The Impact of Garrett v. City of New Berlin on Wisconsin's Approach to Negligent Infliction of Emotional Distress and a Recommendation for Fundamental Doctrinal Change

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THE IMPACT OF GARRETT v. CITY OF NEW BERLIN ON WISCONSIN'S APPROACH TO NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND A RECOMMENDATION FOR FUNDAMENTAL DOCTRINAL CHANGE

I. INTRODUCTION

An unfortunate result of many accidents is that bystanders may witness the terrible results of a person's negligence.\(^1\) The emotional impact on a bystander may range from nominal, to severe and debilitating, especially if a loved one is physically injured in the accident. Bystanders may seek recovery for mental injuries resulting from an observance of a tragic event. Courts across the United States have approached such claims in varied, and by no means uniform, fashion.\(^2\) Initial approaches to bystander claims required a plaintiff to suffer physical impact along with mental injury.\(^3\) Recently, however, courts have been uniform in rejecting this approach.\(^4\) In its place, courts have created a variety of arbitrary rules to replace the former “impact rule.” The “zone of danger rule” and the requirement that a plaintiff’s mental harm be physically manifested subsequent to witnessing an accident are examples. The rather strict requirements of these later rules were created to address judicial fears of fraudulent claims and unlimited liability for defendants. At the time these rules were created, the process of diagnosing mental harm was by no means an exact science.\(^5\) With the pas-

1. The term “bystander” is used throughout this Comment to refer to a person who witnessed an accident but was not in the zone of danger and did not fear for his or her own safety.
2. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (5th ed. 1984). “One interest which is still a subject of substantial controversy is that of freedom from mental disturbances.” Id. “No general agreement has yet been reached on many of the issues involving liability for negligence in fright, shock, or other mental or emotional harm, and any resulting physical consequences.” Id.
3. John E. Flanagan, Comment, Negligent Infliction of Emotional Distress: A Proposal for a Recognized Tort Action, 67 MARQ. L. REV. 557 (1984). “For decades the majority view was that a plaintiff could not recover for negligent infliction of emotional distress absent contemporaneous physical injury or impact.” Id. at 558 (citing JAMES A. DOOLEY, MODERN TORT LAW § 15.05, at 371 (1982)).
4. Flanagan, supra note 3, at 559. “Clearly, the impact rule is destined for legal extinction. However, where the impact rule has been abandoned, the zone of danger and physical manifestation rules have developed in its place . . . .” Id. at 559-60 (citations omitted).
5. Waube v. Warrington, 216 Wis. 603, 604, 258 N.W. 497, 497 (1935). Wisconsin's modern approach to negligent infliction of emotional distress began in 1935 with Waube. The plaintiff in Waube died as a result of her mental injuries. However, the Wisconsin Supreme Court did not allow the plaintiff to recover based on the fact that she was not within the zone of danger. The Waube opinion reflects the then current skepticism toward the mental health field's ability to accurately diagnose and treat patients with mental injuries.
sage of time, and improvements in the mental health field, courts have slowly begun to discard both the zone of danger and physical manifestation requirements when claims of emotional distress are made. Courts that have discarded those requirements generally treat negligent infliction of emotional distress in the same manner as physical injuries.

This Comment will focus on the Wisconsin Supreme Court's decision in *Garrett v. City of New Berlin.* Though the Wisconsin Supreme Court is sharply divided, Wisconsin remains in the middle category of jurisdictions by continuing to adhere to the zone of danger and physical manifestation requirements. The Wisconsin Supreme Court's division, however, has placed Wisconsin on the brink of change. This Comment begins by tracing Wisconsin's position on negligent infliction of emotional distress claims. A detailed analysis of how *Garrett* has impacted Wisconsin's negligent infliction of emotional distress requirements will follow. Finally, a recommendation for fundamental doctrinal change in Wisconsin's approach to negligent infliction of emotional distress will be proposed.

II. WISCONSIN'S HISTORY OF NEGLIGENT INFlictION OF EMOTIONAL DISTRESS

Wisconsin's current method of handling negligent infliction of emotional distress to bystanders began in 1935 with *Waube v. Warrington.* *Waube* involved a mother who, while looking out the window of her house and watching her child cross the highway, witnessed the negligent killing of her child by the defendant. Mrs. Waube "became extremely hysterical, sick and prostrated through fright, shock and excessive sudden emotional disturbances which caused her immediately to take to her bed." She subsequently died. Mr. Waube sued under the wrongful death statute for the death of his wife.

The sole issue before the Wisconsin Supreme Court was "whether the mother of a child, who, although not put in peril or fear of physical impact, sustains the shock of witnessing the negligent killing of her child, may recover for physical injuries caused by such fright or shock." The court stated that its analysis "must be approached at the outset from the viewpoint of the duty of the defendant and the right of the plaintiff, and not

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7. 216 Wis. 603, 258 N.W. 497 (1935).  
8. *Id.* at 603-04, 258 N.W. at 497.  
9. *Id.* at 604, 258 N.W. at 497.  
10. *Id.*  
11. *Id.* at 605, 258 N.W. at 497.
from the viewpoint of proximate cause." The court stated that up until that point, Wisconsin had followed the impact rule. The impact rule denies recovery to a plaintiff unless the plaintiff can demonstrate that he or she suffered a contemporaneous physical injury or impact accompanied by mental distress.

The Wisconsin Supreme Court partially retreated from the impact rule by allowing a plaintiff who was within the zone of danger of physical impact to recover for mental injuries caused by shock arising from the peril, although the plaintiff did not suffer any physical impact. However, the court considered it an entirely different matter to allow recovery for a plaintiff who was out of the zone of danger and who suffered emotional distress only as a result of fearing for the safety of another person. The court stated that it could not extend liability in the latter circumstance, because the "consequences are so unusual and extraordinary, viewed after the event, that a user of the highway may be said not to subject others to an unreasonable risk of them by the careless management of his vehicle." Moreover, the court, in finding that the defendant owed no duty to the plaintiff, went on to state that the "liability imposed by such a doctrine is wholly out of proportion to the culpability of the negligent tort-feasor, would put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point."

The Waube zone of danger rule was examined and re-evaluated in Klassa v. Milwaukee Gas Light Co. In Klassa, the defendant's employees negligently caused a minor explosion in the basement of the plaintiff's home while installing a gas pressure regulator. The plaintiff's claim was not

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12. Id. The Wisconsin Supreme Court's reference to proximate cause is used as a synonym for policy considerations that are to be applied in the court's decision to preclude liability after a jury has made a finding of liability. See infra note 56 for a list of Wisconsin's public policy considerations.
13. Waube, 216 Wis. at 607-08, 258 N.W.2d at 499. "[W]here there was no impact, and where there were no subsequent physical injuries caused by fright, no cause of action existed." Id. at 608, 258 N.W.2d at 499 (citing Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N.W. 973 (1894); Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900)).
15. Waube, 216 Wis. at 612, 258 N.W. at 500-01.
16. Id. at 613, 258 N.W. at 501.
17. Id.
18. Id.
19. 273 Wis. 176, 77 N.W.2d 397 (1956).
20. Id. at 180, 77 N.W.2d at 400.
based on physical injuries, but on injuries that were solely the result of shock and fright.\textsuperscript{21}

In analyzing \textit{Waube}, the \textit{Klassa} court stated: "\textit{W}henever a court holds that a certain act does not constitute negligence because there was \textit{no duty} owed by the actor to the injured party, although the act complained of caused the injury, such court is making a policy determination.\textsuperscript{22} As a result, the \textit{Klassa} court recharacterized \textit{Waube} in terms of precluding liability on public policy grounds rather than in terms of the defendant having no duty to the plaintiff. Moreover, the \textit{Klassa} court interpreted Wisconsin's negligent infliction of emotional distress rule to require that a plaintiff must not only be within the zone of danger, but must also fear for his or her own safety.\textsuperscript{23}

Fourteen years later, in \textit{Ver Hagen v. Gibbons},\textsuperscript{24} the Wisconsin Supreme Court added an additional requirement that had to be met before plaintiffs could recover for negligent infliction of emotional distress. In \textit{Ver Hagen}, the plaintiff claimed the defendant had negligently constructed his fireplace.\textsuperscript{25} When the plaintiff built a fire in his fireplace, the fire spread and consumed the plaintiff's house. The plaintiff was in the house at the time the fire started and was forced to flee. The plaintiff claimed that, as a result of the defendant's negligence, he "\textit{s}uffered shock, mental anguish and great anxiety for his well being . . . ."\textsuperscript{26} The court examined the issue of whether one can recover for mental anguish and emotional distress which is the result of another's negligence but which is not subsequently physically manifested.\textsuperscript{27} The court denied the plaintiff recovery (but did allow him to replead) by adding the requirement that emotional distress "\textit{must be manifested by physical injuries in actions based on negligence}.\textsuperscript{28}

In 1982, the Wisconsin Supreme Court created a narrow exception to the physical manifestation requirement in \textit{La Fleur v. Mosher}.\textsuperscript{29} In \textit{La Fleur}, a fourteen year-old girl was negligently confined in a police station jail cell for thirteen hours without food or water. The plaintiff in \textit{La Fleur}
was allowed to recover on her claim for negligent infliction of emotional distress despite not having suffered physical manifestations of her mental injury.\textsuperscript{30} The majority stated that physical manifestations of emotional distress are required because this is the "tool" which allows the court to distinguish valid from fraudulent claims of emotional injury.\textsuperscript{31} \textit{La Fleur} generally affirmed the physical manifestation requirement, but created a narrow exception for cases involving negligent confinement.\textsuperscript{32} The majority reasoned that negligent confinement, by its very nature, subject to an independent set of requirements, would act as the guarantee that the plaintiff's emotional distress was genuine, even though there were no physical manifestations of the emotional distress.\textsuperscript{33}

In summary, the Wisconsin Supreme Court has, in this series of cases, created a limited duty to a plaintiff whose claim is based on negligent infliction of emotional distress by requiring a plaintiff to: (1) be in the zone of danger; (2) fear for his or her own safety; and (3) have physical manifestations of his or her mental injuries. The only exception to these requirements is the narrow exception limited to negligent confinement, where the very nature of the tort can act as proof of the plaintiff's emotional distress. However, the Wisconsin Supreme Court, in 1984, created what can best be described as a second "exception" to the traditional requirements of negligent infliction of emotional distress in \textit{Garrett v. City of New Berlin}.\textsuperscript{34}

\section*{III. \textit{Garrett v. City of New Berlin}}

\subsection*{A. Facts}

In 1981, thirteen year-old Raymond Garrett and his fourteen year-old sister Connie were on the edge of the grounds on the inside of the 15 Outdoor Theater watching a movie.\textsuperscript{35} Connie was leaning against a fence at the

\begin{itemize}
\item \textsuperscript{30} \textit{Id.} at 114, 325 N.W.2d at 315. "The plaintiff suffered no physical injuries but was diagnosed by a psychiatrist as having suffered a traumatic neurosis as a result of the confinement." \textit{Id.}
\item \textsuperscript{31} \textit{Id.} at 118, 325 N.W.2d at 317.
\item \textsuperscript{32} \textit{Id.} at 119, 325 N.W.2d at 317.
\item \textsuperscript{33} \textit{Id.} at 120, 325 N.W.2d at 318. The following standard of liability must be met in order for an injured plaintiff to recover for emotional distress caused by negligent confinement:
\begin{enumerate}
\item the defendant must have been negligent in confining the plaintiff;
\item the confinement must be for a substantial period of time;
\item the circumstances surrounding the confinement must be such that a reasonably constituted person would be emotionally harmed;
\item the confinement must be a substantial factor in causing the emotional distress; and
\item the resulting emotional distress must be severe.
\end{enumerate}
\textit{Id.}
\item \textsuperscript{34} 122 Wis. 2d 223, 362 N.W.2d 137 (1985).
\item \textsuperscript{35} \textit{Garrett v. City of New Berlin}, 122 Wis. 2d 223, 226, 362 N.W.2d 137, 139 (1985).
edge of the theater premises. Raymond was about fifteen feet away, lying on a blanket near a gravel driveway. At about 10:45 p.m., a squad car driven by a City of New Berlin police officer entered the theater premises through the exit with its headlights extinguished. The officer swept the fence area with his spotlight and accelerated in pursuit of the children he had observed. The officer, driving without his lights on, ran over Raymond and caused him severe and permanent injuries.

Connie witnessed the squad car run over Raymond. However, she was never closer to the squad car than fifteen or twenty feet. Connie ran over to where Raymond was lying, saw his twisted and bloody legs, and became upset. Connie sustained no direct physical injuries as a result of the collision and never feared for her own safety.

Connie Garrett filed suit against the City of New Berlin and the theater owner, seeking recovery for her alleged severe emotional shock and distress as a result of witnessing the injury to her brother. The defendants filed a motion for summary judgment against Connie Garrett's claim. The trial court granted the summary judgment motion since Connie was not within the zone of danger at the time of the accident and did not fear for her own safety. In addition, the trial court noted that the record demonstrated that Connie sustained no physical injury accompanying her claim for emotional distress.

B. The Plurality Opinion

The Wisconsin Supreme Court, in a plurality opinion, reversed the trial court. Justice Callow's opinion first dealt with the issue of whether a person who was not within the zone of danger may recover for negligent inflic-
tion of emotional distress resulting from witnessing a sibling being injured in an accident.\textsuperscript{47} The majority noted\textsuperscript{48} that the parties framed the issue in terms of a choice between \textit{Waube's} zone of danger rule and the test set forth in \textit{Dillon v. Legg}.\textsuperscript{49} In \textit{Dillon}, the California Supreme Court rejected the zone of danger rule and adopted a "foreseeability" test which established three criteria for determining liability: "(1) Whether [the] plaintiff was located near the scene of the accident . . . (2) Whether the shock resulted from a direct emotional impact upon [the] plaintiff from the sensory and contemporaneous observance of the accident . . . (3) Whether [the] plaintiff and the victim were closely related . . ."\textsuperscript{50}

While the battle lines appeared to be clearly drawn, Justice Callow took a different tack in deciding this case. Instead of choosing between \textit{Waube} or \textit{Dillon}, he did "not find it necessary to decide whether the \textit{Waube} rule should be modified or abandoned since [he] conclude[d] that \textit{Waube} [was] inapposite to the facts."\textsuperscript{51} Justice Callow distinguished \textit{Waube} from \textit{Garrett}. He viewed \textit{Waube} as involving a plaintiff who was an "observer not directly involved in the tortious activity who sought to recover for emotional distress suffered as a result of witnessing an accident."\textsuperscript{52} On the other hand, Justice Callow viewed \textit{Garrett} as involving a plaintiff who was "not merely an observer . . . [but] an object of the police officer's [tortious] activities since [Connie] was a member of the group of children he was pursuing."\textsuperscript{53}

This distinction is very important in understanding Justice Callow's reasoning. Since Connie was the object of the police officer's tortious activities, Justice Callow did not examine whether Connie was in the zone of danger or feared for her own safety.\textsuperscript{54}

After distinguishing \textit{Garrett} from \textit{Waube}, Justice Callow next considered whether the public policy considerations enunciated in \textit{Morgan v. Pennsylvania General Insurance Co.}\textsuperscript{55} would preclude Connie Garrett from

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\textsuperscript{47} \textit{Garrett}, 122 Wis. 2d at 228-29, 362 N.W.2d at 140.  \\
\textsuperscript{48} Id. at 229, 231, 362 N.W.2d at 141-42.  \\
\textsuperscript{49} 441 P.2d 912 (1968).  \\
\textsuperscript{50} \textit{Garrett}, 122 Wis. 2d at 232, 362 N.W.2d at 142 (quoting \textit{Dillon}, 441 P.2d at 920).  \\
\textsuperscript{51} \textit{Id.}  \\
\textsuperscript{52} \textit{Id.}  \\
\textsuperscript{53} \textit{Id.}  \\
\textsuperscript{54} It is unclear whether Connie's being the "object" of the tortious activity satisfied the zone of danger and fear for one's own safety requirements or precluded the application of these criteria to the \textit{Garrett} facts.  \\
\textsuperscript{55} 87 Wis. 2d 723, 275 N.W.2d 660 (1979).
\end{flushright}
maintaining a cause of action for emotional distress. Justice Callow con-
cluded that public policy did not prohibit Connie from maintaining an ac-
tion for emotional distress because: (1) Connie observed the traumatic
injuries suffered by Raymond from a distance of fifteen or twenty feet; (2)
Connie was close enough to see the squad car run over Raymond and to
witness his resulting injuries and severe pain; and (3) Connie was Ray-
mond's older sister. Justice Callow went on to state that allowing Connie
to recover would not be likely to "open the way for fraudulent claims or . . .
enter a field with no sensible stopping point." Therefore, Justice Callow
concluded that "under the facts presented in this case Connie Garrett may
maintain an action to recover for the emotional distress she suffered as a
result of seeing her brother injured."

Since Connie's claim for relief would not be barred by the zone of dan-
ger and fear for one's own safety requirements or by public policy consid-
erations, Justice Callow next examined whether Connie suffered any physical
manifestations of her emotional distress. Justice Callow declined to abolish
the physical manifestation requirement because he believed that it was still
"necessary in order to avoid flooding the courts with fraudulent or trivial
claims." Justice Callow reasoned that "[w]hen the emotional distress is
manifested by physical injuries, it is more probable that the claimed distress
is genuine." In Connie's deposition, she testified to "post-accident behav-
ior which evidenced a state of hysteria at the scene of the accident." Moreover, Connie "claimed she suffered insomnia for two months and ex-

56. Garrett, 122 Wis. 2d at 233, 362 N.W.2d at 143. The Morgan court stated that [s]ome of
the public policy reasons for not imposing liability despite a finding of negligence as a substantial
factor producing injury are:
(1) the injury is too remote from the negligence; or
(2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or
(3) in retrospect it appears too highly extraordinary that the negligence should have
brought about the harm; or
(4) because allowance of recovery would place too unreasonable a burden on the negligent
tort-feasor; or
(5) because allowance of recovery would be too likely to open the way for fraudulent
claims; or
(6) allowance of recovery would enter a field that has no sensible or just stopping point.

57. Garrett, 122 Wis. 2d at 234, 362 N.W.2d at 143.
58. Id.
59. Id.
60. See id. at 235-36, 362 N.W.2d at 144 (citing La Fleur v. Mosher, 109 Wis. 2d 112, 118,
325 N.W.2d 314, 317 (1982)).
61. Id. at 236, 362 N.W.2d at 144.
62. Id.
experienced a disruption of her relationship with her family, a drop in her school grades, and a deterioration of her self-image." Justice Callow considered it doubtful that a drop in Connie's grades, a disruption of her family relationship, or a lowering of her self-image could constitute physical manifestations of her emotional distress. However, "while insomnia alone may not be a sufficient physical manifestation of emotional distress, insomnia coupled with some other physical symptom may be sufficient." By consulting two medical dictionaries, Justice Callow concluded that "hysteria" was a recognized physical manifestation of emotional distress. Therefore, Justice Callow concluded that the granting of summary judgment by the trial court against Connie Garrett on the issue of physical manifestations of her injury was not appropriate and remanded the matter to the trial court for further proceedings.

C. The Concurring Opinion

Chief Justice Heffernan, who wrote the concurring opinion in Garrett, took issue with the majority's efforts to distinguish Garrett from Waube. In addition, the Chief Justice disagreed with Justice Callow's characterization of Garrett as an exception to the zone of danger rule.

Chief Justice Heffernan argued that the "zone of danger theory has no place in modern Wisconsin negligence law. It is absolutely clear that . . . where there is negligence, cause in fact (substantial factor), proximate cause, and injury, there is liability." According to Chief Justice Heffernan, the zone of danger requirement falls out of the analysis because "there is liability in respect to anyone who is in fact injured by the negligence."
The concurring opinion further stated that the zone of danger rule was "artificial" because "in the event a plaintiff is injured in any way, that plaintiff is in fact within the zone of danger."\(^{71}\)

Moreover, Chief Justice Heffernan, quoting the dissent in *Ver Hagen v. Gibbons*\(^{72}\) argued that negligently inflicted emotional distress should be compensable "regardless of whether this emotional distress was subsequently physically manifested."\(^{73}\) The Chief Justice continued by saying that "[w]hether there is in fact emotional injury or a compensable distress is a matter of proof under normal evidentiary principles."\(^{74}\)

Furthermore, the concurring opinion also favored abandoning the requirement that a plaintiff must fear for his or her own safety to recover for negligently inflicted emotional distress. Chief Justice Heffernan argued that the rationale behind allowing a plaintiff who is in the zone of danger to recover is based on the plaintiff’s fear for his or her own safety, but that the zone of danger and fear for one’s own safety requirements were often "irrelevant to the claims that have arisen and alien to the characteristics of normal human beings."\(^{75}\) "It is beyond the realm of reason and experience to conclude that emotional distress cannot, as a matter of law, result unless there is danger of physical impact to the plaintiff or there is a physical manifestation of the emotional distress."\(^{76}\) As a result of this analysis, the concurring opinion would specifically overrule *Waube*. The Chief Justice summarized the concurring view by stating that "[i]f there is the requisite sequence of negligence, causation, and damages—whether physical, emotional, or both—there ordinarily should be liability."\(^{77}\) Whether this liability should be prohibited by the court, based on public policy considerations, should be a case-by-case determination.\(^{78}\)

**D. The Dissenting Opinion**

Justice Ceci, the lone dissenter, disagreed with both the reasoning and the result of Justice Callow’s opinion. Moreover, Justice Ceci argued

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71. *Id.* at 239, 362 N.W.2d at 145-46.
72. 47 Wis. 2d 220, 177 N.W.2d 83 (1970).
73. *Garrett*, 122 Wis. 2d at 240, 362 N.W.2d at 146 (quoting *Ver Hagen*, 47 Wis. 2d at 228, 177 N.W.2d at 87 (Wilkie, J., dissenting)).
74. *Id.*
75. *Id.* at 241, 362 N.W.2d at 146.
76. *Id.* at 242, 362 N.W.2d at 147.
77. *Id.* at 241, 362 N.W.2d at 146.
78. *Id.* at 242, 362 N.W.2d at 147.
against any deterioration of the zone of danger rule as set forth in *Waube* and modified in *Klassa*.79

The dissenting opinion first examined Justice Callow's conclusion that *Waube* was inapposite to the facts of *Garrett* because Connie Garrett was the "object of the police officers activities since she was a member of the group of children he was pursuing."80 Justice Ceci argued that *Waube* and *Garrett* were "indistinguishable," and that Justice Callow's characterization of the facts was misleading because it "implies that Connie fled from the scene of the accident with her friends and that she was pursued by the police officer."81 Justice Ceci focused on the fact that when the police officer pointed his spotlight at the area where several of the children were standing, although several fled, Connie remained still.82 The officer then pursued only those children who were running.83 Based on these facts, Justice Ceci concluded that Connie was a mere observer of the accident, like Mrs. Waube had been. Therefore, Connie's claim should be barred.84

Justice Ceci also took issue with what he saw as Justice Callow's extension of the zone of danger rule. He stated that the zone of danger rule, as set forth in *Waube*, does not include the question of "whether the plaintiff was an observer of the accident or an object of the defendant's negligent activities, but, rather, whether the plaintiff was in peril of physical impact."85 Applying the *Waube* zone of danger rule to the *Garrett* facts would bar Connie Garrett from recovering. Justice Ceci stated that "in this case, it is undisputed that Connie Garrett was never closer than fifteen to twenty feet from the squad car that ran over her brother and was never in danger of being injured herself." Therefore, this requirement would bar Connie's claim.86

Moreover, Justice Ceci would also bar recovery, "because it is undisputed that Connie never feared for her own safety."87 Justice Ceci noted that Justice Callow failed to apply the fear for the plaintiff's own safety

79. *Id.* at 243, 362 N.W.2d at 147.
80. *Id.* (quoting language from Justice Callow's opinion) (Ceci, J., dissenting). Justice Ceci did not view the *Garrett* majority opinion as creating an exception to the zone of danger and fear for one's own safety requirements. Instead, the justice took the view that the majority expanded the scope of these requirements.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 244, 362 N.W.2d at 148.
87. *Id.*
requirement and allowed "Connie's cause of action to stand despite the fact that she never feared for her own safety." 88

Finally, Justice Ceci argued that Connie's claim for relief should have been barred based on public policy considerations. Justice Callow set forth six public policy considerations and concluded that Connie's claim was not barred by any of them. 89 However, Justice Ceci pointed out that several of these public policy considerations are the basis for the zone of danger rule, which he believed Justice Callow circumvented in this case. 90 Justice Ceci argued that the following public policy considerations which underlie the zone of danger rule would bar Connie's claim: (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; (3) a legal precedent opening the way to fraudulent claims would be set; and (4) a field with no sensible or just stopping point would be entered. 91 Justice Ceci concluded by saying that he would affirm the summary judgment granted by the trial court against Connie Garrett because she "was never in the field of danger, as is required by Waube, and never feared for her own safety as is required by Klassa." 92 Moreover, Justice Ceci stated that Justice Callow's "deterioration of these requirements will open the way for fraudulent claims and will enter a field with no sensible stopping point." 93

IV. ANALYSIS OF THE GARRETT OPINION

The Garrett court was faced with a compelling fact scenario for recovery in which the existing rules governing negligent infliction of emotional distress would bar the plaintiff's claim. The majority conceded the fact that Connie Garrett was not within the zone of danger, nor did she fear for her own safety. 94 The plurality opinion never argued that these requirements were met. Instead of instituting a fundamental doctrinal change in the basic requirements of negligent infliction of emotional distress, Justice Callow clung to the established rules, but as in La Fleur, created what may only be characterized as an "exception." The exception applied to the Garrett facts on the basis that Connie "was not merely an observer who was not directly involved in the tortious activity," but "was an object of the police officer's

88. See supra note 56 for a list of public policy considerations in Wisconsin.
89. Id. at 233-34, 362 N.W.2d at 143.
90. See id. at 244, 362 N.W.2d at 148.
91. Id. at 245, 362 N.W.2d at 148 (quoting Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935)).
92. Id. at 246, 362 N.W.2d at 149.
93. Id.
activities since she was a member of the group of children he was pursuing."95

Like *La Fleur*, the *Garrett* decision demonstrates the "lawyers' adage that hard cases make bad law."96 The facts of *Garrett* were compelling enough that six of the seven justices believed that Connie Garrett should recover for her emotional distress. However, only three of the justices thought that the facts of *Garrett* were distinguishable from *Waube.*97 Since the facts of the two cases are so similar, the *Garrett* plurality holding will be difficult to administer. Whether the *Garrett* plurality created an actual "exception," as in *La Fleur*, or whether the plurality intended a different result is not clear. There are at least three possible ways in which the *Garrett* plurality holding may affect the existing negligent infliction of emotional distress requirements of zone of danger and fear for one's own safety.

First, *Garrett* could expand what is included within the existing requirements. This would mean that the fear for one's own safety requirement would have been extended to include the plaintiff fearing for a third person's safety. However, both the plaintiff and the third person must be members of a group of people towards which the defendant's tortious conduct was directed. Similarly, if the plurality was expanding the parameters of the zone of danger rule, a plaintiff could now claim that while he was not in the zone of danger, he was, nevertheless, a member of a group of people who were the focus of the defendant's tortious conduct. However, the plurality, by stating that it was not necessary to "modify or abandon" *Waube* because it was "inapposite" with the *Garrett* facts,98 clearly demonstrated their intent not to expand the zone of danger rule and, by analogy, the fear for one's own safety requirement.

The second possible application of the *Garrett* holding is that the plurality considered the zone of danger and fear for one's own safety requirements satisfied by the *Garrett* facts. If the majority's opinion is interpreted as satisfying, without modifying, these requirements, they should theoretically remain unchanged. However, the fear for one's own safety requirement does not lend itself to such a liberal interpretation. It is one thing to say that the zone of danger requirement always applied to persons who were members of a group at which the defendant's negligence was directed;

95. *Id.* at 232, 362 N.W.2d at 142.
97. *Garrett*, 122 Wis. 2d at 245, 362 N.W.2d at 149. Both *Waube* and *Garrett* involved plaintiffs who watched a close relative run down by a motor vehicle. In both cases the plaintiff was not in the zone of danger and did not fear for her own safety.
98. *Id.* at 232, 362 N.W.2d at 142.
it is quite another to make the leap from a requirement that a plaintiff fear for his own safety, to include a plaintiff’s fear for a third person’s safety. While Garrett arguably may not have changed the zone of danger requirement, the fear for one’s own safety requirement could not have been applied to the Garrett facts without modification or expansion.

However, the most likely application of Garrett is that the plurality arrested the application of both the zone of danger and fear for one’s own safety requirements. If the plaintiff fits into the narrow facts of Garrett, then the plaintiff will be excepted from the application of these two requirements. While the plurality does not state its exact position, the concurring opinion does place the label of “exception” on the plurality’s holding, while the dissenting opinion regards the plurality as deteriorating the existing requirements (i.e. expanding what is encompassed by the requirements).

If the facts of Garrett were changed slightly, would the plurality’s exception still have yielded a favorable result for Connie Garrett? Would the plurality have allowed Connie to recover had she just arrived at the drive-in theater to tell her brother to come home with her, and if she were standing on the other side of a four foot high stone wall (outside the theater) when she witnessed the accident? This hypothetical would not make Connie a member of the group of children the police officer was chasing, and therefore, the exception should not apply. Since Connie, in this example, as in the actual case, did not fear for her own safety and was not in the zone of danger, she should not be able to recover under the traditional requirements regardless of what mental harm she suffered. However, the main difference between this example and the actual case is only several feet, but the mental harm to Connie would have almost certainly been the same. It is this type of illogical and arbitrary result from the application of the zone of danger rule that led the Dillon court to abandon it for more flexible guidelines.

While the zone of danger rule and the fear for one’s own safety requirement were fairly fixed, the Garrett plurality removed whatever degree of certainty existed regarding these requirements. A plaintiff who was not within the zone of danger and did not fear for his or her own safety may now attempt to argue that he or she was not a bystander, but a member of the group at which the defendant's tortious activity was directed, and that he or she feared for a group member’s safety. The limits of the Garrett exception are only constrained by the creativity of the plaintiff’s lawyer. For example, the Garrett exception was applied in Westcott v. Mikkelson,99 in which a mother sued her physician for negligent infliction of emotional distress that resulted from an alleged negligent delivery and the resulting

99. 148 Wis. 2d 239, 434 N.W.2d 822 (Ct. App. 1988).
death of her child a day later. The trial court denied recovery because the plaintiff was not in any danger and only feared for the safety of her child. The court of appeals reversed the trial court and applied the Garrett exception. The Westcott court stated that it could not "imagine a more clear-cut example" in which the Garrett exception would apply "than a mother giving birth to a child in distress."101

The appellate court in Westcott was, as in Garrett, faced with a plaintiff whose claim merited recovery under traditional negligent infliction of emotional distress rules. The Westcott court stated the case as a choice between Waube and Garrett. To decide which precedent to apply, the court asked itself whether Mrs. Westcott was an "observer or a participant."102 The court concluded that Mrs. Westcott was a "participant," and therefore, Garrett should apply.

The Westcott case demonstrates the difficulties a court has in trying to interpret and apply the Garrett exception. The court's application of the Garrett exception is probably in accordance with the Garrett plurality's view, however, its interpretation and statement of the exception is inaccurate. The Garrett exception does not analyze whether the plaintiff was a participant, but whether the plaintiff was a member of a group of people at which the defendant's tortious conduct was directed.103 In Westcott, it is unclear who else would have fit within the boundaries of the Garrett exception. The best example would be the father who was present when his child was negligently delivered and subsequently died. Would the appellate court have accepted the argument that the defendant's tortious conduct was directed at the Westcott family as a whole, and therefore, accepted the father's claim for relief? This argument is no less compelling than the Garrett plurality basing Connie's claim for relief on the characterization that the police officer's tortious conduct was directed at the group of children of which Connie was a member. Moreover, if in this example, the father did state a claim for relief, there could be no justification for not allowing the plaintiff in Waube to do likewise. It is unclear how far and in what directions the Garrett exception extends.

After creating the "object of the tortious activity" exception, the Garrett plurality examined whether public policy would prohibit Connie from maintaining her cause of action. The three justices held that it would not.

100. Id. at 240, 434 N.W.2d at 822. The plaintiff's brief stated the child was born dead. However, the complaint claimed the death occurred one day after birth. The infant was maintained on artificial life support for one day.
101. Id. at 242, 434 N.W.2d at 823.
102. Id.
103. See supra note 49 and accompanying text.
What is significant about this is that the plurality used a *Dillon*-like analysis.104 The *Dillon* criteria which limit liability are: (1) whether the plaintiff was located near the scene of the accident; (2) whether the shock to the plaintiff resulted through a contemporaneous observance of the accident; and (3) whether the plaintiff and the victim were closely related. The plurality in *Garrett* singled out the facts that they considered most important in Wisconsin’s public policy analysis based upon the factors enunciated in *Morgan*. The facts the plurality singled out were: (1) that Connie observed the traumatic injuries suffered by Raymond from a distance of fifteen or twenty feet; (2) that Connie was close enough to see the squad car run over Raymond and witness his resulting injuries and severe pain; and (3) that Connie was Raymond’s older sister.105 These facts mirror *Dillon*’s policy criteria exactly. Consequently, it could be questioned whether the plurality has tacitly adopted the *Dillon* criteria as part of Wisconsin’s public policy consideration when the *Garrett* exception is applied to negligent infliction of emotional distress.

The *Garrett* plurality viewed the *Dillon* guidelines as being created to address “the problem of potential unlimited liability.”106 The plurality’s conclusion from their *Dillon*-like public policy analysis is that allowing Connie to recover for her emotional distress would not “be likely to open the way for fraudulent claims or would enter a field with no sensible stopping point.”107 This parallel of the *Dillon* court’s analysis is not surprising when the facts of *Dillon* are examined. *Dillon*, like *Garrett*, involved a plaintiff who was not within the zone of danger and did not fear for her own safety. Mrs. Dillon and her daughter, Cheryl, watched the defendant negligently kill Mrs. Dillon’s other daughter, Erin.108 At trial, Mrs. Dillon was barred from recovering because she was not within the zone of danger, where, Cheryl, who may have been in the zone of danger, was allowed to recover.109 In rejecting the zone of danger rule, the California Supreme Court stated that it could “hardly justify relief to the sister [Cheryl] for trauma which she suffered . . . and yet deny it to the mother merely because of a happenstance that [Cheryl] was some few yards closer to the accident.”110 The end result of the *Dillon* court’s analysis was the formulation of the guidelines discussed above. The *Dillon* guidelines were created for

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104. See *supra* text accompanying note 56.
105. *Garrett*, 122 Wis. 2d at 234, 362 N.W.2d at 143.
106. *Id.* at 232, 362 N.W.2d at 142.
107. *Id.* at 234, 362 N.W.2d at 143.
109. *Id.* at 915.
110. *Id.* at 915.
the purpose of replacing the zone of danger and fear for one's own safety requirements. The Garrett plurality's tacit application of the Dillon guidelines, while at the same time embracing the zone of danger rule and fear for one's own safety requirement, demonstrates a Janus quality in their analysis.

The last criterion the Garrett plurality examined was the requirement that there be physical manifestations of Connie's mental injuries. The trial court found no physical manifestations of Connie's alleged mental injuries. However, the Garrett plurality, confronted with a worthy plaintiff, manipulated the physical manifestation requirement to find it satisfied. Connie testified in her deposition that she suffered a post-accident state of hysteria, insomnia for two months, disruption of her family relationship, and a drop in her school grades. This behavior demonstrated two types of mental reactions to a traumatic event.111 Connie's hysteria at the scene of the accident demonstrated a "primary" response to the witnessing of the accident. Primary reactions occur "automatically and instinctively, as, for example, when the individual is put in great personal danger or is forced to witness" the death of a loved one.112 In addition, Connie appeared to have suffered several "secondary" reactions that may be termed "traumatic neuroses," which are caused by "an individual's continued inability to adequately adjust to a traumatic event."113 Connie's insomnia, disruption of her family relationship, and drop in her school grades could be viewed as secondary reactions to the witnessing of the accident.

The Garrett plurality consulted a medical dictionary to determine if Connie Garrett's post-accident behavior evidenced any recognized physical manifestations of her alleged mental injuries. The plurality focused on the primary reactions to determine if Connie demonstrated any physical manifestations and discounted the secondary reactions. The plurality stated that "it is doubtful that a disruption of one's family relationship or a drop in grades could constitute a physical manifestation of emotional distress, [however], hysteria is recognized as such a physical manifestation."114 The Garrett court's emphasis on primary reactions fails to fully realize the totality of a person's possible mental injuries. Both primary and secondary reactions must be examined to obtain a total picture of the harm that was done to the plaintiff. "It is much clearer that secondary reactions can be extremely detrimental to the individual. Despite their often subtle nature,

111. See Comment, supra note 14, at 1249.
112. Id.
113. Id. at 1250.
114. Garrett, 122 Wis. 2d at 236, 362 N.W.2d at 144.
neuroses can produce severe disability, interference with normal functions, and impairment in the daily satisfaction of life; and . . . a patient's thinking and feeling . . . . " The Garrett plurality's "medical dictionary test" greatly eroded what filtering effect the physical manifestation requirement was intended to serve. A plaintiff's lawyer will now only have to search for the medical dictionary that best describes his or her client's mental injuries. The physical manifestation requirement may have screened some plaintiffs before Garrett, however, after Garrett, the requirement no longer poses much of an obstacle.

V. A RECOMMENDATION FOR FUNDAMENTAL CHANGE

The Wisconsin Supreme Court has backed itself into a corner by creating a web of arbitrary rules that are unrealistic and do not allow recovery for all clearly deserving plaintiffs. The Garrett case served to highlight the shortcomings of the traditional rules. In both La Fleur and Garrett, the court was confronted with plaintiffs whom the court genuinely felt should recover for their emotional distress. However, in both cases, the inflexibility of the traditional requirements would bar the plaintiff's claim. To allow these plaintiffs to bring their claims, the court has ignored its own rules and created narrow exceptions. How long can the Wisconsin Supreme Court continue to pull bricks out of the foundation of the traditional requirements before these requirements collapse on them? Recommending a new set of arbitrary requirements in this Comment would only serve to redraw the arbitrary lines and be subject to the same criticism as the traditional requirements. An illustration of this is demonstrated in California's experience with negligent infliction of emotional distress. For years the California Supreme Court followed the zone of danger and fear for one's own safety rules. However, recognizing the requirements' inadequacies, the California Supreme Court created in Dillon a set of new requirements, discussed earlier, that were intended to replace the former criteria. These new requirements were intended to determine the existence of a duty in bystander negligent infliction of emotional distress cases. However, in subsequent cases, the California Supreme Court realized the inadequacy of this new set of arbitrary rules and relegated them to mere guidelines that were to be considered by the court, but which were not to be determinative.

115. See Comment, supra note 14, at 1252.
The Garrett concurring opinion states the most realistic and compelling approach to negligent infliction of emotional distress cases. The concurring opinion treats mental harm in the same manner as physical harm. Chief Justice Heffernan, who wrote the concurring opinion, argued that the negligent infliction of emotional distress analysis be based only on the most fundamental tort principals of duty, breach, causation, and damages.\textsuperscript{120} The zone of danger and fear for one's own safety requirements have "no place in modern Wisconsin negligence law."\textsuperscript{121} These requirements are excluded from the analysis because, "where there is a negligent act, there is liability in respect to anyone who is in fact injured by the negligence."\textsuperscript{122} Liability should not be examined in an "artificial way, such as saying that there can be no liability for one out of the 'zone of danger,' because in the event a plaintiff is injured in any way, that plaintiff is in fact within the 'zone of danger.'"\textsuperscript{123} While the zone of danger and fear for one's own safety requirements were created to address the dual fears of fraudulent claims and unlimited liability, these fears do not go unchecked in the concurring opinion's approach. What is gone is the arbitrary and unrealistic requirements that inadequately addressed these considerations. Under Wisconsin law, the proper place for these considerations is not in the duty analysis, but rather after the jury has found liability.\textsuperscript{124} Whether to preclude liability in a given set of facts would be a case by case determination to be made by the court after a finding of liability by the jury.\textsuperscript{125} Chief Justice Heffernan was in favor of allowing Connie Garrett to recover, not because she fell within the parameters of arbitrary requirements like zone of danger and fear for one's own safety, but because she could prove duty, breach, causation, and damages. In addition, there was no public policy consideration that should bar her claim.

The concurring opinion's approach to negligent infliction of emotional distress is neither revolutionary nor startling, but only follows the general approach to negligence cases in Wisconsin. The supreme courts of seven jurisdictions have adopted approaches similar to what Chief Justice Heffernan proposed to govern negligent infliction of emotional distress cases.\textsuperscript{126}

\textsuperscript{120} Garrett, 122 Wis. 2d at 241, 362 N.W.2d at 146.
\textsuperscript{121} Id. at 239, 362 N.W.2d at 145.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 239, 362 N.W.2d at 145-46.
\textsuperscript{124} Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 857, 236 N.W.2d 1, 11 (1975).
\textsuperscript{125} Id.
\textsuperscript{126} The following jurisdictions have dropped the zone of danger, fear for one's own safety, and physical manifestation requirements: Alabama, California, Connecticut, Hawaii, Missouri, Montana, and Ohio. See Taylor v. Baptist Medical Center Inc., 400 So. 2d 369 (Ala. 1981); Molien v. Kaiser Found. Hosp., 616 P.2d 813 (Cal. 1980); Montinieri v. Southern New England
The California Supreme Court, in *Molien v. Kaiser Foundation Hospital*,\(^{127}\) stated that "[t]he essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on ... [an] artificial and often arbitrary classification scheme."\(^{128}\) In addition, the *Molien* court stated that the existence of a mental injury "is a matter of proof to be presented to the trier of fact."\(^{129}\) The screening of claims based on a classification scheme at the "pleading stage is usurpation of the jury's function."\(^{130}\) The concurring opinion in *Garrett* mirrors this shift from arbitrary requirements to reliance on the jury as the filtering mechanism. Chief Justice Heffernan argued that the question is factual and "[i]t is for the jury to decide whether injury, physical or emotional, has been proved and was caused by the defendant's negligence."\(^{131}\)

In addition to arguing for the rejection of the zone of danger and fear for one's own safety requirements, the Chief Justice would also eliminate the physical manifestation requirement.\(^{132}\) The Wisconsin Supreme Court has justified this requirement in negligent infliction of emotional distress cases as a way to guarantee genuine claims. However, in *Alsteen v. Gehl*,\(^{133}\) the Wisconsin Supreme Court has recognized that while the physical manifestation requirement was needed in the past because "we lacked techniques for gathering reliable information about psychological experience, we now ... can intelligently evaluate claims of emotional injury."\(^{134}\) The *Alsteen* court continued by saying that "[p]sychiatry and clinical psychology, while not exact sciences, can provide sufficiently reliable information relating to the extent of psychological stress, and to the causal relationship between the injury and the defendant's conduct, to enable a trier of fact to make intelligent valuative judgments on a plaintiff's claim."\(^{135}\) While Justice Wilkie made these statements for the majority in *Alsteen* in reference to intentional infliction of emotional distress, in the dissent in *Ver Hagen*, he argued for their extension to negligent infliction of emotional distress cases. In *Ver Hagen*, Justice Wilkie argued that "[t]here is no longer any reason in logic..."
or in fact to distinguish between intentional or negligent infliction of emotional distress” because “[t]he damage is equally real whatever name is applied.”

However, Wisconsin, while dropping most of the requirements for intentional infliction of emotional distress, still retained the nebulous requirement that the emotional distress must be severe. The purpose of the requirement is to prevent claims based on emotional distress that might be trivial. This screening effect could be equally served by the plaintiff’s lawyer, the jury, and the judge’s application of public policy. The plaintiff’s lawyer, who often works on a contingent fee basis, would not be likely to pursue a plaintiff’s case if the only claim for relief was a de minimis emotional distress claim. For the plaintiff’s lawyer to pursue a marginal claim would not be in his or her own financial interest, nor in the best interests of the client who would have to suffer through the rigors of a jury trial. The jury would also act as a screening mechanism by eliminating marginal claims where plaintiffs fail to prove all the elements of their claim. In addition, the jury would award nominal damages for plaintiffs only proving nominal injuries. The third level of protection from trivial claims is the judge’s ability on a motion after verdict to preclude liability in a given case based on the policy factors enunciated in Morgan.

As was stated before, there is nothing extraordinary or revolutionary about the approach to negligent infliction of emotional distress set forth in the Garrett concurring opinion. Waube and its progeny, by creating what is in effect a limited duty, are “contrary to the accepted Wisconsin tort jurisprudence.” “It is time we dispense with the automatic and irrational application of the liability limiting formulations that the majority attempts to distinguish but at the same time fervently embraces.”

VI. CONCLUSION

Garrett v. City of New Berlin presented the Wisconsin Supreme Court with a case that offered a chance to eliminate the outdated and arbitrary negligent infliction of emotional distress requirements of zone of danger,

137. Meracle v. Children’s Serv. Soc’y of Wisconsin, 149 Wis. 2d 19, 34, 437 N.W.2d 532, 538 (1989). The holding of Waube, which is based on the majority rationale in Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) has been repudiated on numerous occasions by the Wisconsin Supreme Court. See, e.g., Coffey v. City of Milwaukee, 74 Wis. 2d 526, 537-38, 247 N.W.2d 132, 138 (1976); Antoniewicz v. Reszynski, 70 Wis. 2d 836, 857, 236 N.W.2d 1, 11 (1975); Schilling v. Stockel, 26 Wis. 2d 525, 531-32, 133 N.W.2d 335, 338 (1965).
138. Garrett, 122 Wis. 2d at 242, 362 N.W.2d at 147.
fear for one’s own safety, and physical manifestations. By rejecting doctrinal change, the plurality has added to the arbitrariness of the existing requirements. Cases will continue to arise that present a clearly deserving plaintiff who does not fit within the traditional requirements or exceptions. The Wisconsin Supreme Court is likely to continue to either manipulate the existing rules or create additional exceptions to them, to allow deserving plaintiffs to pursue a claim for relief.

Wisconsin, which is usually at the forefront of legal development, has stood by and watched the law governing negligent infliction of emotional distress develop in other jurisdictions. The deep division in the Wisconsin Supreme Court has left Wisconsin on the brink of change for more than half a decade. The Garrett plurality has, through its own reasoning, demonstrated the shortcomings and arbitrary nature of the existing negligent infliction of emotional distress requirements. Chief Justice Heffernan, in the Garrett concurring opinion, has detailed a path that recognizes both the advances in the mental health profession and the need for fundamental doctrinal change. Only through purging the law of the zone of danger, fear for one’s own safety, and physical manifestation requirements, will the law be given stability and coherence. It is time to rethink and fundamentally change Wisconsin’s current approach to negligent infliction of emotional distress. The fears of the Waube court, based on the then current insufficiencies in the developing mental health profession, no longer hold true and should not serve to hinder plaintiffs more than one-half a century later.

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