

2007

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John J. Kircher

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Repository Citation

John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789 (2007).
Available at: <https://scholarship.law.marquette.edu/mulr/vol90/iss4/3>

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THE FOUR FACES OF TORT LAW: LIABILITY FOR EMOTIONAL HARM

JOHN J. KIRCHER*

I. INTRODUCTION

A short time after matriculating, a new law student first encounters the truism that the life of the law is not logic.¹ Soon thereafter, during that person's first semester study of torts, he or she may inevitably come to the conclusion that another sage observation is also true: "If the law supposes that, . . . the law is a ass—a idiot."²

The coalescence of both observations in respect to one situation may come, as it did with me, on discovering the manner in which the law of torts deals with cases in which the victim of tortious conduct sustains emotional harm as the result of that conduct. (Of course, my reaction may have been due in large part to the fact that I married a psychologist as well.) Nevertheless, the law deals with emotional harm in relation to three distinct torts: Assault, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress. In a fourth area of tort law, Damages, another matter is often considered as well. And that matter is referred to as "parasitic" emotional harm—the harm produced as a byproduct of some physical injury. Uniformity is not the hallmark of the law with respect to these four areas.

In this Article I will analyze how tort law deals with emotional distress in each of the four areas. Inconsistencies in each area will be noted—both as to the application of the law generally within a given jurisdiction and also as to jurisdictional differences. Inconsistencies among the four areas also will be noted. The Article will conclude with my suggestions for reform.

* Professor of Law, Marquette University Law School. The author extends his special thanks and deep appreciation to his former colleague Professor Christine M. Wiseman, Provost at Loyola University Chicago, for her valuable comments on an earlier draft of this Article. He also expresses his appreciation to his research assistants, Alexis Boyd and Jessica Swietlik of the Law School Class of 2006 for their significant contributions to this Article.

1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publ'ns 1991) (1881).

2. CHARLES DICKENS, *THE ADVENTURES OF OLIVER TWIST* 399 (Oxford Univ. Press 1981) (1838).

II. ASSAULT

A. *Early History*

The first form of protection the common law afforded against tortious infliction of emotional distress came through the action for assault under the ancient writ of trespass. The seminal British case on the subject involved a woman whose husband operated a tavern.³ A would-be patron took offense to the fact that the establishment was closed and swung his ax at the bar owner's wife when she advised him of the closure. He missed his mark. The woman's luck, the assailant's drunkenness, or both, saved her from any physical injury or death. Nevertheless, the court held that "[t]here is harm done and a trespass for which [the woman's husband] shall recover damages since he made an assault upon the woman, as has been found, although he did no other harm."⁴

Protected was the victim who suffered apprehension of impending, wrongful, physical contact by the assailant. An assault has been characterized as an unlawful threat to do bodily harm to another individual coupled with the ability, when the threat was made, to carry out that threat.⁵ The victim need not sustain any physical harm as a prerequisite to recovery. Nor did the emotional harm sustained need to be "severe." Prosser probably best described the tort: "Since assault, as distinguished from battery, is essentially a mental rather than a physical invasion, it follows that the damages recoverable for it are those for the plaintiff's mental disturbance, including fright, humiliation and the like, as well as any physical illness which may result from them."⁶

B. *The Restatement*

The Restatement of Torts sets forth the elements of the tort of assault as follows:

An actor is subject to liability to another for assault if

3. *I de S et ux v. W de S*, Y.B. 22 Edw. III, f. 99, pl. 60 (1348).

4. *Id.* Of course, at that time women could not sue in their own right and the action was brought by the husband as if the tortfeasor caused harm to the husband's chattel.

5. *Dahlin v. Fraser*, 288 N.W. 851, 852 (Minn. 1939).

6. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 43 (5th ed. 1984) (footnote omitted).

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) the other is thereby put in such imminent apprehension.⁷

Definition of the terms used by the Restatement is important. The word “intent” is used throughout the Restatement to mean that the actor desires the consequences of his or her act or believes those consequences are substantially certain to follow.⁸ Thus, to commit an assault, in the Restatement’s view, the actor must want to cause harmful or offensive contact with a person or merely desire to put a person in apprehension of such contact. Even if the actor has no such desire as to the specific victim, intent may be found if the actor believes such a consequence is substantially certain to follow the act. For example, one who knows about firearms would understand that firing a shotgun at an intended victim who is in a crowded room may also cause others in the room to be hit by the shotgun projectiles. Thus, others standing near the actor’s target may be placed in apprehension that they too will be struck, and the actor should be able to anticipate that they may be apprehensive of contact when he points the weapon and announces his intent.

The foregoing example also brings up the subject of transferred intent. As noted above, the Restatement requires that the actor’s intent must be directed at the “person of the other or a third person.”⁹ Assault is one of five, old common law torts under the writ of trespass as to which the doctrine of transferred intent applies.¹⁰ Thus, if the actor’s intentional conduct is directed at one person and another is thereby affected, liability to the non-intended victim may also attach.

To recover for an assault, the one making the claim must establish that he or she was placed in imminent apprehension of a harmful or offensive contact as a result of the actor’s conduct. While some might equate “apprehension” with fear, such is not the case. What constitutes apprehension? According to the Restatement:

7. RESTATEMENT (SECOND) OF TORTS § 21(1) (1965).

8. *Id.* § 8A.

9. *Id.* § 21(1).

10. KEETON ET AL., *supra* note 6, § 9, at 38.

In order that the other may be put in the apprehension necessary to make the actor liable for an assault, the other must believe that the act may result in imminent contact unless prevented from so resulting by the other's self-defensive action or by his flight or by the intervention of some outside force.¹¹

Thus, an action for assault protects an individual's "interest in freedom from apprehension of a harmful or offensive contact."¹² An assault could be found when the proverbial ninety-nine pound weakling comes up to a NFL linebacker, makes a fist, threatens to punch the linebacker in the jaw and attempts that feat. There would be an assault even though the linebacker had absolutely no fear of being hit, let alone of being hurt by the weakling. The Restatement's Reporter explains:

It is not necessary that the other believe that the act done by the actor will be effective in inflicting the intended contact upon him. It is enough that he believes that the act is capable of immediately inflicting the contact upon him unless something further occurs. Therefore, the mere fact that he can easily prevent the threatened contact by self-defensive measures which he feels amply capable of taking does not prevent the actor's attempt to inflict the contact upon him from being an actionable assault. So too, he may have every reason to believe that bystanders will interfere in time to prevent the blow threatened by the actor from taking effect and his belief may be justified by the event. Bystanders may intervene and prevent the actor from striking him. None the less, the actor's blow thus prevented from taking effect is an actionable assault. The apprehension which is sufficient to make the actor liable may have no relation to fear, which at least implies a doubt as to whether the actor's attempt is capable of certain frustration.¹³

For there to be imminent apprehension, the would-be victim must be aware of the threat at the time it is made. Thus, when Sleeping Beauty

11. RESTATEMENT (SECOND) OF TORTS § 24 (1965).

12. *Id.* § 21 cmt. f.

13. *Id.* § 24 cmt. b.

was kissed by Prince Charming, a battery may have been committed.¹⁴ However, there could not have been an assault because she was asleep and could not observe him pucker or move in to complete the act. If she was told of the amorous advance after the fact, no assault would occur as the threat of his impending kiss had ceased.

Whether the alleged victim was apprehensive of contact is a question of fact and, in some cases, the actual inability of the assailant to carry out his or her desire may not be controlling. The perception of the victim is the key. This is well illustrated by the case of *Western Union Telegraph Co. v. Hill*.¹⁵ That action involved a woman who was confronted by an agent of Western Union when she came to its local office to have a clock repaired.¹⁶ It was alleged that the agent, named Sapp, who was located behind a counter in the office, attempted “to put his hand on the person of plaintiff’s wife coupled with a request that she come behind the counter in defendant’s office, and that, if she would come and allow Sapp to love and pet her, he ‘would fix her clock.’”¹⁷ Western Union presented evidence to establish that it would have been physically impossible for Sapp to have touched the woman unless she was standing against the counter and he was standing on something to elevate him and allow him to reach beyond the counter. The woman testified she was within Sapp’s reach as she stood on the other side of the counter. The court stated that the facts presented an issue for the jury to decide. It said that for there to be an assault:

[T]here must be an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to *create in the mind of the party alleging the assault* a well-founded fear of an imminent battery, coupled with the *apparent present ability to effectuate the attempt*, if not prevented.¹⁸

Thus, whether the victim reasonably believed the assailant could carry out the threat becomes key. Adroit counsel for the plaintiff in *Hill* would call the jury’s attention to the fact that the woman did not have

14. See *id.* sections 13 and 18 for the definitions of battery. Of course, whether the prince had the intent to cause harmful or offensive contact and whether such a contact occurred are questions best left to the fairy tale experts.

15. 150 So. 709 (Ala. Ct. App. 1933).

16. *Id.* at 710.

17. *Id.*

18. *Id.* (emphasis added).

the time, or a tape measure, to accurately determine if Sapp could actually make contact with her. Her choice was retreat.

C. Assault and Battery

Clearly, there are many cases in which the term "assault and battery" is properly descriptive of what happened to a tort victim if that apprehension of contact was followed by actual contact. The assailant may have intended to cause harmful or offensive contact with his or her victim, the victim may have observed what was coming, and the contact may then have occurred. In fact, a search of reported cases displays many more "assault and battery" cases than those limited to "assault."¹⁹ In fact, if one compares the Restatement sections that define "battery"²⁰ with the one that defines "assault,"²¹ it will be found that the provisions are identical as to the actor's intent. They differ only as to the consequences of the act for the victim—harmful or offensive contact as to the first two and apprehension of contact as to the latter.²²

According to the Restatement, "[w]ords do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person."²³ Simply stated, words alone do not constitute assault; some overt act is required for an assault action. Thus, abusive or insulting words and threats of future harm may constitute a cause of action for the intentional infliction of emotional distress, not assault.²⁴ If words are accompanied by a threat of physical violence, and conditions indicate a present ability to carry out that threat, an assault may have been committed.²⁵

D. Current Status

As an Appendix to this Article illustrates, an action for assault is recognized in every jurisdiction in this country.²⁶ Thus, regardless of whether the emotional distress sustained by the assault victim is minor or severe, recovery may be sought because of the assailant's mental

19. See *infra* Appendix A.

20. See RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965).

21. See *id.* § 21.

22. See *id.* §§ 13, 18, 21.

23. *Id.* § 31.

24. See discussion *infra* Part III.

25. Dahlin v. Fraser, 288 N.W. 851, 852 (Minn. 1939).

26. See *infra* Appendix A.

invasion of the victim's previous tranquility. If the defendant assaults the plaintiff, the plaintiff can recover damages for emotional distress even if no other damages exist.²⁷ Whether the victim chooses to pursue the action or can find an attorney willing to assist in its prosecution is another question. However, assault as an intentional tort opens the door to punitive damages.²⁸ That may make the game worth the candle.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Early History

The concept of intentional infliction of emotional distress may be traced to the Nineteenth Century and the case of *Wilkinson v. Downton*.²⁹ As a practical joke, the defendant told the plaintiff that her husband had been involved in an accident and had been taken to a public house with both of his legs broken. The joker advised the plaintiff that she was to take two pillows and come to her husband's aid by cab and then bring him home. The court described the result:

The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.³⁰

Although the court did not characterize the defendant's conduct as the intentional infliction of emotional distress, it did find that the facts justified recovery for the plaintiff:

27. 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?*, 34 ARIZ. L. REV. 439, 458 (1992).

28. See JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 5:8 (2000 & Supp. 2006).

29. (1897) 2 Q.B. 57.

30. *Id.* at 58.

I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully [sic] done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.³¹

In modern parlance, one could say that the plaintiff in *Wilkinson* suffered emotional distress that physically manifested itself. We do not know what the court would have done had there been only free-standing emotional harm without physical consequences. Nevertheless, we have a starting point.

In this country, long before intentional infliction of emotional distress became a separate tort, courts did allow recovery for mental distress associated with intentional mistreatment of dead bodies or burial rights.³² For example, in *Gray Brown-Service Mortuary, Inc. v. Lloyd*, the court observed that “[i]t has long been the law of Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering.”³³ Prosser notes that liability for intentional infliction of emotional distress also was allowed early on as to common carriers, telegraph companies, and innkeepers.³⁴ While various rationales may be ascribed to the courts for so holding, it is well to remember that early in this nation’s history these businesses were in many cases “the only game in town” in that they were the equivalent of a monopoly as to the services they provided to many communities. That gave many people no choice as to with whom they would deal. They simply could not take their business elsewhere. What should happen when there is only one food store or pharmacy in town and an employee there subjects a patron to gross insults? The concept, however, appears

31. *Id.* at 58–59.

32. *See, e.g., Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus & Mary*, 186 N.E. 798, 800 (N.Y. 1933).

33. 729 So. 2d 280, 285 (Ala. 1999).

34. KEETON ET AL., *supra* note 6, § 12, at 57–58; *see also* RESTATEMENT (SECOND) OF TORTS § 48 (1965) (subjecting common carriers or any “other public utility” to liability for gross insults of its servants that reasonably offend patrons).

not to have been extended beyond common carriers, telegraph companies, and innkeepers.³⁵

B. *The First Restatement*

The first Restatement of Torts stated the position that an individual was not liable for the emotional distress or bodily injury that resulted from conduct intended or likely to cause emotional disturbance.³⁶ The only exceptions were, as previously noted, for breach of the duty to exercise civility that common carriers, innkeepers, and telegraph companies were found to owe to their customers,³⁷ and recovery in cases involving the mishandling of dead bodies.³⁸ While the courts “purported to find a property or quasi-property interest” in the bodies of decedents, “in reality they were entertaining claims for emotional distress.”³⁹

The initial development of the tort of intentional infliction of emotional distress transpired largely in law review articles and academic circles rather than in the courts.⁴⁰ Two publications in particular spurred the development of the law: Calvert Magruder’s 1936 article *Mental and Emotional Disturbance in the Law of Torts* in the *Harvard Law Review*⁴¹ and William L. Prosser’s 1939 article, *Intentional Infliction of Mental Suffering: A New Tort* in the *Michigan Law Review*.⁴²

The tort of intentional infliction of emotional distress first appeared in the Restatement of Torts in a 1948 supplement. It was there stated that one who intentionally causes severe emotional distress to another is liable “(a) for such emotional distress, and (b) for bodily harm resulting from it.”⁴³ The California Supreme Court considered that development four years later when it decided the landmark case of *State Rubbish Collectors Ass’n v. Siliznoff*.⁴⁴ Siliznoff was sued by the association to

35. See, e.g., *Slocum v. Food Fair Stores of Fla., Inc.*, 100 So. 2d 396, 396–97 (Fla. 1958) (“If you want to know the price, you’ll have to find out the best way you can * * * you stink to me.” (quoting the defendant’s employee)).

36. RESTATEMENT OF TORTS § 46 (1934).

37. DAN B. DOBBS, *THE LAW OF TORTS* 824 (2000).

38. *Id.* at 825.

39. *Id.*

40. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982).

41. 49 HARV. L. REV. 1033 (1936).

42. 37 MICH. L. REV. 874 (1939).

43. RESTATEMENT OF TORTS § 46 (Supp. 1948).

44. 240 P.2d 282 (Cal. 1952).

collect on promissory notes that he had signed.⁴⁵ He counterclaimed, alleging assault. In a situation sounding much like the storied “protection racket,” the evidence revealed that the notes were signed only after representatives of the association threatened the defendant with physical violence and the destruction of his property because he was collecting trash in what was the “territory” of an association member.⁴⁶ After considering the evidence, the court concluded:

[T]hat a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.⁴⁷

C. *The Second Restatement*

In 1965, the second Restatement refined that rule further. According to its section 46, a cause of action for intentional infliction of emotional distress exists when:

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
 - (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
 - (b) to any other person who is present at the time, if such distress results in bodily harm.⁴⁸

45. *Id.* at 284.

46. *See id.*

47. *Id.* at 284–85.

48. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

As stated previously, the term “intent” is used throughout the Restatement to mean “that the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it.”⁴⁹ It should be noted, however, that although the rule is dubbed “Intentional Infliction,” recovery also will be allowed when the defendant’s conduct is not intended to cause emotional distress, but the defendant is merely reckless in doing so. The Restatement defines recklessness as intentionally acting or intentionally failing to act when one knows or should know not only that the conduct creates an unreasonable risk of harm to another, “but also that such risk is substantially greater than that which is necessary to make his conduct negligent.”⁵⁰ Recklessness could be characterized as engaging in conduct with conscious disregard of its consequences. The recklessness aspect of the tort, of course, may pose a problem in a jurisdiction that does not recognize recklessness as a separate tort theory, leaving for determination only the intentional aspect of the rule.⁵¹ However, that problem may be more imagined than real because, as previously noted, intent is defined to include situations in which the actor does not desire a certain result, but is substantially certain that a given result may occur.

Under the Restatement approach, the defendant not only must intentionally or recklessly cause severe emotional distress, but the conduct must be deemed “extreme and outrageous” as well. In the Restatement’s view, the court determines whether the defendant’s conduct can reasonably be viewed as so outrageous as to permit recovery, and where reasonable minds might differ, the jury decides.⁵² The Restatement notes that it is not enough that the defendant acted with a tortious or criminal intent; that he intended to inflict emotional distress; or that his conduct was characterized by malice: “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”⁵³ The Restatement further states that the recitation of the facts to an average member of the community should lead the person to exclaim, “Outrageous!”⁵⁴ Furthermore, “liability . . .

49. *Id.* § 8A.

50. *Id.* § 500.

51. *See, e.g.*, *Alsteen v. Gehl*, 124 N.W.2d 312, 317 (Wis. 1963) (adopting RESTATEMENT (SECOND) OF TORTS § 46 (1965) except as to “recklessly” caused harm).

52. RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965).

53. *Id.* § 46 cmt. d.

54. *Id.*

does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”⁵⁵

Severe emotional distress can be found only when “the distress inflicted is so severe that no reasonable man could be expected to endure it.”⁵⁶ That concept must be explored with some caution, as preying on a plaintiff’s peculiar vulnerability or idiosyncratic problem may subject one to liability even though the stalwart “reasonable person” would easily endure the situation.⁵⁷ For example, assume a person learns that a neighbor has pickle paranoia. As a practical joke, jars of pickles are placed on the neighbor’s porch. The word “pickle” is purposely inserted into conversations with the neighbor and photographs of pickles are sent to the neighbor through the mail or by e-mail. The reader who has no such paranoia hopefully will find this illustration humorous. However, should a person who holds the neighbor’s condition be told to “grin and bear it”? One would hope not.

An individual is never liable for intentional infliction of emotional distress when he has done no more than to insist upon his legal rights in a permissible way, even if he knows that it is certain to cause emotional distress.⁵⁸ An example of that situation might occur when an insurance adjuster advises a widow that she will not receive her husband’s life insurance policy benefits, which she sorely needs, because the insurer has a valid policy defense.⁵⁹ Of course, legislative action can change common law principles.⁶⁰

Except as noted below, the Restatement does not require proof of any physical symptoms to recover for intentional infliction of emotional distress.⁶¹ The defendant’s extreme and outrageous conduct alone tends to prove the severity of the distress. But when the defendant’s conduct is not so extreme, the plaintiff may need additional evidence that his or her distress is severe.⁶² The failure to produce sufficient evidence of severe emotional distress can be fatal, even when the defendant’s

55. *Id.*

56. *Id.* § 46 cmt. j.

57. *See, e.g.*, *Nickerson v. Hodges*, 84 So. 37, 38–39 (La. 1920) (discussing the eccentric woman and the “pot of gold”).

58. RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965).

59. I purposely used the term “valid policy defense.” I did not want to open the topic of “insurance bad faith” which is beyond the scope of this Article.

60. *See* WIS. STATS. § 427.105(1) (2005–2006) (allowing recovery for any form of emotional distress resulting from certain prohibited debts collection practices).

61. RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965).

62. DOBBS, *supra* note 37, at 833.

conduct was, by all measures, utterly egregious. For example, in *Harris v. Jones*, the plaintiff's supervisor at an automotive plant knew that the plaintiff suffered from a speech impediment that made him stutter.⁶³ The supervisor also knew of the plaintiff's sensitivity and insecurity caused by that problem. Over a five month period the supervisor frequently mimicked the plaintiff verbally and physically at the worksite. In the action for intentional infliction, the only evidence the plaintiff produced as to his psychological condition, other than his own testimony, came from a physician seen by the plaintiff once during the five-month ordeal.⁶⁴ The doctor had prescribed pills for the plaintiff's nervousness, but the court was unimpressed:

Assuming that a causal relationship was shown between Jones' wrongful conduct and Harris' emotional distress, we find no evidence, legally sufficient for submission to the jury, that the distress was "severe" within the contemplation of the rule requiring establishment of that element of the tort. The evidence that Jones' reprehensible conduct humiliated Harris and caused him emotional distress, which was manifested by an aggravation of Harris' pre-existing nervous condition and a worsening of his speech impediment, was vague and weak at best. It was unaccompanied by any evidentiary particulars other than that Harris, during the period of Jones' harassment, saw his physician on one occasion for his nerves, for which pills were prescribed—the same treatment which Harris had been receiving from his physician for six years prior to Jones' mistreatment.⁶⁵

D. Transferred Intent

The Restatement has a form of "transferred intent," allowing recovery for intentional infliction of severe emotional distress suffered by one who is not the object of the defendant's extreme and outrageous conduct. This may occur in one of two situations. In the first, if the plaintiff is a member of the immediate family of the one at whom the conduct is directed, the plaintiff's emotional distress is compensable if intentionally or recklessly inflicted, regardless of whether physical harm

63. 380 A.2d 611, 612 (Md. 1977).

64. *Id.*

65. *Id.* at 617.

results. However, the person claiming the distress must be present at the time of the extreme and outrageous conduct.⁶⁶ In the second situation, plaintiffs who are not immediate family members of the victim of the extreme and outrageous conduct have an additional requirement. Like immediate family members, they must show that the actor intentionally or recklessly caused them severe emotional distress while they were present at the time of the conduct.⁶⁷ However, they must also establish that the distress resulted in bodily harm to them.⁶⁸

To be distinguished is the type of case that initially appears to be one of transferred intent but really involves both extreme and outrageous conduct and intentional infliction directed at the plaintiff. *Knierim v. Izzo*,⁶⁹ is a good example. The defendant there threatened the plaintiff that he would murder her husband and then carried out the threat. The court held that a complaint alleging those facts stated a cause of action for intentional infliction of severe emotional distress.⁷⁰ The husband was nothing more than a pawn used by the defendant to affect the plaintiff's mental well-being. Interestingly, recovery was allowed even though the plaintiff was not present at the murder scene and learned afterward of her husband's death.⁷¹

E. Outrageous Conduct

Critics have argued that determining what constitutes "outrageous" conduct and "severe" distress is primarily a subjective question that has led the tort to be applied inconsistently among jurisdictions.⁷² Because section 46 fails to offer a concise definition of outrageous conduct, courts have had difficulty formulating clear standards as to what conduct is prohibited. Despite the numerous elements provided in section 46, critics have argued that in practice, the tort is reduced to a single element—the outrageousness of the defendant's conduct.⁷³ In turn, courts may assume that severe emotional distress resulted anytime there is evidence of outrageous conduct.⁷⁴ And, when outrageousness cannot be established, the action cannot be maintained even if emotional

66. See RESTATEMENT (SECOND) OF TORTS § 46(2)(a) (1965).

67. See *id.* § 46(2)(b).

68. See *id.*

69. 174 N.E.2d 157 (Ill. 1961).

70. *Id.* at 165.

71. *Id.*

72. Givelber, *supra* note 40, at 51–53.

73. *Id.* at 46.

74. *Id.*

distress was intended and created.⁷⁵ Scholars note that danger lies in the arbitrary enforcement of this tort. In particular, “factfinders may confuse outrageous with unpopular so that fear of tort judgments might chill constitutionally protected (or at least socially important) behavior.”⁷⁶

In general, four categories of conduct support a finding of outrage when the defendant intentionally inflicts emotional harm: (1) abusing a position of power; (2) emotionally harming a plaintiff known to be especially vulnerable; (3) repeating or continuing conduct that may be tolerable when committed once but becomes intolerable when committed numerous times; and (4) committing or threatening violence or serious economic harm to a person or property in which the plaintiff is known to have a special interest.⁷⁷

1. Position of Power

As to this type of situation, the Restatement uses the following example:

A, the principal of a high school, summons *B*, a schoolgirl, to his office, and abruptly accuses her of immoral conduct with various men. *A* bullies *B* for an hour, and threatens her with prison and with public disgrace for herself and her parents unless she confesses. *B* suffers severe emotional distress, and resulting illness. *A* is subject to liability to *B* for both.⁷⁸

The illustration comes directly from the case of *Johnson v. Sampson*.⁷⁹ Since this case was decided well before the 1948 amendment to the first Restatement, the Minnesota court had difficulty in categorizing the theory to be applied. The plaintiff had claimed it to be an “assault.” However, relying on *Wilkinson*,⁸⁰ the court eventually observed:

On the whole we see no good reason why a wrongful invasion of a legal right, causing an injury to the body or mind which reputable physicians recognize and can trace

75. *Id.*

76. *Id.* at 52.

77. DOBBS, *supra* note 37, at 827.

78. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e, illus. 6 (1965).

79. 208 N.W. 814 (Minn. 1926).

80. *Wilkinson v. Downton*, (1897) 2 Q.B. 57; *see supra* Part III.A.

with reasonable certainty to the act as its true cause, should not give rise to a right of action against the wrongdoer, although there was no visible hurt at the time of the act complained of. Of course, there is always a possibility of trumped-up claims if there may be a recovery when no evidence of bodily injury can be discovered immediately. However, the matter is in the control of the trial courts, and verdicts for plaintiffs for any substantial amounts, when based chiefly on proof of subjective symptoms, will not usually be allowed to stand.⁸¹

2. Especially Vulnerable Plaintiff

Again, the Restatement offers an illustration to explain this type of situation:

A, an eccentric and mentally deficient old maid, has the delusion that a pot of gold is buried in her back yard, and is always digging for it. Knowing this, B buries a pot with other contents in her yard, and when A digs it up causes her to be escorted in triumph to the city hall, where the pot is opened under circumstances of public humiliation to A. A suffers severe emotional disturbance and resulting illness. B is subject to liability to A for both.⁸²

That example is taken from the Louisiana case of *Nickerson v. Hodges*.⁸³ The facts are somewhat different from the Restatement's example in that there were multiple defendants and the digging occurred on another's property.⁸⁴ The woman affected died before the action reached the court. Nevertheless the court, again many years before the Restatement's 1948 amendment, found the conduct actionable:

The conspirators, no doubt, merely intended what they did as a practical joke, and had no willful intention of doing the lady any injury. However, the results were quite serious indeed, and the mental suffering and

81. *Johnson*, 208 N.W. at 816.

82. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f, illus. 9 (1965).

83. 84 So. 37 (La. 1920).

84. *Id.* at 37.

humiliation must have been quite unbearable, to say nothing of the disappointment and conviction, which she carried to her grave some two years later, that she had been robbed.⁸⁵

The court found the conduct actionable and awarded damages to the survivors.⁸⁶

3. Conduct Committed Numerous Times

This type of situation is best illustrated by the case of *Kanzler v. Renner*.⁸⁷ Over a period of six weeks, the plaintiff, who was a police dispatcher, had various run-ins with the defendant, a police officer. These situations included those where the defendant, driving a police car at a high rate of speed, caught up with the plaintiff's car and then followed her home, parking in front of her house; parking down the street from the plaintiff's home at 4 a.m.; putting his arm around the plaintiff while she was talking with another officer; and making a sexual advance toward the plaintiff in a utility closet at the police station.⁸⁸ The court held that material issues of fact existed, precluding summary judgment as to the plaintiff's intentional infliction of emotional distress.⁸⁹

4. Threatening Violence or Serious Economic Harm

Again, this type of situation finds its roots in litigation and is illustrated by the case of *La Porte v. Associated Independents, Inc.*⁹⁰ In that matter, the plaintiff was engaged in preparing breakfast when a trash collector came for the refuse. The plaintiff had tethered her miniature dachshund outside. She saw the collector empty her trash can and then hurl it toward her dog.⁹¹ Hearing the dog yelp, the plaintiff went outside and found the dog injured. The trash collector laughed and left. The dog died from the blow. When the plaintiff consulted her physician that afternoon, she was upset to the point of hysteria and could not recount her experience coherently.⁹² The court held that the

85. *Id.* at 39.

86. *Id.*

87. 937 P.2d 1337 (Wyo. 1997).

88. *Id.* at 1339–40.

89. *Id.* at 1344.

90. 163 So. 2d 267 (Fla. 1964).

91. *Id.* at 268.

92. *Id.*

element of the owner's mental suffering resulting from the malicious destruction of her dog was properly submitted to the jury for their consideration in assessing damages.⁹³

F. Current State of the Law

All states have recognized intentional infliction of emotional distress as an independent tort and have adopted Restatement (Second) of Torts section 46 in some form.⁹⁴ But again, it should be noted that recovery is only allowed when the defendant's conduct can be characterized as "extreme and outrageous," and then only if the plaintiff sustains "severe" emotional distress.

IV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A. Early History

As in the areas previously discussed, the early history of negligent infliction of emotional distress may be traced to the nineteenth century. *Victorian Railways Commissioners v. Coultas* concerned a married couple and the wife's brother who were in a buggy attempting to cross a railway line.⁹⁵ The gates at the crossing were closed. The gate-keeper came and opened the gates nearest to the buggy and then went across the line to the gates on the opposite side. The trio followed him in the buggy and got partly over the far track when a train was seen approaching at a rapid speed. In the ensuing confusion the buggy barely made it across the track ahead of the train. The train passed close to the back of the buggy, but did not make contact. As the train approached, the female passenger in the buggy fainted. "[M]edical evidence shewed [sic] that she received a severe nervous shock from [her] fright."⁹⁶ An illness, from which she subsequently suffered, was claimed as a consequence of her fright, but no physical damage was found to her.⁹⁷

In assessing whether that passenger, Mary Coultas, could recover from the railway due to the negligence of its employee, the court observed:

93. *Id.* at 269.

94. *See infra* Appendix B for a state-by-state analysis.

95. (1888) 13 App. Cas. 222, 224 (H.L. & P.C.) (appeal taken from Vict.).

96. *Id.*

97. *Id.*

According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.⁹⁸

Whether the court's approach to the facts actually came from a "stiff upper lip" mentality that sometimes marked British society, or the fact that the victim was a woman, is impossible to determine at this late date. The expressed concern, quite obviously, was with whether there could be any guarantee of the genuineness of the plaintiff's claim. Little was known about mental illness at the time. Sigmund Freud was in his early thirties when the case was decided.⁹⁹ It was not all that long before this decision that Bedlam Hospital in London charged the curious a penny to observe the mentally ill patients who were kept there.¹⁰⁰ Interestingly, a little less than one hundred years later the Delaware Supreme Court allowed recovery under facts almost identical to *Coultas*.¹⁰¹

The tort of negligent infliction of emotional distress has only emerged as a cognizable, independent cause of action within

98. *Id.* at 225–26.

99. See 1 ERNEST JONES, *THE LIFE AND WORK OF SIGMUND FREUD* 1 (1953) (stating May 6, 1856, as the date of Freud's birth).

100. See JOE SHARKEY, *BEDLAM: GREED, PROFITEERING, AND FRAUD IN A MENTAL HEALTH SYSTEM GONE CRAZY* 12 (1994) (stating that at the "notorious English asylum Bedlam" the "18th century spectators were charged an admission fee to see the lunatics").

101. See *Robb v. Pa. R.R.*, 210 A.2d 709, 714–15 (Del. 1965).

approximately the last half century. Prior to that time courts avoided awarding damages for negligently inflicted emotional injuries because the early common law was “wary of opening the floodgates to fraudulent, frivolous, and perhaps even marginal lawsuits.”¹⁰² Harms of an emotional nature, as noted earlier, were viewed as subjective and difficult to categorize or to assign damages. Concerns stemmed from a lack of precedent, a fear of frivolous litigation, and from a difficulty in measuring emotional harm physically and financially.¹⁰³ Emotional harm was viewed as subjective and difficult—if not impossible—to assign damages. Moreover, “[c]ertain types of interest, because of various difficulties they present, have been afforded little protection at the hands of the law against *negligent* invasions.”¹⁰⁴

Although the shift has been towards liberalizing the threshold for bringing causes of action for negligent infliction of emotional distress, *Prosser and Keeton* cites “three principal concerns . . . that continue to foster judicial caution and doctrinal limitations.”¹⁰⁵ These are:

- (1) the problem of permitting legal redress for harm that is often temporary and relatively trivial;
- (2) the danger that claims of mental harm will be falsified or imagined;
- and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the “wrongful” act.¹⁰⁶

B. *The Restatements*

The Restatement (Second) of Torts deals with negligent infliction of emotional distress in two sections. The first provides:

- (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
 - (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise

102. Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 808 (2004).

103. *Id.*

104. KEETON ET AL., *supra* note 6, § 54, at 359 (emphasis added).

105. *Id.* at 360.

106. *Id.* at 360–61.

than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.¹⁰⁷

The second states:

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.¹⁰⁸

Reading these two sections together it may be said that the Restatement stands for the proposition that there can be no recovery for negligent infliction of emotional distress absent some physical manifestation of harm caused by that distress. More will be said about that concept.

It should be noted that the "Proposed Final Draft" for the Restatement (Third) of Torts states that "[l]iability for emotional disturbance (that is not derivative of personal injury) or economic loss (that is not property damage or derivative of personal injury) is governed by the principles of the Restatement (Second) of Torts until additional portions of the Restatement (Third) of Torts addressing this matter are published."¹⁰⁹

C. Current State of the Law

Only two states continue to prohibit recovery for negligent infliction of emotional distress.¹¹⁰ Others vary in the tests that they apply when assessing a claim for negligent infliction. At the outset it should be observed that negligent infliction cases fall into two general categories. The first involves persons who barely escape physical harm and suffer emotional distress as a consequence. An example would be a pedestrian who, while waiting for a traffic light to change, is nearly run over by a

107. RESTATEMENT (SECOND) OF TORTS § 313(1) (1965).

108. *Id.* § 436A.

109. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 cmt. f (Proposed Final Draft No. 1, 2005).

110. See *Mechs. Lumber Co. v. Smith*, 752 S.W.2d 763, 765 (Ark. 1988); *Jaynes v. Strong-Thorne Mortuary, Inc.*, 954 P.2d 45, 50 (N.M. 1997).

drunken driver whose car jumps the curb and comes within inches of striking the pedestrian. The second negligent infliction category involves cases in which the person suffering emotional distress is not in harm's way, but merely a bystander to a harm that befalls another. An example would be parents who, while looking out of a window in their home, observe their child being struck by an errant motorist. Each category will be considered separately. We are not dealing with emotional distress that results from negligently inflicted bodily harm—so-called parasitic emotional distress. That subject will be discussed later in this Article.¹¹¹

The rules adopted by courts for negligent infliction of emotional distress are cumulative to those they generally employ for other negligence cases. We are dealing with what *Prosser and Keeton* describes as “limited duty” rules.¹¹² As explained previously, at the root of these rules is judicial concern over the genuineness of claims for negligently caused emotional distress.

1. Non-Bystanders

Several rules have evolved over time regarding what limits, if any, are to be placed upon the right of recovery of one, other than a bystander, who sustained emotional distress resulting from another's negligent conduct.

i. Impact Requirement

One of the earliest impediments to recovering for negligent infliction of emotional distress required not only proof of the standard quartet of duty, breach, cause, and damages, but also required that the plaintiff sustain some contemporaneous physical injury or physical impact to their person as a result of the negligent act. In other words, no impact, no recovery. A few states continue to follow this approach.¹¹³

Florida consistently has followed the impact rule. In *Reynolds v. State Farm Mutual Automobile Insurance Co.*, the court observed:

The impact rule is the long-standing rule that a plaintiff must suffer a physical impact before recovering for emotional distress caused by the negligence of another.

111. See *infra* Part V.

112. KEETON ET AL., *supra* note 6, ch. 9.

113. The states are Florida, Georgia, Indiana, Kansas, Kentucky and Nevada. See *infra* Appendix C for state-by-state analysis.

In essence, the impact rule stands for the proposition that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact. Thus, the impact rule precludes the recovery of damages for negligent infliction of emotional distress unless the emotional distress arises directly from the physical injuries sustained by the plaintiff in the impact.¹¹⁴

The Florida court does not appear to allow recovery in a case like *Coultas*, in which the emotional distress preceded the physical harm.¹¹⁵ With emotional distress flowing from a physical injury, the Florida court appears to be tendering a rule limiting recovery to parasitic emotional distress alone.¹¹⁶

In Indiana, in the case of *Shuamber v. Henderson*, the court explained its version of the rule as follows:

This rule is known as the “impact rule” because of the requirement that there be some physical impact on the plaintiff before recovery for mental trauma will be allowed. This has been the rule in Indiana for nearly one hundred years, and has it [sic] origins in England. The rule, as applied in Indiana, has three elements: (1) an impact on the plaintiff; (2) which causes physical injury to the plaintiff; (3) which physical injury, in turn, causes the emotional distress.¹¹⁷

As with Florida, Indiana appears to use the impact rule to limit recovery only to emotional distress produced by negligently inflicted physical harm.

Georgia, like Indiana, continues to follow the impact rule today, requiring “three elements: (1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff’s mental suffering or emotional distress.”¹¹⁸

114. 611 So. 2d 1294, 1295–96 (Fla. Dist. Ct. App. 1992) (citation omitted).

115. See (1888) 13 App. Cas. 222, 224 (H.L. & P.C.) (appeal taken from Vict.).

116. See *infra* Part V for discussion of parasitic emotional distress.

117. 579 N.E.2d 452, 454 (Ind. 1991) (citations omitted).

118. *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 85 (Ga. 2000).

The issue that such a rule presents is whether an impact, without any actual physical injury, will be enough to satisfy the rule. In *Christy Bros. Circus v. Turnage*, for example, the contact came from a performing circus horse that “evacuated his bowels” into the lap of a woman who was a guest at the performance.¹¹⁹ The plaintiff only alleged that she “was caused much embarrassment, mortification, and mental pain and suffering,” presumably because observers of the event laughed at what they saw.¹²⁰ Nevertheless, the Georgia court held that “[a]ny unlawful touching of a person’s body, although no actual physical hurt may ensue therefrom, yet, since it violates a personal right, constitutes a physical injury to that person.”¹²¹ Georgia, however, later clarified the rule and expressly overruled *Christy* to make it clear that “the impact which will support a claim for damages for emotional distress must result in a physical injury.”¹²² What would occur in an impact state today in a less bizarre situation than *Christy* is open to question, for example when a person walks away from a violent auto collision without a scratch because of effective air bags but subsequently suffers paranoia about motor vehicle travel.

ii. Physical Manifestation

It appears that a majority of states that have considered the issue allow recovery for negligently inflicted emotional distress so long as that mental condition produces some physical sign of its existence.¹²³ In Maryland, the term “physical injury” is used. In *Vance v. Vance*, the court explained that:

[T]he requisite “physical injury” resulting from emotional distress may be proved in one of four ways. It appears that these alternatives were formulated with the overall purpose in mind of requiring objective evidence to guard against feigned claims. The first three categories pertain to manifestations of a physical injury through evidence of an external condition or by

119. 144 S.E. 680, 681 (Ga. Ct. App. 1928).

120. *Id.*

121. *Id.*

122. *Ob-Gyn Assocs. of Albany v. Littleton*, 386 S.E.2d 146, 149 (Ga. 1989).

123. Alaska, Arizona, Delaware, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, and Utah. See *infra* Appendix C for state-by-state analysis.

symptoms of a pathological or physiological state. Proof of a “physical injury” is also permitted by evidence indicative of a “mental state,” . . . therefore, the term “physical” is not used in its ordinary dictionary sense. Instead, it is used to represent that the injury for which recovery is sought is capable of objective determination.¹²⁴

Evidence found sufficient in some jurisdictions includes loss of appetite, insomnia, nightmares of the accident;¹²⁵ nervous disturbance or disorder;¹²⁶ weight loss, inability to perform household chores, extreme nervousness and irritability;¹²⁷ and nervous prostration.¹²⁸

Nevada appears to employ both physical impact and physical manifestation theories. In *Olivero v. Lowe*, the court held that “in cases where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness must be presented.”¹²⁹

In *Bass v. Nooney Co.*, the Missouri court was confronted with a case in which a woman was trapped in an elevator some twenty stories above the ground.¹³⁰ She rang the emergency bell but no one answered on the elevator’s intercom system and no one came to her aid from the outside. After ten to fifteen minutes, she began to pound on the door. A man in the corridor heard the pounding and told her he would get help. The plaintiff then became dizzy and slid to the floor. When the elevator door was finally opened, the plaintiff had been confined for about thirty minutes. The following day she was hospitalized and placed under heavy sedation. She remained there for five days. Her attending psychiatrist testified that the elevator confinement resulted in a severe anxiety reaction. She returned to work less than a month after the incident following her psychiatrist’s opinion that there would be no permanent disability. The Missouri Supreme Court found that the action had to be retried to determine whether the plaintiff’s damages

124. 408 A.2d 728, 733–34 (Md. 1979) (footnote omitted).

125. *D’Ambra v. United States*, 396 F. Supp. 1180, 1183 (D.R.I. 1973).

126. *Espinosa v. Beverly Hosp.*, 249 P.2d 843, 844 (Cal. Ct. App. 1952).

127. *Daley v. LaCroix*, 179 N.W.2d 390, 396 (Mich. 1970).

128. *Netusil v. Novak*, 235 N.W. 335, 337 (Neb. 1931).

129. 995 P.2d 1023, 1026 (Nev. 2000).

130. 646 S.W.2d 765, 766–67 (Mo. 1983) (en banc).

were sufficiently severe to be legally cognizable.¹³¹ Nevertheless, the court held:

Instead of the old impact rule, a plaintiff will be permitted to recover for emotional distress provided: (1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant.¹³²

As *Bass* reflects, it is not enough to state a rule requiring physical injury, manifestation, or contact as a precursor to recovery for negligently inflicted emotional distress. The question then becomes: just what type of contact, manifestation, or physical injury will be enough. In the case of *Hawes v. Germantown Mutual Insurance Co.*, for example, the plaintiff was in the basement of her home when a wall began to collapse inward.¹³³ Realizing that she was in danger of being crushed, the plaintiff ran up the basement stairs. She escaped with only an abrasion to one of her heels that was caused by falling wall fragments. Following that experience, the plaintiff "complained of anxiety, panic during rainstorms, impairment of social communication skills, and uncontrollable crying spells for no apparent reason. She also suffered loss of sleep and appetite, resulting in an eleven-pound weight loss."¹³⁴ At the time the matter was heard, Wisconsin followed the rule requiring physical injuries for recovery of negligent infliction of emotional distress.¹³⁵ The *Hawes* court held that the heel abrasion, standing alone, was not "sufficient to remove an emotional distress claim from the realm of speculation."¹³⁶ However, coupled with the loss of sleep, appetite, and weight loss, the abrasion was adequate when augmented by the plaintiff's fear for her own safety "and a direct causal relationship between the emotional distress and the traumatic collapse of the

131. *Id.* at 774.

132. *Id.* at 772-73.

133. 309 N.W.2d 356, 360 (Wis. Ct. App. 1981).

134. *Id.* at 360.

135. See *Ver Hagen v. Gibbons*, 177 N.W.2d 83, 86 (Wis. 1970).

136. *Hawes*, 309 N.W.2d at 360.

wall.”¹³⁷ These provided “a sufficient basis for the trial court to determine that this was not a fraudulent claim.”¹³⁸

iii. Zone of Danger

Other courts simply require that the plaintiff be in the zone of danger when the tortious conduct occurred, and subsequently experience a physical manifestation of emotional distress. The zone of danger test draws upon Judge Cardozo’s reasoning in *Palsgraf v. Long Island Railroad Co.* that if a plaintiff is within close proximity to a cause of harm, it is foreseeable that harm may in fact be caused to that person.¹³⁹ Of course, if a jurisdiction already follows the zone of danger test for the duty element of a negligence claim, requiring it for a negligent infliction claim adds nothing more. However, as *Prosser and Keeton* explains, duty is not that cut-and-dried an issue.¹⁴⁰ Therefore, it is important to note when a jurisdiction uses zone of danger with negligent infliction cases. Regardless of the jurisdiction’s general duty rule, the zone test will be important for the negligent infliction case because the test may be intended to limit liability in terms of “proximate” or legal causation in that particular jurisdiction.

A number of jurisdictions appear to espouse zone of danger as a test in negligent infliction cases.¹⁴¹ For example, in *Wal-Mart Stores, Inc. v. Bowers*, the Alabama Supreme Court explained: “In negligence actions, Alabama follows the ‘zone-of-danger’ test, which limits recovery of mental anguish damages ‘to those plaintiffs who sustain a physical injury as a result of a defendant’s negligent conduct, or who are placed in immediate risk of physical harm by that conduct.’”¹⁴² The court’s use of the disjunctive is, of course, important.

Some states couple the physical manifestation rule with the requirement that the plaintiff be within the zone of danger. For example, in *Hamilton v. Nestor*, the Nebraska court stated: “a plaintiff

137. *Id.*

138. *Id.*

139. 162 N.E. 99 (N.Y. 1928). Interestingly, it appears that the bulk of Mrs. Palsgraf’s injuries were psychological. Mark G. Yudof, “*Tea at the Palaz of Hoon*”: *The Human Voice in Legal Rules*, 66 TEX. L. REV. 589, 617 (1988).

140. KEETON ET AL., *supra* note 6, § 43, at 280.

141. Alabama, California, Colorado, Connecticut, District of Columbia, Illinois, Iowa, Maine, Minnesota, Montana, Nebraska, Nevada, New York, North Dakota, Rhode Island, and Vermont. See *infra* Appendix C for state-by-state analysis.

142. 752 So. 2d 1201,1203 (Ala. 1999) (citing *AALAR, Ltd. v. Francis*, 716 So. 2d 1141, 1147 (Ala. 1998); *White Consol. Indus., Inc. v. Wilkerson*, 737 So. 2d 447, 449 (Ala. 1999)).

seeking recovery for negligently inflicted emotional distress was still required to show (1) that some type of physical injury resulted from the negligently inflicted suffering and (2) that the plaintiff was within the 'zone of danger' or actually feared for his or her own safety."¹⁴³

Although the facts appeared to present more of a situation of assault and battery or intentional infliction of emotional distress, the Vermont court, in the case of *Brueckner v. Norwich University*, defined the element of negligent infliction:

If there has been an impact, plaintiff may recover for emotional distress stemming from the incident during which the impact occurred. If plaintiff has not suffered an impact, plaintiff must show that: (1) he was within the "zone of danger" of an act negligently directed at him by defendant, (2) he was subjected to a reasonable fear of immediate personal injury, and (3) he in fact suffered substantial bodily injury or illness as a result.¹⁴⁴

Also in New York, the home of *Palsgraf*, the zone of danger rule as to negligent infliction cases appears to be alive and well:

The circumstances under which recovery may be had for purely emotional harm are extremely limited and, thus, a cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the plaintiff which either endangered the plaintiff's physical safety or caused the plaintiff fear for his or her own physical safety.¹⁴⁵

iv. No Limitations

Of late, a number of states have removed any limitation on the recovery of damages for negligent infliction of emotional distress in non-bystander situations.¹⁴⁶ Hawaii was one of the first states to remove all limitations in this area of negligent infliction.¹⁴⁷ In *Leong v. Takasaki*,

143. 659 N.W.2d 321, 326-27 (Neb. 2003).

144. 730 A.2d 1086, 1092 (Vt. 1999) (citation omitted).

145. *Lancellotti v. Howard*, 547 N.Y.S.2d 654, 655 (App. Div. 1989).

146. The states are Hawaii, New Jersey, North Carolina, Ohio, Oklahoma, Tennessee, Washington, and Wisconsin. See *infra* Appendix C.

147. *Rodrigues v. State*, 472 P.2d 509, 520-21 (Haw. 1970).

the court observed: “[b]ecause other standards exist to test the authenticity of plaintiff’s claim for relief, the requirement of resulting physical injury, like the requirement of physical impact, should not stand as another artificial bar to recovery, but merely be admissible as evidence of the degree of mental or emotional distress suffered.”¹⁴⁸

Likewise, in *Paugh v. Hanks*, the Ohio Supreme Court stated: “[a]lthough we believe that a manifestation of physical harm which occurs as a result of serious emotional distress can assist a jury in determining whether a claim is compensable, we find that a limitation such as this may prevent a worthy plaintiff from recovering from a blameworthy defendant.”¹⁴⁹

In Tennessee, in the case of *Camper v. Minor*, the court similarly noted:

[W]e conclude that these cases should be analyzed under the general negligence approach discussed above. In other words, the plaintiff must present material evidence as to each of the five elements of general negligence—duty, breach of duty, injury or loss, causation in fact, and proximate, or legal, cause, in order to avoid summary judgment. Furthermore, we agree that in order to guard against trivial or fraudulent actions, the law ought to provide a recovery only for “serious” or “severe” emotional injury. A “serious” or “severe” emotional injury occurs “where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.”¹⁵⁰

Wisconsin has had an interesting history with negligent infliction of emotional distress in non-bystander cases. Initially, even though the state subscribed to the Andrews dissent in *Palsgraf* and held that duty is established in a negligence case when an unreasonable risk of some harm should have been foreseen as to anyone,¹⁵¹ the same court adopted the zone of danger rule as to negligent infliction of emotional distress.¹⁵² Later, recognizing the doctrinal conflict, the court attempted to clarify

148. 520 P.2d 758, 762 (Haw. 1974).

149. 451 N.E.2d 759, 764–65 (Ohio 1983).

150. 915 S.W.2d 437, 446 (Tenn. 1996) (citations omitted).

151. *A.E. Inv. Corp. v. Link Builders, Inc.*, 214 N.W.2d 764, 766 (Wis. 1974).

152. *Waube v. Warrington*, 258 N.W. 497, 498 (Wis. 1935).

by asserting that it was really talking about public policy considerations for limiting liability and was not discussing duty at all.¹⁵³ Nevertheless, the Wisconsin Supreme Court in *Bowen v. Lumbermens Mutual Casualty Co.* recently ruled that in non-bystander cases a claimant need not prove physical manifestation of severe emotional distress; rather, the claimant must demonstrate only traditional negligence elements of negligent conduct, causation, and harm.¹⁵⁴ The court announced its rationale as follows:

First, as we have seen, the physical manifestation requirement has denied recovery for serious emotional distress not accompanied by physical symptoms. Second, given the present state of medical science, emotional distress can be established by means other than proof of physical manifestation. Third, although it was designed to ensure against manufactured or feigned claims, the physical manifestation requirement has encouraged extravagant pleading, distorted testimony, and meaningless distinctions between physical and emotional symptoms. Detection of false claims is best left to the adversary process. Finally, we can find no evidence that the predicted deluge of litigation has occurred in states that have abandoned either the zone of danger or physical manifestation rule.¹⁵⁵

Tennessee has adopted a similar approach, with some limitations. *Camper v. Minor* involved a truck driver whose vehicle collided with an automobile that had entered an intersection.¹⁵⁶ The driver of the automobile was killed instantly. The truck driver brought an action against the administrator of the motorist's estate and the owner of the automobile driven by the motorist to recover damages for emotional distress caused by viewing the motorist's body in the wreckage. Like the Wisconsin court in *Bowen*, the Tennessee court found the physical manifestation rule "inflexible and inadequate in practice; . . . it completely ignores the fact that some valid emotional injuries simply may not be accompanied by a contemporaneous physical injury or have

153. *Klassa v. Milwaukee Gas Light Co.*, 77 N.W.2d 397, 402-03 (Wis. 1956).

154. 517 N.W.2d 432 (Wis. 1994).

155. *Id.* at 443.

156. 915 S.W.2d 437, 439 (Tenn. 1996).

physical consequences.”¹⁵⁷ Like *Bowen*, it also determined that a plaintiff claiming negligently inflicted emotional distress need only establish the basic elements of a negligence case.¹⁵⁸ That being said, it did note a limitation:

Furthermore, we agree that in order to guard against trivial or fraudulent actions, the law ought to provide a recovery only for “serious” or “severe” emotional injury. A “serious” or “severe” emotional injury occurs “where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” Finally, we conclude that the claimed injury or impairment must be supported by expert medical or scientific proof.¹⁵⁹

2. Liability to Bystanders

As noted previously, negligent infliction of emotional distress suffered by a bystander usually occurs as the result of some physical harm sustained by another—most often one of the bystander’s loved ones. The bystander either witnesses the event that caused the physical injury or learns about it soon afterward. The example cited previously of parents who, from the safety of their home, looked out the window only to observe their child being hit by an errant motorist is apt.

Initially, bystanders were not entitled to recover damages for negligent infliction of emotional distress regardless of the circumstances. The Restatement (Second) of Torts unequivocally denies the right to recover for such harm “which is caused by emotional distress arising solely from harm or peril to a third person, *unless* the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.”¹⁶⁰

Appellate courts in a number of states do not appear to have confronted the issue.¹⁶¹ In a few states, the courts have rejected such an

157. *Id.* at 446.

158. Those being “duty, breach of duty, injury or loss, causation in fact, and proximate, or legal, cause.” *Id.*

159. *Id.* (citations omitted).

160. RESTATEMENT (SECOND) OF TORTS § 313(2) (1965) (emphasis added).

161. No authority has been found in Alabama, Colorado, Idaho, Kansas, and Kentucky. See *infra* Appendix C.

action out of hand.¹⁶² The reason underlying denial of bystander recovery for emotional distress is, once again, the principle of foreseeability—that liability should not extend to harm that is speculative and too far removed from the scope of the tortious conduct. Courts uniformly adhered to the notion that negligent tortfeasors should not be subject to unlimited liability to any witness of the tortious event, because these are unforeseen harms. Of course, that concept is subject to debate. It is certainly not unforeseeable that a person who sustains serious bodily injury or death will have close relatives who are emotionally impacted by the event. Likewise, why is there no problem in allowing emotional distress damages to survivors when the remains of a loved one are mishandled, but yet a problem when a live body is mishandled and relatives claim emotional distress as a result? Courts that allow bystander recovery have established various rules to govern the situation.

i. Impact

As noted previously, Georgia has consistently applied the impact requirement in non-bystander cases involving negligent infliction of emotional distress.¹⁶³ It appears to be the only state where the impact requirement also pertains to a bystander situation as well. In *Lee v. State Farm Mutual Insurance Co.*, a woman was injured in the same auto collision that took the life of her daughter.¹⁶⁴ She claimed damages for the emotional distress that was caused by witnessing the death of her daughter. The court held:

When, as here, a parent and child sustain a direct physical impact and physical injuries through the negligence of another, and the child dies as the result of such negligence, the parent may attempt to recover for serious emotional distress from witnessing the child's suffering and death without regard to whether the

162. See *Waldrip v. McGarity*, 605 S.W.2d 5, 5–6 (Ark. 1980) (except as permitted by wrongful death statute); *Slaton v. Vansickle*, 872 P.2d 929, 931 (Okla. 1994); *Litton v. Cann*, 47 Va. Cir. 334, 339 (Cir. Ct. 1998) (finding that only exceptions allowed are parents' malpractice claims for wrongful birth of a child or the birth of a severely injured child inflicted during the delivery).

163. See discussion *supra* Part IV.C.1.i.

164. 533 S.E.2d 82, 82 (Ga. 2000).

emotional trauma arises out of the physical injury to the parent.¹⁶⁵

But, it refused to budge further as to other situations.

ii. Zone of Danger

As the Restatement passage quoted above foretold, some courts recognized a bystander's right to recover for negligent infliction of emotional harm in limited situations, e.g., when the bystander-plaintiff was in the zone of danger from the tortious event. A number of courts still follow that approach.¹⁶⁶

In Illinois, however, the court decided to abandon the impact requirement in the case of *Rickey v. Chicago Transit Authority*:

The standard that we substitute for the one requiring contemporaneous injury or impact is the standard which has been adopted in the majority of jurisdictions where this question of recovery by a bystander for emotional distress has been examined. That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence.¹⁶⁷

Thus, Illinois requires both presence in the zone of danger and physical manifestation of the emotional trauma.

In *Resavage v. Davies*, the Maryland court considered a case involving a mother who witnessed her daughters' death when they were

165. *Id.* at 86-87.

166. Delaware, District of Columbia, Illinois, Louisiana, Maryland, Missouri, South Dakota, Utah, and Vermont. *See infra* Appendix C.

167. 457 N.E.2d 1, 5 (Ill. 1983) (citations omitted).

struck and killed by a motorist.¹⁶⁸ The mother was standing on the porch of her home and her daughters were standing on a parkway some distance away waiting for a bus. In full view of the mother an automobile jumped the curb and struck the children. The mother “ran to the children who were languishing in pools of blood” and dying.¹⁶⁹ The mother was confined to bed for a considerable time from the shock of her observation. The court expressed concern over the fact that if the mother, not in harm’s way, was allowed to recover for her emotional harm, the flood gates would be opened.¹⁷⁰ It observed:

We see no logical reason for holding that liability does not extend to bystanders or persons less closely related than a child or spouse, but may extend to a child or spouse, as indicated in the caveat in [Restatement] § 313. We think the operator of a motor vehicle on the highway is not liable to spectators in a place of safety off the highway for visible shock to them. If such a rule were adopted it would involve a tremendous extension of liability to the world at large, not justified by the best considered authorities.¹⁷¹

The South Dakota court, in *Nielson v. AT&T Corp.*, first reviewed the various tests employed in surrounding jurisdictions.¹⁷² It then held:

After reviewing case law in other jurisdictions, we hold that South Dakota law recognizes a bystander’s claim for negligent infliction of emotional distress caused by contemporaneous observation of the serious injury or death of a third party with whom the bystander has a close relationship. The bystander must be within the zone of danger. However, the emotional distress suffered may be caused by fear for the third person and need not be caused by the bystander’s fear for his or her own safety. The negligently inflicted emotional distress must be accompanied with physical manifestations.¹⁷³

168. 86 A.2d 879, 879 (Md. 1952).

169. *Id.*

170. *Id.* at 883.

171. *Id.*

172. 597 N.W.2d 434, 440–42 (S.D. 1999).

173. *Id.* at 442.

Thus, zone of danger is again coupled with physical manifestation.

In North Dakota, the court in *Whetham v. Bismarck Hospital*, confronted a situation involving a mother who had just given birth.¹⁷⁴ She watched while a hospital attendant brought the newborn to her and proceeded to drop the child on the floor. While one might not expect a clearer guarantee of the mother's genuine emotional distress, the court, after a review of various authorities available at the time, held that "the plaintiff herein could recover only if the defendant's negligent act had threatened the plaintiff herself with harm or placed her within what is termed the zone of danger. The complaint contains no facts upon which such a contention could be supported."¹⁷⁵ Apparently, if the clumsy hospital staffer had caused the infant to sail past the mother's head before it hit the floor, recovery might have been allowed. The court seemed to fear the opening of a Pandora's Box if it went further.

In *Asaro v. Cardinal Glennon Memorial Hospital*, the Missouri court was confronted with a situation in which a mother brought an action against physicians who allegedly committed medical malpractice resulting from a heart operation on her five-year-old son.¹⁷⁶ She claimed that due to their errors following an operation, she was forced to observe the child's pain and fainting spells for over a year and a half until his condition was finally rectified.¹⁷⁷ The court noted that the case addressed an issue left undecided by its ruling in *Bass v. Nooney Co.*,¹⁷⁸ regarding whether recovery might be had for emotional distress caused solely by observing injury caused to a third person by another's negligence.¹⁷⁹ It answered that question in the negative, finding zone of danger a preferable rule:

We hold, therefore, that in Missouri a plaintiff states a cause of action for negligent infliction of emotional distress upon injury to a third person only upon a showing: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) that plaintiff was present at the scene of an injury producing, sudden event, (3) and that plaintiff was in the

174. 197 N.W.2d 678, 679 (N.D. 1972).

175. *Id.* at 684.

176. 799 S.W.2d 595, 597 (Mo. 1990).

177. *Id.*

178. 646 S.W.2d 765 (Mo. 1983). See discussion *supra* Part IV.C.1.ii.

179. *Asaro*, 799 S.W.2d at 597-98.

zone of danger, i.e., placed in a reasonable fear of physical injury to his or her own person.

....

Given its broadest intendment, Asaro's petition does not aver that she was herself endangered by the negligence of the respondents. While appellant was intimately involved with her son's treatment and understandably distressed at the condition of his health, she was not the patient. She faced no personal peril. Her understandable distress follows solely from seeing the harm and suffering endured by her young son.¹⁸⁰

iii. The Dillon Test

The final test to be considered with respect to bystander recovery for negligently inflicted emotional distress came from the California Supreme Court in the case of *Dillon v. Legg*.¹⁸¹ The rule of *Dillon*, or a variation thereof, has been adopted in a number of states.¹⁸²

In *Dillon*, the plaintiff alleged that she was in close proximity to a collision that caused her infant daughter's death and personally witnessed that collision.¹⁸³ As a result, she claimed to have sustained great emotional distress, "shock and injury to her nervous system' which caused her great physical and mental pain and suffering."¹⁸⁴ After examining the law in other jurisdictions, as well as its own,¹⁸⁵ and the views of various commentators, the court decided that relief should be granted in such a case in certain circumstances.¹⁸⁶ It determined that foreseeability was the key to deciding liability:

We note, first, that we deal here with a case in which plaintiff suffered a shock which resulted in physical

180. *Id.* at 599-600.

181. 441 P.2d 912 (Cal. 1968).

182. Alaska, Arizona, California, Connecticut, Florida, Hawaii, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See *infra* Appendix C.

183. *Dillon*, 441 P.2d at 914.

184. *Id.*

185. It overruled *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963). *Id.* at 925.

186. *Dillon*, 441 P.2d at 920-21.

injury and we confine our ruling to that case. In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.¹⁸⁷

It is important to note that the foregoing are mere factors for consideration and not elements of a hard-and-fast test. In considering these three factors, if a court determines that the tortfeasor should reasonably have foreseen that bystanders might suffer emotional harm, liability follows if that emotional harm manifests physically. Once again, severe emotional distress standing alone will not suffice.

California subsequently drew a bright line emphasizing the second requirement of the *Dillon* test in *Thing v. La Chusa*.¹⁸⁸ In that action a minor was injured when he was struck by an automobile operated by the defendant. The plaintiff mother was nearby, but she neither saw nor heard the accident. She learned of her son's injury from a daughter. The mother "rushed to the scene where she saw her bloody and unconscious child, whom she believed was dead, lying in the roadway. [She] sued [the] defendants, alleging that she suffered great emotional disturbance, shock, and injury to her nervous system as a result of these events."¹⁸⁹ The majority of the court, expressing concern with what it thought was the open-endedness of the *Dillon* approach, recast the three elements of that case as follows:

[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely

187. *Id.* at 920.

188. 771 P.2d 814 (Cal. 1989).

189. *Id.* at 815.

related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.¹⁹⁰

While many jurisdictions chose to follow the *Dillon* approach, some did so with modifications. The Ohio case of *Paugh v. Hanks*¹⁹¹ is an example. The case involved a woman who lived with her husband and two children in a home across the street from the end of an Interstate exit ramp.¹⁹² On three separate occasions, from December to August of the following year, cars exiting the ramp collided with the plaintiff's home or the fence surrounding that home. The collisions occurred late at night or very early in the morning. The earlier collisions put the plaintiff in fear for the safety of her children. After the last collision she began fainting and hyperventilating and went to a mental health center. She had no prior history of fainting. Thereafter, she began to see a nurse at the mental health center and was placed on medication. The plaintiff claimed "she was experiencing serious nightmares; was afraid to be left alone at her home; was afraid to cross streets; was afraid of traffic in general, or being on a big street; and was afraid to drive the family car."¹⁹³ The court stated:

Although we adopt in close form the guidelines of reasonable foreseeability established in *Dillon*, it must be remembered that this court, unlike the *Dillon* court, does not limit recovery to that emotional distress which manifests itself in the form of some physical injury. Furthermore, we do not believe that it is necessary that the victim (whose safety was feared for by the plaintiff-bystander) even suffered actual physical harm. We believe that a cause of action for the negligent infliction of serious emotional distress may be stated where the plaintiff-bystander reasonably appreciated the peril which took place, whether or not the victim suffered

190. *Id.* at 829–830 (footnotes omitted).

191. 451 N.E.2d 759 (Ohio 1983).

192. *Id.* at 761.

193. *Id.* at 762.

actual physical harm, and, that as a result of this cognizance or fear of peril, the plaintiff suffered serious emotional distress.¹⁹⁴

Unlike *Dillon*, the court in *Paugh* declined “to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress. This usually will be a jury question bearing on the reasonable reaction to the event unless the court can conclude as a matter of law that the reaction was unreasonable.”¹⁹⁵ In its view, “serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.”¹⁹⁶

New Hampshire adopted the *Dillon* criteria¹⁹⁷ and later denied an application to expand them to include a case in which parents did not see the accident that injured their child but later viewed the injured child in a hospital.¹⁹⁸ However, in *Graves v. Estabrook*, the supreme court was confronted with a situation in which a decedent’s fiancée brought an action to recover for the emotional distress she sustained in witnessing the death-causing accident.¹⁹⁹ She lived with the decedent before the accident. The court concluded that to foreclose recovery to the plaintiff because her relationship with her fiancée did not have the correct label would be unjust.²⁰⁰

The New Hampshire court relied heavily upon the New Jersey case of *Dunphy v. Gregor*,²⁰¹ in reaching its decision. The New Jersey Supreme Court, like its New Hampshire counterpart, was dealing with a claim for negligent infliction of emotional distress brought by a woman after witnessing an accident involving a man to whom she was engaged and with whom she was cohabiting.²⁰² The couple was engaged in April 1988 and began cohabitating two months later. They set a date in February 1992 for their wedding. The accident occurred on September 29, 1990. After analyzing its own law and that of other jurisdictions, the court determined that under the circumstances of the case the plaintiff

194. *Id.* at 767.

195. *Id.*

196. *Id.* at 765.

197. *Corso v. Merrill*, 406 A.2d 300, 306 (N.H. 1979).

198. *Wilder v. City of Keene*, 557 A.2d 636, 639 (N.H. 1989).

199. 818 A.2d 1255, 1257 (N.H. 2003).

200. *Id.* at 1261–62.

201. 642 A.2d 372 (N.J. 1994).

202. *Id.* at 373.

should be protected against negligent infliction of emotional injury.²⁰³ In the court's view, the basis was "the existence of an intimate familial relationship" with the injured person:

An intimate familial relationship that is stable, enduring, substantial, and mutually supportive is one that is cemented by strong emotional bonds and provides a deep and pervasive emotional security. We are satisfied that persons who enjoy such an intimate familial relationship have a cognizable interest in the continued mutual emotional well-being derived from their relationship. When that emotional security is devastated because one witnesses, in close and direct proximity, an accident resulting in the wrongful death or grievous bodily injury of a person with whom one shares an intimate familial relationship, the infliction of that severe emotional injury may be the basis of recovery against the wrongdoer.²⁰⁴

Since an "intimate familial relationship" in the New Jersey court's view applied to unmarried cohabitants who were involved in a long-term engagement, other relationships of a similar nature might qualify.

South Carolina expanded upon *Dillon* in another fashion. In *Kinard v. Augusta Sash & Door Co.*, the court was concerned with an accident in which the plaintiff and her daughter were injured when a load of roof trusses fell from defendant's truck and struck their car.²⁰⁵ The daughter was severely injured and was comatose for three months after the accident. The plaintiff sought damages not only for her physical injuries, but also for severe emotional distress caused by witnessing the serious injury to her daughter. She claimed that she lost weight, often cried, was unable to do heavy housework, was unable to sleep, and had difficulty socializing. She also alleged that she was unable to tolerate stress.²⁰⁶ Interestingly, prior to this time the court had refused to adopt an action for negligent infliction of emotional distress.²⁰⁷ Nevertheless:

Today, we approve the general approach of *Dillon v.*

203. *Id.* at 380.

204. *Id.*

205. 336 S.E.2d 465, 466 (S.C. 1985).

206. *Id.*

207. *See* *Dooley v. Richland Mem'l Hosp.*, 322 S.E.2d 669, 670-71 (S.C. 1984).

Legg, and adopt the cause of action with the following elements:

- (a) the negligence of the defendant must cause death or serious physical injury to another;
- (b) the plaintiff bystander must be in close proximity to the accident;
- (c) the plaintiff and the victim must be closely related;
- (d) the plaintiff must contemporaneously perceive the accident; and
- (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.²⁰⁸

Once again, an emotional problem absent physical manifestation is not enough.

As noted previously, Wisconsin has one of the more liberal approaches to negligent infliction of emotional distress, limiting recovery only on the basis of legal cause or public policy considerations.²⁰⁹ In the case of *Bowen v. Lumbermens Mutual Casualty Co.*, the court confronted the issue of whether additional limits should be set in a bystander case.²¹⁰ The court in *Bowen* dealt with a situation involving a mother and fatal injuries to a child.²¹¹ The mother here did not witness the car strike her child's bike. She arrived at the scene a few minutes later. She observed that her severely injured son was trapped under the defendant's car and watched the rescue attempt. She claimed that these experiences caused her extreme emotional and psychic injuries. These were accompanied by "hysteria, insomnia, nausea and the disruption of [her] work and family relationships."²¹² The court noted that "the doctrine of public policy, not the doctrine of duty, limits the scope of the defendant's liability" in a negligence action in the state,²¹³ and that application of public policy principles is a function of the court.²¹⁴ While the court noted that a public policy determination might be made at the pleading stage, it also observed that "when the issues are complex or the factual connections attenuated, it may be

208. *Kinard*, 336 S.E.2d at 467.

209. See discussion *supra* Part IV.C.1.iv.

210. 517 N.W.2d 432, 434 (Wis. 1994).

211. *Id.* at 435.

212. *Id.*

213. *Id.* at 439.

214. *Id.* at 443.

desirable for a full trial to precede the court's determination."²¹⁵ The court reasoned:

Historically, the tort of negligent infliction of emotional distress has raised two concerns: (1) establishing authenticity of the claim and (2) ensuring fairness of the financial burden placed upon a defendant whose conduct was negligent. A court deals with these concerns by exploring in each case such public policy considerations as: (1) whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears too extraordinary that the negligence should have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or (6) whether allowance of recovery would enter a field that has no sensible or just stopping point. The court has stated these public policy considerations that may preclude liability in capsule form as follows: When it would shock the conscience of society to impose liability, the courts may hold as a matter of law that there is no liability.²¹⁶

It then proceeded to enunciate *Dillon*-like public policy factors for consideration in bystander cases.

[T]o determine on the basis of public policy considerations whether to preclude liability for severe emotional distress to a bystander a court must consider three factors: the severity of the injury to the victim, the relationship of the plaintiff to the victim, and the extraordinary circumstances surrounding the plaintiff's discovery of the injury.²¹⁷

215. *Id.* at 443.

216. *Id.* at 443-44.

217. *Id.* at 445.

In applying those various factors to this case, the court held that the plaintiff stated a claim upon which relief could be granted and that the various public policy considerations would not preclude liability.²¹⁸

Thus, as observed above, recovery for negligent infliction of emotional distress is confined by limitations affecting bystander and non-bystander cases in most jurisdictions. Some are less stringent than others.

V. PARASITIC EMOTIONAL DISTRESS

The last emotional distress area to be considered involves situations in which the emotional harm occurs as the result of some physical injury that was negligently inflicted. Various terms such as “loss of enjoyment of life,”²¹⁹ “emotional damages”²²⁰ or “hedonic damages”²²¹ have been used as descriptors. However, the terms are used to describe a damage category, not a separate cause of action as with the other three areas discussed above.

A. Early History

As frequently occurred, early common law declined to afford legal protection to mental tranquility. It has been stated that when first allowing recovery for emotional harm that was intentionally inflicted, “early cases focused more on preserving peace by offering an alternative to self-help retribution than on preserving emotional tranquility.”²²² One author observed that “[l]oss of enjoyment of life made its debut as a peripheral element of damages in the 1890’s.”²²³

B. The Restatement

The Restatement (Second) of Torts stands for the proposition that negligently inflicted emotional distress is not compensable absent some physical harm.²²⁴ It does not speak directly to the subject of parasitic

218. *Id.* 446.

219. *Thibeaux v. Trotter*, 883 So. 2d 1128, 1130 (La. Ct. App. 2004).

220. *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995).

221. *Hunt v. K-Mart Corp.*, 981 P.2d 275, 277 (Mont. 1999).

222. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 788 n.78 (1985) (citing 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, 486 (1982)).

223. Carleton R. Cramer, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965, 965 (1981).

224. See discussion *supra* Part IV.B.

emotional distress. Nevertheless, it does provide that: "Compensatory damages that may be awarded without proof of pecuniary loss include compensation (a) for bodily harm, and (b) for emotional distress."²²⁵ An accompanying illustration emphasizes the point: "A seriously wounds B, who fears that the wound will cause death. In addition to damages for the physical impairment of the body and pecuniary loss caused by the wound, B is entitled to compensatory damages for the fear of death."²²⁶ Thus, it could be argued that given a negligently inflicted physical injury, the Restatement allows that compensation for parasitic emotional harm is acceptable.

The proposed Restatement (Third) of Torts assumes a slightly modernized approach regarding parasitic emotional distress. First, the "Proposed Final Draft" of section 4, in comment *b*, stresses the difference between a physical injury and emotional disturbance and seems to preserve the approach of the second Restatement that physical impact is a prerequisite to recover for emotional injury.²²⁷ Comment *d* to section 4 reads:

This Restatement is limited to liability for physical harm. Thus, whether and when the interest in emotional tranquility is protected against culpable invasion is a matter left to the Restatement Second of Torts §§ 46–47 and § 436A, the developing case law, and future Third Restatement efforts. *Emotional disturbance, often referred to as mental suffering or emotional distress, is recoverable under the rules of this Restatement when it results from bodily harm.* When emotional disturbance is recoverable, the rules of this Restatement on the prima facie elements of a tort claim may be employed to determine if the requisite elements of the emotional-disturbance claim are satisfied.²²⁸

At the same time, comment *d* goes on to caution that:

Since the Restatement Second of Torts, courts have liberalized recovery for negligently inflicted emotional

225. RESTATEMENT (SECOND) OF TORTS § 905 (1965).

226. *Id.* cmt. e, illus. 6.

227. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 4 cmt. b (Proposed Final Draft No. 1, 2005).

228. *Id.* cmt. d (emphasis added).

disturbance. *To the extent this liberalization has occurred by recognizing a claim for negligent infliction of emotional distress, this Restatement does not address that development.* However, other courts have liberalized recovery for negligently inflicted emotional disturbance by characterizing what is essentially psychic or emotional harm as bodily harm. The Second Restatement contributed to this development by providing that some serious, long-term conditions, such as nausea, headaches, and hysterical attacks constituted illnesses that were bodily harm. To the extent that courts liberalize the standard for what constitutes bodily harm and characterize a plaintiff's harm as such, those cases are governed by the rules provided in this Restatement. This Restatement leaves to the developing case law the determination of where to draw the line between bodily harm and emotional disturbance.²²⁹

Comment *d* seems to suggest as well that the definition of what constitutes a "physical harm" continues to broaden.²³⁰

Finally, section 6 of the proposed Restatement (Third) of Torts seems to suggest that parasitic emotional distress will be recoverable even when negligently inflicted, so long as it is accompanied by physical injury. It reads "[a]n actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable."²³¹ Comment *f* to that section offers further substance: "[l]iability for emotional disturbance (that is not derivative of personal injury) . . . is governed by the principles of the Restatement Second of Torts until additional portions of the Restatement Third of Torts addressing this matter are published."²³²

C. Current Status

As an appendix to this Article illustrates, the ability to recover for loss of enjoyment of life, whatever its label, is now generally recognized in all jurisdictions.²³³ The only disagreement among them is over

229. *Id.* (emphasis added).

230. *See id.*

231. *Id.* § 6.

232. *Id.* cmt. f.

233. *See infra* Appendix D.

whether it should be considered a separate form of damages or merely an aspect of damages for pain and suffering.²³⁴ Of course, as a general proposition, in a personal injury action sounding in negligence, a person now may recover damages for whatever consequences of the tortfeasor's act or omission occur, despite the fact that the specific form of the injury was not foreseen or foreseeable.²³⁵

That damages for pain and suffering are allowed at all speaks to the fact that tort law considers a human being something more than a machine to be repaired and placed back in operation. If a tortiously-inflicted physical injury causes the harmed person emotional concern about the future consequences of that injury (Will I ever tap dance again?), then that injury is compensable.

Consider the daughter of a woman who took DES during pregnancy. As a result of the drug, the young woman suffered from "adenosis," a pre-cancerous condition that requires careful monitoring.²³⁶ It is not difficult to imagine the concerns that linger in the mind of that person—wondering whether the "bad news" will arrive then or after a later examination.

In *LeBleu v. Safeway Insurance Co.*, the plaintiff was injured in an automobile accident.²³⁷ She "was thrown against the steering wheel, and her knees hit the dashboard."²³⁸ The impact was so severe that the rear seat of the plaintiff's car moved forward and a tire tool from the trunk smashed through the windshield on the passenger side. "The trial court found credible [the plaintiff's] testimony that her doctor [cautioned] that her lung would be painful during the winter" and that she would have difficulty breathing when she exercised.²³⁹ The plaintiff also testified that her condition limited her ability to participate in family activities, "such as jogging and hunting with her husband and playing with her children."²⁴⁰ On appeal, the court held that "an award for disability may include compensation for limitations on activities outside the

234. Compare *Adams v. Miller*, 908 S.W.2d 112, 116 (Ky. 1995) ("There is no need to allow for the recoupment of hedonic damages as a separate category of loss."), with *Smallwood v. Bradford*, 720 A.2d 586, 592 (Md. 1998) ("Generally, the 'loss of enjoyment of life' includes the 'impairment of the capacity to enjoy life, or to enjoy a particular avocation' and, in some cases, it constitutes a proper, separate element of damages.").

235. KEETON ET AL., *supra* note 6, § 43, at 291-93.

236. *New v. Armour Pharm. Co.*, 58 F.3d 445, 448 (9th Cir. 1995).

237. 824 So. 2d 422, 423 (La. Ct. App. 2002).

238. *Id.* at 424.

239. *Id.* at 426.

240. *Id.*

workplace.”²⁴¹ It noted further that the plaintiff “established to the trial court’s satisfaction that her injuries restricted her once-active lifestyle, and she is entitled to compensation for this change in her life.”²⁴²

Underwood v. Atlanta & West Point Railroad Co. was an action for injuries sustained by a taxi driver in a grade crossing accident.²⁴³ The plaintiff’s wife was an invalid. Her condition existed before the accident in question. At trial the plaintiff proposed to prove by his wife’s testimony that, prior to the accident, he played with his five children and helped with their care as much as she did. He also sought to prove thereby that “he helped his wife in and out of bed and [into] the bath room, would come home during the day and put her in a wheelchair,” and that “since the accident he can do none of these things, is ill and indifferent with the children, can’t stand to hear the baby cry and for the children to make a fuss.”²⁴⁴ The trial court blocked that testimony on the ground that evidence of the plaintiff’s domestic circumstances in such an action are irrelevant and immaterial.²⁴⁵ On appeal the court held that:

While the fact that the plaintiff had an invalid wife and five children, standing alone, does not constitute a basis of damages recoverable by the plaintiff, the plaintiff’s mental distress resulting from his inability to care for his invalid wife and to care for and play with his five children, caused by or growing out of his bodily injury, was a proper element of damage—pain and suffering.²⁴⁶

Consider as well the case of *Bartolone v. Jeckovich*.²⁴⁷ It concerned a plaintiff who was involved in a relatively minor collision. He sustained a “whiplash” causing cervical and lower back strain.²⁴⁸ He was not hospitalized, but treated with muscle relaxants and physical therapy. Subsequently, he suffered an acute psychotic breakdown from which he had not recovered at the time the case was heard. The action was tried on the theory that the accident aggravated a pre-existing paranoid

241. *Id.*

242. *Id.*

243. 124 S.E.2d 758, 758 (Ga. Ct. App. 1962).

244. *Id.* at 768.

245. *Id.*

246. *Id.* at 769.

247. 481 N.Y.S.2d 545 (App. Div. 1984).

248. *Id.* at 546.

schizophrenic condition that totally and permanently disabled the plaintiff. When the accident occurred, the plaintiff, who was slightly under age fifty, lived alone in one room and worked as a carpenter. He was proud of his physique and his strength, working out regularly at a local Y.M.C.A. On weekends he pursued nonphysical interests such as painting and sculpture. He also sang and played the guitar and trombone. The court described the evidence presented at trial about his condition:

Three psychiatrists and one neurosurgeon testified on behalf of plaintiff. From their testimony a strange and sad profile emerged: Plaintiff's mother had died of cancer when he was a very young boy. His sister had also died of cancer. Probably as a consequence, plaintiff had developed a fear and dislike of doctors and engaged in body building in order to avoid doctors and ward off illness. His bodily fitness was extremely important to him because it provided him with a sense of control over his life so that he was able to function in a relatively normal way. He had adopted a life style in which he was something of a "loner," but he was self-supporting, had no complaints and lived a rather placid existence. After the accident, although his physical injuries were minor, he perceived that his bodily integrity was impaired and that he was physically deteriorating. Because he had such an intense emotional investment in his body, his perception of this impairment made him incapable of his former physical feats and he was thus deprived of the mechanism by which he coped with his emotional problems. As a consequence, he deteriorated psychologically and socially as well. He increasingly isolated himself and felt himself to be a victim of powerful forces over which he had no control. It was the consensus of plaintiff's medical experts that he had suffered from a pre-existing schizophrenic illness which had been exacerbated by the accident and that he was now in a chronic paranoid schizophrenic state which is irreversible.²⁴⁹

249. *Id.*

Finding the evidence credible and invoking the rule that a defendant takes the plaintiff as he or she is found, the court had no difficulty in affirming a substantial award for the plaintiff's emotional harm.²⁵⁰

As any student of the subject is aware, the face of tort law has evolved over the years—shifting the focus from formalistic limitations on liability towards making the plaintiff whole. This focus on wholeness inevitably has come to encompass parasitic emotional harms.

VI. CONCLUSION

Tort law places no impediments in the path of those who seek recompense for emotional injuries caused by the intentional tort of assault or resulting from a negligently inflicted physical injury. Restrictions still exist as to intentional infliction of emotional distress and negligent infliction of emotional distress. As noted, those restrictions include a requirement:

- that the emotional distress be “severe”;
- that the tortious conduct produce contact with the plaintiff;
- that the plaintiff sustain some physical manifestation of the distress; and
- that the plaintiff be within the zone of danger of physical harm.

When the emotional distress results from witnessing or learning of physical harm to another person still other limitations are imposed. The question is: why?

Assume a situation in which different people sustain the same type of emotional distress resulting from particular tortious conduct:

1. The first is a byproduct of an assault.
2. The second is the result of intentional reckless infliction.
3. The third comes after the plaintiff walks away from an auto accident without physical injury because her air bags have inflated.
4. The fourth is like the third, but physical harm resulted to the plaintiff and the emotional distress comes from the plaintiff's concern about eventual recovery from the physical harm.

250. *Id.* at 546–47.

5. The fifth is also like the third, but the distress comes only from the plaintiff's concern with the safety of another passenger in the vehicle.

Why do we say to the victim of intentional infliction of emotional distress that she must prove the distress is severe, while the victim of an assault need not do so? Why can one who is physically injured as a result of another's negligence recover for emotional harm that is the product of the injury while one who escapes physical harm in the same incident cannot recover for the byproduct of the fear created by the situation?

The reason could well be fear of "opening the flood gates" that will eventually swamp the courts. Approaching my forty-fifth year at the bar, I have heard and seen the floodgates argument used many times. In fact I may have used it myself, when I first appeared to represent the defense. It is clearly an argument of last resort when no other, logical argument is available. Within my knowledge the floodgates have yet to be breached or cause a flood.

The reason for the limits discussed above could well be concern over the genuineness of the emotional distress claim. After all, there are no lacerations or x-rays for jury display and the proof often comes from the plaintiff's own mouth (or the mouth of a psychiatric expert). The case of *La Fleur v. Mosher*²⁵¹ offers cogent analysis. That case allowed recovery for emotional distress to a fourteen-year-old child negligently confined in a jail cell. A dissenting justice noted:

[I]n this case, the majority is impressed with the diagnosis by a psychiatrist who opines the confinement caused the emotional distress. Due to the nature of claims of emotional disturbance without accompanying physical injury, the discipline of medicine that will normally offer such opinions will be psychiatrists. This court [has] . . . stated:

While some courts may have blind faith in all phases of psychiatry, this court does not We commented in an earlier case that this court has frequently been dismayed by the examination of trial court records which showed a marked propensity of those who

251. 325 N.W.2d 314 (Wis. 1982).

purport to have psychiatric expertise to tailor their testimony to the particular client whom they represent.²⁵²

The dissenter's lack of faith in the ability of opposing counsel to demonstrate witness bias to a jury and his obvious disdain for the ability of a jury to sort these things out are remarkable. The fact that expert witnesses may disagree in a tort action or that, on occasion, there might even be an "expert of the evening" should not be a surprise to anyone. It happens all the time. Witness the famous insurance "bad faith" case of *Crisci v. Security Insurance Co.*, which involved an emotional distress component at the trial court level:

Security attempts to justify its rejection of a settlement by contending that it believed Mrs. DiMare had no chance of winning on the mental suffering issue. That belief in the circumstances present could be found to be unreasonable. Security was putting blind faith in the power of its psychiatrists to convince the jury when it knew that the accident could have caused the psychosis, that its agents had told it that without evidence of prior mental defects a jury was likely to believe the fall precipitated the psychosis, and that Mrs. DiMare had reputable psychiatrists on her side. *Further, the company had been told by a psychiatrist that in a group of 24 psychiatrists, 12 could be found to support each side.*²⁵³

This is the stuff of tort litigation. The fact that it exists provides no reason to preclude the possibility of any recovery for the harm they sustained to entire classes of tortiously injured persons. Courts still have the inherent power to limit liability in individual cases for public policy reasons.²⁵⁴ Surely this solution is much better than mass deprivation of the right to pursue recovery. One can only hope that, in this area, the life of the law could become logic.

252. *Id.* at 320 (Steinmetz, J., dissenting) (citing *Steele v. State*, 294 N.W.2d 2, 13 (1980)).

253. 426 P.2d 173, 178 (Cal. 1967) (emphasis added).

254. Compare *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964) ("Kinsman No. 1"), with *In re Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) ("Kinsman No. 2").

APPENDIX A
ASSAULT—STATE-BY-STATE ANALYSIS

Alabama

In Alabama, the tort of assault was recognized very early on as requiring

“an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt, if not prevented.”²⁵⁵

Alaska

Alaska’s highest court has recognized the definition of assault under the Restatement (Second) of Torts section 21.²⁵⁶ In an unpublished decision, the Alaska Supreme Court allowed a plaintiff to recover for assault after the defendant stated: “This is my property and I’m going to kill you and your dogs.”²⁵⁷

Arizona

Arizona case law does not appear to discuss assault as a separate tort. Nevertheless, the state does recognize assault and battery.²⁵⁸ Thus, it is fair to assume that an action for assault, absent an accompanying battery, would be recognized there.

Arkansas

The Arkansas Supreme Court has allowed recovery for an assault. For example, plaintiffs were able to recover for assault when two assailants placed a pistol behind one of the plaintiff’s ears, threatened to blow his head off, and threatened to rape the other plaintiff.²⁵⁹

255. *W. Union Tel. Co. v. Hill*, 150 So. 709, 710 (Ala. Ct. App. 1933).

256. *Williams v. Alyeska Pipeline Serv. Co.*, 650 P.2d 343, 348 (Alaska 1982).

257. *Schwartz v. Smith*, No. S-10627, 2003 WL 22417514, at *2 (Alaska Oct. 22, 2003).

258. *Twin City Fire Ins. Co. v. Doe*, 788 P.2d 121, 123 (Ariz. Ct. App. 1989).

259. *Smith v. Hansen*, 914 S.W.2d 285, 290 (Ark. 1996).

California

California courts have recognized that the “tort of assault is complete when the anticipation of harm occurs.”²⁶⁰

Colorado

Colorado case law does recognize the tort of assault and battery.²⁶¹ The state’s legislature has established a statute of limitations for assault.²⁶² Thus, it is fair to assume that an action for assault, absent an accompanying battery, would be recognized there.

Connecticut

In Connecticut, “A civil assault is the intentional causing of imminent apprehension of harmful or offensive contact in another.”²⁶³

Delaware

Delaware case law does not appear to discuss assault as a separate tort. Nevertheless, the state does recognize assault and battery.²⁶⁴ Thus, it is fair to assume that an action for assault, absent an accompanying battery, would be recognized there.

District of Columbia

The District of Columbia recognizes the distinct interests protected by the tort of assault and has adopted the Restatement (Second) of Torts section 21, which protects freedom from apprehension of harmful contact.²⁶⁵ It has been held that “[a]n essential element of the ancient tort of assault is the intentional putting another in *apprehension* of an *immediate* and harmful or offensive conduct.”²⁶⁶

260. *Kiseskey v. Carpenters’ Trust for S. Cal.*, 192 Cal. Rptr. 492, 498 (Ct. App. 1983).

261. *White v. Muniz*, 999 P.2d 814, 819 (Colo. 2000).

262. Colo. Rev. Stat. Ann. § 13-80-103(1)(a) (West 2006).

263. *DeWitt v. John Hancock Mut. Life Ins. Co.*, 501 A.2d 768, 770 (Conn. App. Ct. 1985) (citing RESTATEMENT (SECOND) OF TORTS § 21 (1965)).

264. *Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1366 (Del. Super. Ct. 1980).

265. *Saunders v. Nemati*, 580 A.2d 660, 664 (D.C. 1990).

266. *Madden v. D.C. Transit Sys., Inc.*, 307 A.2d 756, 757 (D.C. 1973) (citing RESTATEMENT (SECOND) OF TORTS § 21 (1965)).

Florida

Florida has recognized "that, as every law student should know by his third week, the tort of assault does not require physical injury or even touching. Its minimal essence is putting the victim in fear of bodily harm."²⁶⁷

Georgia

Georgia case law establishes that physical contact is not a necessary element of assault: "[I]t is only necessary to show an intention to commit an injury, coupled with an apparent ability to do so."²⁶⁸

Hawaii

Hawaii case law does not appear to discuss assault as a separate tort. Nevertheless, the state does recognize assault and battery.²⁶⁹ Thus, it is fair to assume that an action for assault, absent an accompanying battery, would be recognized there.

Idaho

Idaho case law does not appear to discuss assault as a separate tort. Nevertheless, the state does recognize assault and battery.²⁷⁰ Thus, it is fair to assume that an action for assault, absent an accompanying battery, would be recognized there.

Illinois

Illinois defines assault as an "intentional, unlawful offer of corporal injury by force, or force unlawfully directed, under such circumstances as to create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented."²⁷¹ In order to state a claim for assault, the plaintiff must allege a "reasonable apprehension of an imminent battery."²⁷²

267. *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1105 (Fla. 1989) (Grimes, J., concurring).

268. *Edwards v. Sabat*, 589 S.E.2d 618, 620 (Ga. Ct. App. 2003).

269. *Ozaki v. Ass'n of Apartment Owners of Discovery Bay*, 954 P.2d 652, 669 (Haw. Ct. App. 1998).

270. *White v. Univ. of Idaho*, 797 P.2d 108, 114 (Idaho 1990).

271. *Parrish v. Donahue*, 443 N.E.2d 786, 788 (Ill. App. Ct. 1982).

272. *Rosenberg v. Packerland Packing Co.*, 370 N.E.2d 1235, 1238 (Ill. App. Ct. 1977).

Indiana

In Indiana, an assault “is effectuated when one acts intending to cause a harmful or offensive contact with the person of the other or an imminent apprehension of such contact.”²⁷³ Because “it is a touching of the mind, as opposed to the body, the damages which are recoverable for an assault are damages for mental trauma and distress.”²⁷⁴ For instance, the Indiana Supreme Court held that a jury could reasonably find assault when defendants surrounded the plaintiff’s trailer and threatened him with bodily harm and one of the defendants was armed with a revolver in his holster.²⁷⁵

Iowa

Iowa case law does not appear to discuss assault as a separate tort. Nevertheless, the state does recognize assault and battery.²⁷⁶ Thus, it is fair to assume that an action for assault, absent an accompanying battery, would be recognized there.

Kansas

In Kansas, assault is defined as “an intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm.”²⁷⁷ Kansas follows the Restatement (Second) of Torts section 31 and holds that “words can constitute assault if ‘together with other acts or circumstances they put the other in reasonable apprehension of imminent harmful or offensive contact with his person.’”²⁷⁸

Kentucky

In Kentucky, “[a]ssault is a tort which merely requires the threat of unwanted touching of the victim, while battery requires an actual unwanted touching.”²⁷⁹

273. *Cullison v. Medley*, 570 N.E.2d 27, 30 (Ind. 1991) (citing RESTATEMENT (SECOND) OF TORTS § 21 (1965)).

274. *Id.*

275. *Id.* at 30–31.

276. *Borchard v. Anderson*, 542 N.W.2d 247, 250 (Iowa 1996).

277. *Taiwo v. Vu*, 822 P.2d 1024, 1031 (Kan. 1991).

278. *Vetter v. Morgan*, 913 P.2d 1200, 1203–04 (Kan. Ct. App. 1995).

279. *Banks v. Fritsch*, 39 S.W.3d 474, 480 (Ky. Ct. App. 2001).

Louisiana

In Louisiana, to constitute an assault: "threats, coupled with the present ability to carry out the threats, are sufficient when one is placed in reasonable apprehension of receiving an injury."²⁸⁰ The concept of assault, embodied in the Restatement (Second) of Torts section 21, has been recognized in the state.²⁸¹

Maine

In Maine, "[a]bsent tactile contact, a person's mental tranquility is also protected in the limited situation where a person intentionally or recklessly places another in fear of imminent harmful or offensive contact, thus fulfilling the requirements of the intentional tort of assault."²⁸² The Restatement (Second) of Torts section 21 has been recognized in the state.²⁸³

Maryland

Maryland, citing section 21 of the Restatement (Second) of Torts, defines tortious assault as "any unlawful attempt to cause a harmful or offensive contact with the person of another or to cause an apprehension of such a contact."²⁸⁴

Massachusetts

Massachusetts defines assault as "an attempt or offer by one person to do bodily injury to another by force or violence . . . [and] consists of putting a person in fear of immediate bodily injury."²⁸⁵ State law also speaks of intentionally placing a person in apprehension of immediate physical harm.²⁸⁶

280. *Johnson v. English*, 779 So. 2d 876, 880 (La. Ct. App. 2000).

281. *Citizen v. Theodore Daigle & Bro.*, 418 So. 2d 598, 601 (La. 1982).

282. *Rowe v. Bennett*, 514 A.2d 802, 806 n.3 (Me. 1986).

283. *Hale v. Antoniou*, No. CV-02-185, 2004 WL 1925551, at *3 (Me. Super. Ct. July 29, 2004).

284. *Cont'l Cas. Co. v. Mirabile*, 449 A.2d 1176, 1183 (Md. Ct. Spec. App. 1982).

285. *Commonwealth v. Prater*, 725 N.E.2d 233, 244 (Mass. 2000).

286. *See Verma v. Anand Corp.*, No. 974763, 2000 WL 33171049, at *4 (Mass. Super. Ct. Dec. 29, 2000); *Laghetto v. Takacs*, No. CA922978, 1994 WL 879841, at *2 (Mass. Super. Ct. Jan. 14, 1994) (citing RESTATEMENT (SECOND) OF TORTS § 21 (1965)).

Michigan

Michigan law recognizes that “[w]here there is only an assault, the largest element of harm may be emotional.”²⁸⁷ Michigan defines assault as “any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact.”²⁸⁸ The Restatement (Second) of Torts section 21 has been adopted in Michigan.²⁸⁹

Minnesota

Minnesota defines assault as a “wrongful threat, more than words alone, with the present ability to carry such threat into effect and which causes a reasonable apprehension of immediate harm or offensive contact.”²⁹⁰

Mississippi

In Mississippi, “[a]n assault occurs where a person (1) acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and (2) the other is thereby put in such imminent apprehension.”²⁹¹

Missouri

In Missouri, “an assault is any unlawful offer or attempt to injure another with the apparent present ability to effectuate the attempt under circumstances creating a fear of imminent peril.”²⁹²

Montana

Montana case law does not appear to discuss assault as a separate tort. Nevertheless, the state does recognize assault and battery.²⁹³ In addition, the state has a statute of limitations specifically dealing with

287. 1 CHERYL GIRAULO ET AL., MICHIGAN CIVIL JURISPRUDENCE § 15 (2001).

288. *Espinoza v. Thomas*, 472 N.W.2d 16, 21 (Mich. Ct. App. 1991).

289. *Mitchell v. Daly*, 350 N.W.2d 772, 778–79 (Mich. Ct. App. 1984); *Russell v. Bronson Heating & Cooling*, 345 F. Supp. 2d 761, 796 (E.D. Mich. 2004).

290. *Lazover v. Clifford*, No. C4-98-1123, 1999 WL 43329, at *9 (Minn. Ct. App. Feb. 2, 1999).

291. *Morgan v. Greenwaldt*, 786 So. 2d 1037, 1043 (Miss. 2001).

292. *Adler v. Ewing*, 347 S.W.2d 396, 402 (Mo. Ct. App. 1961).

293. *Weston v. Cole*, 758 P.2d 289, 291 (Mont. 1988).

actions for assault.²⁹⁴ Thus, it is safe to assume that an action for assault alone would be recognized.

Nebraska

In Nebraska, it has been held that:

[T]he intentional tort of assault [is] a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.²⁹⁵

Nevada

The Nevada Supreme Court has stated that “an assault, a tort that does not require a physical impact, is in and of itself a predicate for an award of nominal or compensatory damages without proof of ‘serious emotional distress.’”²⁹⁶ As a tort that does not require physical impact, assault “is in and of itself a predicate for an award of nominal or compensatory damages without proof of ‘serious emotional distress.’”²⁹⁷ A jury may therefore award nominal or compensatory damages for an assault in which the only injury was mental suffering, insult, or hurt feelings.²⁹⁸

New Hampshire

New Hampshire case law states that “allegations of an intentional assault do not require expert testimony to prove damages for emotional and mental suffering.”²⁹⁹ A victim of assault may recover for emotional distress “that he proves he actually suffered, if his damage is of a kind that normally results from an assault and is normal and reasonable in its extent.”³⁰⁰

294. MONT. CODE. ANN. § 27-2-204(3) (2005).

295. *Reavis v. Solminski*, 551 N.W.2d 528, 536 (Neb. 1996).

296. *Olivero v. Lowe*, 995 P.2d 1023, 1026 (Nev. 2000).

297. *Id.*

298. *See id.*

299. *Silva v. Warden*, 839 A.2d 4, 6 (N.H. 2003).

300. *Id.*

New Jersey

New Jersey recognizes the tort of assault and with it the concept of the Restatement (Second) of Torts section 21.³⁰¹

New Mexico

New Mexico law recognizes a civil action for assault.³⁰²

New York

In New York, “[t]o sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact.”³⁰³ When the plaintiff did not establish that any of the actions of the defendant put her in “‘imminent apprehension’ of ‘harmful or offensive contact’” the action was properly dismissed.³⁰⁴

North Carolina

In North Carolina, “[t]he interest in freedom from apprehension of a harmful or offensive contact with the person is protected by the action for assault.”³⁰⁵

North Dakota

North Dakota case law finds assault when one “willfully . . . places another human being in immediate apprehension of bodily restraint or harm.”³⁰⁶ North Dakota recognizes emotional distress as “a constituent element of damages only recoverable along with other damages in tort actions for assault.”³⁰⁷

Ohio

Ohio case law defines assault:

301. *Earl v. Winne*, 101 A.2d 535, 539 (N.J. 1953); *Giovine v. Giovine*, 663 A.2d 109, 125 (N.J. Super. Ct. App. Div. 1995).

302. *Ocana v. Am. Furniture Co.*, 91 P.3d 58, 70 (N.M. 2004); *Mead v. O’Connor*, 344 P.2d 478, 479 (N.M. 1959).

303. *Bastein v. Sotto*, 749 N.Y.S.2d 538, 539 (App. Div. 2002).

304. *Hayes v. Schultz*, 541 N.Y.S.2d 115, 116 (App. Div. 1989) (citing RESTATEMENT (SECOND) OF TORTS § 21 (1965)).

305. *McCracken v. Sloan*, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979).

306. *Blessum v. Shelver*, 567 N.W.2d 844, 849 (N.D. 1997).

307. *Muchow v. Lindblad*, 435 N.W.2d 918, 920 (N.D. 1989).

[A]s the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. The threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching.³⁰⁸

Oklahoma

Oklahoma follows the definition of assault in Restatement (Second) of Torts section 21.³⁰⁹

Oregon

Oregon has recognized that assault is not the same as battery.³¹⁰ It has defined assault as “an intentional attempt to do violence to the person of another coupled with present ability to carry the intention into effect.”³¹¹

Pennsylvania

Pennsylvania defines assault as “*an act* intended to put another person in reasonable apprehension of an immediate battery, and which succeeds in causing an apprehension of such battery.”³¹²

When a person approaches another with two associates wielding chainsaws, screams ‘Bring on the chainsaws!’, to which the sawyers respond by dismembering the tree in which the person sits, a factfinder could reasonably conclude that an assault has occurred. Frankly, we are at a loss to understand how a factfinder could arrive at any other conclusion.³¹³

308. *Smith v. John Deere Co.*, 614 N.E.2d 1148, 1154 (Ohio Ct. App. 1993).

309. *Brown v. Ford*, 905 P.2d 223, 229 (Okla. 1995).

310. *Mays v. Huling Buick Co.*, 424 P.2d 679, 679 (Or. 1967).

311. *Cook v. Kinzua Pine Mills Co.*, 293 P.2d 717, 723 (Or. 1956).

312. *Cucinotti v. Ortmann*, 159 A.2d 216, 217 (Pa. 1960).

313. *Sides v. Cleland*, 648 A.2d 793, 796–97 (Pa. Super. Ct. 1994).

Rhode Island

Rhode Island has defined assault as “a physical act of a threatening nature or an offer of corporal injury which puts an individual in reasonable fear of imminent bodily harm.”³¹⁴

South Carolina

Although no South Carolina case has been found dealing solely with the tort of assault, the state does recognize an action for assault and battery.³¹⁵

South Dakota

South Dakota recognizes that a “claim of civil assault and battery can be proved if the defendant: ‘(a) [intended] to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and, (b) an offensive contact with the person of the other directly or indirectly results.’”³¹⁶

Tennessee

In Tennessee, “a defendant is not subject to liability for assault unless he or she commits an intentional act creating a reasonable apprehension of imminent physical harm on the part of the plaintiff.”³¹⁷

Texas

Under Texas law, an action for assault has been recognized.³¹⁸ Specifically, the tort under Restatement (Second) of Torts section 21 has been recognized.³¹⁹

Utah

Utah case law recognizes a civil action for assault that requires: “1. The defendant *acted*, intending to cause harmful or offensive contact with the plaintiff, or imminent apprehension of such contact; and 2. As a

314. *Proffitt v. Ricci*, 463 A.2d 514, 517 (R.I. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 21 (1965)).

315. *Bryant v. Smith*, 198 S.E. 20, 21 (S.C. 1938).

316. *Stratmeyer v. Engberg*, 649 N.W.2d 921, 925–26 (S.D. 2002) (citing RESTATEMENT (SECOND) OF TORTS § 18 (1965)).

317. *Johnson v. Cantrell*, No. 01A01-9712-CV-00690, 1999 WL 5083, at *3 (Tenn. Ct. App. Jan. 7, 1999).

318. *N. Side State Bank v. Hunter*, 452 S.W.2d 34, 36 (Tex. Civ. App. 1970).

319. *Lisanti v. Dixon*, 147 S.W.3d 638, 645 (Tex. App. 2004).

result, the plaintiff was thereby put in imminent apprehension of [harm] [contact].”³²⁰ The Restatement (Second) of Torts section 21 has been recognized in the state.³²¹

Vermont

In Vermont:

[i]f the party threatening the assault have [sic] the ability, means, and apparent intention to carry his threat into execution, it may in law constitute an assault An assault is an unlawful physical force, partly or fully put in motion, which creates a reasonable apprehension of immediate physical injury to a human being.³²²

Virginia

In Virginia:

[t]o prove assault, a plaintiff must show that the defendant “performed ‘an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in the other person’s mind a reasonable apprehension of an imminent battery.’ There is no requirement that the victim of such acts be physically touched.”³²³

Washington

In Washington, the definition of assault under Restatement (Second) of Torts section 21 has been recognized.³²⁴ Assault has also been defined as “any such act that causes apprehension of a battery.”³²⁵

320. *D.D.Z. v. Molerway Freight Lines, Inc.*, 880 P.2d 1, 3 (Utah Ct. App. 1994) (alterations in original).

321. *Banks v. Shivers*, 432 P.2d 339, 342 (Utah 1967).

322. *Bishop v. Ranney*, 7 A. 820, 821 (Vt. 1887) (citation omitted).

323. *Bowie v. Murphy*, 624 S.E.2d 74, 80 (Va. 2006) (citations omitted).

324. *Wagner v. Patterson*, 440 P.2d 162, 162 n.1 (Wash. 1968); *Brower v. Ackerley*, 943 P.2d 1141, 1144–45 (Wash. Ct. App. 1997).

325. *Barbu v. Rite Aid Corp.*, No. 53494-7-I, 2004 WL 2526672, at *2 (Wash. Ct. App. Nov. 8, 2004).

West Virginia

In West Virginia the definition of assault under section 21 of the Restatement (Second) of Torts has been recognized.³²⁶ The West Virginia Supreme Court of Appeals has held that “[b]ecause an action for assault and battery allows for recovery of damages due to resulting emotional distress, a claim for the tort of outrageous conduct is duplicitous of a claim for assault and battery, where both claims arise from the same event.”³²⁷

Wisconsin

In Wisconsin, “[a]n assault claim requires proof that the defendant ‘either had an intent to cause physical harm to [the plaintiff] or an intent to put [the plaintiff] in fear that physical harm was to be committed upon [him or her].’”³²⁸ It has also been noted that “[i]n the civil tort realm, assault is defined as essentially a mental rather than a physical invasion.”³²⁹

Wyoming

In Wyoming, the supreme court has stated: “In our review of the intentional torts pleaded . . . we find that the elements of civil assault, as recognized in *Restatement (Second) of Torts* [§ 21] . . . are stated”³³⁰

326. *W. Va. Fire & Cas. Co. v. Stanley*, 602 S.E.2d 483, 495 (W. Va. 2004).

327. *Criss v. Criss*, 356 S.E.2d 620, 620 (W. Va. 1987).

328. *Walters v. Soriano*, No. 2004AP2100, 2005 WL 2665339, at *4 (Wis. Ct. App. Oct. 20, 2005) (citing *Wis. JI-Civil 2004 (2003)* (assault)).

329. *Doe v. Archdiocese of Milwaukee*, 565 N.W.2d 94, 96 n.3 (Wis. 1997).

330. *Jung-Leonczynska v. Steup*, 782 P.2d 578, 583 (Wyo. 1989).

APPENDIX B
INTENTIONAL INFLICTION—STATE-BY-STATE ANALYSIS

Alabama

In order to prevail on a claim of intentional infliction of emotional distress in Alabama, substantial evidence must be presented “that the defendant’s conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it.”³³¹ The Alabama Supreme Court “has consistently held that the tort of outrage is a very limited cause of action that is available only in the most egregious circumstances.”³³² Consequently, in the vast majority of outrage cases reviewed, the court has held that no jury question was presented.³³³ The cases in which the Alabama Supreme Court has found a jury question on an outrage claim have fallen largely within three categories: (1) wrongful conduct in family burials; (2) insurance agents engaging in heavy-handed, barbaric tactics to coerce the insured into settling a claim; and (3) egregious sexual harassment.³³⁴ The Alabama Supreme Court has held that “[g]eneralized apprehensions and fears do not rise to the level of the extreme, severe emotional distress required to support a claim alleging the tort of outrage.”³³⁵ A plaintiff’s fear alone, without any corroborating clinical evidence, does not rise to the level of severe emotional distress.³³⁶ For example, a nurse who was required to undergo blood tests for HIV for one year after a doctor angrily threw a surgical drape containing a patient’s blood and surgical refuse did not rise to the level of conduct required for the tort of outrage.³³⁷

Alaska

In order to establish a prima facie case of intentional infliction of emotional distress in Alaska, the plaintiff must prove that the defendant

331. *Thomas v. BSE Indus. Contractors, Inc.*, 624 So. 2d 1041, 1043 (Ala. 1993).

332. *Johnson v. Fambrough*, 706 So. 2d 739, 741 (Ala. Civ. App. 1997) (citation omitted).

333. *Id.*

334. *Thomas*, 624 So. 2d at 1044.

335. *Grantham v. Vanderzyl*, 802 So. 2d 1077, 1081 (Ala. 2001); *see also Thomas*, 624 So. 2d at 1045.

336. *Grantham*, 802 So. 2d at 1081.

337. *Id.*

“through extreme or outrageous conduct . . . intentionally or recklessly cause[d] severe emotional distress or bodily harm to another.”³³⁸ The Supreme Court of Alaska has determined in only a few cases that a trial court abused its discretion in holding that conduct was not sufficiently outrageous to justify a claim for intentional infliction of emotional distress. These cases have included an employer pursuing a “two year private vendetta” against an employee³³⁹ and an employer retaliating against an anesthesiologist after the anesthesiologist announced plans to open a clinic that would compete with his employer.³⁴⁰ The employer placed the anesthesiologist under investigation in bad faith, denied him staff privileges, and published in a national medical reporting system that his privileges were revoked due to incompetence, negligence, and malpractice.³⁴¹

Arizona

In Arizona, the tort of intentional infliction of emotional distress requires proof of three elements: (1) the defendant’s conduct was extreme and outrageous; (2) the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that emotional distress will result from his conduct; and (3) severe emotional distress must indeed occur as a result of the defendant’s conduct.³⁴² Following the Restatement approach, Arizona does not require bodily injury in order to have a claim for intentional infliction of emotional distress. For example, a wife was awarded damages for emotional distress after an escaped inmate broke into her home and shot her husband in her presence.³⁴³

Arkansas

The Arkansas Supreme Court set out four factors needed to establish a claim for outrage or the intentional infliction of emotional distress:

- (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was

338. *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985).

339. *King v. Brooks*, 788 P.2d 707, 711 (Alaska 1990).

340. *Odom v. Fairbanks Mem’l Hosp.*, 999 P.2d 123, 127 (Alaska 2000).

341. *Id.* at 127–28.

342. *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987).

343. *Duke v. Cochise County*, 938 P.2d 84, 89 (Ariz. Ct. App. 1996).

the likely result of his conduct; (2) the conduct was “extreme and outrageous,” was “beyond all possible bounds of decency,” and was “utterly intolerable in a civilized community;” (3) the actions of the defendant were the cause of the plaintiff’s distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it.³⁴⁴

Arkansas courts have addressed the intentional infliction of emotional distress in a cautious manner and have stated that recognition of this tort is “not intended to ‘open the doors of the courts to every slight insult or indignity one must endure in life.’”³⁴⁵ The tendency of Arkansas courts to construe the tort of outrage very narrowly is particularly evident in the employment context. For example, a terminated employee’s allegations that she was improperly written up for performance problems, improperly placed on probation, and wrongfully fired failed to state a claim for outrage.³⁴⁶

California

The elements of intentional infliction of emotional distress in California are: “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.”³⁴⁷ California requires that the conduct be intended to inflict injury or be engaged in with the realization that injury will result.³⁴⁸ The conduct must also “be of a nature that is especially calculated to cause mental distress of a very serious kind.”³⁴⁹ California limits recovery for emotional distress suffered as the result of conduct directed at another person to “the most extreme cases of violent attack, where there is some especial likelihood of fright or shock.”³⁵⁰ In these cases, “it is generally,

344. *Faulkner v. Ark. Children’s Hosp.*, 69 S.W.3d 393, 403–04 (Ark. 2002).

345. *Dillard Dep’t. Stores, Inc. v. Adams*, 867 S.W.2d 442, 443 (Ark. 1993) (quoting *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380 (Ark. 1988)).

346. *Palmer v. Ark. Council on Econ. Educ.*, 40 S.W.3d 784, 791–92 (Ark. 2001).

347. *Cervantez v. J.C. Penney Co.*, 595 P.2d 975, 983 (Cal. 1979).

348. *Ess v. Eskaton Props., Inc.*, 118 Cal. Rptr. 2d 240, 247 (Ct. App. 2002).

349. *Id.* at 248.

350. *Ochoa v. Superior Court*, 703 P.2d 1, 4 n.5 (Cal. 1985).

if not always, required that the plaintiff be present at the time the outrageous conduct occurred.”³⁵¹

Colorado

The elements of a claim for intentional infliction of emotional distress, or outrageous conduct, are “1. [t]he defendant engaged in extreme and outrageous conduct; 2. [t]he defendant engaged in the conduct recklessly or with the intent of causing the plaintiff severe emotional distress[;] and 3. [t]he plaintiff incurred severe emotional distress which was caused by the defendant’s conduct.”³⁵² In the examination of discrimination cases, the Colorado Court of Appeals has stated that “to hold that every discrimination claim automatically constitute[s] outrageous conduct would stretch the tort far beyond its intended boundaries.”³⁵³ Thus, outrageous conduct was not found when a truck driver alleged violations of the Americans with Disabilities Act after he was fired because of having suffered a heart attack.³⁵⁴ A claim for outrageous conduct was found when a car lessor’s employees used strong-armed tactics during negotiations, committed fraudulent acts, and falsified documents related to the lease transaction.³⁵⁵

Connecticut

In Connecticut:

In order for a plaintiff to prevail in a case for liability under intentional infliction of emotional distress, four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant’s conduct was the cause of the plaintiff’s distress; and (4) that the emotional distress sustained by the plaintiff was severe.³⁵⁶

351. *Ess*, 118 Cal. Rptr. 2d at 248.

352. *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994) (alteration in original).

353. *Bigby v. Big 3 Supply Co.*, 937 P.2d 794, 800 (Colo. Ct. App. 1996).

354. *Id.*

355. *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341, 346 (Colo. Ct. App. 1999).

356. *Appleton v. Bd. of Educ.*, 757 A.2d 1059, 1062 (Conn. 2000) (citations omitted).

The Connecticut Superior Court has stated that “[c]onduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.”³⁵⁷ For instance, when a terminated employee sued his former employer for inquiring into the employee’s personal beliefs and attitudes and for harassing the employee to change his mind regarding his refusal to sign false grant documents, a claim for intentional infliction of emotional distress was not found.³⁵⁸

Delaware

Delaware follows the Restatement (Second) of Torts section 46 word-for-word and defines intentional infliction of emotional distress as “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”³⁵⁹ It is not enough that a defendant acted with tortious or criminal intent, intended to inflict emotional distress, or even that his conduct has been characterized by malice or a degree of aggravation that would entitle the plaintiff to punitive damages under another tort.³⁶⁰ In order for recklessness to exist, two significant elements must be present.³⁶¹ The first is the act itself; the second is “the issue of foreseeability, or the perception [that] the actor had or should have had of the risk of harm which his conduct would create.”³⁶² Intentional infliction of emotional distress was found when an attorney intentionally and without notice to his client stopped payment on a check endorsed to the client.³⁶³ The conduct was viewed as outrageous in the context of an attorney-client relationship of “trust and confidence.”³⁶⁴

357. *Mellaly v. Eastman Kodak Co.*, 597 A.2d 846, 847 (Conn. Super. Ct. 1991).

358. *See Campbell v. Town of Plymouth*, 811 A.2d 243, 253 (Conn. App. Ct. 2002).

359. *Avallone v. Wilmington Med. Ctr., Inc.*, 553 F. Supp. 931, 938 (D. Del. 1982).

360. *See Mattern v. Hudson*, 532 A.2d 85, 86 (Del. Super. Ct. 1987).

361. *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).

362. *Id.*

363. *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990).

364. *Id.*

District of Columbia

In order to establish intentional infliction of emotional distress, the District of Columbia requires that a plaintiff show “(1) ‘extreme and outrageous conduct’ on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff ‘severe emotional distress.’”³⁶⁵ Following the Restatement (Second) of Torts section 46, the conduct must be so outrageous and extreme as to go beyond all possible bounds of decency and be regarded as atrocious and intolerable in a civilized community.³⁶⁶ Intentional infliction of emotional distress was found when an employer subjected an employee to nine months of loud and piercing noise emitted by sound-screen devices, and the employer knew that the employee had become seriously ill as a result.³⁶⁷ Outrageous conduct was not found when an employee was demoted following an investigation of sexual harassment charges that had been filed against him.³⁶⁸

Florida

In order to establish a cause of action for intentional infliction of emotional distress in Florida, the plaintiff must show that:

(1) the wrongdoer’s conduct was intentional or reckless[, that is], he intended his behavior when he knew or should have known that emotional distress would likely result; (2) the conduct was outrageous[, that is], beyond all bounds of decency, atrocious and utterly intolerable in a civilized community; (3) the conduct caused emotional distress; and (4) the emotional distress was severe.³⁶⁹

Florida has adopted the definition of outrageous conduct offered in Restatement (Second) of Torts section 46.³⁷⁰ While Florida courts have been hesitant to find outrageous conduct based solely on verbal abuse, they did find that a *prima facie* case was established when an employer

365. *Howard Univ. v. Best*, 484 A.2d 958, 985 (D.C. 1984) (citations omitted).

366. *Kerrigan v. Britches of Georgetown, Inc.*, 705 A.2d 624, 628 (D.C. 1997).

367. *Larijani v. Georgetown Univ.*, 791 A.2d 41, 44–45 (D.C. 2002).

368. *Kerrigan*, 705 A.2d at 628.

369. *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210, 1212 (Fla. Dist. Ct. App. 1995).

370. *See Johnson v. Thigpen*, 788 So. 2d 410, 412 (Fla. Dist. Ct. App. 2001).

repeatedly used language that ordinary people would find obscene and lascivious in addition to evidence of offensive, repeated, and unwelcomed physical contact with an employee.³⁷¹ Florida does not require physical injury to recover for intentional infliction of emotional distress.³⁷²

Georgia

Four elements must be present to support a claim for intentional infliction of emotional distress in Georgia: (1) intentional or reckless conduct; (2) that is extreme and outrageous; (3) a causal connection between the wrongful conduct and the plaintiff's emotional distress; and (4) the resulting emotional distress must be severe.³⁷³ Under Georgia law, it is not enough for the defendant's conduct to be intentional, willful, or wanton.³⁷⁴ To warrant recovery, the conduct must also be so severe that it "*naturally* give[s] rise to such intense feelings of humiliation, embarrassment, fright or extreme outrage as to cause severe emotional distress."³⁷⁵ Georgia outlines specific factors that may contribute to outrageous conduct, including the existence of a special relationship in which one person controls another, the actor's awareness of the victim's particular susceptibility, and the severity of the outrageous conduct as a matter of law.³⁷⁶ Following Restatement (Second) of Torts section 46, the Georgia Court of Appeals has stated that "plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."³⁷⁷ Thus, outrageous conduct was not found when an employer gave a harsh performance evaluation the day an employee returned from extended psychiatric care and when the employer continued the review despite tearful pleas from the employee to postpone it.³⁷⁸

371. *See id.* at 414.

372. *See* R.J. v. Humana of Fla., Inc., 652 So. 2d 360, 363 (Fla. 1995).

373. *Clark v. Arras*, 443 S.E.2d 277, 278 (Ga. Ct. App. 1994).

374. *St. Mary's Hosp. of Athens, Inc. v. Radiology Prof'l Corp.*, 421 S.E.2d 731, 734 (Ga. Ct. App. 1992).

375. *Id.*

376. *Clark*, 443 S.E.2d at 279.

377. *Peoples v. Guthrie*, 404 S.E.2d 442, 444 (Ga. Ct. App. 1991).

378. *Jarrard v. United Parcel Serv., Inc.*, 529 S.E.2d 144, 146 (Ga. Ct. App. 2000).

Hawaii

Hawaii did not adopt the approach set forth in section 46 of the Restatement (Second) of Torts until 2003.³⁷⁹ It now holds that the elements of intentional infliction of emotional distress are: “(1) that the act allegedly causing the harm was intentional or reckless, 2) that the act was outrageous, and 3) that the act caused 4) extreme emotional distress to another.”³⁸⁰ This marks a significant change from Hawaii’s previous elements for intentional infliction of emotional distress which were: “(1) that the act allegedly causing the harm was intentional; (2) that the act was unreasonable; and (3) that the actor should have recognized that the act was likely to result in illness.”³⁸¹ In accordance with the Restatement, Hawaii no longer requires bodily injury to establish severe emotional distress.³⁸²

Idaho

In Idaho, intentional infliction of emotional distress has the following elements: (1) the defendant’s conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the plaintiff’s emotional distress; and (4) the emotional distress was severe.³⁸³ Interestingly, the justification for an award of damages for emotional distress “lie[s] not in whether distress was actually suffered by a plaintiff, but rather the quantum of outrageousness of the defendant’s conduct.”³⁸⁴

Illinois

In Illinois there are three elements necessary to state a claim for intentional infliction of emotional distress:

First, the conduct involved must be truly extreme and outrageous. Second, the actor must either *intend* that his conduct inflict severe emotional distress, or know that there is at least a high probability that his conduct will

379. See *Hac v. Univ. of Haw.*, 73 P.3d 46, 60–61 (Haw. 2003).

380. *Id.*

381. *Id.* at 59.

382. *Id.* at 60.

383. *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 740 (Idaho 2003).

384. *Id.*

cause severe emotional distress. Third, the conduct must in fact cause *severe* emotional distress.³⁸⁵

The state has fully adopted the comments to Restatement (Second) of Torts section 46.³⁸⁶ It does not bar an action for intentional infliction of emotional distress in a marital relationship or subject it to a heightened threshold for establishing outrageous conduct.³⁸⁷ The Illinois Supreme Court has found a claim for intentional infliction of emotional distress when a former wife sued her former husband for dozens of episodes of physical and emotional abuse and her resulting loss of self-esteem, difficulty in forming relationships, and post-traumatic stress disorder.³⁸⁸

Indiana

To establish liability for the intentional infliction of emotional distress in Indiana, "a plaintiff must prove that a defendant (1) engaged in 'extreme and outrageous' conduct that (2) intentionally or recklessly (3) caused (4) severe emotional distress."³⁸⁹ The basis for the tort is "the intent to harm one emotionally."³⁹⁰ Specifically, the Indiana Court of Appeals has stated that the tort of intentional infliction of emotional distress applies in cases that involve "the invasion of a legal right which by its very nature is likely to provoke an emotional disturbance."³⁹¹ Sufficient evidence of intentional infliction of emotional distress was found when a deceased man's daughter sued the deceased's second wife for disinterring the deceased's remains and removing the headstone from his grave.³⁹² The second wife knew family members customarily visited the grave and when they arrived at the grave site, they suffered severe emotional trauma when they discovered the grave had been desecrated.³⁹³ Evidence of intentional infliction of emotional distress was not found when a young boy was injured when he became entangled in a fence at a city playground.³⁹⁴ The court held that the family failed to

385. *McGrath v. Fahey*, 533 N.E.2d 806, 809 (Ill. 1988) (emphasis in original).

386. *Doe v. Calumet City*, 641 N.E.2d 498, 507 (Ill. 1994).

387. *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 81 (Ill. 2003).

388. *Id.* at 88–89.

389. *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 691 (Ind. 1997).

390. *Munsell v. Hambricht*, 776 N.E.2d 1272, 1280 (Ind. Ct. App. 2002).

391. *Mullen v. Cogdell*, 643 N.E.2d 390, 402 (Ind. Ct. App. 1994).

392. *Mitchell v. Stevenson*, 677 N.E.2d 551, 564 (Ind. Ct. App. 1997).

393. *Id.*

394. *Rivera ex rel. Rivera v. City of Nappanee*, 704 N.E.2d 131, 132 (Ind. Ct. App. 1998).

state a claim for intentional infliction of emotional distress because there were no allegations that the city intended to cause harm to the family.³⁹⁵

Iowa

To assert a claim for the tort of intentional infliction of emotional distress in Iowa, a plaintiff must demonstrate four elements: “(1) [o]utrageous conduct by the defendant; (2) [t]he defendant’s intentional causing, or reckless disregard of the probability of causing emotional distress; (3) [p]laintiff has suffered severe or extreme emotional distress; and (4) [a]ctual proximate causation of the emotional distress by the defendant’s outrageous conduct.”³⁹⁶ Iowa courts emphasize that “the conduct must be extremely egregious; mere insult, bad manners, or hurt feelings are insufficient.”³⁹⁷ Thus, intentional infliction of emotional distress was not found when a university dean allegedly lost his temper with a faculty member, yelling at her and using sexist and condescending language.³⁹⁸

Kansas

Under Kansas law, the tort of outrage is the same as the tort of intentional infliction of emotional distress. The elements of this claim are: (1) the defendant’s conduct was intentional or in reckless disregard of the plaintiff; (2) the conduct was extreme and outrageous; (3) a causal connection existed between the defendant’s conduct and the plaintiff’s mental distress; and (4) the plaintiff’s mental distress was extreme and severe.³⁹⁹ Prior to establishing a claim for outrage, two threshold requirements must be met: (1) the defendant’s conduct must be so extreme and outrageous as to go beyond the bounds of decency and (2) the plaintiff’s emotional distress must be so extreme that the law must intervene because “the distress inflicted was so severe that no reasonable person should be expected to endure it.”⁴⁰⁰ The overwhelming majority of Kansas cases have held in favor of the defendants on the issue of intentional infliction of emotional distress,

395. *Id.* at 133.

396. *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 197 (Iowa 1985).

397. *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996).

398. *See id.*

399. *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 978 P.2d 922, 930 (Kan. 1999).

400. *Id.*

“finding that the alleged conduct was not sufficiently ‘outrageous’ to support the cause of action.”⁴⁰¹ For example, a mortuary’s act of allowing a decedent’s son to see decedent’s body in damaged and lacerated condition was not extreme and outrageous enough to support a claim of outrage.⁴⁰² Intentional infliction of emotional distress was found when an employer refused to pay a former employee, shoved her, locked her in a building, and filed intentionally false police reports against her.⁴⁰³ The Kansas Supreme Court held that reasonable people could regard the defendant’s abuse of the criminal justice process as atrocious and utterly intolerable behavior, and the outrage created by the employer’s conduct was sufficient to satisfy the requirement of severe and extreme emotional distress.⁴⁰⁴

Kentucky

Kentucky considers the tort of outrage, or intentional infliction of emotional distress, to be a “gap-filler” tort intended to provide a remedy when no other tort is adequate.⁴⁰⁵ In order to recover under the tort of outrage, a plaintiff must prove: (1) the wrongdoer’s conduct was intentional or reckless; (2) the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) there was a causal connection between the wrongdoer’s conduct and the emotional distress; and (4) the emotional distress was severe.⁴⁰⁶ Kentucky has been much more liberal than many other states in finding intentional infliction of emotional distress. For example, a supervisor calling an employee sexually explicit names and making lewd comments was held to be sufficiently extreme and outrageous as to give rise to a claim for intentional infliction of emotional distress.⁴⁰⁷ Intentional infliction of emotional distress was also found when a farm owner who boarded horses sold them for slaughter and then lied to the owner about the horses’ whereabouts.⁴⁰⁸ The Kentucky Court of Appeals also held that a jury could find subjecting an African-American co-employee to extreme racial remarks,

401. See *Wood v. City of Topeka, Kan., Topeka Hous. Auth.*, 90 F. Supp. 2d 1173, 1194 (D. Kan. 2000).

402. *Ely v. Hitchcock*, 58 P.3d 116, 125 (Kan. Ct. App. 2002).

403. *Taiwo v. Vu*, 822 P.2d 1024, 1028–31 (Kan. 1991).

404. *Id.* at 1030.

405. *Brewer v. Hillard*, 15 S.W.3d 1, 8 (Ky. Ct. App. 1999).

406. *Id.* at 6.

407. *Id.* at 6–8.

408. *Burgess v. Taylor*, 44 S.W.3d 806, 811–12 (Ky. Ct. App. 2001).

verbal abuse, intimidation, and harassment was sufficiently extreme and outrageous so as to constitute intentional infliction of emotional distress.⁴⁰⁹

Louisiana

In order to recover for intentional infliction of emotional distress in Louisiana:

[A] plaintiff must establish (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct.⁴¹⁰

Further,

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he intended to inflict emotional distress, or even that this conduct has been characterized by "malice" or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.⁴¹¹

In recent years, Louisiana courts have dealt with a large number of intentional infliction of emotional distress claims arising in the employment context. They have limited the cause of action for intentional infliction of emotional distress in a workplace setting to cases that involve:

409. *Wilson v. Lowe's Home Ctr.*, 75 S.W.3d 229, 238 (Ky. Ct. App. 2001).

410. *White v. Monsanto Co.*, 585 So. 2d 1205, 1209 (La. 1991).

411. *Goldberg v. Moses*, 811 So. 2d 1165, 1166 (La. Ct. App. 2002).

[A] pattern of deliberate, repeated harassment over a period of time. The distress suffered by the employee must be more than a reasonable person could be expected to endure. Moreover, the employer's conduct must be intended or calculated to cause severe emotional distress, not just some lesser degree of fright, humiliation, embarrassment or worry.⁴¹²

For example, an employer's understaffing of a department that resulted in an employee's depression, stress, and persistent anxiety was not found to be outrageous or intended to cause severe emotional distress.⁴¹³ In addition, a supervisor directing profanity at employees who were sitting idly and referring to and castigating them with vulgar words was not found to constitute intentional infliction of emotional distress.⁴¹⁴

Maine

To prevail on a claim of intentional infliction of emotional distress, the plaintiff must show that:

(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community"; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."⁴¹⁵

The Supreme Judicial Court of Maine has noted that "a plaintiff need not prove that the defendant, in fact, wanted the resulting distress to occur or foresaw that distress as a practically certain result of his acts."⁴¹⁶ A person acts recklessly only "if he knows or has reason to

412. *Id.* at 1167 (citation omitted).

413. *Richardson v. Home Depot USA*, 808 So. 2d 544, 546-48 (La. Ct. App. 2001).

414. *White*, 585 So. 2d at 1210-11.

415. *Vicire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979) (citations omitted).

416. *Maine Mut. Fire Ins. Co. v. Gervais*, 715 A.2d 938, 941 (Me. 1998).

know of facts giving rise to a high degree of risk of harm to another and yet deliberately acts, or fails to act, in conscious disregard of that risk.”⁴¹⁷ Thus, an insurer was not found to have intentionally or recklessly inflicted emotional distress when it investigated and denied coverage to an insured.⁴¹⁸

Maryland

A claim for intentional infliction of emotional distress has four elements in Maryland: “(1) [t]he conduct must be intentional or reckless; (2) [t]he conduct must be extreme and outrageous; (3) [t]here must be a causal connection between the wrongful conduct and the emotional distress; (4) [t]he emotional distress must be severe.”⁴¹⁹ Recovery for intentional infliction of emotional distress is extremely limited in Maryland. The Court of Special Appeals has specifically stated that “recovery [for intentional infliction of emotional distress] will be meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves.”⁴²⁰ Maryland courts uphold claims for intentional infliction of emotional distress only for truly egregious acts.⁴²¹ These cases have included a psychologist having sexual relations with the plaintiff’s wife while he was treating the couple in marriage counseling,⁴²² a physician not telling a nurse with whom he had sexual intercourse that he had herpes,⁴²³ and a worker’s compensation insurer insisting the a claimant submit to psychiatric examination with the only purpose to harass her and to force her to abandon her claim or commit suicide.⁴²⁴

Massachusetts

To prevail on a claim of intentional infliction of emotional distress in Massachusetts, the plaintiff must show:

- (1) that the defendant intended to inflict emotional distress, or knew or should have known that emotional

417. *Id.*

418. *Id.* at 942.

419. *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977).

420. *Miller v. Ratner*, 688 A.2d 976, 996 (Md. Ct. Spec. App. 1997) (emphasis omitted).

421. *See id.*

422. *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75–77 (Md. 1991).

423. *B.N. v. K.K.*, 538 A.2d 1175, 1180–82 (Md. 1988).

424. *Young v. Hartford Accid. & Indem. Co.*, 492 A.2d 1270, 1277–79 (Md. 1985).

distress was the likely result of his conduct, . . . (2) that the defendant's conduct was extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community, (3) [that] the actions of the defendant were the cause of the plaintiff's distress, and (4) [that] the emotional distress suffered by the plaintiff was severe and of such a nature that no reasonable person could be expected to endure it.⁴²⁵

An extramarital affair, even if conducted for the purpose of hurting the other spouse, does not rise to the level of outrageousness necessary to support an action for intentional infliction of emotional distress.⁴²⁶ A parent and brother of a sexually abused child could not recover from the abuser for intentional or reckless infliction of emotional distress when they were not present, had no contemporaneous knowledge of the event, and did not have severe emotional responses.⁴²⁷

Michigan

In Michigan, "[t]he tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress."⁴²⁸ Following Restatement (Second) of Torts section 46, Michigan courts consider the duration and intensity of the distress in determining its severity, and seeking medical treatment is not a condition precedent to finding intentional infliction of emotional distress.⁴²⁹ The Michigan Court of Appeals held that a reasonable person could conclude that the act of surreptitiously videotaping plaintiffs having sexual relations would cause emotional distress.⁴³⁰ In addition, intentional infliction of emotional distress was found when, during a two-year period, a doctor's co-worker threatened the doctor's fiancée with physical harm, left lingerie on the doctor's car and outside his home, and left a hatchet and axe on the fiancée's vehicle.⁴³¹ An employer's discrimination based upon race and employees' associations with people of other races was

425. *Quinn v. Walsh*, 732 N.E.2d 330, 338 (Mass. App. Ct. 2000) (alterations in original).

426. *Id.* at 340.

427. *Nancy P. v. D'Amato*, 517 N.E.2d 824, 828 (Mass. 1988).

428. *Haverbush v. Powelson*, 551 N.W.2d 206, 209 (Mich. Ct. App. 1996).

429. *See id.*

430. *Lewis v. LeGrow*, 670 N.W.2d 675, 689-90 (Mich. Ct. App. 2003).

431. *Haverbush*, 551 N.W.2d at 209.

not sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress.⁴³²

Minnesota

Following section 46 of the Restatement (Second) of Torts, Minnesota holds that intentional infliction of emotional distress consists of four distinct elements: “(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe.”⁴³³ Minnesota follows section 46 closely and defines outrageous conduct as conduct that “passes the boundaries of decency and is utterly intolerable to the civilized community.”⁴³⁴ Similarly, emotional distress is severe if “no reasonable [person] could be expected to endure it.”⁴³⁵ The Minnesota Court of Appeals allowed an intentional infliction of emotional distress claim go to the jury when the plaintiff saw his friend get run over and killed by an oil tanker driven by the defendant.⁴³⁶ There was medical evidence that the plaintiff suffered nightmares, paranoia, and nervousness as a result of the defendant leaving the accident scene. The court held that “[a] jury should be given an opportunity to determine whether [the defendant’s] intentional conduct surpassed the bounds of decency and whether his intentional act of leaving the scene caused [the plaintiff] to suffer severe emotional distress.”⁴³⁷

Mississippi

To prevail in a claim for intentional infliction of emotional distress in Mississippi, “the defendant’s conduct must be ‘wanton and willful [as to] evoke outrage or revulsion.’”⁴³⁸ Following the Restatement (Second) of Torts section 46, the alleged conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds

432. *Graham v. Ford*, 604 N.W.2d 713, 716–17 (Mich. Ct. App. 1999).

433. *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 438–39 (Minn.1983).

434. *Haagenson v. Nat’l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 n.3 (Minn. 1979).

435. *Hubbard*, 330 N.W.2d at 439 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965)).

436. *Iacona v. Schrupp*, 521 N.W.2d 70, 73 (Minn. Ct. App. 1994).

437. *Id.*

438. *Speed v. Scott*, 787 So. 2d 626, 630 (Miss. 2001) (quoting *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 659 (Miss. 1995)).

of decency.”⁴³⁹ Actions that have been found to evoke such outrage include plotting to hide the child of an unwed father while arranging for the baby to be adopted while the father pursued a custody suit,⁴⁴⁰ and a car dealership forging a customer’s name on a sales contract and selling the contract to a finance company, resulting in the customer’s credit being damaged.⁴⁴¹ Mississippi courts have further stated that legal redress results from the nature of the act itself, not the seriousness of the consequences.⁴⁴² In asserting a claim for mental anguish, whether as a result of simple negligence or intentional, the emotional distress must be proved to be a reasonably foreseeable result of the defendant’s conduct.⁴⁴³ As long as there is outrageous conduct, no injury is required for recovery.⁴⁴⁴

Missouri

In Missouri, the “tort has four elements: (1) the defendant must act intentionally or recklessly, (2) [the defendant’s] conduct must be extreme and outrageous, and (3) the conduct must be the cause (4) of severe emotional distress.”⁴⁴⁵ Missouri defines outrageous conduct according to the Restatement (Second) of Torts section 46. Missouri courts have found conduct sufficiently outrageous to support a claim of intentional infliction of emotional distress when a whistleblower sued her employer for confiscating files from her office, altering vacation records relating to her vacation time, making prank calls to her home, and demoting her.⁴⁴⁶

Montana

Under Montana law, an independent cause of action for intentional infliction of emotional distress arises “under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant’s negligent or intentional act or omission.”⁴⁴⁷ Montana defines “serious or severe emotional distress”

439. *Clark v. Luvel Dairy Prods., Inc.*, 821 So. 2d 827, 831 (Miss. Ct. App. 2001) (quoting *Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976, 982 (N.D. Miss. 1996)).

440. *Smith v. Malouf*, 722 So. 2d 490, 497–98 (Miss. 1998).

441. *T.G. Blackwell Chevrolet Co. v. Eshee*, 261 So. 2d 481, 484–85 (Miss. 1972).

442. *Brown v. Inter-City Fed. Bank for Sav.*, 738 So. 2d 262, 265 (Miss. Ct. App. 1999).

443. *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, 743 (Miss. 1999).

444. *Id.* at 742.

445. *Boes v. Deschu*, 768 S.W.2d 205, 207 (Mo. Ct. App. 1989).

446. *Polk v. Inroads/St. Louis, Inc.* 951 S.W.2d 646, 648 (Mo. Ct. App. 1997).

447. *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 418 (Mont. 1995).

according to Restatement (Second) of Torts section 46, comment *j*. Whether a tortfeasor's conduct is "extreme and outrageous" is not controlling under Montana law. The difference between negligent and intentional infliction of emotional distress does not lie in the elements of the tort, "but in the nature and culpability of the defendant's conduct."⁴⁴⁸

Nebraska

To state a cause of action for intentional infliction of emotional distress in Nebraska, a plaintiff must allege facts showing: (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community; and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.⁴⁴⁹ The Nebraska Supreme Court has held that a decedent's estate may recover for the decedent's conscious pain, suffering, and mental distress that resulted from the apprehension or fear of impending death.⁴⁵⁰ The Nebraska Supreme Court has also held that a "sexual relationship between two consenting adults is not outrageous conduct such as to give rise to a claim for intentional infliction of emotional distress."⁴⁵¹ For example, a priest's sexual relationship with a member of his church who also received emotional counseling from him at the time did not give rise to a claim of intentional infliction of emotional distress.⁴⁵²

Nevada

To establish a cause of action for intentional infliction of emotional distress in Nevada, the plaintiff must establish the following: "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation."⁴⁵³ "Nevada does not recognize a cause of action for intentional infliction of emotional distress in the employment

448. *Id.* at 429.

449. *Dale v. Thomas Funeral Home, Inc.*, 466 N.W.2d 805, 807-08 (Neb. 1991).

450. *Nelson v. Dolan*, 434 N.W.2d 25, 25 (Neb. 1989).

451. *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 911 (Neb. 1993).

452. *See id.*

453. *Star v. Rabello*, 625 P.2d 90, 92 (Nev. 1981).

termination context.”⁴⁵⁴ While Nevada does not have an explicit physical injury or manifestation requirement to recover for intentional infliction of emotional distress, the Supreme Court of Nevada has stated that “[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress.”⁴⁵⁵ Insomnia, embarrassment, and physical or emotional discomfort, without more, are insufficient to establish a claim for intentional infliction of emotional distress.⁴⁵⁶

New Hampshire

New Hampshire did not recognize a cause of action for intentional infliction of emotional distress until 1991 when it adopted Restatement (Second) of Torts section 46.⁴⁵⁷ Since this time, New Hampshire courts have rarely dealt with claims alleging the intentional infliction of emotional distress. A claim for intentional infliction of emotional distress was found when an employer abused her position of power and threatened to monitor an employee’s conversations and discipline her without cause, and the employer continued the threats after receiving notice that the employee was susceptible to emotional distress.⁴⁵⁸

New Jersey

In order to state a cause of action for intentional infliction of emotional distress in New Jersey, the “plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe.”⁴⁵⁹ While New Jersey has adopted the definition of outrageous conduct offered in Restatement (Second) of Torts section 46, unlike other states, New Jersey has offered a definition of severe emotional distress. New Jersey defines severe emotional distress as “ ‘any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.’ ”⁴⁶⁰ In order to constitute actionable negligent infliction of emotional distress, the defendant’s conduct must

454. *Brooks v. Hilton Casinos, Inc.*, 959 F.2d 757, 766 (9th Cir. 1992).

455. *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1145 (Nev. 1983).

456. *Chowdhry v. NLVH, Inc.*, 851 P.2d 459, 462 (Nev. 1993).

457. *Morancy v. Morancy*, 593 A.2d 1158, 1158–59 (N.H. 1991).

458. *Karch v. Baybank FSB*, 794 A.2d 763, 770–71 (N.H. 2002).

459. *Buckley v. Trenton Saving Fund Soc’y*, 544 A.2d 857, 863 (N.J. 1988).

460. *Taylor v. Metzger*, 706 A.2d 685, 697 (N.J. 1998) (quoting *Poole v. Copland, Inc.*, 481 S.E.2d 88, 93 (N.C. Ct. App. 1997)).

be sufficiently severe to “cause genuine and substantial emotional distress or mental harm to average persons.”⁴⁶¹ While many jurisdictions have concluded that racial slurs uttered by an employer do not constitute intentional infliction of emotional distress, the Supreme Court of New Jersey found that a sheriff calling an African-American employee “jungle bunny” could cause severe emotional distress to the average African-American.⁴⁶² The court noted that a racial slur spoken on the street does not constitute outrageous conduct, but “a jury could reasonably conclude that the power dynamics of the workplace contribute to the extremity and the outrageousness of defendant’s conduct.”⁴⁶³

New Mexico

Following Restatement (Second) of Torts section 46, New Mexico law states that a claim for intentional infliction of emotional distress arises when “a defendant intentionally or recklessly causes severe emotional distress through extreme and outrageous conduct.”⁴⁶⁴ To recover emotional stress damages, the harm must be “severe.” Severe means that “a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances.”⁴⁶⁵ The New Mexico Court of Appeals held that an employer’s discharge of an employee while she was recuperating from surgery could constitute extreme and outrageous conduct.⁴⁶⁶ A mortuary’s conduct of disturbing the grave of the plaintiffs’ mother and exposing her remains was not found to be extreme or outrageous and plaintiffs’ mental distress was not found to be sufficiently severe to give rise to a cause of action for intentional infliction of emotional distress.⁴⁶⁷

New York

To establish a cause of action for intentional infliction of emotional distress under New York law, the plaintiff “must demonstrate wrongful conduct on the part of [the defendant] that was ‘intentionally or

461. *Decker v. Princeton Packet, Inc.*, 561 A.2d 1122, 1128 (N.J. 1989).

462. *Taylor*, 706 A.2d at 695.

463. *Id.*

464. *Jaynes v. Strong-Thorne Mortuary, Inc.*, 954 P.2d 45, 50 (N.M. 1997).

465. *Id.* (quoting *Folz v. State*, 797 P.2d 246, 254 (N.M. 1990)).

466. *Stock v. Grantham*, 964 P.2d 125, 136 (N.M. Ct. App. 1998).

467. *Jaynes*, 954 P.2d at 50.

recklessly' calculated to cause [the plaintiff] emotional distress."⁴⁶⁸ Following Restatement (Second) of Torts section 46, the misconduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community."⁴⁶⁹ New York courts have been extremely hesitant to find outrageous conduct. One court did find that a jury could rationally conclude that a neighbor's conduct was extreme and outrageous when he used vulgar language and made outrageous threats to the plaintiff and his young daughters when the plaintiff was recovering from major surgery and suffering the physical and emotional effects of cancer.⁴⁷⁰

North Carolina

The elements of intentional infliction of emotional distress in North Carolina are: "1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress."⁴⁷¹ Severe emotional distress is defined in North Carolina as "neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."⁴⁷² North Carolina courts have consistently found valid claims for intentional infliction of emotional distress in sexual harassment cases when there is an unfair power relationship; explicitly obscene language; sexual advances toward plaintiff; and inappropriate touching.⁴⁷³

North Dakota

In North Dakota, "[t]he elements of an action for intentional infliction of emotional distress are extreme and outrageous conduct that is intentional or reckless and causes severe emotional distress."⁴⁷⁴ "The 'extreme and outrageous' threshold is narrowly limited to conduct that exceeds 'all possible bounds of decency,' and which would arouse

468. *Brown v. City of New York*, 306 F. Supp. 2d 473, 481 (S.D.N.Y. 2004) (quoting *Fischer v. Maloney*, 373 N.E.2d 1215, 1217 (N.Y. 1978)).

469. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

470. *Stram v. Farrell*, 646 N.Y.S.2d 193, 194, 196 (App. Div. 1996).

471. *Waddle v. Sparks*, 414 S.E.2d 22, 27 (N.C. 1992) (quoting *Dickens v. Puryear*, 276 S.E.2d 325 (N.C. 1981)).

472. *Id.* (emphasis omitted) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 395 S.E.2d 85, 97 (N.C. 1990)).

473. *See Guthrie v. Conroy*, 567 S.E.2d 403, 409 (N.C. Ct. App. 2002).

474. *Zuger v. State*, 673 N.W.2d 615, 621 (N.D. 2004).

resentment against the actor and lead to an exclamation of 'Outrageous!' by an average member of the community."⁴⁷⁵ North Dakota has upheld a claim of intentional infliction of emotional distress in very few cases. The state's supreme court allowed an intentional infliction of emotional distress claim to go to the jury when an employee alleged that her supervisor discriminated against her, oppressed her repeatedly on the basis of gender, refused to discuss her employment situation, and knew of her unstable and deteriorating emotional condition.⁴⁷⁶

Ohio

The Ohio Supreme Court held that in order to prove intentional infliction of emotional distress, a plaintiff must show "(1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress."⁴⁷⁷ Unlike Restatement (Second) of Torts section 46, Ohio does not include reckless conduct in its elements for intentional infliction of emotional distress. In defining "extreme and outrageous" conduct, the Supreme Court of Ohio adopted the definition provided in section 46, and stated that "[l]iability has been found only where the conduct has been so outrageous . . . [that it goes] beyond all possible bounds of decency" and is so atrocious that it is "utterly intolerable in a civilized community."⁴⁷⁸ Furthermore, "[o]nly the most extreme wrongs, which do gross violence to the norms of a civilized society, will rise to the level of outrageous conduct."⁴⁷⁹ The Ohio Court of Appeals found a genuine issue of material fact as to the outrageousness of intentional conduct when an employer fired an employee when he did not return to work at the end of twelve weeks of medical leave following a dock leveler collapse on the employee's head that caused serious injuries.⁴⁸⁰ The employee became very upset after the employer's numerous phone calls and lack of understanding in repeatedly asking the employee to return to work.⁴⁸¹

475. *Id.* at 622.

476. *Swenson v. N. Crop Ins., Inc.*, 498 N.W.2d 174, 183 (N.D. 1993).

477. *Phung v. Waste Mgmt., Inc.*, 644 N.E.2d 286, 289 (Ohio 1994).

478. *Reamsnyder v. Jaskolski*, 462 N.E.2d 392, 394 (Ohio 1984).

479. *Brown v. Denny*, 594 N.E.2d 1008, 1012 (Ohio Ct. App. 1991).

480. *Rigby v. Fallsway Equip. Co.*, 779 N.E.2d 1056, 1058-59 (Ohio Ct. App. 2002).

481. *Id.* at 1065.

Oklahoma

“To recover damages for intentional infliction of emotional distress [in Oklahoma], a plaintiff must prove: (1) the defendant acted intentionally or recklessly; (2) the defendant’s conduct was extreme and outrageous; (3) the defendant’s conduct caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe.”⁴⁸² The Supreme Court of Oklahoma has held that an emotional distress claim was warranted to go to the jury when following an employee’s termination of a consensual sexual relationship with the business owner, the owner harassed the employee for two years with letters, phone calls, and visits to her home and workplace.⁴⁸³ In employment cases in which the plaintiff-employee alleged that the employer mimicked and ridiculed the employee;⁴⁸⁴ made lewd remarks and embarrassed the employee;⁴⁸⁵ and used derogatory sexual comments,⁴⁸⁶ Oklahoma courts have not found intentional infliction of emotional distress.

Oregon

Oregon has adopted elements of Restatement (Second) of Torts section 46, but has not adopted it *in toto* as Oregon law.⁴⁸⁷

“To state a claim for intentional infliction of severe emotional distress, a plaintiff must plead that (1) the defendant intended to inflict severe emotional distress on the plaintiff, (2) the defendant’s acts were the cause of the plaintiff’s severe emotional distress, and (3) the defendant’s acts constituted an extraordinary transgression of the bounds of socially tolerable conduct.”⁴⁸⁸

Following the commentary with section 46, a claim for intentional infliction of emotional distress can arise when the defendant “desires to inflict severe emotional distress” or when the defendant knows “such

482. *Computer Publ’ns, Inc. v. Welton*, 49 P.3d 732, 735 (Okla. 2002).

483. *Id.* at 736.

484. *Eddy v. Brown*, 715 P.2d 74, 76–77 (Okla. 1986).

485. *Anderson v. Okla. Temp. Servs., Inc.*, 925 P.2d 574, 577 (Okla. Civ. App. 1996).

486. *Mirzaie v. Smith Cogeneration, Inc.*, 962 P.2d 678, 682–84 (Okla. Civ. App. 1998).

487. *Delaney v. Clifton*, 41 P.3d 1099, 1104 (Or. Ct. App. 2002).

488. *McGanty v. Staudenraus*, 901 P.2d 841, 849 (Or. 1995) (quoting *Sheets v. Knight*, 779 P.2d 1000 (Or. 1989)).

distress is certain, or substantially certain, to result from his conduct.”⁴⁸⁹ Oregon courts look particularly closely at the setting in which the conduct occurred as well as the relationships between the parties to determine the degree of offensiveness of the conduct.⁴⁹⁰ The Oregon Court of Appeals upheld a claim for intentional infliction of emotional distress when a physically disabled bus passenger sued the metropolitan transportation district for a bus driver allegedly belittling, berating, and insulting the passenger.⁴⁹¹ The Oregon Supreme Court has declined to resolve the question of whether third-party claims for intentional infliction of emotional distress generally should be acknowledged in Oregon.⁴⁹²

Pennsylvania

There is much controversy over whether Pennsylvania jurisprudence recognizes the tort of intentional infliction of emotional distress. It is clear that in order to state such a claim, the elements of section 46 of the Restatement (Second) of Torts must be satisfied: “(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”⁴⁹³ In addition, the plaintiffs must allege physical injury.⁴⁹⁴ Pennsylvania bars recovery for intentional infliction of emotional distress when a third-party does not have contemporaneous observation of the tort allegedly committed upon a relative and holds that presence is required to pursue a tort for severe emotional distress.⁴⁹⁵

Rhode Island

To impose liability based upon the intentional infliction of emotional distress in Rhode Island, “(1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress, (2) the conduct must be extreme and outrageous, (3) there must be a causal connection between the wrongful conduct and the emotional distress,

489. *Id.* at 853. (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965)).

490. See *Delaney*, 41 P.3d at 1106.

491. *Williams v. Tri-County Metro. Transp. Dist.*, 958 P.2d 202, 203, 205 (Or. Ct. App. 1998).

492. *Delaney*, 41 P.3d at 1110, *rev. denied*, 54 P.3d 1041 (Or. 2002).

493. *Hunger v. Grand Cent. Sanitation*, 670 A.2d 173, 177 (Pa. Super. Ct. 1996).

494. *Hart v. O'Malley*, 647 A.2d 542, 554 (Pa. Super. Ct. 1994).

495. *Taylor v. Albert Einstein Med. Ctr.*, 754 A.2d 650, 653 (Pa. 2000).

and (4) the emotional distress in question must be severe.”⁴⁹⁶ Rhode Island requires at least some proof of medically established physical symptomatology for both negligent and intentional infliction of emotional distress.⁴⁹⁷ The proof of physical symptomatology is a relaxed standard in Rhode Island. For example, a plaintiff was found to have established physical symptomatology based upon his own testimony about emotional distress and humiliation despite the absence of a medical expert.⁴⁹⁸

South Carolina

To recover for the intentional infliction of emotional distress in South Carolina, a plaintiff must establish that:

- (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;
- (2) the [defendant’s] conduct was so “extreme and outrageous” as to exceed “all possible bounds of decency” and must be regarded as “atrocious and utterly intolerable in a civilized community”;
- (3) the actions of the defendant caused the plaintiff’s emotional distress;
- and (4) the emotional distress suffered by the plaintiff was “severe” so that “no reasonable [person] could be expected to endure it.”⁴⁹⁹

The majority of South Carolina cases finding outrageous conduct generally require “hostile or abusive encounters” or “coercive or oppressive conduct.”⁵⁰⁰ The South Carolina Supreme Court has held that a jury could find outrageous conduct when an employer forced an employee to perform activities in public which exposed her incontinence problem.⁵⁰¹ A claim for intentional infliction of emotional distress was also upheld when a homebuyer repeatedly subjected a real estate agent to public brow beatings, obscenities, and threats over a two-year period

496. *Champlin v. Wash. Trust Co.*, 478 A.2d 985, 989 (R.I. 1984).

497. *Swerdlick v. Koch*, 721 A.2d 849, 863 (R.I. 1998).

498. *Adams v. Uno Rests., Inc.*, 794 A.2d 489, 492–93 (R.I. 2002).

499. *Ford v. Hutson*, 276 S.E.2d 776, 778 (S.C. 1981) (citations omitted).

500. *Gattison v. S.C. State Coll.*, 456 S.E.2d 414, 417 (S.C. Ct. App. 1995); *Wright v. Sparrow*, 381 S.E.2d 503, 506 (S.C. Ct. App. 1989).

501. *McSwain v. Shei*, 402 S.E.2d 890, 892 (S.C. 1991).

and entered her home without permission and verbally attacked her in front of her guests.⁵⁰²

South Dakota

The tort of intentional infliction of emotional distress is proved in South Dakota by establishing that the defendant “(1) by extreme and outrageous conduct, (2) acted intentionally or recklessly to cause the plaintiff severe emotional distress, (3) which conduct in fact caused the plaintiff severe distress, and (4) the plaintiff suffered an extreme, disabling emotional response to the defendant’s conduct.”⁵⁰³ In South Dakota, “[t]he tort of intentional infliction of emotional distress requires no proof of physical injury or actual pecuniary loss.”⁵⁰⁴ Following comment *d* in the Restatement (Second) of Torts section 46, the conduct necessary to form intentional infliction of emotional distress must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community.”⁵⁰⁵ South Dakota has found outrageous conduct when a husband made public accusations of child abuse that caused his wife to lose her job.⁵⁰⁶ A jury also believed that a former husband arranging to have his former wife criminally prosecuted on a bogus theft charge, harassing her, and sending her threatening letters constituted outrageous conduct.⁵⁰⁷

Tennessee

Under Tennessee law, there are three essential elements to a cause of action for intentional infliction of emotional distress: “(1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury.”⁵⁰⁸ Tennessee has adopted the definition of outrageous conduct given in the Restatement (Second) of Torts.⁵⁰⁹ The Supreme Court of Tennessee held that a claim for intentional infliction of emotional distress was

502. *Ford*, 276 S.E.2d at 779–80.

503. *Henry v. Henry*, 604 N.W.2d 285, 288 (S.D. 2000).

504. *Id.*

505. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

506. *Christians v. Christians*, 637 N.W.2d 377, 382–83 (S.D. 2001).

507. *Henry*, 604 N.W.2d at 287.

508. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997).

509. *Id.* at 622–23.

sufficiently alleged when employees of a funeral home made upsetting comments to a deceased individual's children regarding the condition of the decedent's body after it was embalmed.⁵¹⁰

Texas

In order to recover damages for intentional infliction of emotional distress in Texas, a plaintiff must establish that "(1) the defendant acted intentionally or recklessly, (2) the [defendant's] conduct was 'extreme and outrageous,' (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the resulting emotional distress was severe."⁵¹¹ Intentional infliction of emotional distress requires either that the actor intends to cause severe emotional distress or severe emotional distress is the primary risk created by the actor's reckless conduct.⁵¹² Texas has adopted the definition of outrageous conduct offered in Restatement (Second) of Torts section 46 and the Supreme Court of Texas has directed its courts to consider both the conduct's context and the parties' relationship.⁵¹³ Thus, evidence of physical and emotional abuse was sufficient to support the finding that a husband caused his wife severe emotional distress and that his behavior was extreme and outrageous.⁵¹⁴

Utah

Utah bases a claim of intentional infliction of emotional distress on two elements. A plaintiff must show that the defendant:

[I]ntentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; *and* his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.⁵¹⁵

510. *Leach v. Taylor*, 124 S.W.3d 87, 87 (Tenn. 2004).

511. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998).

512. *Id.* at 63.

513. *See GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 611-12 (Tex. 1999).

514. *Toles v. Toles*, 45 S.W.3d 252, 262-63 (Tex. App. 2001).

515. *Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17, 30 (Utah 2003) (citations omitted).

A claim for intentional infliction of emotional distress was found when an attorney used his fiduciary position and information gained while representing his client in a divorce to lure the client into a sexual relationship.⁵¹⁶

Vermont

To prove intentional infliction of emotional distress, plaintiffs must show “outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct.”⁵¹⁷ Following Restatement (Second) of Torts section 46, the plaintiff must demonstrate that the defendant’s conduct was so outrageous as to surpass “all possible bounds of decency” and “be regarded as atrocious, and utterly intolerable in a civilized community.”⁵¹⁸ A claim for intentional infliction of emotional distress was upheld when an employer summoned an employee to a three-hour meeting without notice and without break for rest or food, repeatedly badgered the employee to amend and sign a statement regarding the employer’s allegations of theft, and terminated the employee immediately after the meeting despite the employee’s eighteen years of service.⁵¹⁹

Virginia

In Virginia, a plaintiff who seeks to recover damages for intentional infliction of emotional distress must show that the wrongdoer’s conduct is intentional or reckless; the conduct is outrageous and intolerable; the alleged conduct and emotional distress are causally connected; and the distress is severe.⁵²⁰ Liability for intentional infliction of emotional distress “arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it.”⁵²¹ Following section 46 of the Restatement (Second) of Torts, Virginia defines emotional distress as “the suffering or mental anguish that arises from being placed in reasonable fear of

516. *Walter v. Stewart*, 67 P.3d 1042, 1048–49 (Utah Ct. App. 2003).

517. *Crump v. P & C Food Mkts, Inc.*, 576 A.2d 441, 448 (Vt. 1990) (quoting *Birkenhead v. Coombs*, 465 A.2d 244, 247 (Vt. 1983)).

518. *Demag v. Am. Ins. Cos.*, 508 A.2d 697, 699 (Vt. 1986) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

519. *Crump*, 576 A.2d at 448–49.

520. *Jordan v. Shands*, 500 S.E.2d 215, 218–19 (Va. 1998).

521. *Russo v. White*, 400 S.E.2d 160, 163 (Va. 1991).

death or bodily injury and is so severe that no reasonable person could be expected to endure it.”⁵²² It does not require that a plaintiff be present during the outrageous conduct in order to recover for the intentional infliction of emotional distress.⁵²³ For instance, a mother did not have to be present during the sexual abuse of her daughter in order to recover for intentional infliction of emotional distress.⁵²⁴

Washington

To prevail on a claim for outrage, a plaintiff must prove three elements: “(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff.”⁵²⁵ Following the comments in Restatement (Second) of Torts section 46, Washington holds that plaintiffs who were not present when the allegedly outrageous conduct occurred cannot recover for intentional infliction of emotional distress.⁵²⁶ In addition, Washington does not require objective symptomatology in terms of physical injury or bodily harm to establish intentional infliction of emotional distress.⁵²⁷ A claim for intentional infliction of emotional distress was found when a manufacturer’s employees were exposed to toxic chemicals at the workplace and the employer conducted human experimentation.⁵²⁸ The Supreme Court of Washington has also held that an employer can be held vicariously liable for intentional infliction of emotional distress when an employee’s conduct is sufficiently outrageous.⁵²⁹

West Virginia

In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress in West Virginia, four elements must be established. It must be shown:

- (1) that the defendant’s conduct was atrocious, intolerable, and so extreme and outrageous as to exceed

522. *Woolfolk v. Virginia*, 447 S.E.2d 530, 534 (Va. Ct. App. 1994).

523. *See Morgan v. Foretich*, 846 F.2d 941, 950 (4th Cir. 1988).

524. *Id.*

525. *Reid v. Pierce County*, 961 P.2d 333, 337 (Wash. 1998).

526. *Id.* at 338.

527. *Kloepfel v. Bokor*, 66 P.3d 630, 633 (Wash. 2003).

528. *Birklid v. Boeing Co.*, 904 P.2d 278, 288–89 (Wash. 1995).

529. *Robel v. Roundup Corp.*, 59 P.3d 611, 619–20 (Wash. 2002).

the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.⁵³⁰

The Supreme Court of Appeals of West Virginia has held that a corporation cannot recover for the tort of intentional infliction of emotional distress.⁵³¹ But, an employer may be liable for intentional infliction of emotional distress for failing to stop a supervisor's outrageous conduct despite repeated requests.⁵³² The employer may be liable whether the supervisor "caused, contributed to, or acquiesced in the intentional or reckless infliction of emotional distress upon an employee."⁵³³

Wisconsin

In Wisconsin, a person may recover damages for the intentional infliction of severe emotional distress upon him or her by another. Four factors must be established for an injured person to recover: "[(1)] That the conduct was intended to cause emotional distress, [(2)] That the conduct was extreme and outrageous, [(3)] That the conduct was a cause of the person's emotional distress, and [(4)] That the emotional distress was extreme and disabling."⁵³⁴ Recklessness on the part of a defendant will not support such an action, since Wisconsin does not recognize recklessness as a separate form of tortious conduct.⁵³⁵ Wisconsin requires that there be "something more than a showing that the defendant intentionally engaged in the conduct that gave rise to emotional distress in the plaintiff; the plaintiff must show that the conduct was engaged in for the purpose of causing emotional

530. *Travis v. Alcon Labs., Inc.*, 504 S.E.2d 419, 425 (W. Va. 1998).

531. *Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc.*, 341 S.E.2d 414, 417 (W. Va. 1986).

532. *Travis*, 504 S.E.2d at 431-32.

533. *Id.* at 432.

534. Wis. JI-Civil 2725 (2006).

535. *Alsteen v. Gehl*, 124 N.W.2d 312, 317 (Wis. 1963).

distress.”⁵³⁶ Thus, when an owner of a dog brought action against the city police department for shooting and killing the dog, the owner failed to establish a claim for intentional infliction of emotional distress because there was no evidence that the officer acted with the purpose of causing the owner emotional harm.⁵³⁷

Wyoming

Wyoming has adopted the tort of intentional infliction of emotional distress as defined in the Restatement (Second) of Torts section 46: “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”⁵³⁸ While Wyoming acknowledges that certain conduct in employment situations may be outrageous enough to provide a terminated employee with a claim for intentional infliction of emotional distress, “if an employee’s mental distress is caused solely by a termination that was permitted by the contract, then the employer has a complete defense even if the employer knows that the termination will cause the employee emotional distress.”⁵³⁹ Wyoming has adopted the third party intentional infliction of emotional distress cause of action found in the Restatement (Second) of Torts section 46(2) and does not require that the conduct be repetitive or recurrent before it can be considered extreme and outrageous. The plaintiff must show that the behavior was “beyond all possible bounds of decency, and [would be] regarded as atrocious, and utterly intolerable in a civilized community.”⁵⁴⁰ A third party does not necessarily have to visually observe the outrageous conduct, but “must simply show his ‘sensory and contemporaneous observance’ of the defendant’s acts.”⁵⁴¹ Thus the claimant is not required to have seen the outrageous acts and may recover “if he gained personal and contemporaneous knowledge of them through the use of his remaining senses.”⁵⁴²

536. *Rabideau v. City of Racine*, 2001 WI 57, ¶ 36, 243 Wis. 2d 486, ¶ 36, 627 N.W.2d 795, ¶ 36.

537. *Id.*

538. *Trabing v. Kinko’s, Inc.*, 57 P.3d 1248, 1256 (Wyo. 2002).

539. *Id.*

540. *Bevan v. Fix*, 42 P.3d 1013, 1020 (Wyo. 2002).

541. *Id.* at 1024.

542. *Id.*

APPENDIX C
NEGLIGENT INFLICTION—STATE-BY-STATE ANALYSIS

Alabama

Alabama follows the “zone-of-danger” test, limiting recovery for negligent infliction of emotional distress to plaintiffs who sustain a physical injury as a result of a defendant’s conduct or who are placed in immediate risk of physical harm by that conduct.⁵⁴³ The state appears not to have dealt with a bystander situation.

Alaska

Persons in Alaska can recover for negligent infliction of emotional distress they suffer under limited circumstances. “Generally, damages are not awarded . . . in the absence of physical injury.”⁵⁴⁴ In bystander situations: “(1) the plaintiff [must be] located near the scene of the accident, (2) the shock [must result] from a direct emotional impact from the sensory and contemporaneous observance of the accident, and (3) a close relationship [must exist] between plaintiff and victim.”⁵⁴⁵

Arizona

In Arizona, to recover for the tort of negligent infliction of emotional distress, the shock or mental anguish of the plaintiff must manifest itself as a physical injury.⁵⁴⁶ Without that, damages are too speculative.⁵⁴⁷ In bystander situations, “the emotional distress must result from witnessing an injury to a person with whom the plaintiff has a close personal relationship, either by consanguinity or otherwise.”⁵⁴⁸

Arkansas

A cause of action for negligent infliction of emotional distress is not recognized in Arkansas.⁵⁴⁹ In wrongful death cases, however, the state’s

543. *Wal-Mart Stores, Inc. v. Bowers*, 752 So. 2d 1201, 1203 (Ala. 1999).

544. *Kallstrom v. United States*, 43 P.3d 162, 165 (Alaska 2002).

545. *Id.*

546. *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979).

547. *Id.* at 669–70.

548. *Id.* at 670.

549. *Mechs. Lumber Co. v. Smith*, 752 S.W.2d 763, 765 (Ark. 1988).

death statute is the sole means of recovery for mental anguish in the death of a loved one.⁵⁵⁰

California

In California, “[a] cause of action for negligent infliction of emotional distress requires that a plaintiff show ‘(1) serious emotional distress, (2) actually and proximately caused by (3) [the] wrongful conduct (4) [of] a defendant who should have foreseen that the conduct would cause such distress.’”⁵⁵¹ In bystander situations, recovery may be had if, but only if, the plaintiff:

(1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.⁵⁵²

Colorado

In Colorado, to establish a case of negligent infliction of emotional distress, a plaintiff is

required to present evidence from which a jury could reasonably conclude that defendant’s negligence subjected [the plaintiff] to an unreasonable risk of bodily harm and caused [the plaintiff] to be put in fear for [his or her] own safety, that plaintiff’s fear was shown by physical consequences or long-continued emotional disturbance, and that plaintiff’s fear was the cause of the damages [he or she] claimed.⁵⁵³

The state courts have yet to rule on the bystander situation except to hold that no recovery would be allowed in a case in which the bystander

550. *Waldrip v. McGarity*, 605 S.W.2d 5, 6 (Ark. 1980).

551. *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir. 2004) (quoting *Brooks v. United States*, 29 F. Supp. 2d 613, 617 (N.D. Cal. 1998)).

552. *Thing v. La Chusa*, 771 P.2d 814, 829–30 (Cal. 1989) (footnotes omitted).

553. *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89, 93 (Colo. Ct. App. 1997).

was not within the zone of danger and did not fear for his or her own safety.⁵⁵⁴

Connecticut

To recover for negligent infliction of emotional distress in Connecticut, the plaintiff must prove that “(1) the defendant’s conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff’s distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant’s conduct was the cause of the plaintiff’s distress.”⁵⁵⁵ In bystander situations, the plaintiff must prove:

(1) he or she is closely related to the injury victim, such as the parent or the sibling of the victim; (2) the emotional injury of the bystander is caused by the contemporaneous sensory perception of the event or conduct that causes the injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the victim’s condition or location; (3) the injury of the victim must be substantial, resulting in his or her death or serious physical injury; and (4) the bystander’s emotional injury must be serious, beyond that which would be anticipated in a disinterested witness and which is not the result of abnormal response.⁵⁵⁶

Delaware

When negligence causes fright in a person within the immediate area of physical danger from that negligence, which in turn produces physical consequences such as would be elements of damages if a bodily injury had been suffered, the injured party is entitled to recover for the emotional harm.⁵⁵⁷ Such a rule would not be extended to cover the bystander situation, unless the bystander was within the zone of danger to the victim of the tortious conduct.⁵⁵⁸ When “negligent conduct results

554. *James v. Harris*, 729 P.2d 986, 987 (Colo. Ct. App. 1986).

555. *Carrol v. Allstate Ins. Co.*, 815 A.2d 119, 127 (Conn. 2003).

556. *Clohessy v. Bachelor*, 675 A.2d 852, 865 (Conn. 1996).

557. *Robb v. Pa. R.R.*, 210 A.2d 709, 714–15 (Del. 1965).

558. *Mancino v. Webb*, 274 A.2d 711, 714 (Del. Super. Ct. 1971).

only in emotional disturbance no bodily injury or sickness being present, there can be no recovery.”⁵⁵⁹

District of Columbia

To recover for negligent infliction of emotional distress in the absence of a direct physical injury, a plaintiff must show that he or she was within the zone of physical danger caused by the tortfeasor's negligence so as to fear for his or her own safety.⁵⁶⁰ Bystanders who are not within the zone of danger appear to have no recourse.⁵⁶¹

Florida

Florida had applied the impact rule in most negligent infliction of emotional distress cases.⁵⁶² However, in bystander situations, “a claim exists for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured.”⁵⁶³ Thereafter, the court refused to apply the impact rule in an action for emotional damages resulting from the birth of a stillborn child because of the defendant's negligence⁵⁶⁴ and held that the impact rule does not apply to the tort of wrongful birth, noting that the impact rule does not generally apply in recognized torts where the damages “are predominately emotional, such as defamation or invasion of privacy.”⁵⁶⁵

Georgia

In Georgia, a claim based on the negligent infliction of emotional distress requires: “(1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury

559. *Cosgrove v. Beymer*, 244 F. Supp. 824, 825 (D. Del. 1965) (emphasis omitted); see also *Newman v. Exxon Corp.*, 722 F. Supp. 1146, 1149 (D. Del. 1989).

560. *Kaiser v. United States*, 761 F. Supp. 150, 156 (D.D.C. 1991); *Jane W. v. President & Dirs. of Georgetown Coll.*, 863 A.2d 821, 826 (D.C. 2004); *Johnson v. Dist. of Columbia*, 728 A.2d 70, 77 (D.C. 1999); *Williams v. Baker*, 572 A.2d 1062, 1067 (D.C. 1990) (en banc).

561. See *Williams*, 572 A.2d at 1067.

562. *Gracey v. Eaker*, 837 So. 2d 348, 358 (Fla. 2002).

563. *Champion v. Gray*, 478 So. 2d 17, 20 (Fla. 1985).

564. *Tanner v. Hartog*, 696 So. 2d 705, 708 (Fla. 1997).

565. *Kush v. Lloyd*, 616 So. 2d 415, 422 (Fla. 1992).

to the plaintiff causes the plaintiff's mental suffering or emotional distress."⁵⁶⁶ However, its supreme court has stated that:

When . . . a parent and child sustain a direct physical impact and physical injuries through the negligence of another, and the child dies as the result of such negligence, the parent may attempt to recover for serious emotional distress from witnessing the child's suffering and death without regard to whether the emotional trauma arises out of the physical injury to the parent. This is in accord with the precepts of the impact approach and appropriately restricts recovery to those directly affected by the defendant's negligent act or omission.⁵⁶⁷

Hawaii

Hawaii has abandoned impact and zone of danger rules, holding merely "that there is a duty to refrain from the negligent infliction of serious mental distress."⁵⁶⁸ Although the duty to refrain from negligent infliction of severe emotional distress exists in bystander situations regardless of the absence of physical impact, resulting physical injury, or blood relationship, the plaintiff must, however, be located within a reasonable distance from the actual scene of the accident.⁵⁶⁹ Thus, a person located in California at the time of an automobile accident had no cause of action for negligent infliction of serious mental distress.⁵⁷⁰

Idaho

It is beyond dispute that in Idaho no cause of action for negligent infliction of emotional distress will arise unless there is "both an allegation and proof that a party claiming negligent infliction of emotional distress suffered a physical injury, *i.e.*, a physical manifestation of an injury *caused* by the negligently inflicted emotional distress."⁵⁷¹ "Physical manifestations of the emotional injury enable a plaintiff to posit a claim for negligent infliction of emotional distress"

566. *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 85 (Ga. 2000).

567. *Id.* at 86–87 (citation omitted).

568. *Rodriguez v. State*, 472 P.2d 509, 520 (Haw. 1970).

569. *Kelley v. Kokua Sales & Supply, Ltd.*, 532 P.2d 673, 675 (Haw. 1975).

570. *Id.* at 676.

571. *Evans v. Twin Falls County*, 796 P.2d 87, 95 (Idaho 1990) (emphasis added).

and can be established by lay testimony.⁵⁷² It appears that a bystander situation has not been considered by Idaho appellate courts.

Illinois

In Illinois one who is in a “zone of physical danger and who, because of the defendant’s negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress.”⁵⁷³ The rule does not require that the plaintiff suffer a physical impact or injury at the time of the negligent act, but it does require that he or she must have been in such proximity to the consequences of the tortious act that there was a high risk to him or her of physical impact.⁵⁷⁴ The plaintiff “must show physical injury or illness as a result of the emotional distress caused by the defendant’s negligence.”⁵⁷⁵ The zone of danger rule and the requirement of physical injury or illness also apply to bystander situations.⁵⁷⁶

Indiana

In Indiana, when one sustains “a direct impact by the negligence of another and, by virtue of that direct involvement sustains emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person,” that person may maintain an action to recover for that emotional trauma without regard to whether that trauma arose out of or accompanied any physical injury.⁵⁷⁷ In bystander situations, when:

[T]he direct impact test is not met, the bystander may nevertheless establish “direct involvement” by proving that [he or she] actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant’s negligent or otherwise tortious conduct.⁵⁷⁸

572. *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 775 P.2d 640, 646 (Idaho 1989).

573. *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983).

574. *See id.*

575. *Id.*

576. *See id.*

577. *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991).

578. *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000).

Iowa

At one time it appeared that Iowa would not allow recovery for negligent infliction of emotional distress in any type of case.⁵⁷⁹ However, the Iowa Supreme Court subsequently held that a bystander could recover for emotional distress caused by witnessing the peril to a victim caused by the negligence of another when:

1. The bystander was located near the scene of the accident.
2. The emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
3. The bystander and the victim were husband and wife or related within the second degree of consanguinity or affinity.
4. A reasonable person in the position of the bystander would believe, and the bystander did believe, that the direct victim of the accident would be seriously injured or killed.
5. The emotional distress to the bystander must be serious.⁵⁸⁰

It would thus appear that in non-bystander situations recovery for serious emotional distress would be allowed if the plaintiff was in harm's way and feared for his or her safety.

Kansas

Generally, "[t]here may be no recovery in Kansas for emotional distress unless that distress results in 'physical impact': an actual physical injury to the plaintiff."⁵⁸¹ Generalized physical symptoms of emotional distress such as headaches and insomnia are insufficient to state a cause of action.⁵⁸² It appears that Kansas courts have yet to consider negligent infliction in a bystander situation.

579. *See* *Wambsgans v. Price*, 274 N.W.2d 362, 365 (Iowa 1979).

580. *Barnhill v. Davis*, 300 N.W.2d 104, 108 (Iowa 1981); *see also* *Baas v. Hoye*, 766 F.2d 1190, 1196-97 (8th Cir. 1985); *Pollock v. Ottumwa Reg'l Mobile Intensive Care Servs.*, Nos. 0-631, 00-0040, 2000 WL 1825444, at *2 (Iowa Ct. App. Dec. 13, 2000).

581. *Anderson v. Scheffler*, 752 P.2d 667, 669 (Kan. 1988); *see also* *Hoard v. Shawnee Mission Med. Ctr.*, 662 P.2d 1214, 1219-20 (Kan. 1983) (citing exceptions to the general rule in Kansas).

582. *Hopkins v. State*, 702 P.2d 311, 319-20 (Kan. 1985).

Kentucky

For a long time Kentucky courts have held that an action will not lie for fright, shock, or mental anguish that is not accompanied by physical contact or injury.⁵⁸³ The reason advanced is that "such damages are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured."⁵⁸⁴

Louisiana

The state appears to generally require a physical manifestation of injury to recover for accompanying emotional distress when negligently inflicted, indicating that there is no independent tort for negligent infliction of emotional distress. "[I]f the defendant's conduct is merely negligent and causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, the defendant is not liable for such emotional disturbance."⁵⁸⁵ However, "[t]here may be [exceptions], but all of these categories have in common the especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious."⁵⁸⁶ As to bystander situations, the matter appears to have been handled by statute. The Louisiana Civil Code Article 2315.6 provides:

A. The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury:

- (1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.
- (2) The father and mother of the injured person, or either of them.
- (3) The brothers and sisters of the injured person or any of them.

583. See *Wilhoite v. Cobb*, 761 S.W.2d 625, 626 (Ky. Ct. App. 1988).

584. *Morgan v. Hightower's Adm'r.*, 163 S.W.2d 21, 22 (Ky. Ct. App. 1942).

585. *Moresi v. State*, 567 So. 2d 1081, 1095 (La. 1990).

586. *Id.* at 1096.

(4) The grandfather and grandmother of the injured person, or either of them.

B. To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable. Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article.⁵⁸⁷

Maine

The non-bystander who claims "negligent infliction of emotional distress may recover when the defendant's negligence was directed at the victim; namely, that the defendant owed the victim an independent duty of care and that the defendant should have foreseen that mental distress would result from his negligence."⁵⁸⁸ However, the bystander or, as the court calls the person, an "indirect victim,"

who witnesses another person being harmed by a tortfeasor's [negligence] may recover for serious mental distress only if "[t]he psychic injury may be deemed foreseeable when the plaintiff bystander was present at the scene of the accident, suffered mental distress as a result of observing the accident and ensuing danger to the victim, and was closely related to the victim."⁵⁸⁹

Maryland

In Maryland, recovery may be had for negligent infliction of emotional distress that results in "physical injury." The requisite "physical injury" resulting from emotional distress may be proved in one of four ways. The first three involve "manifestations of a physical injury through evidence of an external condition or by symptoms of a pathological or physiological state. Proof of a 'physical injury' is also

587. LA. CIV. CODE ANN. art. 2315.6 (1997); see *Kipps v. Caillier*, 197 F.3d 765, 770-71 (5th Cir. 1999); *Maney v. Evans*, 780 So. 2d 1136, 1139 (La. Ct. App. 2001).

588. *Michaud v. Great N. Nekoosa Corp.*, 715 A.2d 955, 959 (Me. 1998).

589. *Id.* (quoting *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 438 (Me. 1982)).

permitted by evidence indicative of a ‘mental state,’” using the term physical “to represent that the injury for which recovery is sought is capable of objective determination.”⁵⁹⁰ In bystander situations, the state appears to also subscribe to the zone of danger requirement.⁵⁹¹

Massachusetts

In order to recover for negligently inflicted emotional distress in Massachusetts, a plaintiff must prove “(1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case.”⁵⁹² “Only a bystander plaintiff who is closely related to a third person directly injured by a defendant’s tortious conduct, and suffers emotional injuries as the result of witnessing the accident or coming upon the third person soon after the accident, states a claim for which relief may be granted.”⁵⁹³

Michigan

In Michigan, “where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant’s negligent conduct,” the plaintiff may recover damages “for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock.”⁵⁹⁴ In a bystander case,

the elements of negligent infliction of emotional distress are: (1) serious injury threatened or inflicted on a person, not the plaintiff, of a nature to cause severe mental disturbance to the plaintiff, (2) shock by the plaintiff from witnessing the event that results in the plaintiff’s actual physical harm, (3) close relationship between the plaintiff and the injured person (parent, child, husband, or wife), and (4) presence of the plaintiff at the location of the accident at the time the accident occurred or, if not

590. *Vance v. Vance*, 408 A.2d 728, 733–34 (Md. 1979); *see also* *Bowman v. Williams*, 165 A. 182, 184 (Md. 1933).

591. *Matthews v. Amberwood Assocs. Ltd. P’ship, Inc.*, 719 A.2d 119, 132 (Md. 1998).

592. *Rodriguez v. Cambridge Hous. Auth.*, 823 N.E.2d 1249, 1253 (Mass. 2005) (quoting *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982)).

593. *Migliori v. Airborne Freight Corp.*, 690 N.E.2d 413, 415 (Mass. 1998).

594. *Daley v. LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970).

presence, at least shock “fairly contemporaneous” with the accident.⁵⁹⁵

Minnesota

In Minnesota a plaintiff must “satisfy the three elements of a claim for negligent infliction of emotional distress: (1) the plaintiff was in the zone of danger of physical impact; (2) reasonably feared for her own safety; and (3) has severe emotional distress with physical manifestations.”⁵⁹⁶ In addition to those three elements, in bystander cases a plaintiff “may recover damages for distress caused by fearing for the safety of or by witnessing serious bodily injury to one with whom the plaintiff has a close relationship when such serious bodily injury was caused by the defendant’s negligent conduct.”⁵⁹⁷

Mississippi

In Mississippi, “a plaintiff therefore may not recover emotional distress damages resulting from ordinary negligence without proving some sort of physical manifestation of injury or demonstrable physical harm.”⁵⁹⁸ In bystander situations:

the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁵⁹⁹

Missouri

Missouri courts will not recognize a cause of action for negligent infliction of emotional distress without contemporaneous physical

595. *Hesse v. Ashland Oil, Inc.*, 642 N.W.2d 330, 337 (Mich. 2002).

596. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 765 (Minn. 2005).

597. *Id.*

598. *Wilson v. Gen. Motors Acceptance Corp.*, 883 So. 2d 56, 65 (Miss. 2004) (quoting *American Bankers' Ins. Co. v. Wells*, 819 So. 2d 1196, 1209 (Miss. 2001)).

599. *Entex, Inc. v. McGuire*, 414 So. 2d 437, 444 (Miss. 1982).

trauma. To recover for emotional distress the plaintiff must show that: “(1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant.”⁶⁰⁰ In bystander cases:

a plaintiff states a cause of action for negligent infliction of emotional distress upon injury to a third person only upon a showing: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) that plaintiff was present at the scene of an injury producing, sudden event, (3) and that plaintiff was in the zone of danger, i.e., placed in a reasonable fear of physical injury to his or her own person.⁶⁰¹

Montana

In Montana, “[a] cause of action for negligent infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant’s negligent act or omission.”⁶⁰² As to bystander situations:

1. The shock must result from a direct emotional impact upon the plaintiff from the sensory and contemporaneous perception of the accident, as contrasted with learning of the accident from others after its occurrence.
2. The plaintiff and victim must be closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.
3. Either death or serious physical injury of the victim must have occurred as a result of the defendant’s negligence.⁶⁰³

Nebraska

To recover for negligent infliction of emotional distress a plaintiff must prove that he or she was within the zone of danger of the

600. Bass v. Nooney Co., 646 S.W.2d 765, 772–73 (Mo. 1983) (en banc).

601. Asaro v. Cardinal Glennon Mem’l. Hosp., 799 S.W.2d 595, 599–600 (Mo. 1990).

602. Sacco v. High Country Indep. Press, Inc., 896 P.2d 411, 425 (Mont. 1995).

603. Versland v. Caron Transp., 671 P.2d 583, 588 (Mont. 1983).

defendant's negligence and that the emotional distress is severe.⁶⁰⁴ In bystander situations, the three evidentiary requirements for a plaintiff seeking recovery for the negligent infliction of emotional distress have been stated most recently as: "(1) a seriously injured victim as the result of the proven negligence of the defendant, (2) an intimate familial relationship with the victim, and (3) emotional distress so severe that no person could be expected to endure it."⁶⁰⁵

Nevada

"[I]n cases in which emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness must be presented" and the harm occasioned by the defendant's negligence must be foreseeable to be compensable.⁶⁰⁶ In bystander situations, (1) the plaintiff must have been located near the scene of the accident as contrasted to being a distance away from it; (2) the shock must have resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) the plaintiff and the victim must have been closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁶⁰⁷

New Hampshire

In New Hampshire, to recover for emotional distress under a traditional negligence theory, plaintiffs must demonstrate physical symptoms of their distress regardless of physical impact.⁶⁰⁸ In bystander situations, the plaintiff must "witness or contemporaneously sensorially perceive a serious injury" to the other and suffer serious mental and emotional harm that is accompanied by objective physical symptoms.⁶⁰⁹ Any action for "negligent infliction of emotional distress must be based

604. *Hamilton v. Nestor*, 659 N.W.2d 321, 326–27 (Neb. 2003).

605. *Vosburg v. Cenex-Land O'Lakes Agronomy Co.*, 513 N.W.2d 870, 873 (Neb. 1994).

606. *Olivero v. Lowe*, 995 P.2d 1023, 1026 (Nev. 2000).

607. *State v. Eaton*, 710 P.2d 1370, 1377–78 (Nev. 1985).

608. *O'Donnell v. HCA Health Servs. of N.H., Inc.*, 883 A.2d 319, 324 (N.H. 2005).

609. *Corso v. Merrill*, 406 A.2d 300, 308 (N.H. 1979).

on the criteria of foreseeability outlined in this opinion and on the causal negligence of the defendant.”⁶¹⁰

A bright line rule that includes only individuals related by blood or marriage is overinclusive because it permits recovery when the suffering accompanies a legal or biological link between bystander and victim, regardless of whether the relationship between the two is estranged, alienated, or in some other way removed. Conversely, the [rule] is underinclusive because it arbitrarily denies court access to persons with valid claims that they could prove.⁶¹¹

New Jersey

In New Jersey, the elements of the tort of negligent infliction of emotional distress are: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff suffered severe emotional distress; and (4) the defendant’s breach of duty was the proximate cause of the injury.⁶¹² In bystander situations, the cause of action for negligent infliction of emotional distress requires proof of: “(1) the death or serious physical injury of another caused by the defendant’s negligence; (2) a marital or intimate, familial relationship between the plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress.”⁶¹³ However, an “unmarried cohabitant should be afforded the protections of bystander liability for the negligent infliction of emotional injury. The basis for that protection is the existence of an intimate familial relationship with the victim of the defendant’s negligence.”⁶¹⁴

New Mexico

Apart from bystander liability, there exists no recognized cause of action for negligent infliction of emotional distress in New Mexico.⁶¹⁵ In a bystander situation, for a plaintiff to recover,

610. *Id.*

611. *Graves v. Estabrook*, 818 A.2d 1255, 1261 (N.H. 2003).

612. *Decker v. Princeton Packet, Inc.*, 561 A.2d 1122, 1128 (N.J. 1989).

613. *Portee v. Jaffee*, 417 A.2d 521, 528 (N.J. 1980).

614. *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994).

615. *Jaynes v. Strong-Thorne Mortuary, Inc.*, 954 P.2d 45, 50 (N.M. 1997).

[(1)] [t]here must be a marital or intimate family relationship between the victim and the plaintiff, limited to husband and wife, parent and child, grandparent and grandchild, brother and sister, and to those persons who occupy a legitimate position in loco parentis; [(2)] [t]he shock to the plaintiff must be severe and must result in a direct emotional impact upon the plaintiff from the contemporaneous sensory perception of the accident, as contrasted with learning of the accident by means other than contemporaneous sensory perception or learning of the accident after its occurrence; [(3)] [t]here must be some physical manifestation of, or physical injury to the plaintiff resulting from the emotional injury; and, [(4)] [t]he accident must result in physical injury or death to the victim.⁶¹⁶

New York

In New York:

The circumstances under which recovery may be had for purely emotional harm are extremely limited and, thus, a cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the plaintiff which either endangered the plaintiff's physical safety or caused the plaintiff fear for his or her own physical safety.⁶¹⁷

In bystander situations:

[T]he plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family—assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing about such injury or death.⁶¹⁸

616. *Folz v. State*, 797 P.2d 246, 257 (N.M. 1990).

617. *Lancellotti v. Howard*, 547 N.Y.S.2d 654, 655 (App. Div. 1989).

618. *Bovsun v. Sanperi*, 461 N.E.2d 843, 848 (N.Y. 1984).

North Carolina

In either direct victim and bystander situations, North Carolina appears to require proof of only three elements to recover for negligent infliction of emotional distress: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . and (3) the conduct did in fact cause the plaintiff severe emotional distress."⁶¹⁹ In bystander situations, the second element would obviously be impacted by the relationship between the bystander and the person who sustained physical injury as well as the proximity of the bystander to the injury causing situation.⁶²⁰

North Dakota

North Dakota follows the zone of danger test and requires that a plaintiff seeking to recover for negligent infliction of emotional distress must also establish that it resulted in "bodily harm."⁶²¹ In bystander situations, the zone of danger test also applies.⁶²²

Ohio

Although the Ohio Supreme Court observed that physical harm that results in serious emotional distress can assist a jury in determining whether the claim is compensable, it found that such a limitation "may prevent a worthy plaintiff from recovering from a blameworthy defendant."⁶²³

We believe that a cause of action for the negligent infliction of serious emotional distress may be stated where the plaintiff-bystander reasonably appreciated the peril which took place, whether or not the victim suffered actual physical harm, and, that as a result of this cognizance or fear of peril, the plaintiff suffered serious emotional distress.⁶²⁴

619. *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85, 97 (N.C. 1990).

620. *Id.* at 98.

621. *Muchow v. Lindblad*, 435 N.W.2d 918, 921 (N.D. 1989) (citing RESTATEMENT (SECOND) TORTS § 436A (1965)).

622. *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972).

623. *Paugh v. Hanks*, 451 N.E.2d 759, 764-65 (Ohio 1983).

624. *Id.* at 767.

“[S]erious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.”⁶²⁵

Oklahoma

Negligent infliction of emotional distress is not an independent tort in Oklahoma. Before damages for mental suffering may be collected, a plaintiff must establish, just as in any other negligence case, “a duty on the part of the defendant to protect the plaintiff from injury; a failure of the defendant to perform the duty; and an injury to the plaintiff resulting from the failure.”⁶²⁶ However, a person alleging negligent infliction of emotional distress as a bystander is not entitled to recover under Oklahoma law.⁶²⁷

Oregon

In Oregon, a person may not recover for negligent infliction of emotional distress if he or she is not also physically injured, threatened with physical injury, or physically impacted by the tortious conduct.⁶²⁸ The rule, however, has exceptions. Under one, recovery may occur if “the defendant’s conduct infringed on some legally protected interest apart from causing the claimed distress” suffered by the plaintiff.⁶²⁹ “[T]he term ‘legally protected interest’ refers to an independent basis of liability separate from the general duty to avoid foreseeable risk of harm,”⁶³⁰ and “[t]he identification of such a distinct source of duty is the *sine qua non* of liability for emotional distress damages unaccompanied by physical injury.”⁶³¹ Absent such proof in a bystander situation, the Oregon court has refused to adopt Restatement (Second) of Torts section 436.⁶³²

625. *Id.* at 765.

626. *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 916 P.2d 241, 245 (Okla. 1996).

627. *Slaton v. Vansickle*, 872 P.2d 929, 931 (Okla. 1994).

628. *Hammond v. Cent. Lane Commc’n Ctr.*, 816 P.2d 593, 596 (Or. 1991).

629. *Id.*

630. *Phillips v. Lincoln County Sch. Dist.*, 984 P.2d 947, 949 (Or. Ct. App. 1999).

631. *Curtis v. MRI Imaging Servs. II*, 941 P.2d 602, 608 (Or. Ct. App. 1997), *aff’d on other grounds*, 956 P.2d 960, 964 (Or. 1998).

632. *Hammond*, 816 P.2d at 597–98.

Pennsylvania

The general rule “in Pennsylvania has been that, except in limited circumstances, a claimant may not recover damages for negligently inflicted emotional distress in the absence of a physical manifestation of the emotional distress allegedly suffered.”⁶³³ In bystander situations a three-part test is applied:

- (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
- (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
- (3) Whether plaintiff and the victim were closely related.⁶³⁴

Rhode Island

In Rhode Island, only two groups of plaintiffs are able to recover for negligent infliction of emotional distress: “those within the ‘zone-of-danger’ who are physically endangered by the acts of a negligent defendant, and bystanders related to a victim whom they witness being injured. In addition, plaintiffs must [also] . . . suffer serious emotional injury that is accompanied by physical symptomatology.”⁶³⁵ In bystander situations:

[I]n order to recover for negligent infliction of emotional distress, a party must (1) be a close relative of the victim, (2) be present at the scene of the accident and be aware that the victim is being injured, and (3) as a result of experiencing the accident, suffer serious emotional injury that is accompanied by physical symptomatology.⁶³⁶

South Carolina

A South Carolina plaintiff may recover for negligent infliction of emotional distress with proof that bodily injury was proximately caused

633. *Houston v. Texaco, Inc.*, 538 A.2d 502, 504 (Pa. Super. Ct. 1988).

634. *Sinn v. Burd*, 404 A.2d 672, 685 (Pa. 1979).

635. *Perrotti v. Gonicberg*, 877 A.2d 631, 636–37 (R.I. 2005) (quoting *Jalowy v. Friendly Home, Inc.*, 818 A.2d 698, 710 (R.I. 2003)).

636. *Marchetti v. Parsons*, 638 A.2d 1047, 1052 (R.I. 1994).

by the emotional trauma.⁶³⁷ In bystander situations, recovery may be had with proof of the following elements:

(a) the negligence of the defendant must cause death or serious physical injury to another; (b) the plaintiff bystander must be in close proximity to the accident; (c) the plaintiff and the victim must be closely related; (d) the plaintiff must contemporaneously perceive the accident; and (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.⁶³⁸

South Dakota

South Dakota law recognizes a claim for negligent infliction of emotional distress, but requires “manifestation of physical symptoms.”⁶³⁹ It also:

[R]ecognizes a bystander’s claim for negligent infliction of emotional distress caused by contemporaneous observation of the serious injury or death of a third party with whom the bystander has a close relationship. The bystander must be within the zone of danger. However, the emotional distress suffered may be caused by fear for the third person and need not be caused by the bystander’s fear for his or her own safety. The negligently inflicted emotional distress must be accompanied with physical manifestations.⁶⁴⁰

Tennessee

In order to make a case for negligent infliction of emotional distress in Tennessee, the plaintiff must prove the elements of duty, breach of duty, injury or loss, causation in fact, and proximate cause.⁶⁴¹ Further, when there is no physical injury, recovery is limited to serious or severe emotional injury supported by expert medical or scientific proof.

637. *Strickland v. Madden*, 448 S.E.2d 581, 584 (S.C. Ct. App. 1994).

638. *Kinard v. Augusta Sash & Door Co.*, 336 S.E.2d 465, 467 (S.C. 1985).

639. *Maryott v. First Nat’l Bank of Eden*, 624 N.W.2d 96, 104 (S.D. 2001) (quoting *Stene v. State Farm Mut. Auto. Ins. Co.*, 583 N.W.2d 399, 404 (S.D. 1998)).

640. *Nielson v. AT&T Corp.*, 597 N.W.2d 434, 442 (S.D. 1999).

641. *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996).

Furthermore, in order to guard against trivial or fraudulent actions, recovery is provided only for "serious" or "severe" emotional injury.⁶⁴² To recover for emotional injuries sustained in a bystander situation, the plaintiff must establish that defendant's negligence was the cause in fact of the third person's death or injury as well as plaintiff's emotional injury and that the third person's death or injury and plaintiff's emotional injury were proximate and foreseeable results of defendant's negligence.⁶⁴³ "Establishing foreseeability, and therefore a duty of care to plaintiff, requires consideration of a number of relevant factors. The plaintiff's physical location at the time of the event or accident and awareness of the accident are essential factors."⁶⁴⁴

Texas

In Texas, there is no general duty not to negligently inflict emotional distress. "A claimant may recover mental anguish damages only in connection with defendant's breach of some other legal duty."⁶⁴⁵ "Where emotional distress is a recognized element of damages for breach of a legal duty, the claimant may recover without demonstrating a physical manifestation of the emotional distress."⁶⁴⁶

Texas has adopted the bystander rules originally promulgated by the California Supreme Court in *Dillon v. Legg*: (1) [w]hether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it; (2) [w]hether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) [w]hether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁶⁴⁷

642. *Id.*

643. *Ramsey v. Beavers*, 931 S.W.2d 527, 531 (Tenn. 1996).

644. *Id.*

645. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993); see also Charles E. Cantu, *An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying it Does Not Exist*, 33 ST. MARY'S L.J. 455, 466 (2002).

646. *Boyles*, 855 S.W.2d at 598.

647. *Id.* (citation omitted).

Utah

To prove negligent infliction of emotional distress in Utah, the plaintiff must have been placed in actual physical peril and must prove actual illness or bodily harm.⁶⁴⁸ The emotional distress must be so severe that a reasonable person, normally constituted, would not be able to adequately cope with it.⁶⁴⁹ The “illness” may be mental illness stemming from the negligent act; however, such illness must be established by expert testimony.⁶⁵⁰ As to bystander situations, Utah follows Restatement (Second) of Torts section 313.⁶⁵¹

Vermont

To establish a claim for negligent infliction of emotional distress in Vermont, “a plaintiff must make [an initial] showing that the he, [she] or someone close to him [or her] faced physical peril. The prerequisites for establishing a claim differ according to whether the plaintiff suffered a physical impact from an external force.”⁶⁵² If the plaintiff has not suffered an impact as a result of the negligence, “he must show that: (1) he was within the ‘zone of danger’ of an act negligently directed at him by defendant, (2) he was subjected to a reasonable fear of immediate personal injury, and (3) he in fact suffered substantial bodily injury or illness as a result.”⁶⁵³

[A]fter *witnessing* a person closely related to the plaintiff suffer critical injury or death as a result of defendant’s negligent conduct, [recovery] is premised upon the traditional negligence test of foreseeability. A plaintiff is required to prove under this test that his or her serious emotional distress was reasonably foreseeable, that the defendant’s negligent conduct caused the victim to suffer critical injury or death, and that the plaintiff suffered serious emotional distress *as a direct result of witnessing* the victim’s critical injury or death.⁶⁵⁴

648. *Straub v. Fisher & Paykel Health Care*, 990 P.2d 384, 387 (Utah 1999); *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 69 (Utah 1998).

649. *Harnicher*, 962 P.2d at 70.

650. *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 975 (Utah 1993).

651. *Harnicher*, 962 P.2d at 69 (quoting RESTATEMENT (SECOND) OF TORTS § 313 (1965)).

652. *Brueckner v. Norwich Univ.*, 730 A.2d 1086, 1092 (Vt. 1999) (citations omitted).

653. *Id.*

654. *Leo v. Hillman*, 665 A.2d 572, 577 (Vt. 1995).

Virginia

In Virginia, when conduct is merely negligent and physical impact is lacking, there can be no recovery for free standing emotional disturbance.⁶⁵⁵

We hold, however, that where the claim is for emotional disturbance *and* physical injury resulting therefrom, there may be recovery for negligent conduct, notwithstanding the lack of physical impact, provided the injured party properly pleads and proves by clear and convincing evidence that his physical injury was the natural result of fright or shock proximately caused by the defendant's negligence.⁶⁵⁶

The Virginia Supreme Court has not endorsed a plaintiff's action of emotional distress resulting from fright or shock due to negligent infliction of physical injury to a third person.⁶⁵⁷ The only exceptions allowed are parents' malpractice claims for wrongful birth of a child or the birth of a severely injured child inflicted during the delivery.⁶⁵⁸

Washington

Washington allows a claim for negligent infliction of emotional distress, dispensing with the requirement that the plaintiff be within the zone of danger. Instead, the court evaluates the claim based on the general tort principles of duty and foreseeability and requires that plaintiffs demonstrate objective symptoms of their emotional injury.⁶⁵⁹ In bystander cases, when the plaintiff-relative is not present at the scene of the accident or does not arrive shortly thereafter, the harm is unforeseeable as a matter of law and no recovery is allowed.⁶⁶⁰

West Virginia

In West Virginia, a person may recover for negligent infliction of emotional distress, without accompanying physical injury, by showing facts sufficient to guarantee that emotional damages claim is not

655. *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973).

656. *Id.*

657. *Litton v. Cann*, No. L98-19, 1998 WL 1765700, at *4 (Va. Cir. Ct. Nov. 10, 1998).

658. *Id.*

659. *Hegel v. McMahon*, 960 P.2d 424, 427 (Wash. 1998).

660. *Gain v. Carroll Mill Co.*, 787 P.2d 553, 557 (Wash. 1990).

“spurious.”⁶⁶¹ “The seriousness of this distress must be proved through the use of medical and psychiatric evidence.”⁶⁶² In bystander situations:

[P]laintiff’s right to recover for negligent infliction of emotional distress, after witnessing a person closely related to the plaintiff suffer critical injury or death as a result of defendant’s negligent conduct, is premised upon the traditional negligence test of foreseeability. A plaintiff is required to prove under this test that his or her serious emotional distress was reasonably foreseeable, that the defendant’s negligent conduct caused the victim to suffer critical injury or death, and that the plaintiff suffered serious emotional distress as a direct result of witnessing the victim’s critical injury or death. In determining whether the serious emotional injury suffered by a plaintiff in a negligent infliction of emotional distress action was reasonably foreseeable to the defendant, the following factors must be evaluated: (1) whether the plaintiff was closely related to the injury victim; (2) whether the plaintiff was located at the scene of the accident and is aware that it is causing injury to the victim; (3) whether the victim is critically injured or killed; and (4) whether the plaintiff suffers *serious* emotional distress.⁶⁶³

Wisconsin

Wisconsin has the most liberal requirements for a claim of negligent infliction of emotional distress: “(1) that the defendant’s conduct in the underlying accident fell below the applicable standard of care; (2) that the plaintiff suffered an injury [of] severe emotional distress; and (3) that the defendant’s conduct was a cause-in-fact of the plaintiff’s injury.”⁶⁶⁴ “The factfinder determines cause-in-fact. The court determines whether considerations of public policy relieve the defendant of liability in a particular case. These public policy considerations are an aspect of legal cause, not cause-in-fact.”⁶⁶⁵ In bystander situations:

661. *Marlin v. Bill Rich Constr., Inc.*, 482 S.E.2d 620, 637 (W. Va. 1996).

662. *Stump v. Ashland, Inc.*, 499 S.E.2d 41, 53 (W. Va. 1997).

663. *Jones v. Sanger*, 512 S.E.2d 590, 592 (W. Va. 1998).

664. *Rabideau v. City of Racine*, 2001 WI 57, ¶ 20, 243 Wis. 2d 486, ¶ 20, 627 N.W.2d 795, ¶ 20 (citations omitted).

665. *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 434 (1994).

to determine on the basis of public policy considerations whether to preclude liability for severe emotional distress to a bystander a court must consider three factors: the severity of the injury to the victim, the relationship of the plaintiff to the victim [limited to spouse, parent, child, grandparent, grandchild or sibling], and the extraordinary circumstances surrounding the plaintiff's discovery of the injury."⁶⁶⁶

Wyoming

Although negligent infliction of emotional distress in a non-bystander setting has not been addressed by the Wyoming Supreme Court, its decisions in bystander cases make it evident that there would be no limitation on recovery in non-bystander cases. In bystander cases:

[P]laintiffs who may bring an action for negligent infliction of emotional distress consists of those who could bring, at least under some set of circumstances, a wrongful death action for the primary victim's death [spouses, children, parents, and siblings]. The primary victim must die, or suffer serious bodily injury as that term is defined in the Wyoming Criminal Code. The plaintiff must observe either the infliction of the fatal or harmful blow or observe the results of the blow after its occurrence without material change in the condition and location of the victim. Once these conditions are satisfied, the case can go forward under normal negligence principles. The defendant must have been negligent and his negligence must be the proximate cause of the plaintiff's mental injuries.⁶⁶⁷

666. *Id.* at 445.

667. *Gates v. Richardson*, 719 P.2d 193, 200-01 (Wyo. 1986).

APPENDIX D

PARASITIC EMOTIONAL DISTRESS—STATE-BY-STATE ANALYSIS

Alabama

In Alabama, “[t]raditionally, damages for mental anguish alone have not been recoverable in this jurisdiction. However, if the mental suffering has been accompanied by some physical injury, damages for mental suffering have been allowed.”⁶⁶⁸ The term “parasitic” has also been used to describe this harm.⁶⁶⁹

Alaska

Damages in Alaska for mental suffering from a negligently inflicted harm are recognized by statute: “In an action to recover damages for personal injury or wrongful death, all damage claims for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.”⁶⁷⁰ The term “parasitic” has also been employed.⁶⁷¹

Arizona

In Arizona, damages have been allowed for “loss of enjoyment of life” described as the inability of the plaintiff, as a result of the defendant’s negligence, “to participate in and derive pleasure from the normal activities of daily life, or for the individual’s inability to pursue his talents, recreational interests, hobbies, or avocations.”⁶⁷² The term “hedonic” has also been employed.⁶⁷³

668. *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 372 (Ala. 1981) (citing *W. Union Tel. Co. v. Jackson*, 50 So. 316 (Ala. 1909) and *E. Ala. Express Co. v. Dupes*, 124 So. 2d 809 (Ala. 1960) (plaintiff who sustained whiplash and fracture allowed to recover for her “worry” about the future result of her injury)).

669. *Id.* at 373.

670. ALASKA STAT. § 09.17.010(a) (2006); *see also* *Buoy v. Era Helicopters, Inc.*, 771 P.2d 439, 442 (Alaska 1989).

671. *Chizmar v. Mackie*, 896 P.2d 196, 202 (Alaska 1995).

672. *Ogden v. J.M. Steel Erecting, Inc.*, 31 P.3d 806, 813 (Ariz. Ct. App. 2001).

673. *Id.*

Arkansas

In Arkansas, the validity of damages in a negligence action for loss of enjoyment of life has been recognized.⁶⁷⁴ Awards for “pain and suffering” damages have also been generally allowed,⁶⁷⁵ with no distinct rule as to measuring those damages,⁶⁷⁶ and the awards left to the “sound discretion of a trial jury and the conclusion reached by it should not be disturbed unless the award is clearly excessive.”⁶⁷⁷ The terms “hedonic”⁶⁷⁸ and “parasitic”⁶⁷⁹ have also been used.

California

California decisions seldom employ “enjoyment of life,” “yet achieve a result consistent with it. No California rule restricts a plaintiff’s attorney from arguing this element to a jury. Damage for mental suffering supplies an analogue.”⁶⁸⁰ The terms “hedonic”⁶⁸¹ and “parasitic”⁶⁸² have also been employed.

Colorado

In Colorado, it is well accepted “that a plaintiff, in a personal injury action, could seek damages for loss of enjoyment of life, emotional stress, permanent disability, and loss of earning capacity, as well as medical expenses and pain and suffering, these damages would be awarded as compensation for the single claim of personal injury.”⁶⁸³ The term “hedonic damages” has also been used.⁶⁸⁴

Connecticut

“Under Connecticut law, any pain, suffering, emotional stress, loss of enjoyment of life’s activities . . . are items that must be compensated for in addition to the costs of the care and the treatment of these painful

674. *W. Union v. Vostatek*, 788 S.W.2d 952, 954 (Ark. 1990).

675. *Hamby v. Haskins*, 630 S.W.2d 37, 40 (Ark. 1982).

676. *See Morrison v. Lowe*, 625 S.W.2d 452, 456 (Ark. 1981).

677. *Hamby*, 630 S.W.2d at 40 (citing *Mo. Pac. R.R. v. Hendrix*, 277 S.W. 337 (Ark. 1925)).

678. *Durham v. Marberry*, 156 S.W.3d 242, 246 (Ark. 2004).

679. *McQuay v. Guntharp*, 963 S.W.2d 583, 585 (Ark. 1998).

680. *Huff v. Tracy*, 129 Cal. Rptr. 551, 553 (Ct. App. 1976).

681. *Loth v. Truck-A-Way Corp.*, 70 Cal. Rptr. 2d 571, 578 (Ct. App. 1998).

682. *Fluharty v. Fluharty*, 69 Cal. Rptr. 2d 244, 252 (Ct. App. 1997).

683. *Artery v. Allstate Ins. Co.*, 984 P.2d 1187, 1192 (Colo. Ct. App. 1999).

684. *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89, 92 (Colo. Ct. App. 1997).

conditions. In short, the law requires the plaintiff to recover monetary compensation for both.”⁶⁸⁵ The term “parasitic” has also been used.⁶⁸⁶

Delaware

In Delaware:

[D]amages are recoverable for pain and suffering and for permanent injuries. If plaintiff establishes that his finger is permanently impaired, he will be entitled to recover a reasonable sum to compensate him for the impairment or disability. In evaluating the degree of impairment and in assessing damages, the jury may take into consideration all of the activities—business, pleasure and otherwise—which the impairment impedes or prevent.⁶⁸⁷

Florida

In Florida, “[d]isability, mental anguish, and loss of capacity for the enjoyment of life are important elements of damages.”⁶⁸⁸ The term “parasitic” has also been employed.⁶⁸⁹

Georgia

In Georgia, the right to recover for a variety of mental anguish harms, including the capacity to enjoy life, appears to be recognized as a proper element of pain and suffering damages.⁶⁹⁰

Hawaii

In Hawaii, “[g]eneral damages ‘encompass all the damages which naturally and necessarily result from a legal wrong . . .’ [including] ‘pain and suffering, inconvenience, and loss of enjoyment which cannot be

685. *Pulaski v. Healthsouth Rehab. Ctr. of Conn., LLC*, No. CV020079543S, 2005 WL 941419, at *7 (Conn. Super. Ct. Mar. 24, 2005).

686. *Montinieri v. S. New England Tel. Co.*, 398 A.2d 1180, 1184 (Conn. 1978).

687. *Winter v. Pa. R.R.*, 68 A.2d 513, 515 (Del. Super. Ct. 1949).

688. *Capone v. Winn-Dixie Stores, Inc.*, 233 So. 2d 175, 177 (Fla. Dist. Ct. App. 1970).

689. *Rowell v. Holt*, 850 So. 2d 474, 478 (Fla. 2003).

690. *See Underwood v. Atlanta & W. Point R.R.*, 124 S.E.2d 758, 769 (Ga. Ct. App. 1962).

measured definitively in monetary terms.”⁶⁹¹ The terms “hedonic”⁶⁹² and “parasitic”⁶⁹³ have been used.

Idaho

It appears that in Idaho, loss of enjoyment of life is a proper element of damages in an action for personal injuries.⁶⁹⁴

Illinois

In Illinois, loss of enjoyment of life may be treated as a factor in determining the extent of the injuries and damages in general or for pain and suffering.⁶⁹⁵ On the other hand, “Illinois courts have also found that disability damages include damages for loss of a normal life.”⁶⁹⁶ The terms “hedonic”⁶⁹⁷ and “parasitic”⁶⁹⁸ have also been used.

Indiana

In Indiana, “trial courts should instruct juries in personal injury cases that they may consider ‘the nature and extent of the plaintiff’s injury and the effect of the injury itself on the plaintiff’s ability to function as a whole person.’”⁶⁹⁹ In other words, courts will allow a separate and distinct award for parasitic emotional damages. The terms “parasitic”⁷⁰⁰ and “hedonic”⁷⁰¹ have also been used.

Iowa

In Iowa, “[o]ne component of pain and suffering is loss of enjoyment of life. Evidence concerning other medical conditions that have and will impact [the claimant’s] physical and mental well-being and his ability to

691. *Bynum v. Magno*, 101 P.3d 1149, 1153 (Haw. 2004) (quoting *Dunbar v. Thompson*, 901 P.2d 1285, 1294 (Haw. Ct. App. 1995)); see also *Sprague v. Cal. Pac. Bankers & Ins. Ltd.*, 74 P.3d 12, 22–23 (Haw. 2003).

692. *Montalvo v. Lapez*, 884 P.2d 345, 364 (Haw. 1994).

693. *Leong v. Takasaki*, 520 P.2d 758, 762 (Haw. 1974).

694. *Sanchez v. Galey*, 733 P.2d 1234, 1249 (Idaho 1986); *Moeller v. Harshbarger*, 794 P.2d 1148, 1149 (Idaho Ct. App. 1990).

695. *Fetzer v. Wood*, 569 N.E.2d 1237, 1244–45 (Ill. App. Ct. 1991).

696. *Smith v. City of Evanston*, 631 N.E.2d 1269, 1278 (Ill. App. Ct. 1994).

697. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1066 (Ill. 1997).

698. *Corgan v. Muehling*, 574 N.E.2d 602, 608 (Ill. 1991).

699. *Canfield v. Sandock*, 563 N.E.2d 1279, 1282 (Ind. 1990).

700. *Lovings v. Thomas*, 805 N.E.2d 442, 448 (Ind. Ct. App. 2004).

701. *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677, 680 (Ind. Ct. App. 1991).

enjoy life are clearly relevant to the plaintiff's damage claims."⁷⁰² The term "parasitic" has also been employed.⁷⁰³

Kansas

In Kansas "evidence of loss of enjoyment of life is definitely admissible and proper for the jury's consideration as it relates to disability and pain and suffering, and may certainly be argued by counsel to the jury," but not as a separate element of damages.⁷⁰⁴ The term "hedonic" has also been used.⁷⁰⁵

Kentucky

In Kentucky, "[t]his court recognizes that there is measurable value to one's life other than his or her earning capacity. However, this value is already recoverable in the recognized category of mental suffering. There is no need to allow for the recoupment of hedonic damages as a separate category of loss."⁷⁰⁶ The terms "parasitic"⁷⁰⁷ as well as "hedonic"⁷⁰⁸ have been employed.

Louisiana

In Louisiana, "[t]he types of damages awarded in a personal injury action consist of general and special damages. General damages, are speculative in nature and, thus, incapable of being fixed with any mathematical certainty. They include pain and suffering, physical impairment and disability, and loss of enjoyment of life."⁷⁰⁹ Recovery may be had when there is proof that "the injured party's lifestyle was detrimentally altered or that the injured party was forced to give up

702. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 158 (Iowa 2004) (citation omitted); *see also* *Estate of Pearson v. Interstate Power & Light Co.*, 700 N.W.2d 333, 347 (Iowa 2005) ("Mental pain and suffering includes mental anguish, anxiety, embarrassment, loss of enjoyment of life, a feeling of uselessness, or other emotional distress."); *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985) (concluding that loss of enjoyment of life is a factor to be considered as a part of future pain and suffering, but not a separate element of damages).

703. *Warner v. Moore*, No. 5-960/05-0403, 2006 Iowa App. LEXIS 140, at *5 (Iowa Ct. App. Feb. 15, 2006), *aff'd*, 713 N.W.2d 248 (Iowa Ct. App. 2006).

704. *Gregory v. Carey*, 791 P.2d 1329, 1336 (Kan. 1990).

705. *Id.* at 1335.

706. *Adams v. Miller*, 908 S.W.2d 112, 116 (Ky. 1995).

707. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996).

708. *Adams*, 908 S.W.2d at 116.

709. *Thibeaux v. Trotter*, 883 So. 2d 1128, 1130 (La. Ct. App. 2004).

activities because of his injury.”⁷¹⁰ The terms “hedonic”⁷¹¹ or “parasitic”⁷¹² have also been used.

Maine

In Maine, the supreme court observed: “We have long allowed recovery for ‘mental anguish and loss of enjoyment of life’ in most tort actions.”⁷¹³ In affirming a jury’s damage award, the Supreme Judicial Court of Maine noted long ago that “[t]he total loss of the left hand by a boy 10 years of age takes a great deal of usefulness and enjoyment out of his prospective life. The loss of earning power is by no means the extent of the injury.”⁷¹⁴ The term “parasitic” has at times been employed.⁷¹⁵

Maryland

In Maryland, “the ‘loss of enjoyment of life’ includes the ‘impairment of the capacity to enjoy life, or to enjoy a particular avocation’ and, in some cases, it constitutes a proper, separate element of damages.”⁷¹⁶ It has been held that loss of enjoyment of life, or a loss characterized by some closely synonymous phrase, may not be claimed as a separate element of damages, but may be treated as a factor in determining the extent of the injuries and damages in general or for pain and suffering.⁷¹⁷ On the other hand, the state followed the view that loss of enjoyment of life is a proper, separate element of damages.⁷¹⁸ The term “parasitic” has also been used.⁷¹⁹

Massachusetts

In Massachusetts it has been held that:

710. *Simms v. Progressive Ins. Co.*, 883 So. 2d 473, 488 (La. Ct. App. 2004).

711. *Poche v. Allstate Ins. Co.*, 900 So. 2d 55, 63 (La. Ct. App. 2005).

712. *Johnson v. First Nat’l Bank of Shreveport*, 792 So. 2d 33, 50 (La. Ct. App. 2001).

713. *Curtis v. Porter*, 784 A.2d 18, 26 (Me. 2001).

714. *Haynes v. Waterville & O. St. Ry.*, 64 A. 614, 615 (Me. 1906).

715. *Rowe v. Bennett*, 514 A.2d 802, 804 (Me. 1986).

716. *Smallwood v. Bradford*, 720 A.2d 586, 592 (Md. 1998).

717. *See generally id.*

718. *See generally Culley v. Pa. R.R.*, 244 F. Supp. 710, 715 (D. Del. 1965) (applying Maryland law); *Smallwood*, 720 A.2d at 592 (stating that in some cases, loss of enjoyment of life may constitute “a separate, proper element of damages”); *McCalister v. Carl*, 197 A.2d 140 (Md. Ct. App. 1964).

719. *Hoffman v. Stamper*, 867 A.2d 276, 295 (Md. 2005).

Where plaintiffs have suffered directly inflicted personal injuries as a result of a defendant's negligence, courts have not been reluctant to allow recovery for emotional distress, occurring contemporaneously with those personal injuries, as an additional element of damages. In these cases, recovery for emotional distress was allowed as a claim "parasitic" to the "host" claim of damages for negligently inflicted physical injuries.⁷²⁰

The phrase "loss of enjoyment of life" has also been employed.⁷²¹

Michigan

In Michigan, "compensation for a purely mental component of damages where [a] defendant negligently inflicts an immediate physical injury has always been awarded as 'parasitic damages.'"⁷²² The phrase "loss of natural enjoyments of life" has also been used.⁷²³

Minnesota

Minnesota follows the view that the effect of "injuries on the enjoyment of the amenities of life" is a proper measurement of damages.⁷²⁴ The term "parasitic" is also used to describe those damages.⁷²⁵

Mississippi

In Mississippi, "loss of enjoyment of life should be fully compensated and should be considered on its own merits as a separate element of damages, not as a part of one's pain and suffering."⁷²⁶ The term "parasitic" has also been recognized as descriptive of those damages.⁷²⁷

720. *Payton v. Abbott Labs*, 437 N.E.2d 171, 176 (Mass. 1982) (citations omitted).

721. *Glicklich v. Spievack*, 452 N.E.2d 287, 291 n.3 (Mass. Ct. App. 1983).

722. *Daley v. LaCroix*, 179 N.W.2d 390, 392 (Mich. 1970) (emphasis omitted).

723. *Weymers v. Khera*, 563 N.W.2d 647, 656 (Mich. 1997).

724. *Anunti v. Payette*, 268 N.W.2d 52, 55 (Minn. 1978).

725. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438 n.7 (Minn. 1983).

726. *Kan. City S. Ry. Co. v. Johnson*, 798 So. 2d 374, 380 (Miss. 2001).

727. *Lyons v. Zale Jewelry Co.*, 150 So. 2d 154, 157 (Miss. 1963).

Missouri

In Missouri, “lost enjoyment of life is a compensable element of general damages in a personal injury case.”⁷²⁸

Montana

In Montana, “hedonic” damages, including damages for loss of enjoyment of life are allowed in personal injury cases.⁷²⁹ There, it has been noted that “[d]amages for emotional distress with a host cause of action, known as ‘parasitic’ damages, have been recovered even in cases where the independent action giving rise to emotional distress damages is trivial.”⁷³⁰

Nebraska

The Supreme Court of Nebraska has held that “[l]oss of enjoyment of life may, in a particular case flow from a disability and be simply a part thereof, and where the evidence supports it, may be argued to the jury.”⁷³¹ The court has also referred to a claim for “parasitic damages, which are damages occasioned by anxiety specifically due to a reasonable fear of future harm attributable to a physical injury caused by the negligence of another.”⁷³²

Nevada

The Nevada Supreme Court stated:

We agree with California and those jurisdictions permitting plaintiffs to seek compensation for hedonic loss [including loss of enjoyment of life] as an element of the general award for pain and suffering. Like California, Nevada does not restrict a plaintiff’s attorney from arguing hedonic damages. Moreover, by including hedonic losses as a component of pain and suffering, we perceive no problem of confusion or duplication of awards by the jury.⁷³³

728. *Schumann v. Mo. Highway & Transp. Comm’n*, 912 S.W.2d 548, 554 (Mo. Ct. App. 1995).

729. *Hunt v. K-Mart Corp.*, 981 P.2d 275, 277 (Mont. 1999).

730. *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 418 (Mont. 1995).

731. *Swiler v. Baker’s Super Mrkt., Inc.*, 277 N.W.2d 697, 700 (Neb. 1979).

732. *Hamilton v. Nestor*, 659 N.W.2d 321, 324–25 (Neb. 2003).

733. *Banks ex rel. Banks v. Sunrise Hosp.*, 102 P.3d 52, 64 (Nev. 2004).

New Hampshire

In New Hampshire, the state supreme court, as to loss of enjoyment of life or hedonic damages, held that the question whether

such losses exist is beyond dispute. “The capacity to enjoy life . . . is unquestionably an attribute of an ordinary healthy individual. The loss of that capacity as a result of another’s negligent act is at least as serious an impairment as the permanent destruction of a physical function, which has always been treated as a compensable item under traditional tort principles.”⁷³⁴

New Jersey

The New Jersey Supreme Court has held that “[i]n the usual case such elements of damage [loss of enjoyment of life] are readily included in the ambit of the broad damages charge taking into account pain, suffering, disability, and impairment.”⁷³⁵ The term “hedonic damages” is also used in the state for this concept.⁷³⁶

New Mexico

In New Mexico it has been held that “tort remedy is theoretically designed to compensate for lost wages, lost earning capacity, medical expenses, pain and suffering, loss of enjoyment of life, and other expenses or losses proximately caused by the wrongdoer.”⁷³⁷ Loss of enjoyment of life has also been referred to as “hedonic damages.”⁷³⁸

New York

In New York, loss of enjoyment of life is a recognized measure of damages in a negligence action.⁷³⁹ However, “[l]oss of enjoyment of life is not a separate element of damages deserving a distinct award, but is only a factor to be considered by the jury in assessing damages for

734. *Bennett v. Lembo*, 761 A.2d 494, 498 (N.H. 2000) (quoting *McDougald v. Garber*, 536 N.E.2d 372, 377 (N.Y. 1989) (Titone, J., dissenting)).

735. *Lombardo v. Hoag*, 634 A.2d 550, 562 (N.J. Super. Ct. App. Div. 1993).

736. *Smith v. Whitaker*, 734 A.2d 243, 246 (N.J. 1999).

737. *Gutierrez v. City of Albuquerque*, 964 P.2d 807, 811 (N.M. 1998).

738. *Sena v. N.M. State Police*, 892 P.2d 604, 610 (N.M. Ct. App. 1995).

739. *Hotaling v. CSX Transp.*, 773 N.Y.S.2d 755, 762 (App. Div. 2004) (Cardona, J., dissenting).

conscious pain and suffering, thereby requiring a demonstration that plaintiffs have suffered some physical injury or pain.”⁷⁴⁰

North Carolina

Loss of enjoyment of life appears to be a recognized element of damages in a negligence action in North Carolina.⁷⁴¹ While “severe emotional distress” is an essential element of a claim for infliction of emotional distress, that is not the same as the emotional suffering that “may be a part of a claim seeking damages for general pain and suffering.”⁷⁴² “Defendant’s proposition that the psychological component of damages for “pain and suffering” must meet the same standard as the element of “severe emotional distress” that is part of claims for infliction of emotional distress,” is not supported.⁷⁴³

North Dakota

In North Dakota, it is proper for a plaintiff to argue “loss of enjoyment of life as a component of pain, discomfort, mental anguish, and impairment of health, mind, or person.”⁷⁴⁴

Ohio

In a negligence action in Ohio, compensatory damages include actual losses, including past and future medical bills, pain and suffering, disabilities or disfigurement, and loss of enjoyment of life.⁷⁴⁵ The term “hedonic damages” has also been used⁷⁴⁶ as has “parasitic” damages.⁷⁴⁷

Oklahoma

In affirming a jury award, the Oklahoma Supreme Court suggested that a jury may hear evidence concerning all long-term effects a personal injury will have on an individual and also that a jury need not enumerate what amounts are compensating particularized “pain and

740. *Golden v. Manhasset Condo.*, 770 N.Y.S.2d 55, 57 (App. Div. 2003) (citations omitted).

741. *Jones v. Asheville Radiological Group, P.A.*, 518 S.E.2d 528, 530 (N.C. Ct. App. 1999).

742. *Iadanza v. Harper*, 611 S.E.2d 217, 219 (N.C. Ct. App. 2005).

743. *Id.*

744. *First Trust Co. of N.D. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 13–14 (N.D. 1988).

745. *Fantozzi v. Sandusky Cement Prods. Co.*, 597 N.E.2d 474, 481–82 (Ohio 1992).

746. *Lewis v. Alfa Laval Separation, Inc.*, 714 N.E.2d 426, 433 (Ohio Ct. App. 1998).

747. *Vandiver v. Morgan Adhesive Co.*, 710 N.E.2d 1219, 1222 (Ohio Ct. App. 1998).

suffering.”⁷⁴⁸ It has recognized the concept of loss of enjoyment of life as an element of damages in a bystander case.⁷⁴⁹

Oregon

Oregon appears to liberally allow recovery for parasitic mental distress when it naturally flows from the injury caused by the underlying tort.⁷⁵⁰

Pennsylvania

In Pennsylvania, “loss of the pleasures and enjoyments of life” and “loss of feeling of well-being,” are more properly “seen as subdivisions of pain and suffering and do not set forth separate categories of damages recognized by law which may be tabulated in addition to damages awarded for pain and suffering.”⁷⁵¹

Rhode Island

In Rhode Island:

[W]hen a person suffers damages because of another’s intentional tortious acts, that person is entitled to recover any and all losses caused by the tortfeasor’s misconduct, including, in certain circumstances, punitive damages, compensatory damages, damages attributable to emotional distress pain, and suffering, scarring or other permanent injury, loss of enjoyment of life or reduced life expectancy, humiliation, loss of consortium, and any other consequential damages and monetary relief potentially available to victims of tortious misconduct.⁷⁵²

South Carolina

In South Carolina:

[A]n award for the diminishment of pleasure resulting from the loss of use of one of the senses, or for a paraplegic’s loss of the ability to participate in certain

748. *Chicago, Rock Island & Pac. R.R. v. Hawes*, 424 P.2d 6, 15 (Okla. 1967).

749. *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 916 P.2d 241, 247 n.17 (Okla. 1996).

750. *Fehely v. Senders*, 135 P.2d 283, 285 (Or. 1943).

751. *Carpinet v. Mitchell*, 853 A.2d 366, 369 (Pa. Super. Ct. 2004).

752. *Vallinoto v. DiSandro*, 688 A.2d 830, 849 (R.I. 1997).

physical activities, falls under the rubric of hedonic damages. In our view, 'loss of enjoyment of life' damages compensate the individual not only for the subjective knowledge that one can no longer enjoy all of life's pursuits, but also for the objective loss of the ability to engage in these activities.⁷⁵³

South Dakota

The right to recover damages for loss of enjoyment of life is statutorily recognized in South Dakota.⁷⁵⁴ The Supreme Court of South Dakota has also held that an instruction stating that the jury could award the plaintiff damages for "[t]he pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury" was proper.⁷⁵⁵

Tennessee

In Tennessee, it has been held that "[d]amages for loss of enjoyment of life compensate the injured person for the limitations placed on his or her ability to enjoy the pleasures and amenities of life."⁷⁵⁶

Texas

In Texas, loss of enjoyment of life is sometimes referred to as "physical impairment."

To receive damages for physical impairment, the injured party must prove that the effect of his physical impairment extends beyond any impediment to his earning capacity and beyond any pain and suffering, to the extent that it produces a separate and distinct loss that is substantial and for which he should be compensated. Therefore, even proof that one is entitled to compensatory damages for pain and suffering, or for lost wages, does not automatically entitle one to compensation for physical impairment.⁷⁵⁷

753. *Boan v. Blackwell*, 541 S.E.2d 242, 245 (S.C. 2001).

754. *See* S.D. CODIFIED LAWS § 21-1-13.1 (2004).

755. *Gilkyson v. Wheelchair Express, Inc.*, 579 N.W.2d 1, 6 (S.D. 1998).

756. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 715-16 (Tenn. Ct. App. 1999).

757. *Dawson v. Briggs*, 107 S.W.3d 739, 752 (Tex. App. 2003) (citation omitted).

The term “hedonic damages” has also been used in the state to describe loss of enjoyment of life.⁷⁵⁸

Utah

In Utah, it has been held that:

The pain and suffering for which damages are recoverable in a personal injury action include not only physical pain but also mental pain or anguish, that is, the mental reaction to that pain and to the possible consequences of the physical injury. Included in mental pain and suffering is the diminished enjoyment of life, as well as the humiliation and embarrassment resulting from permanent scars and disability.⁷⁵⁹

Vermont

In Vermont, damages for loss of enjoyment of life are allowed in a negligence action that results in bodily injury.⁷⁶⁰ The term “parasitic” damages has also been used.⁷⁶¹

Virginia

In Virginia, it has been held that “mental anguish may be inferred in those instances where such would be the natural and probable consequence of bodily injury and that it is error in such a situation to refuse to instruct the jury that it may consider mental anguish as an element of damages.”⁷⁶² However, loss of enjoyment of life is not a “separately compensable element of damages.”⁷⁶³

Washington

In Washington, “[a] plaintiff may recover for loss of enjoyment of life as a distinct item of damages in a personal injury action that is not a survival action.”⁷⁶⁴ A damages instruction referring to injuries that

758. *Patlyek v. Brittain*, 149 S.W.3d 781, 785 (Tex. App. 2004).

759. *Judd v. Rowley’s Cherry Hill Orchards, Inc.*, 611 P.2d 1216, 1221 (Utah 1980).

760. *Debus v. Grand Union Stores of Vt.*, 621 A.2d 1288, 1295 (Vt. 1993) (Allen, C.J., dissenting).

761. *Sheltra v. Smith*, 392 A.2d 431, 432 (Vt. 1978).

762. *Bruce v. Madden*, 160 S.E.2d 137, 140 (Va. 1968).

763. *Bulala v. Boyd*, 389 S.E.2d 670, 677 (Va. 1990).

764. *Otani v. Broudy*, 59 P.3d 126, 128 (Wash. Ct. App. 2002).

“disable the plaintiff, if at all, from enjoying the natural and ordinary uses of a healthy mind and body” was held proper.⁷⁶⁵ The term “parasitic damage[s]” has also been used to describe the concept.⁷⁶⁶

West Virginia

In West Virginia, it has been held that loss of enjoyment of life is a proper element of damages in a personal injury action.⁷⁶⁷ The court has held: “We believe that our definition of a permanent injury which includes ‘those future effects of an injury which have reduced the capability of an individual to function as a whole man’ . . . is the appropriate area for considering the element of the loss of enjoyment of life.”⁷⁶⁸

Wisconsin

Wisconsin follows the view that loss of enjoyment of life is a proper, separate element of damages.⁷⁶⁹ “Loss of enjoyment of life includes those damages that result from one’s ‘diminished capacity for enjoying life’ or due to the ‘deprivations of the pleasures of life.’”⁷⁷⁰

Wyoming

Wyoming follows the view that “[l]oss of enjoyment of life is a compensable damage that the fact finder may either make a separate award for, or take into consideration when arriving at the total general damages.”⁷⁷¹ The term “parasitic” damages has also been employed.⁷⁷²

765. *Reed v. Jamieson Inv. Co.*, 10 P.2d 977, 978 (Wash. 1932).

766. *Hunsley v. Giard*, 553 P.2d 1096, 1098 (Wash. 1976).

767. *Henry v. Benyo*, 506 S.E.2d 615, 622 (W. Va. 1998).

768. *Flannery v. United States*, 297 S.E.2d 433, 437 (W. Va. 1982) (citation omitted).

769. *Sawyer v. Midelfort*, 595 N.W.2d 423, 437 (Wis. 1999).

770. *Id.* at 437 (quoting *Bassett v. Milwaukee N. Ry. Co.*, 170 N.W. 944 (Wis. 1919)).

771. *Wyo. Med. Ctr., Inc. v. Murray*, 27 P.3d 266, 269 (Wyo. 2001).

772. *Gates v. Richardson*, 719 P.2d 193, 200 (Wyo. 1986).