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Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation

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In *Elza v. Liberty Loan Corp.*,[1] the Indiana Supreme Court refused to review a Second District Indiana Court of Appeals decision[2] which reached what has been characterized as "an unprecedented result"[3] when it required contemporaneous physical impact as a necessary condition to recovery for intentionally inflicted emotional distress.[4] Although the Indiana Supreme Court's denial of transfer and the unpublished memorandum decision of the court of appeals are without authority as precedent,[5] these decisions come perilously close to contaminating this area of the law[6] with the much maligned plaintiff "impact rule."[7]

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[1]426 N.E.2d 1302 (Ind. 1981).

[2]Elza v. Liberty Loan Corp., No. 2-1180-A-371 (Ind. Ct. App. Apr. 30, 1981).

[3]Elza v. Liberty Loan Corp., 426 N.E.2d 1302, 1308 (Ind. 1981) (Hunter, J., dissenting).

[4]Elza v. Liberty Loan Corp., No. 2-1180-A-371 (Ind. Ct. App. Apr. 30, 1981).

[5]IND. R. APP. P. 11(B)(4) provides that a denial of a petition to transfer has "no legal effect other than to terminate the litigation between the parties in the Supreme Court." IND. R. APP. P. 15(A)(3) provides that an unpublished memorandum decision shall not "be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case."

[6]Indiana presently requires a contemporaneous physical impact on the plaintiff as a prerequisite to recovery for negligently inflicted emotional distress. Boston v. Chesapeake & O. Ry., 223 Ind. 425, 61 N.E.2d 326 (1945); Kroger Co. v. Beck, 375 N.E.2d 640 (Ind. Ct. App. 1978); Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E. 694 (1897).

[7]The "impact rule" provides that there can be no recovery for emotional distress when there has been no immediate physical impact to the plaintiff. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 328-30 (4th ed. 1971). *See also* Note, *Recovery for Negligent Infliction of Emotional Distress: Changing the Impact Rule in Indiana*, 54 IND. L.J. 467 (1979) (hereinafter cited as *Negligent Infliction* Note) for a critique of the impact rule as it has been applied in negligent infliction of emotional distress cases.

In *Kroger Co. v. Beck*,[8] the Third District Indiana Court of Appeals, in dictum, criticized the impact rule and indicated that it may not be the soundest possible rule.[9] In an unpublished opinion concurring with the decision of the Indiana Court of Appeals in *Elza*, Judge Sullivan opined that it would be appropriate for the Indiana Supreme Court to reconsider the propriety of the impact rule in light of the current law in other jurisdictions recognizing a right to recover for intentionally inflicted emotional distress absent physical impact to the plaintiff.[10] This author has advanced what Justice Hunter of the Indiana Supreme Court, dissenting to the denial of transfer in *Elza*, has characterized as "persuasive arguments for the abrogation of the rule . . . ."[11]

In spite of this trend toward rejecting the impact rule, Indiana remains with the ranks of five out of this nation's fifty-one jurisdictions which still require impact as a prerequisite to recovery for negligently inflicted emotional distress.[12] The Indiana Supreme Court's refusal of transfer in *Elza* not only permits the court's adherence to the impact rule to stand, but also indicates that it is prepared to allow Indiana to become one of the only jurisdictions in the nation to require a contemporaneous physical impact to the plaintiff as a prerequisite to recovery for intentionally inflicted emotional distress. This Article discusses the law of intentional and negligent infliction of emotional distress, both in terms of the confusing and volatile state of Indiana law and the different treatment which these two areas have received in this and other countries. These different treatments are analyzed and challenged, and

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[8]375 N.E.2d 640 (Ind. Ct. App. 1978).

[9]*Id.* at 645 n.5. *Kroger* dealt with negligent infliction of emotional distress.

[10]No. 2-1180-A-371 (Ind. Ct. App. Apr. 30, 1981) (Sullivan, J., concurring).

[11]426 N.E.2d 1302, 1308 (Ind. 1981) (Hunter, J., dissenting) (citing *Negligent Infliction* Note which advocated abrogation of the impact requirement as a condition necessary to recovery for negligently inflicted emotional distress).

[12]*See* Butchikas v. Travelers Indemn. Co., 343 So. 2d 816 (Fla. 1977); Howard v. Bloodworth, 137 Ga. App. 478, 224 S.E.2d 122 (1976); Kroger Co. v. Beck, 375 N.E.2d 640 (Ind. Ct. App. 1978); Louisville & N.R. Co. v. Roberts, 207 Ky. 310, 269 S.W. 333 (1925); McCardle v. George B. Peck Dry Goods Co., 191 Mo. App. 263, 177 S.W. 1095 (1915). The number of jurisdictions following the impact rule continues to dwindle. The Illinois Court of Appeals has most recently rejected the impact rule, characterizing it as an arbitrary and obsolete rule which bars meritorious claims, and stating that "the subsequent history of the impact rule and the development of the law in areas dealing with mental distress convince us that a reevaluation of the rule is proper. . . . [T]he rationales underlying the impact rule have been rejected as unsound . . . by the vast majority of jurisdictions . . . ." Rickey v. Chicago Transit Auth., 428 N.E.2d 596, 598 (Ill. Ct. App. 1981). Colorado and Massachusetts have also recently abandoned the impact requirement. Towns v. Anderson, 579 P.2d 1163 (Colo. 1978); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978).

an approach is recommended which rationalizes and reconciles these two differently treated but very similar areas of the law.

I. INDIANA LAW

The *Elza* decisions, being without precedential value,[13] have left Indiana law respecting the right to recover for intentionally inflicted emotional distress in a state of confusion.[14] In *Elza*, an employee of Liberty Loan Corporation, while inside the Elza home trying to collect a debt, called Broderick Elza a "lying little punk" and told Broderick to meet him "behind Liberty Loan at 6:00." Elza asked the Liberty Loan employee to leave the house, whereupon the employee, with Elza's wife and children watching from ten feet away, shoved Elza against the sink, counter and cabinets, stuck his finger in Elza's face, and beat upon Elza's chest, telling Elza to "meet him later" so he could "finish" him. Elza's wife and children sought damages for the mental distress they suffered as a result of watching the Liberty Loan employee batter Elza.[15] The trial court held that the allegations in the complaint along with the answers to interrogatories did not satisfy the Indiana impact requirement, therefore, no genuine issue of fact existed.[16]

Elza's wife and children advanced three arguments to the Indiana Court of Appeals in support of their case. They first argued that Indiana recognizes intentional infliction of emotional distress as an independent tort. Alternatively, they urged the court to overrule existing case law and recognize the tort of intentional infliction of mental distress. Third, they argued that their claims fell within the recognized intentional infliction of emotional distress exception to the impact rule.[17] The Indiana Court of Appeals refused to recognize the tort of intentional infliction of emotional distress and held that the only exception to the impact rule requires a host action in the form of a tort directed to or committed against the claimant when it appears that, either from the type of host tort or the means or manner by which it is committed, there is a likelihood emotional distress will follow.[18] The court of appeals based its characterization of Indiana law, as requiring an impact prerequisite to recovery for inten-

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[13]*See* note 5 *supra* and accompanying text.

[14]Indiana law respecting the right to recover for negligently inflicted emotional distress is much clearer. Indiana requires a contemporaneous physical impact in order to recover for negligently inflicted emotional distress. *See* note 6 *supra.*

[15]Elza v. Liberty Loan Corp., 426 N.E.2d 1302, 1303 (Ind. 1981) (Hunter, J., dissenting).

[16]Elza v. Liberty Loan Corp., No. 2-1180-A-371, slip op. at 2 (Ind. Ct. App. Apr. 30, 1981).

[17]*Id.*

[18]*Id.* at 2-5.

tionally inflicted emotional distress, on *Boden v. Del-Mar Garage, Inc.*[19] in which the Indiana Supreme Court addressed a claim for intentionally inflicted emotional distress.[20]

It is open to serious question whether *Boden* is dispositive of *Elza*.[21] In *Boden*, the plaintiff sought recovery for the emotional distress she sustained by watching a driver intentionally knock down and injure plaintiff's husband with an automobile.[22] The Indiana Supreme Court upheld the trial court's dismissal, albeit without citation to authority, on the basis that there was no contemporaneous physical impact to her.[23] At the time of the *Boden* decision there were numerous Indiana cases directly contrary to the supreme court's position.[24] These cases stand for the proposition that recovery of damages for mental distress in tort actions does not require proof of contemporaneous physical impact when the defendant's conduct was intentional and should reasonably have been anticipated to provoke a severe emotional disturbance.[25] Three of the cases involved intentional misconduct in which third party family members were permitted to recover for their mental distress.[26]

Boden has never before been cited as authority for the question in *Elza*.[27] Post-*Boden* appellate courts have continued to recognize the pre-*Boden* rule as controlling.[28] The subsequent lack of citation of *Boden* as authority may be explained by *Boden's* reliance on the then prevailing view of a married woman's legal status which limited her right to sue as an individual.[29] The Indiana Supreme

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[19]205 Ind. 59, 185 N.E. 860 (1933).

[20]No. 2-1180-A-371, slip op. at 3-4; *id.* at 6 (Sullivan, J., concurring).

[21]426 N.E.2d at 1303 (Hunter, J., dissenting).

[22]205 Ind. at 60-61, 185 N.E. at 860-61.

[23]*Id.* at 70-72, 185 N.E. at 864.

[24]*See* Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928) (abduction of plaintiff's child gives rise to compensable injuries for mental distress); Harness v. Steele, 159 Ind. 286, 64 N.E. 875 (1902) (false arrest and imprisonment gives rise to compensable injuries for humiliation and mortification); Kline v. Kline, 158 Ind. 602, 64 N.E. 9 (1902) (assault gives rise to compensable injuries for fright and mental anguish); Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N.E. 439 (1890) (wrongful ejection from train gives rise to compensable injury for indignity); Felkner v. Scarlet, 29 Ind. 154 (1867) (seduction of daughter gives rise to compensable injuries for family dishonor and injured feelings); Pruitt v. Cox, 21 Ind. 15 (1863) (seduction of daughter gives rise to compensable mental distress).

[25]*See* note 24 *supra*.

[26]*See* Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928); Felkner v. Scarlet, 29 Ind. 154 (1867); Pruitt v. Cox, 21 Ind. 15 (1863).

[27]426 N.E.2d at 1305 (Hunter, J., dissenting).

[28]*See, e.g.*, Charlie Stuart Oldsmobile, Inc. v. Smith, 171 Ind. App. 315, 357 N.E.2d 247 (1976), *modified on other grounds*, 369 N.E.2d 947 (Ind. Ct. App. 1977); Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N.E.2d 360 (1938).

[29]*See* 205 Ind. 59, 185 N.E. 860 (1933).

Court later overruled *Boden* on the question of whether a wife could recover for loss of consortium[30] and specifically rebuked the limited view of a married woman's legal status to sue as an individual.[31]

Thus, the case upon which the Indiana Court of Appeals in *Elza* relied in attempting to extend the impact rule into the area of intentional infliction of emotional distress is of questionable precedential value for the proposition cited. The statement made by the Second District Court of Appeals in *Elza* that the exception to the impact rule requires a host action in the form of a tort directed to or committed against the claimant is unsupported by case precedent.[32] While the Second District Court of Appeals is attempting to insert the impact requirement into the law of intentional infliction of emotional distress,[33] the Third District Court of Appeals appears ready to abolish the impact requirement as a condition to recovery for negligently inflicted emotional distress.[34] The Indiana Supreme Court's refusal to grant the petition for transfer and clarify the law,[35] along with the willingness of several Indiana higher court judges to abolish the impact rule in both the intentional and negligent infliction of emotional distress areas,[36] coupled with the lack of precedential value of the court of appeal's decision in *Elza*, leave the Indiana law with respect to recovery for emotional distress a tangled web. The harbinger of Justice Hunter's dissent in *Elza* declares, "[t]his Court should seize this opportunity to overrule *Boden* and eliminate confusion such as that which its language has here conceived."[37] It can only be hoped that the Indiana Supreme Court will seize the next opportunity to untangle the web.

II. Intentional Versus Negligent Infliction

A. The Dichotomy between Requirements for Recovery

The courts have imposed far more substantial barriers to recovery for negligently inflicted emotional distress than they have in cases involving intentionally inflicted emotional distress.

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[30]Troue v. Marker, 253 Ind. 284, 295, 252 N.E.2d 800, 806 (1969).

[31]*Id.* at 289-90, 252 N.E.2d at 803-04.

[32]Although the host torts at issue in Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928), Felkner v. Scarlet, 29 Ind. 154 (1867), Pruitt v. Cox, 21 Ind. 15 (1863), and Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N.E.2d 360 (1938) were not directed at the person claiming mental distress, recovery was allowed.

[33]*See* No. 2-1180-A-371.

[34]*See* Kroger Co. v. Beck, 375 N.E.2d 640, 645 n.5 (Ind. Ct. App. 1978).

[35]426 N.E.2d 1302 (Ind. 1981).

[36]*See id.* at 1303-04, 1308, 1312 (Hunter, J., dissenting); No. 2-1180-A-371, slip op. at 6 (Sullivan, J., concurring); 375 N.E.2d at 645 n.5.

[37]426 N.E.2d at 1312 (Hunter, J., dissenting).

Although there are persuasive arguments for different results in these two types of cases, the barriers erected by the courts seldom advance these arguments and do no more than draw arbitrary lines which produce incongruous and indefensible results. The courts and commentators have neglected to challenge these incongruities and suggest reconciliation where appropriate. The following will expose these differences in approach, analyze and evaluate them, and suggest a principled synthesis.

B. The Dichotomy First Appears

The first case to establish different prerequisites to recovery for negligently inflicted emotional distress and intentionally inflicted emotional distress was the English case of *Wilkinson v. Downtown*.[38] In *Wilkinson*, the defendant told the plaintiff that the plaintiff's husband had been seriously injured in an accident and that the plaintiff was to go at once to see him. The defendant knew these statements to be false and meant for the plaintiff to believe them. The plaintiff did believe them with the result that she became seriously ill from a shock to her nervous system. Allowing recovery, Judge Wright held that the Privy Council's decision in *Victorian Railways Commissioners v. Coultas*,[39] generally recognized as inspiring the impact rule in the United States[40] and explicitly considered in Indiana's initial adoption of the impact rule,[41] was not precedential authority because there was no element of intentional wrong in that case.[42]

The first case of this kind in the United States was *Hickey v. Welch*[43] which distinguished between the negligent and the intentional infliction of emotional distress without citing specific precedents or giving cogent reasons for such a distinction. Discussing cases which denied relief for injuries following fright, the Missouri Court of Appeals in *Hickey* stated:

> But nearly all the cases in which the rule was applied that no recovery is permissible for mental anguish, fright or their *sequelae*, were where the tort alleged was negligence. The decisions usually state that if the act was willful, malicious or accompanied by circumstances of inhumanity

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[38][1897] 2 Q.B. 57.

[39][1888] 13 App. Cas. 222.

[40]46 MISS. L.J. 871, 872 (1975); Note, *Mental Distress—The Impact Rule*, 42 UMKC L. REV. 234, 234 (1973).

[41]Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 208-10, 47 N.E. 694, 696-97 (1897).

[42]Wilkinson v. Downtown, [1897] 2 Q.B. 57, 59-60.

[43]91 Mo. App. 4 (1901).

> and oppression, an action lies for mental anguish, whether physical harm was done or not. A precedent exactly deciding this proposition is not at hand; but it is assumed to be the law in the text-books and in most of the cases which exonerate the defendant where negligence is the basis of the action.[44]

With this crude beginning of citation to assumed authority and decision without articulation of supporting reasons, the stage was set for a dichotomy in emotional distress law which persists to this day.[45]

C. Lines Drawn Because of Moral Culpability

The first Indiana case to distinguish between the negligent and the intentional infliction of emotional distress was *Kline v. Kline*.[46] In *Kline*, the Indiana Supreme Court held that while current authority provided no recovery for emotional distress in negligence actions in which there has been no physical impact, this is not the law as applied to the commission of a willful and intentional wrong.[47] Unlike the Missouri court in *Hickey*, the Indiana Supreme Court's reasoning is apparent from its quotation of the Massachusetts Supreme Court's opinion in *Spade v. Lynn & B.R.R.*:[48] " 'The logical vindication of this rule is that it is unreasonable to hold persons, who are merely negligent, bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims that could not be successfully met.' "[49] The Massachusetts and Indiana Supreme Courts were expressing a fear of fraudulent emotional distress claims, implicitly saying that negligent conduct is not sufficiently reprehensible to cause the courts to abandon this fear of fraudulent claims in favor of allowing recovery. This reasoning is an extension of the natural tendency of courts to expand liability as the moral guilt of the defendant increases.[50]

This tendency to pay attention to the degree of the defendant's fault, even independent of the theory of exemplary damages, dates back to the ancient Roman courts.[51] The idea of liability based upon

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[44]*Id.* at 13.

[45]*See* Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 878 (1939) (hereinafter cited as Prosser Article).

[46]158 Ind. 602, 64 N.E. 9 (1902).

[47]*Id.* at 605, 64 N.E. at 10.

[48]168 Mass. 285, 47 N.E. 88 (1897).

[49]158 Ind. at 606, 64 N.E. at 10 (quoting Spade v. Lynn & B.R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897)).

[50]*See* Prosser Article, *supra* note 45, at 878.

[51]*See* W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 587 (3d. ed. 1963), in which the author states:

> Where a man wounded another not mortally, who died in consequence of

fault arose from the partly philosophical, partly religious, partly ethical texture of intellectual tenets characterizing man's conduct as either good or bad and mandating that all society be ordered accordingly.[52] This deep-rooted intolerance of intentional misconduct is shown by Justice Holmes' statement at the turn of the century. "It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."[53]

By imposing an impact requirement in negligent infliction cases, the Indiana court in *Kline* was attempting to set a standard of liability roughly congruent with the degree of the defendant's moral culpability. By tempering the rules of causation and certainty of proof to fit the kinds and degrees of moral fault, the courts have made justice fit the kind and degree of fault in the particular case.[54]

Although, in its purest form, the rationale of extending liability as the moral guilt of the defendant increases is meritorious, the Massachusetts and Indiana Supreme Courts, as well as many other proponents, attempt to extend this rationale beyond its logical conclusion in reasoning that intentional misconduct provides assurance that mental distress actually occurred. For example, William Prosser, noting this tendency of courts to allow recovery commensurate with the defendant's degree of fault, wrote:

> But perhaps more important is the fact that in such intentional misconduct there is an element of outrage, which in itself is an important guarantee that the mental disturbance which follows is serious, and that it is not feigned. Not only is there a normal social desire to compensate the victim at the expense of the more heinous offender whose conduct is subject to every moral condemnation, but the danger of imposition is lessened to a point where it becomes reasonably safe to grant the remedy.[55]

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being neglected, he was liable for the wounding but not for the death. But if the original act was wilful it is generally held (there is no clear text) that intervening negligence of the injured person was no defence, though there was the same breach of causal *nexus*.

Id. (footnote omitted).

[52]Green, *The Duty Problem in Negligence Cases* (pt.2), 29 COLUM. L. REV. 255, 255 (1929).

[53]Aikens v. Wisconsin, 195 U.S. 194, 204 (1904).

[54]Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 596 (1933) (hereinafter cited as Bauer).

[55]Prosser Article, *supra* note 45, at 878. The Indiana Supreme Court in *Kline* also advanced this reason when it adopted the rationale that allowing recovery for negligent infliction of emotional distress "would open a wide door for unjust claims that could not be successfully met." 158 Ind. at 606, 64 N.E. at 10.

There are several flaws in the reasoning underlying this belief that, absent intentional misconduct, assurance that emotional distress actually occurred is lacking. First, William Prosser himself has contended that the problem of feigning injuries can be solved simply by testing the adequacy of the proof of emotional injury in each case and denying recovery when proof of the genuineness of the injury is inadequate.[56] Second, today's state of medical science makes accurate proof of emotional distress possible.[57] Moreover, although the fear of fraudulent claims is well-founded, intentional misconduct does nothing to separate the legitimate from the illegitimate claims; intentional misconduct does not ensure that the emotional distress claimed is genuine, nor does the absence of intentional misconduct and the presence of only negligence ensure that the claim is fraudulent.[58]

Extending liability as the moral culpability of the defendant increases is a principle of law rooted in history and morality. However, statements made by courts and commentators that intentional misconduct guarantees the genuineness of emotional distress claims are overextended. The fear of fraudulent emotional distress claims is a legitimate fear against which there must be protection, but intentional misconduct offers little, if any, protection. Only requirements that, in fact, effectively test the genuineness of emotional distress claims are defensible.

D. Arbitrary Tests Imposed

The courts have erected artificial barriers to recovery for negligently inflicted emotional distress[59] by deciding whether recovery will be allowed based primarily upon the "impact rule," the "zone of danger rule,"[60] or the "foreseeability test."[61] Yet, these same courts decide whether recovery for intentionally inflicted emotional distress will be allowed based simply upon the likelihood and

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[56]W. PROSSER, *supra* note 7, at 328.

[57]Leong v. Takasaki, 55 Hawaii 398, 411-13, 520 P.2d 758, 766-67 (1975); Knierim v. Izzo, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1258-63 (1971).

[58]*See* Rickey v. Chicago Transit Auth., 427 N.E.2d 596, 598 (Ill. Ct. App. 1981).

[59]*See Negligent Infliction* Note, *supra* note 7, at 467-74.

[60]The "zone of danger rule" provides that, as a minimum prerequisite to recovery, plaintiff must have been within the range of ordinary physical peril. Resavage v. Davies, 199 Md. App. 479, 487, 86 A.2d 879, 883 (1952); Tobin v. Grossman, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559 (1969); Waube v. Warrington, 216 Wis. 603, 612-13, 258 N.W. 497, 500-01 (1935).

[61]The "foreseeability test," also labelled the "zone of emotional danger rule," predicates recovery upon whether defendant should have foreseen fright or shock severe enough to cause substantial injury in a person normally constituted. Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

presence of mental distress.[62] Although the reasons articulated by the courts for imposing such requirements in negligent infliction cases include fear of fraudulent claims,[63] fear that the courts will be drowned in a flood of emotional distress litigation,[64] fear that emotional distress damages are not susceptible of accurate measurement,[65] and a felt need to limit liability,[66] the imposition of these requirements does not logically address those reasons.[67] Furthermore, allowing recovery for emotional distress in intentional infliction cases is inconsistent with three of these four reasons because intentional misconduct does little to guarantee that the claim is meritorious, that the damages will be susceptible of accurate measurement, or that the courts will be free from a litigation deluge.

Although allowing recovery only in intentional infliction cases might reduce the number of mental distress cases, such an artificial distinction does not ascertain the legitimacy of the claim and leaves the court with the same problems in testing the claim. Thus, barriers to recovery resulting from the impact rule, the zone of danger rule, and the foreseeability test, which the courts have erected in negligent infliction of emotional distress cases, fail to meet the fears and concerns for which they were imposed.[68] It has been suggested that the construction of these obstacles to recovery by the courts can be characterized as a further crude attempt to make justice roughly fit the kind and degree of moral fault in each particular case.[69]

E. Resultant Physical Injury Requirement Imposed

A further barrier which, although practically nonexistent in intentional infliction cases, stands as a virtually universal barrier to recovery in negligent infliction cases is the requirement of resultant

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[62]Handford, *Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort*, 8 ANGLO-AM. L. REV. 1, 14-18 (1979) (hereinafter cited as Handford).

[63]*See* Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 382-86, 56 N.E. 917, 920-21 (1900); Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896); Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

[64]*See* Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 213, 47 N.E. 694, 698 (1897); Spade v. Lynn & B.R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897).

[65]*See* Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 66, 60 N.E. 674, 675 (1901); Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896).

[66]Dillon v. Legg, 68 Cal. 2d 728, 739, 741-46, 441 P.2d 912, 919, 921-24, 69 Cal. Rptr. 72, 79, 81-84 (1968); Spade v. Lynn & B.R.R., 168 Mass. 285, 288-89, 47 N.E. 88, 89 (1897); Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

[67]*See Negligent Infliction* Note, *supra* note 7, at 468-74.

[68]*See id. See also* notes 63 & 64 *supra.*

[69]*See* Bauer, *supra* note 54, at 589-96.

physical injury. The most enlightening comparison of the torts of intentional and negligent infliction of emotional distress is available in this requirement. Although a majority of the nation's jurisdictions impose no prerequisite of resulting physical injuries to the plaintiff for actionable intentionally inflicted emotional distress,[70] the traditional rule in tort law is that the negligent infliction of emotional distress is not compensable unless such infliction results in physical injury to the plaintiff or objective manifestations thereof.[71] A review of the history of this dichotomy is necessary to an understanding of the reasons for its development and an evaluation of its justification.

In the early emotional distress cases the courts required a showing of physical injuries to the plaintiff in intentional as well as negligent infliction of emotional distress cases.[72] However, the courts began carving out exceptions to this resultant physical injury requirement, gradually eroding this rule in intentional infliction cases until the requirement became virtually nonexistent in the intentional infliction area.

This split in requirements began when the Iowa Supreme Court, in the intentional infliction case of *Watson v. Dilts*[73] although imposing a resulting physical injury requirement, abrogated the impact requirement and allowed recovery, parasitic to an independent intentional host tort, for physical disability produced by fright unaccompanied by physical impact. Noting that the weight of authority was to the contrary, the court in *Watson* stated the intentional misconduct "might well cause alarm to the boldest man, and, if it produced nervous prostration and physical disability, the theory, no matter what its reason, that would say there was not actionable wrong, would be too fine spun and too cold for our sanction."[74] However, the court noted that a different result would have followed had the defendant's conduct been merely negligent.[75] The court's finding in *Watson* that the defendant's conduct was so outrageous and extremely likely to cause severe emotional distress that any reasons militating against recovery were overcome qualifies *Watson* as yet another case imposing different prerequisites to recovery for intentionally and negligently inflicted emotional distress because of differences in moral culpability. In *Voss v. Bolzenius*,[76] the court held that the result-

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[70]*See* Handford, *supra* note 62, at 19.

[71]*See id.* at 21; Leong v. Takasaki, 55 Hawaii 398, 400, 520 P.2d 758, 761 (1974).

[72]*See* Wilkinson v. Downtown, [1897] 2 Q.B. 57, 58-59; Hickey v. Welch, 91 Mo. App. 4, 9 (1901).

[73]116 Iowa 249, 89 N.W. 1068 (1902).

[74]*Id.* at 250, 89 N.W. at 1069.

[75]*Id.* at 250-51, 89 N.W. at 1069-70.

[76]147 Mo. App. 375, 128 S.W. 1 (1910).

ant physical injury requirement imposed in *Watson* was satisfied by loss of sleep, perhaps showing that the physical consequence requirement had become a strain in intentional infliction cases.

As the courts began to wonder why physical injury was so important and the existing knowledge about the effects of emotion on the body was enlarged by continuing research, they prepared to relax the resultant physical injury restriction in intentional infliction cases. The next step in the evolutionary process was taken when the courts began to allow recovery for intentionally inflicted emotional distress, unaccompanied by resulting physical injury parasitic to independent intentional host torts.[77] The Iowa Supreme Court, again taking the lead, stated in *Barnett v. Collection Service Co.*:[78]

> The rule seems to be well-established where the act is willful or malicious, as distinguished from being merely negligent, that recovery may be had for mental pain, though no physical injury results. In such a case the door to recovery should be opened but narrowly and with due caution.[79]

From the above historical analysis, the reasons for development of the split between requiring resultant physical injuries in negligent infliction cases and not requiring such injuries in intentional infliction cases become apparent. The fears of feigned injuries, unlimited liability, and an opening of the floodgates of litigation paled in light of the outrageous conduct and its consequences in the most severe cases. As the intentional infliction of emotional distress became recognized as an independent tort, it became less justifiable to allow the cause of action to remain attached to a physical harm because the new tort, by its nature, involved an intentional act causing severe mental distress. The perception that the imposition of liability upon tortfeasors who were merely negligent would be burdensome and disproportionate in relation to their culpability left the courts without a similar inclination to abandon their fears of fraudulent claims, unlimited liability, and a flood of litigation in the negligent infliction area.[80]

Although extending liability to fit the degree of moral fault is legitimate, allowing recovery where a claimant can show a physical injury has nothing to do with moral culpability. To the extent that courts' fears of fraudulent claims, unlimited liability, and a flood of litigation are overcome by the heinous conduct of the tortfeasor in

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[77]*See* Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930); Lyons v. Smith, 176 Ark. 728, 3 S.W.2d 982 (1928); Kurpgeweit v. Kirby, 88 Neb. 72, 129 N.W. 177 (1910).

[78]214 Iowa 1303, 242 N.W. 25 (1932).

[79]*Id.* at 1310, 242 N.W. at 28.

[80]*See, e.g.*, Butchikas v. Travelers Indemn. Co., 343 So. 2d 816 (Fla. 1977).

intentional infliction cases but are reflected by the physical injury requirement in negligent infliction cases, the courts are imposing irrational barriers to recovery which simply chop off liability at an arbitrary point. There is no compelling reason to limit liability at the point of physical manifestations of emotional distress.

The fear that a finding of emotional distress, absent resulting physical injury, is subject to mere speculation and conjecture can be no less in intentional infliction cases than in negligent infliction cases. Advancements in medical and psychiatric science throughout this century have discredited the belief that medical science is unable to establish a causal link between psychic injuries and alleged misconduct.[81] Because other safeguards[82] exist to test the authenticity of a claim for relief, the requirement of resulting physical injury, like the requirement of a contemporaneous physical impact, should not stand as an artificial barrier to recovery.[83]

One court has characterized the resulting physical injury requirement as "another synthetic device to guarantee the genuineness of the claim."[84] Another has stated that "to continue to require physical injury caused by culpable tortious conduct, when mental suffering may be equally recognizable standing alone, would be an adherence to procrustean principles which have little or no resemblance to medical realities."[85] Alabama, Hawaii, and Pennsylvania are the only jurisdictions which have abrogated the resultant physical injury prerequisite to recovery for negligently inflicted emotional distress.[86]

F. The Evolution Continues

The law regarding negligent infliction of emotional distress is evolving, albeit more slowly than did the law in the intentional infliction area. While a majority of the nation's jurisdictions followed

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[81]*See* Sinn v. Burd, 486 Pa. 146, 158-59, 404 A.2d 672, 678-79 (1979). The court quoted one commentator who discussed the advances in scientific proof of mental distress: " 'The development of psychiatric tests and the refinement of diagnostic techniques has led some authorities to conclude that science can establish with reasonable medical certainty the existence and severity of psychic harm.' " *Id.* (quoting 63 GEO. L.J. 1179, 1184-85). *See also* Liebson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163 (1976-77).

[82]Other safeguards include medical and psychiatric evidence, as well as applications by the triers of fact of standards of reasonableness, common sense, and experience.

[83]Leong v. Takasaki, 55 Hawaii 398, 403, 520 P.2d 758, 762 (1974).

[84]486 Pa. at 160, 404 A.2d at 679.

[85]Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369, 374 (Ala. 1981).

[86]*See id.*

the impact rule at the turn of the century,[87] the impact requirement has now been discredited and only a handful of jurisdictions follow it today.[88] A loosening of the resultant physical injury requirement is also occurring. Much as in the last stages of the evolutionary process which concluded with the courts finally disposing of the resulting physical injury requirement in intentional infliction cases, some courts are now straining to find the resultant physical injuries prerequisite to recovery in negligent infliction cases. A Michigan court has found that a plaintiff who, as the result of seeing her daughter negligently killed, withdrew from normal forms of socialization, became temporarily unable to perform as before, and continued in a state of depression, had suffered a physical injury sufficient to allow recovery.[89] Reaching the pinnacle, the Supreme Court of Hawaii has explicitly recognized the negligent infliction of emotional distress as an independent tort without any requirement of physical injury.[90]

III. Recommendation: Rationalization and Reconciliation

Requiring intentional misconduct, resultant physical injuries, contemporaneous physical impact, placement in the zone of danger, or foreseeability of emotional distress injuries does not guarantee that emotional distress has occurred. The courts fail to recognize that emotional distress, whether inflicted intentionally or negligently, is the same emotional distress and does not become more real simply because it was intentionally inflicted. Either the reasons articulated for the differences between the court-imposed prerequisites to recovery for negligently inflicted emotional distress and intentionally inflicted emotional distress are unpersuasive[91] or the requirements imposed are unrelated to the valid reasons for differences.[92] There are only two rational alternatives regarding tort liability for the infliction of emotional distress, whether intentional or negligent: denial of recovery because the plaintiff's interests in being free from subjection to emotional distress are not legally protected, or

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[87]Rickey v. Chicago Transit Auth. 428 N.E.2d 596, 598 (Ill. Ct. App. 1981).

[88]*See, e.g.*, Elza v. Liberty Loan Corp., 426 N.E.2d 1302 (Ind. 1981) (Hunter, J., dissenting).

[89]Toms v. McConnell, 45 Mich. App. 647, 657, 207 N.W.2d 140, 145 (1973). The Michigan Supreme Court allowed a finding of the requisite physical injury from plaintiff's sudden loss of weight, inability to perform ordinary household duties, extreme nervousness, and irritability. Daley v. LaCroix, 384 Mich. 4, 12-13, 179 N.W.2d 390, 395 (1970).

[90]*See* Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 208, 532 P.2d 673, 675 (1975); Leong v. Takasaki, 55 Hawaii 398, 407-08, 520 P.2d 758, 764-65 (1974).

[91]*See* notes 56-58 *supra* and accompanying text.

[92]*See* notes 56-58, 63-68 & 81-85 *supra* and accompanying text.

allowance of recovery when the plaintiff can show breach of duty and causation.

Nevertheless, the courts and commentators continue to treat intentionally inflicted emotional distress radically different from negligently inflicted emotional distress. Although the *Restatement (Second) of Torts* has established intentional infliction of emotional distress as an independent tort,[93] and although most jurisdictions in the United States recognize the tort of intentional infliction of emotional distress,[94] virtually all the courts have refused to recognize

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[93]RESTATEMENT (SECOND) OF TORTS § 46 (1965) provides:

(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.

Id.

[94]Handford, *supra* note 62, at 1. At least thirty-eight jurisdictions recognize the intentional infliction of emotional distress as an independent tort. *See* American Road Serv. Co. v. Inmon, 394 So. 2d 361 (Ala. 1980); Watts v. Golden Age Nursing Home, 127 Ariz. 255, 619 P.2d 1032 (1980); Counce v. M.B.M. Co., 266 Ark. 1064, 597 S.W.2d 92 (1979); State Rubbish Collectors Ass'n v. Silizhoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970); Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292 (1952); Waldon v. Covington, 415 A.2d 1070 (D.C. 1980); Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. Ct. App. 1979); Whitmire v. Woodbury, 154 Ga. App. 159, 267 S.E.2d 783 (1980), *rev'd on other grounds*, 246 Ga. 349, 271 S.E.2d 491 (1980); Fraser v. Morrison, 39 Hawaii 370 (1952); Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944 (1980); Public Fin. Corp. v. Davis, 66 Ill. 2d 85, 360 N.E.2d 765 (1976); Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976); Wiehe v. Kukal, 225 Kan. 478, 592 P.2d 860 (1979); Steadman v. South Cent. Bell Tel. Co., 362 So. 2d 1144 (La. Ct. App. 1978); Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979); Richey v. American Auto Ass'n, Inc., 406 N.E.2d 675 (Mass. 1980); Fry v. Ionia Sentenial—Standard, 101 Mich. App. 725, 300 N.W.2d 687 (1980); LaBrier v. Anheuser Ford, Inc., 612 S.W.2d 790 (Mo. Ct. App. 1981); Paasch v. Brown, 193 Neb. 368, 227 N.W.2d 402 (1975); Star v. Rabello, 625 P.2d 90 (Nev. 1981); Hume v. Bayer, 157 N.J. Super. 310, 428 A.2d 966 (1981); Fischer v. Maloney, 43 N.Y.2d 553, 373 N.E.2d 1215 (1978); Dickens v. Puryear, 276 S.E.2d 325 (N.C. 1981); Breeden v. League Servs. Corp., 575 P.2d 1374 (Okla. 1978); Turman v. Central Billing Bureau, Inc., 279 Or. 443, 568 P.2d 1382 (1977); Mullen v. Suchko, 279 Pa. Super. 499, 421 A.2d 310 (1980); Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981); First Nat. Bank v. Bragdon, 84 S.D. 89, 167 N.W.2d 381 (1969); Moorhead v. J.C. Penney Co., 555 S.W.2d 713 (Tenn. 1977); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961); Sheltra v. Smith, 136 Vt. 472, 392 A.2d 431 (1978); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974); Phillips v. Hardwick, 29 Wash. App. 382, 628 P.2d 506 (1981); Harless v. First Nat. Bank, 246 S.E.2d 270 (W. Va. 1978); Scarpaci v. Milwaukee County, 96 Wis. 2d 663, 292 N.W.2d 816 (1980).

the negligent infliction of emotional distress as an invasion of an interest sufficient to constitute a tort.[95]

The means to right this inconsistency and irrationality in the law lies in the wisdom of a statement made by the Massachusetts Supreme Court in abolishing the impact rule: "[e]very effort must be made to avoid arbitrary lines which 'unnecessarily produce incongrous and indefensible results.' . . . The focus should be on underlying principles."[96] The only rational way to avoid arbitrary lines and artificial barriers is to weigh all those considerations of policy which favor a plaintiff's recovery against those favoring a limitation on a defendant's liability and determine in each particular case whether the balance tips the scale against or in favor of recovery. As early as 1915, Dean Pound recognized that the needed distrinction between recovery for negligent infliction and recovery for intentional infliction of emotional distress should come from a balancing of the differing social interests.

> In cases of negligence the individual interest of the actor,—that is, his interest in the free exercise of his faculties,—must be weighed as well as the social interest against imposture and the practical difficulties of proof and reparation. Where he exercises his faculties for purposes recognized by law and, so far as he could reasonably foresee, does nothing that would work an injury, the individual interest of the unduly sensitive or abnormally nervous must give way. But the law does not secure individuals in the free exercise of their faculties for the purpose of injuring others, since obvious social interests are opposed to such a claim. Hence, if there was an intention to injure, only the social interest against imposture and the practical difficulties are to be weighed. This is the philosophical basis of the distinction made in these cases. Probably advance in our knowledge of psychology and mental pathology and progress in means of arriving at the truth in matters where expert evidence is required will determine the development of the law upon this subject.[97]

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[95]*See* Leong v. Takasaki, 55 Hawaii 398, 402-03, 520 P.2d 758, 761-62 (1974); Comment, *supra* note 57, at 1237.

[96]Dziokonski v. Babineau, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978) (quoting Mone v. Greyhound Lines, Inc., 368 Mass. 354, 365, 331 N.E.2d 916, 922 (1975) (Braucher, J., dissenting)).

[97]Pound, *Interests of Personalty*, 28 HARV. L. REV. 343, 361-62 (1915). The advance in our knowledge of psychology and mental pathology and the ability to achieve a degree of certainty in these areas which Dean Pound foresaw are at hand. *See* notes 57 & 81 *supra* and accompanying text.

The result of this process of weighing the interests involved and apportioning the risks according to the dictates of justice has been characterized in tort law vernacular as "duty."[98] This approach is useful and necessary in both the intentional and negligent infliction of emotional distress areas. Although the results may differ between these areas, the differences will be explainable by the differing balances resulting from weighing the policy considerations militating for and against recovery rather than by the imposition of artificial barriers which have little, if any, relation to the reasons for the differences.

The premier policy consideration in the emotional distress area is to what extent recovery for the infliction of emotional distress should be allowed. Surely this concern is now troubling the Indiana courts as some of them attempt to draw tight the reins of recovery for both negligently and intentionally inflicted emotional distress around the narrow impact rule.[99] In answering the questions raised by this concern, many factors must be considered. The proviso of the Indiana Constitution that every person shall have remedy for injury done to him[100] is not without limitation.

Although nearly all jurisdictions recognize that the interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it,[101] recognition of a blanket right to freedom from severe emotional distress has been seriously questioned.[102] It has been suggested that even though the law may protect emotional tranquility over a great range of interests, it should not safeguard emotional tranquility as to all interests.[103] William Prosser eloquently argues:

> Liability still cannot be extended to every trifling indignity. The rough edges of our society still are in need of a great deal of filing down, and the plaintiff in the meantime 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. There is no occasion for the law to intervene with balm for wounded

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[98]*See, e.g.*, Leong v. Takasaki, 55 Hawaii 398, 407, 520 P.2d 758, 764 (1974); W. PROSSER, *supra* note 7, at 325-26.

[99]*See* note 12 *supra* and accompanying text.

[100]IND. CONST. art. 1, § 12.

[101]*See, e.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 337, 240 P.2d 282, 285 (1952) (quoting RESTATEMENT OF TORTS § 46, comment d at 72-73 (Supp. 1948).

[102]Theis, *The Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DEPAUL L. REV. 275, 277 (1977).

[103]*Id.* at 278.

> feelings in every case where a flood of billingsgate is loosed in an argument over a back fence. There is still, in this nation at least, such a thing as freedom to express an unflattering opinion; and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.
>
> There is an obvious difference between the threat of a group of self-appointed vigilantes to string the plaintiff up to a sour apple tree, and the mere statement to his face that they think that he is the meanest man in town. There is a difference between an infuriated railroad conductor raucously bellowing opprobrious epithets at humiliated passengers, and the mild discourtesy of "Hurry up! Do you think we've got all night?" . . . It is all a matter of drawing the line.[104]

It has been argued that it is the place of society, and not the province of the law, to breed a certain toughening of the mental hide.[105] Minor emotional shocks are inevitable consequences of everyday living and social controls may provide a more effective means for dealing with the infliction of these small degrees of emotional distress than do legal controls.[106]

The reason underlying this discussion by the courts and commentators is the fear of unlimited liability.[107] There are two rational responses to this fear. One response is that emotional distress, however inflicted, is not the type of injury for which the law will offer redress. Should the Indiana courts reach this decision after a consideration of all the policy considerations involved, such a position would be more defensible than the present state of Indiana law of imposing the arbitrary impact rule in both negligent and intentional infliction cases. At least the Indiana courts will have reached their decision by evaluating competing considerations and choosing the result which reflects the way the balance of considerations tips.

However, such a position would run counter to virtually all this

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[104]Prosser Article, *supra* note 45, at 887 (citations omitted).

[105]Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 229 n.128 (1944) in which the author writes that "[p]sychic stimuli multiply as society becomes more complex and people are crowded together, but this is part and parcel of existence. Our concern should be with conditioning the citizen, and with breeding more toughness by pampering the psyche less." *See also* McGruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936), in which the author writes that "[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is better protection than the law could ever be."

[106]Rodrigues v. State, 52 Hawaii 156, 172-73, 472 P.2d 509, 520 (1970).

[107]*See* Prosser Article, *supra* note 45, at 887.

nation's jurisdictions which recognize that a line can and must be drawn between the slight hurts, which are the price of a complex society, and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility.[108] In making such a decision Indiana would be, as Prosser has stated, "fighting a rear-guard action."[109]

The second reasonable response to this fear of boundless liability is to limit recovery to claims of "serious mental distress."[110] The use of a test which focuses upon the situation causing the emotional distress and requires it to be of a nature that would be likely to produce a response in a person of average sensibilities would satisfy this need to adopt general standards that test the seriousness of mental distress in any particular case. This would impose a prerequisite to recovery which is rationally related to a legitimate judicial fear of limitless liability.[111]

Adherence to the duty approach requires that courts view the policy considerations from the defendant's standpoint as well by looking at "not merely what it might be right for an injured person to receive [in order] to afford just compensation for his injury, but also what it is just to compel the other party to pay."[112] The duty analysis recognizes that "one cannot always look to others to make compensation for injuries received"[113] because a balancing of policy considerations requires that the sufferer bear the consequences of many accidents alone.[114]

The courts have shown more willingness to impose liability for the infliction of mental distress when they perceive that the evil done by the defendant is far greater than any evil which allowing recovery could cause, as opposed to situations in which the defendant's conduct was merely "simple negligence."[115] This consideration presents a persuasive reason for distinguishing between recovery for negligent infliction of emotional distress and recovery for intentional infliction of emotional distress, because the court may determine that the competing social and economic considerations make it unreasonable to bind persons who are merely negligent to anticipate and guard against fright and its consequences.[116] This reasoning

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[108]*See* Knierim v. Izzo, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961).

[109]W. PROSSER, *supra* note 7, at 333.

[110]*See* Sinn v. Burd, 486 Pa. 146, 167, 404 A.2d 672, 683 (1979).

[111]Leong v. Takasaki, 55 Hawaii 398, 407, 520 P.2d 758, 764 (1974); 486 Pa. at 167, 404 A.2d at 683.

[112]*See* Spade v. Lynn & B.R.R., 168 Mass. 285, 288-89, 47 N.E. 88, 89 (1897).

[113]*Id.*

[114]*Id.*

[115]*See* Watson v. Dilts, 116 Iowa 249, 253, 89 N.W. 1068, 1070 (1902).

[116]Although the Massachusetts Supreme Court in Spade v. Lynn & B.R.R., 168

takes into consideration the degree of moral culpability.[117] However, drawing one straight black line between intentional and negligent infliction cases on the grounds of moral fault ignores the fine gradations of negligence.

Ancient Roman law divided conduct and accompanying duties into three classes. When a person was acting for his benefit alone, Roman law required him to exercise the greatest care and held him liable for the slightest neglect. When the performer was acting for the benefit of both himself and the injured party, he was held to a duty of ordinary care. When the person was acting for the sole benefit of another, he was not bound, by Roman law, to exercise much care.[118] The duty approach here suggested is flexible enough to take into account these nuances.

In determining whether recovery for emotional distress should be allowed in either negligent or intentional infliction cases, one can scarcely ignore considerations of who between the two parties can better bear the loss, deterrence of future tortious conduct, and ease of administering the decision.[119]

The impact requirement, which Indiana courts previously imposed only in negligent infliction cases,[120] the zone of danger and foreseeability requirements which other jurisdictions impose only in negligent infliction cases,[121] and the resultant physical injury requirement which most jurisdictions impose only in negligent infliction cases,[122] do nothing to satisfy the reasons for the distinction between intentional and negligent infliction of emotional distress. Presence of impact, placement within the zone of danger, foreseeability alone, and resulting physical injuries do not make it reasonable to hold persons who are merely negligent bound to anticipate and guard against fright. Likewise, the imposition of these requirements in negligent infliction cases does not strengthen the probability that the alleged emotional distress is as genuine as it is in the intentional infliction cases. Use of these requirements merely serves to arbitrarily chop off liability rather than rationally limit it. The only analysis which takes into consideration all the reasons for differences in the intentional and negligent infliction cases is the

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Mass. 285, 290, 47 N.E. 88, 89 (1897) stated that it is unreasonable to hold persons who are merely negligent responsible to anticipate and to guard against fright, it held that this proposition was a logical vindication of the impact rule.

[117] *See* notes 48-50 *supra* and accompanying text.

[118] *See* H. SMITH, LAW OF NEGLIGENCE 21 (2d ed. 1896).

[119] *Id.*

[120] *See* notes 5-7 *supra* and accompanying text.

[121] *See* notes 59-62 *supra* and accompanying text.

[122] *See* notes 70-71 *supra* and accompanying text.

duty approach, which considers all policy factors in determining whether imposition of liability is reasonable.

IV. Conclusion

What is advocated here is a reformation of the law: a tearing down of the artificial barriers to recovery which the courts have continually built and changed over the last century. The barriers have no relationship to the courts' legitimate fears. Adoption of the principles of duty in tort law would take into account these valid concerns and require that determinations be based upon them. Most, but not all, of the nation's jurisdictions recognize intentional infliction of emotional distress as an independent tort.[123] Only one jurisdiction has conferred independent tort status upon the negligent infliction of emotional distress.[124] Nevertheless, as one court has stated: "[w]hile recognizing the importance of *stare decisis* to our system of jurisprudence, we note at the same time that the strength of the common law has always been its responsiveness to the changing needs of society."[125] The changes in society are at hand. Through the development of modern medicine and psychiatry, problems of proof have been minimized.[126] The best response is to tear down the arbitrary barriers to recovery, recognize intentional and negligent infliction of emotional distress as independent torts, and let the balance of policy considerations in each case determine whether recovery should be allowed.

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[123]*See* note 94 *supra* and accompanying text.
[124]*See* note 90 *supra* and accompanying text.
[125]Towns v. Anderson, 195 Colo. 517, 519, 579 P.2d 1163, 1164 (1978).
[126]*See* note 97 *supra* and accompanying text.