *Crews v. Provident Finance Co.*, 271 N.C. 684, 689, 157 S.E.2d 381, 385 (1967).

41. *Id.*

recovery was met where the defendant collecting agent, knowing of plaintiff's heart condition and high blood pressure, continued to threaten the plaintiff that he would have her arrested even though he was well aware of the fact that she had paid in full the prior claim of forty-five dollars. The defendant's use of abusive language incited so much anger within the plaintiff that she suffered a heart attack while preparing dinner that evening.⁴² The court held that anger causing an acute angina condition and increased blood pressure would satisfy the requirements as an "emotional disturbance."⁴³ In particular, the court noted that the "physical injury" requirement does not demand that the injury be visible; it is sufficient that the physical consequences of the disturbance have an adverse effect on the normal bodily functions.⁴⁴ The *Restatement of Torts* substantiates the court's application of "physical injury."⁴⁵ The criterion for recovery therefore becomes one of attaching physical ramifications to the emotional annoyances. An action based solely on mental suffering will not stand in a court of law.⁴⁶

In closely tracing the historical development of the impact rule and in examining the reaction of modern courts to isolated applications of the rule, it is not uncommon to locate ordinary fact situations that nevertheless provide for a substantive alteration of the rule by the court systems.⁴⁷ The early decisions that applied the rule allowed recovery only if awarded as "parasitic" damages made concomitant to an award on an independent substantive cause of action.⁴⁸ A slow but gradual weakening of the arbitrary barriers to recovery became apparent with the establishment of various exceptions to the rule whenever there was

42. *Id.* at 686, 157 S.E.2d at 383.

43. *Id.* at 690, 157 S.E.2d at 386.

44. *Id.*

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

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

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

46. *Petition of United States*, 303 F.Supp. 1282, 1324 (E.D.N.C. 1969).

47. One illuminating example is *First National Bank v. Langley*, 314 So.2d 324 (Miss. 1975) where the plaintiff asserted a cause of action against a bank for damages allegedly sustained by the bank's negligence in losing a deposit. The Mississippi court held that the total absence of physical impact on the plaintiff does not serve to automatically preclude an award of damages for emotional disturbance where the adverse reaction is reasonably foreseeable on the part of the defendant. The court added that loss of earnings and earning capacity were recoverable, but that punitive damages were not.

48. *See Lynch v. Knight*, *supra* note 12, where Lord Wensleydale elaborately expressed the court's decision when he stated: "Mental pain or anxiety the law cannot value and does not pretend to redress, when the unlawful act complained of causes that alone."

even the slightest impact,⁴⁹ or whenever the emotional disturbance occurred before the impact,⁵⁰ or whenever the infliction of the emotional disturbance was done in a willful, wanton or grossly negligent way.⁵¹ These exceptions which provide an "end run" around the impact requirement explicitly illustrate that bodily impact is not a prerequisite to insure the genuineness of the alleged injuries.⁵² Some jurisdictions ultimately rejected the impact rule in deference to a limitation that liability would be conditioned on the proximity of the plaintiff to the physical risk.⁵³ But even a repudiation of this "zone of danger" doctrine can be found in *Dillon v. Legg*⁵⁴ where the court's rationale for allowing recovery turned on the foreseeability of the injury.⁵⁵ Yet *Dillon* is not to be read too broadly. The requirements of assuredly exigent circumstances coupled with the medical proof as a guarantee of the validity of the injury are indeed ever present; nevertheless, recovery is without doubt restricted to negligently inflicted emotional disturbances that are characterized by some type of physical injury.⁵⁶ However, the *Restatement of Torts (Second)* takes an even broader view. In one section the *Restatement* recognizes a valid right to recover only when the emotional distress produces physical injury.⁵⁷ Paradoxically, the *Restatement (Second)* also provides for a recovery if the defendant should realize that the emotional disturbance resulting from his negligence involves an unreasonable risk of bodily harm.⁵⁸ It would seem appropriate to conclude that the *Restatement (Second)* has laid the theoretical foundation for the emergence of mental tranquility as deserving independent protection under general tort principles.⁵⁹ In *First National Bank v. Langley*, the court implicitly created a necessary safeguard against infinite liability by making the recovery conditional on the de-

49. *E.g.* *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke); *Porter v. Delaware, L. and W.R.R.*, 73 N.J.L. 405, 63 A. 860 (1906) (dust in eye).

50. *E.g.* *Mitlik v. Whalen Bros. Inc.*, 115 Conn. 650, 163 A. 414 (1932) (automobile collision causing fear).

51. *Delta Finance Co. v. Ganakas*, 93 Ga. App. 297, 91 S.E.2d 383 (1956) (intimidation of a child); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So.2d 154 (1963) (harsh and abusive language).

52. The advances of medical technology and psychiatry contributed to the fact that a genuine medical injury did not require a physical impact. See Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339 (1963); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 at 212-26 (1944).

53. See *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970); Comment, *Negligence—Infliction of Emotional Harm—A Suggested Analysis*, 54 IOWA L. REV. 914 (1964); 43 TEMP. L.Q. 59 (1969).

54. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). The court was faced with the task of justifying its rationale when placed in a dilemma of sorts. The court had to reason through a mode of analysis that would ordinarily give a recovery to the sister of the deceased, who was within the zone of danger, while denying it to the mother, who was only a few yards away, but outside of the danger zone.

55. By eliminating artificial obstacles to the plaintiff's claim, he is then allowed to present evidence; it does not show that the plaintiff will win a recovery. See Comment, 1 FLA. ST. U.L.REV. 670 (1973).

56. See 16 VILL. L. REV. 1011, 1014 (1971); *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117, 118 (Me. 1970).

57. RESTATEMENT (SECOND) OF TORTS §§ 436A, 312, Comment a at 110 (1965).

58. RESTATEMENT (SECOND) OF TORTS § 436 (1).

59. See *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974); *Rodriguez v. State*, 52 Haw. 156, 472 P.2d 509 (1970); See also PROSSER, THE LAW OF TORTS §§ 53-53 (4th ed. 1971); Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1019-28 (1928).

fendant creating a foreseeable and also unreasonable risk of extreme mental harm to an average person, notwithstanding his position to any arbitrarily established danger zone.⁶⁰ One can only hazard a guess as to whether courts will seek to retain the aura of the *Langley* decision; nevertheless, to prohibit a plaintiff from producing evidence of valid emotional harm would do little more than extend the arbitrariness that the renunciation of the impact rule has attacked.⁶¹

Closely related to the allegations of the instant case are remarks spoken to others or acts done in the presence of others which result in petty insult and indignity. Our present society places moderate demands upon its citizens (all plaintiffs included) to withstand a certain degree of insensitive language, as well as rude and inconsiderate acts.⁶² Historically, the common law was unquestionably hesitant to recognize the personal interest of mental tranquility as deserving of legal protection, even as to invasions that were intentional.⁶³ An argument can be made for a broad principle that would make the deliberate infliction of mental distress actionable, placing the burden of establishing a defense (i.e. privilege) on the defendant.⁶⁴ On the other side of the coin lies the ubiquitous protection afforded by the first amendment to the United States Constitution.⁶⁵ One obvious but perplexing question demands a focus in order to realign the perspective of protection given by tort principles. Between the extremes of utter outrage and petty annoyances, where must the line be drawn so that liability will be attached? The courts, in answering the question, have made their task less difficult than it otherwise would have been. The threshold of extreme outrage marks the beginning of the line; the courts have drawn it there.⁶⁶ In *Wallace v. Shoreham Hotel Corporation*,⁶⁷ a patron of the hotel cocktail lounge was insulted by the words of a waiter who, after being paid with a twenty

60. 314 So.2d at 339. See also PROSSER, Note 59 *supra*, § 54; 1 FLA. ST. U.L. REV. *supra* note 55 at 682.

61. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971).

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

63. Magruder, *Mental and Emotional Disturbance of the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

64. *Id.* at 1035. Notice that such a principle has been rejected on policy reasons.

Adoption of the suggested principle would open up a wide vista of litigation in the field of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than the law. Quite apart from the question how for peace of mind is a good thing in itself, it would be a quixotic indeed for the law to attempt a general security of it. Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.

65. See Prosser, note 62, *supra*, at p. 44.

66. *Id.* at p. 45.

67. 49 A.2d 81, 83 (Mun. App. D.C. 1946). The court noted that consideration should be given to the severity of the defendant's conduct and the amount of injury suffered as those factors are related to the existence of the cause of action. The cause of action itself and the extent of recovery are dependent on the amount of damage suffered. If a cause of action for insult arises only when the insult goes beyond triviality so that the insult produces harm of significant nature, then the jury must be guided by a standard in order to decide if a right of recovery indeed exists. Such a guideline for the jury would aid in ascertaining the limits of decency and in so doing would inherently create the requirements necessary to distinguish the serious from the trivial.

dollar bill, gave the patron change for a ten dollar bill and then stated, "We have had people try this before." An order dismissing the complaint for failure to state a cause of action was affirmed. The court there relied on several noteworthy authorities who expressed difficulty in determining a standard for distinguishing between trivial and serious indignities. Professor Magruder, writing in the *Harvard Law Review*, prefers extended liability through the use of broad principles enunciated within the following formula: "That one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually enure."⁶⁹ Magruder himself warns of dangers in placing conduct within the mentioned categories. Moreover, he furnishes no test for differentiating the serious from the trivial.⁷⁰

In its summary argument the court in *Wallace v. Shoreham Hotel Corporation* relied heavily upon a quotation found in *Clark v. Associated Retail Credit Men*, where the court stated in its initial focus on liability for mental distress in the absence of physical injury:

The law does not, and doubtless should not, impose a general duty of care to avoid causing mental distress. For the sake of reasonable freedom of action, in our own interest and that of society, we need the privilege of being careless whether we inflict mental distress on our neighbors. It is perhaps less clear that we need the privilege of distressing them intentionally and without excuse. Yet there is, and probably should be, no principle that mental distress purposely caused is actionable unless justified. Such a principle would raise awkward questions of *de minimis* and of excuse.⁷³

In short, there is at least one standard of which we can be certain. That standard simply defines the duty of the court to decide if the conduct is extreme (as the court did in *Wallace v. Shoreham Hotel Corporation*)⁷⁴ and whether the distress is serious and reasonable. Where reasonable men would differ, the jury decides if the conduct is extreme and if the emotional distress is serious. The jury's function here is executed under the direction of instructions directing their focus on the question of degree.⁷⁵

68. *Id.* at 81.

69. *Id.* at 82.

70. *Id.*

71. *Id.* at 81.

72. 70 App. D.C. 183, 105 F.2d 62 (D.C. Cir. 1939).

73. *Id.* at 64.

74. See note 67 *supra*.

75. See Prosser, note 62 *supra*, at p. 45, note 25.

OFFICIAL IMMUNITY AND THE CONSTITUTIONAL AMBIT OF 42 USC § 1983⁷⁶

In the instant case the petitioners base a major claim upon an alleged constitutional violation of their fourth amendment right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁷⁷ Attached to this claim is petitioner's claim for compensation for the humiliation caused by the violation, regardless of a specific showing of property damage.⁷⁸ The Court of Appeals, in holding for the defendants, relied upon the validity of the judicial order and thus stated:

A violation of such an unofficial and informal agreement or policy as shown here between the sheriff and the holder of an ejectment judgment is at most a breach of the defendants' duties to exercise ordinary care, and does not divest the defendants of their authority to execute a valid judicial order.⁷⁹

Such authority and its ramifications lend itself to a critique of the immunity applications contained within 42 USC § 1983. This civil rights legislation presents different degrees of immunity, one of which is applicable to the instant case.⁸⁰

The wording of 42 USC § 1983 places two demands upon the plaintiff seeking recovery. The plaintiff must allege and prove that the defendant has deprived the plaintiff of a protected right, secured by the provisions of the United States Constitution or by statutory law.⁸¹ The second requirement is that the plaintiff must show that the defendant deprived the plaintiff of his constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."⁸²

A landmark case involving significant interpretation of 42 USC § 1983 is *Monroe v. Pape*.⁸³ The plaintiffs in *Monroe* alleged that the defendants, (police officers) acting completely in the absence of a warrant in violation of the fourth and fourteenth amendments to the constitution, broke into their home one morning, roused them from bed, ransacked the house and arrested one of

76. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity or other proper proceeding for redress.

77. 33 N.C. App. at 533.

78. *Id.*

79. *Id.* at 536.

80. *E.g.* Wood v. Strickland, 420 U.S. 308 (1975). The Strickland standard is one of qualified immunity—such a standard does not impose absolute immunity; the standard allows a defendant to demonstrate immunity by showing that he was reasonable in not knowing that his actions constituted a derogation of another's constitutionally protected rights. 420 U.S. at 322; Schuer v. Rhodes, 416 U.S. 232, 247-49 (1974). Immunity is upheld if the conduct was, in light of all the circumstances, reasonable and in good faith.

81. Adickes v. S.H. Kress and Co., 398 U.S. 144, at 150 (1970).

82. *Id.*

83. 365 U.S. 167 (1961).

EMOTIONAL DISTRESS AS INDEPENDENT TORT

91

them.⁸⁴ The defendants argued that they could not be reached by section 1983, contending that their conduct violated no Illinois law and therefore, they could not have acted with a valid claim under color of that state's laws.⁸⁵ The argument continues that unless the conduct is done under color of state law, the defendants are not constitutionally liable under the statute.⁸⁶ The Court refused to acquiesce in this interpretation of section 1983, noting that the statute was enacted to give individuals a federal remedy "where the state remedy, though adequate in theory, was not available in practice."⁸⁷ A hearing of the plaintiffs' federal claims was approved by the high court even though the defendants' conduct constituted a violation state law thereby providing for a state remedy.⁸⁸ The Court construed the word "wilfully," which was missing in section 1983,⁸⁹ to reflect the broad background of tort liability that makes a man responsible for the natural consequences of his actions,⁹⁰ and that there should be no requirement placed upon the plaintiffs to show that the defendants intended to cause a constitutional invasion.⁹¹

The holding in *Monroe* is not altogether singular but has dual ramifications. The case did indeed establish the principle that those whose constitutional rights are deprived by a state officer's "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state" can recover damages in federal courts.⁹² Of equal significance is the additional holding that Congress did not attempt or desire to draw municipal corporations within the scope of section 1983.⁹³ This holding was accomplished by examining the legislative history of section 1983 and by carefully construing the word "persons" so that municipalities would not be considered putatively liable under the section for unconstitutional conduct.⁹⁴ The second portion of the *Monroe* holding disturbs the various policy reasons favoring municipal liability. First of all, it is at times extraordinarily difficult to identify the individual

84. *Id.* at 169.

85. *Id.* at 172. The defendant's argument was put to rest in *Home Tel. and Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913) where the Court held that a federal court had the authority to enjoin unconstitutional actions by state officers even when the state did not authorize the actions.

86. *See* *The Civil Rights Cases*, 109 U.S. 3 (1883).

87. 365 U.S. at 174.

88. *Id.* at 183.

89. *Id.* at 187.

90. *Id.*

91. *Id.*

92. *Id.* at 184 (quoting *United States v. Classic*, 313 U.S. 299, at 326 (1941)). One extreme exception allows for conduct by the officers that is in the "ambit of their personal pursuits," *Screws v. U.S.*, 325 U.S. 91, 111 (1945), but the limitation is obviously restricted to situations where the state officer is acting as a private citizen. *See e.g.*, *Perkins v. Rich*, 204 F.Supp. 98 (D. Del. 1962), *aff'd*, 316 F.2d 236 (3d Cir. 1963) (a police officer in signing a complaint against one who had placed an obscene call to his house, was not acting under color of state law because the act of signing the complaint was not limited to the police officials—anyone similarly harmed could have done likewise).

93. 365 U.S. at 187.

94. *Id.* at 190-191. *See e.g.*, *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) ("Person" does not include municipalities); *Moor v. County of Alameda*, 411 U.S. 693 (1973) ("Person" does not include counties). *But see* *Griffin v. Prince Edward County School Board*, 377 U.S. 218 (1964).

officials who have committed the violation.⁹⁵ Also, individual officials do not have the financial ability to satisfy large judgments.⁹⁶ Furthermore, even when the jury is persuaded that the plaintiff has been deprived of his constitutional rights, they nevertheless are hesitant to allow a recovery against an official who undergoes litigation for doing what he thought his job required.⁹⁷ At any rate, *Monroe* has withstood these challenges as well as one based on the readings of the legislative history.⁹⁸ In fact, some of the lower federal courts tried to restrict *Monroe* by holding that municipalities were vulnerable to attacks where there was no immunity provided under state law,⁹⁹ or where the claim for relief was equitable in nature.¹⁰⁰ The U.S. Supreme Court nevertheless struck down these federal cases and reinforced *Monroe's* interpretation of the statute in two 1973 decisions.¹⁰¹ These decisions demonstrate the absence of congressional intent to perpetrate statutory liability on municipalities via section 1983. However, these same cases do not show that the Supreme Court would restrain the federal courts in awarding damages arising under the fourteenth amendment.¹⁰²

Although most state officials are endowed with personal immunity that defeats recovery against them individually,¹⁰³ the 1983 immunity is by no means absolute,¹⁰⁴ and it even becomes "qualified" when objective guidelines are considered in the evaluation of the circumstances.¹⁰⁵ (Of course, absolute immunity for legislators¹⁰⁶ and judicial officials¹⁰⁷ does remain a solid part of the American legal process.) The U.S. Supreme Court did not entertain the question of official

95. See *Burton v. Waller*, 502 F.2d 1261, 1265, 1271, 1281-82, 1284, 1286 (5th Cir. 1974), cert. denied, 420 U.S. 964 (1975) (Court upheld verdict for 69 defendant police officers partially on the theory that plaintiff shouldered the burden of showing which defendant had fired the lethal shots).

96. See e.g., *Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966). "Neither the personal assets of policemen nor the nominal bonds they furnish afford genuine hope of redress."

97. See e.g., *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 421-22 (1971).

98. See e.g., *Kates and Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S.CAL. L. REV. 131, 132-45 (1972); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1205-07 (1971).

99. See *Carter v. Carlson*, 447 F.2d 358, 368-69 (D.C. Cir. 1971) (intent of Congress not to establish municipal immunity but to defer such immunity to that which exists under local law), *rev'd on other grounds sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973); Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CALIF. L. REV. 1142, 1145, 1158 (1969).

100. See *Adams v. City of Park Ridge*, 293 F.2d 585, 587 (7th Cir. 1961).

101. *City of Kenosha v. Bruno*, Note 94 *Supra*, (Section 1983 cannot support an action that seeks an injunction against the city); *Moor v. County of Alameda*, note 94 *supra* (Section 1983 cannot be used as an alternative ground for recovery in a damage action where a county could be held liable under state law).

102. Cf. *Robinson v. Cunlisk*, 385 F.Supp. 529, 535-36 (N.D. Ill. 1974) (*Moor*, notes 101, 94 *supra*, does not forbid using 42 U.S.C. § 1981 (1970) against municipalities); *Maybanks v. Ingraham*, 378 F.Supp. 913, 916-18 (E.D. Pa. 1974) (same).

103. See *Dakin, Municipal Immunity in Police Torts*, 16 CLEV.-MAR. L. REV. 448, 480 (1967).

104. See *Monroe v. Pape*, 365 U.S. 157, 174 (1961); *Sterling v. Constantin*, 287 U.S. 378 (1932) (The Governor of Texas was refused a grant of absolute immunity by the Supreme Court).

105. See *Wood v. Strickland*, 420 U.S. 308 (1975); *Schuer v. Rhodes*, 416 U.S. 232 (1974).

106. *Tenney v. Brandhove*, 341 U.S. 367 (1951); U.S. CONST. art. I § 6.

107. *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871).

EMOTIONAL DISTRESS AS INDEPENDENT TORT

immunity in section 1983 suits until 1974 when *Schuer v. Rhodes*¹⁰⁸ was litigated. There the Court reversed a dismissal of a damage claim, brought on behalf of three of the students killed at Kent State University, against the Governor of Ohio, the University president, and Ohio National Guard officers. In repudiating absolute immunity with respect to executive officers, the Court adopted a qualified immunity that would serve to reinforce and maintain the Constitution as the supreme law of the land¹⁰⁹ while simultaneously operating to avoid a sapping of 42 USC § 1983 of all its significance.¹¹⁰ The scope of qualified immunity was depicted as being:

... dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.¹¹¹

In *Wood v. Strickland*,¹¹² two high school students were suspended for "spiking" the punch of an extracurricular home economics function. The students argued that the suspension was in violation of their constitutional right to due process¹¹³ and that the punishment was malicious. The students sought reinstatement, an injunction against further sanctions, a declaratory judgment invalidating the school regulation,¹¹⁴ and compensatory and punitive damages.¹¹⁵ The suit was filed in federal district court under section 1983 against the school district, the school board member (in their individual and official capacities) and the particular administrators enforcing the suspension. A mistrial took place when the jury could not reach a verdict. A directed verdict was afterwards given to the defendants. The court's holding declared that the defendants were immune from liability for damages as long as their actions were conducted in good faith or without malice,¹¹⁶ and that there existed no evidence from which

108. 416 U.S. 232 (1974).

109. *Id.* at 248.

110. *Id.*

111. *Id.* at 347-48.

112. 420 U.S. 308 (1975).

113. *Id.* at 310.

114. The school regulation provided that "pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with the reason for suspension.

"(4) The use of intoxicating beverage or possession of same at school or at a school sponsored activity." *Id.* at 311, n. 3. The members of the school board thought that the compulsory language of the rule required them to suspend the students for the remainder of the semester. *Strickland v. Inlow*, 348 F.Supp. 244, 246 (W.D. Ark. 1972).

115. Originally the students sought a preliminary injunction. After a denial of the motion, they amended the complaint and added the prayer for damages. 420 U.S. at 314, n. 6; *Strickland v. Inlow*, 485 F.2d 186, 188-189 (8th Cir. 1973).

116. *Strickland v. Inlow*, 348 F.Supp. 244, 250 (W.D. Ark. 1972). The definition of malice was given to be "ill will against a person—a wrongful act done intentionally without just cause or excuse." *Id.* at 248.

malice could be inferred.¹¹⁷ This particular application of qualified immunity, based on a defendant's subjective intent, is the one used by most pre-*Strickland* decisions in section 1983 suits against school officials.¹¹⁸ However, the Supreme Court views that good faith standard as containing both subjective and objective elements:

In the specific context of school discipline, we hold that a school board member is not immune from liability for damages under section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.¹¹⁹

Another application of the *Strickland* standard, particularly its subjective quality, overflows into the area of punitive damages. Even though the objective element permits a discovery of lack of good faith without a showing of subjective malice, an official act which is adverse to one's constitutional rights can be unreasonable or negligent in the absence of malice. The demands of fairness nonetheless require that any award of punitive damages be grounded on the subjective standard of malicious intent.¹²⁰ Malicious intent is, for the most part, primarily established via circumstantial evidence, and it is not extraordinary for an unreasonable constitutional violation to suffice for the trier of fact to infer malicious intent.¹²¹

CONCLUSION

An application of the facts of the instant case to the established legal doctrine shows the rationale of the Court of Appeals in making the decision. The independent tort of infliction of emotional distress is subject to defeat in the absence of physical adversity. Modern living demands that petty annoyances go without legal redress. The traditional impact rule has largely disintegrated into a question of the foreseeability of injury. Furthermore, with regard to official immunity, discretionary and objective factors demand use of the concept of "qualified" immunity. Such a standard reveals a broad policy of forcing those in public office to account for their own infliction of unconstitutional acts. Public officials would be wise to become more subjectively alert to their personal behavior in view of the omnipresent United States Constitution.

WAYNE O. CLONTZ

117. "The close question, if there is one at all, is whether or not the school policy, as adopted and maintained, plus the enforcement thereof, created a situation from which malice could be inferred." The court found that it did not. *Id.* at 253.

118. *Handverger v. Hawill*, 479 F.2d 513 (9th Cir. 1973), *cert. denied.*, 414 U.S. 1072 (1973); *Wood v. Goodman*, 381 F.Supp. 413 (D. Mass. 1974).

119. *Wood v. Strickland*, 420 U.S. 308 at 322 (1975).

120. *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920); *Stewart v. Nationwide Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971).

121. Note 41 and accompanying text *supra* (School policy and concomitant enforcement insufficient to draw an inference of malice).