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Negligently Inflicted Mental Distress: The Question of Bystander Recovery

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NEGLIGENTLY INFLICTED MENTAL DISTRESS: THE QUESTION OF BYSTANDER RECOVERY

Recent decisions in tort law demonstrate an increased judicial recognition of the reality of mental distress and suffering. Contemporary courts are re-examining long established doctrines and theories that in the past have determined the extent of legal protection afforded the individual's interest in mental security.[1] As modern psychiatric methods have revealed that emotional stress can produce observable physical reactions as well as significant psychic disorders[2] the law, responsive to these findings, has retreated from a position disfavoring claims of mental pain.[3]

Mental anguish was first recognized as a component of the damages recoverable when the defendant, through his tortious conduct, invaded some legally protected interests of another. Courts have allowed mental suffering as "parasitic" damages in actions for bodily injuries,[4] false imprisonment,[5] trespass,[6] nuisance,[7] and in other claims based on long recognized legal interests.[8] In addition, courts have traditionally upheld an independent right to recover for emotional distress in assault cases[9] and in cases involving the mishandling of dead bodies.[10] Where the defendant was engaged in some special calling such as a common carrier,[11] inn-keeper,[12] or other public enterprise,[13] the law imposed a duty to refrain from inflicting mental anguish. Where the

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1. See generally Amdursky, *The Interest in Mental Tranquility*, 13 Buffalo L. Rev. 339 (1963); Blessing, *The Right to Mental Security*, 16 U. Fla. L. Rev. 540 (1964); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936).

2. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193, 225 (1943); Smith and Soloman, *Traumatic Neurosis in Court*, 30 Va. L. Rev. 87 (1943).

3. Lynch v. Knight, 9 H.L. 577, 598; 11 Eng. Rep. 854, 863 (1861) stated: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone. . . ." In Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996 (1958) the New York Court of Appeals stated, "Freedom from mental disturbance is now a protected interest in this State."

4. Serio v. American Brewing Co., 141 La. 290, 74 So. 998 (1917) (fear of sickness after dog bite); Ferrara v. Galluchio, *supra* note 3 (anxiety over possibility of cancer developing from X-ray burn); Rosen v. Yellow Cab Co., 162 Pa. Super. 58, 56 A.2d 398 (1948) (fear over effect of injury on unborn child).

5. Jacobs v. Third Ave. R.R., 71 App. Div. 199, 75 N.Y. Supp. 679 (1st Dep't 1902); Salisbury v. Poulson, 51 Utah 552, 172 Pac. 315 (1918).

6. Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906).

7. Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944).

8. See Amdursky *supra* note 1.

9. Atlanta Hub Co. v. Jones, 47 Ga. 778, 171 S.E. 470 (1933). See generally 6 Am. Jur. 2d *Assault and Battery* § 183 (1963).

10. Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); Gostkowski v. Roman Catholic Church, 262 N.Y. 320, 186 N.E. 798 (1933).

11. Goddard v. Grand Trunk Ry., 57 Me. 202 (1869); Texas & Pacific Ry. v. Jones, 39 S.W. 124 (Tex. Civ. App. 1897).

12. Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920).

13. Dunn v. Western Union Telegraph Co., 2 Ga. App. 845, 59 S.E. 189 (1907); Buchanan v. Western Union Telegraph Co., 115 S.C. 433, 106 S.E. 159 (1920) (telegraph companies); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 P. 209 (1904) (amusement park).

defendant's outrageous acts were intended to cause mental distress or were recklessly committed and reasonably calculated to cause such suffering, recent cases allow recovery.[14] Even in the intentional infliction of mental anguish the emotional disturbances occasioned by the defendant's act must be severe enough to threaten physical well being.[15] "Liability still can not be extended to every trifling indignity,"[16] and mere hurt feelings, even though defendant intentionally caused them, are not a basis for a claim.[17] Where defendant's negligent action produced mental suffering, without contemporaneous bodily injury of impact, the earlier view denied plaintiff a cause of action. Following the recent trend, the New York Court of Appeals in *Battalla v. State*,[18] overruled a long established precedent requiring physical impact upon the plaintiff as a prerequisite to an action for mental anguish.[19] In those states which have passed on the issue of whether or not physical injury or impact is required before an action can be established for mental suffering negligently caused, the majority hold that, where mental anguish is severe and has produced physical harm, the plaintiff may recover notwithstanding the absence of contemporaneous physical impact.[20]

Subsequent to the abandonment of the impact requirement in New York, actions were brought seeking to extend liability for mental distress to plaintiffs outside the area of physical danger created by defendant's negligence.[21] The results demonstrate a reluctance to expand liability for mental anguish beyond the person who was the potential victim of the negligent act. In *Kalina v. General Hospital*,[22] plaintiffs' alleged mental pain and anguish, as a result of an unauthorized circumcision upon their son, performed by the defendant doctor who had negligently failed to note that plaintiffs wanted the operation performed by one qualified to do so under their religious law. Their complaint was dismissed for failure to state a cause of action, the trial court stating that *Battalla* intended "to realistically enlarge the damage claim of one acted against. It did not intend to provide a cause of action for interested by-

14. Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); Wilson v. Wilkins, 81 Ark. 137, 25 S.W.2d 428 (1930); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952). See generally Prosser, *Insult and Outrage*, 44 Calif. L. Rev. 40 (1956).

15. Savage v. Boies, *supra* note 14; Duty v. General Finance Co., 273 S.W.2d 64 (Tex. 1954); *accord*, Clark v. Associated Retail Credit Men, 70 App. D.C. 183, 105 F.2d 62 (1939).

16. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 887 (1939).

17. Slocum v. Food Fair Stores of Florida Inc., 100 So. 2d 396 (Fla. 1958).

18. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

19. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

20. 64 A.L.R.2d 100, 134, 143 (1959) lists, before the *Battalla* decision, twenty-four states as not requiring impact and fourteen states requiring some physical impact as a prerequisite for a claim of mental distress.

21. Haight v. McEwen, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964); Robbins v. Castillani, 37 Misc. 2d 1046, 239 N.Y.S.2d 53 (Sup. Ct. 1962); Lahann v. Cravotta, 228 N.Y.S.2d 371 (Sup. Ct. 1962); Berg. v. Baum, 224 N.Y.S.2d 974 (Sup. Ct. 1962); Kalina v. General Hospital, 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961), *aff'd*, 18 A.D.2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962), *aff'd*, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963).

22. 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961).

standers hitherto excluded."[23] This limitation on the *Battalla* holding has been followed in later cases. Thus it has been stated that "pre-requisite to a right of recovery by a claimant unexposed to physical contact or impact is the existence of a duty owed directly to the claimant by one from whom recovery is sought . . . ."[24]

Berg v. Baum[25] presented a vivid example of mental anguish negligently inflicted on one outside the area of physical harm. The plaintiff mother watching from a position of safety saw her child struck by the defendant's automobile. The court declined to allow recovery for her resulting mental disturbance, relying principally on the limitation established in *Kalina* that the defendant's duty extended only to those in the area of physical peril. Under the same facts as *Berg*, the California Supreme Court also denied recovery for mental anguish.[26]

However, a recent New York case refused to hold that the zone of physical risk marked the limit of defendant's duty to safeguard others from mental distress occasioned by the defendant's negligence.[27] *Haight v. McEwen*[28] presented the same facts as the *Berg* case. The plaintiff saw her son killed by defendant's vehicle while he crossed the highway; she alleged severe emotional disturbances as a result of the occurrence. Even though the plaintiff was not in any danger of physical harm, the court held the complaint sufficient to state a cause of action stating, "whether or not the defendant should have anticipated the mother's presence, and whether or not her fright was a foreseeable consequence of the defendant's negligence may or could be revealed by proof at the trial."[29] In New York, therefore, there are conflicting decisions on the extent of liability for negligently caused mental anguish, *Kalina* and other cases holding that the plaintiff must be within the zone of physical peril before a cause of action for mental suffering can be established, while the *Haight* decision indicates that those outside the zone are not automatically barred from asserting their claim. The other American jurisdictions that have passed on the issue either employ the zone of danger limitation or go further and require some direct physical impact upon the plaintiff before a claim for mental distress can be brought.[30]

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23. *Id.* at 20, 220 N.Y.S.2d at 736.
24. Lahann v. Cravotta, 228 N.Y.S.2d 371, 373 (Sup. Ct. 1962).
25. 224 N.Y.S.2d 974 (Sup. Ct. 1962).
26. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).
27. Haight v. McEwen, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964), 14 Buffalo L. Rev. 332.
28. Haight v. McEwen, *supra* note 27.
29. *Id.* at 585, 251 N.Y.S.2d at 842.
30. Physical impact has been required in: Cleveland, C.C. & St. Ry., v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900); State Farm Mutual Auto Ins. Co. v. Village of Isle, 122 N.W.2d 36 (Minn. 1963); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958); Bedenk v. St. Louis Pub. Serv. Co., 285 S.W.2d 609 (Mo. 1955); Humphrey v. Twin State Gas & Elec. Co., 100 Vt. 414, 139 Atl. 440 (1927). Presence of plaintiff in the zone of physical danger has been required before a cause of action may be established in: Amaya v. Home

It is, consequently, important to examine some of the reasons that lie behind the reluctance of the courts to extend liability for mental distress beyond those either physically injured or those wthin the zone of physical danger. It will be seen that these mechanical formulas of "impact" and "zone of danger" most commonly employed to limit liability are, for the most part, illogical and irrelevant with respect to the injury suffered and only serve to obscure the fundamental policy considerations that actually determine the outcome of the decisions in this area. A survey of similar cases in England will show an evolution in the attitude of the English courts concerning claims for mental anguish from a determination that no such claims can be asserted because of the "remoteness" of mental damages to a position that such injuries may indeed be a foreseeable consequence of negligent activity. Finally an examination of a recent American case may serve to illustrate the policy factors at work to limit liability for negligently inflicted mental distress.

Where a mental shock is produced by an intentional attack upon a third party, the courts have had little difficulty in allowing those seriously upset at witnessing the attack to recover damages.[31] Liability has been extended to them on the grounds that the intentional wrong-doer should "reasonably foresee" that one observing his act will suffer mental anguish.[32] While the decisions have been couched in terms of foreseeability, the true reason for expanding liability in the intentional tort area has more likely been judicial reaction to the immorality of the defendant's act.[33] Because the defendant is less censurable when his conduct is merely negligent, those shocked at witnessing his activity have a remedy only if they can satisfy certain arbitrary "tests." It is essential that the jurisdiction be one where emotional distress caused by a negligent act

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Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Barber v. Pollock, 104 N.H. 379, 187 A.2d 788 (1963); Kalina v. General Hospital, 18 A.D.2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962); Strazza v McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). If some independent legal right to be secure from mental disturbance can be established, plaintiff will recover without having to meet the tests of impact or zone of danger, see cases cited notes 4 to 14 *supra*.

31. Young v. Western & Atlantic R.R., 39 Ga. App. 761, 148 S.E. 414 (1929); Jeppsen v. Jensen, 47 Utah 536, 155 Pac. 429 (1916); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890). *But see*, Goddard v. Walters, 14 Ga. App. 722, 82 S.E. 304 (1914). Where the plaintiff was not present at the time of the attack, Knox v. Allen, 4 La. App. 223 (1926); Koontz v. Keller Adm'rx 52 Ohio App. 265, 3 N.E.2d 694 (1936), or the defendant did not know of the plaintiff's presence, Phillips v. Dickerson, 85 Ill. 11 (1877); Hutchinson v. Stern, 115 App. Div. 791, 101 N.Y. Supp. 145 (4th Dep't 1906), no liability for shock was imposed. *But see* Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961). Where the plaintiff suffered nervous shock at the discovery of the bloody body of a neighbor who committed suicide in plaintiff's kitchen, it was held a jury question whether the decedent's actions constituted an "intentional" infliction of mental distress on the plaintiff, Blakeley v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945). The plaintiff in this area has almost always been a close relative of the person intentionally attacked, but such a close relationship has not been established as essential to recovery, see Hill v. Kimball *supra*.

32. Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920). See Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 Va. L. Rev. 253, 266 (1933).

33. See generally Bauer, *The Degree of Moral Fault as Affecting Defendants' Liability*, 81 U. Pa. L. Rev. 586 (1933).

is a legally recognized injury. As it has already been noted,[34] some states deny recovery for mental disturbance unless some physical impact or injury occurs simultaneously with the mental shock, even in cases where the act was directed at the plaintiff. Various justifications for such an arbitrary rule have been advanced.[35] Presumably the original reason for denying all relief was judicial fear of a flood of fraudulent claims which could not be readily disproven.[36] There is no need to relate here the shift away from this physical impact requirement as a foundation for allowing the parasitic damages of mental suffering.[37] However, when the plaintiff is not the potential victim of the negligent activity but is shocked at the apprehension of injury to another, similar mechanical formulations survive to bar all relief. Not only must the plaintiff in such a situation overcome a decided, if inarticulate, judicial skepticism as to the reality of his mental damage, but he must also satisfy the "tests" of either impact or zone of danger which have been established not to determine the existence of a valid claim but to prevent false ones. Furthermore, if the plaintiff is successful in maintaining a claim, the recovery granted may very well be completely out of proportion to the injury. In a Missouri case,[38] under the physical injury test, plaintiff and her child were alighting from a bus when the doors closed on them. The child slipped under the wheels of the vehicle and was killed. Plaintiff was awarded an $8000 recovery for her emotional damage based on a slight bruise on her arm caused by the closing door.

Application of the zone of danger formula likewise results in recovery bearing little relation to the mental injury sustained. In a recent Connecticut case,[39] plaintiff's house was struck by defendant's negligently driven truck. Plaintiff was standing in the house two rooms away from the point of impact and was slightly shaken by the force. Believing her son to be on the porch which had been demolished by the truck, she became severely upset. The court allowed recovery for her anxiety because it found that she was within the zone of physical danger. However recovery was not granted for her fear concerning her son, but solely for that shock attributable to her apprehension over her own safety even though ". . . it does not appear that she sought or obtained medical attention because of it."[40] A contrary result was reached in a Maryland case under similar facts.[41] There the plaintiff had feared both for his own safety and also for that of his children who were in a house struck by the defendant's vehicle. The Maryland court declined to distinguish between plaintiff's fear

34. See note 20 *supra*.
35. See Hallen, *supra* note 32, at 266-67; Smith, *supra* note 2, believes the basic reason for denying liability was judicial concern over the social burden of expanded liability.
36. See Victorian Rys. Comms. v. Coultas, 13 App. Cas. 222 (P.C. 1888); Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E. 694 (1897). *Cf.* Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930).
37. See authorities cited note 1 *supra*.
38. Bedenk v. St. Louis Pub. Serv. Co., 285 S.W. 2d 609 (Mo. 1955).
39. Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959).
40. *Id.* at 719, 156 A.2d at 152.
41. Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933).

for himself and his fear for his children, allowing recovery for the total anxiety.

In order to discern the true reason for restricting liability to those injured by defendant's conduct or those within the zone of danger, it is necessary to look beyond these unrealistic limitations. As the opinion in a classic case in this area states:

> The answer to [the question of liability to those outside the zone of danger] . . . can not be reached solely by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. The answer must be reached by balancing the social interest involved, in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended.[42]

While viewing the question as an exercise in judicial balancing of conflicting policies avoids the arbitrary results of the impact and zone of danger analysis, it also leads into one of the most controversial areas of tort law.[43] Traditionally, a "duty" is owed only to those whom one can reasonably foresee as being harmed by one's activity, and it is only those placed in physical peril who are "foreseeable." This established concept, that the duty to be observed is circumscribed by the foreseeability of the risk, is essential to a system basing liability upon fault.[44] However, we are presently witnessing a shift in the underlying justification of tort liability from fault to rational loss distribution and,[45] as a consequence of this change, traditional concepts of duty and its role in determining liability have been questioned. As Professor Green demonstrates in his analysis of the duty problem:

> Whether [the defendant] . . . foresaw or should have foreseen the particular risk that contributed to the victim's injury is relevant to the issue of negligence, if that issue is reached. But whether the risk created by the actor's conduct and which contributed to the victim's injury falls within the scope of the actor's duty is a different matter and is an issue for the court to decide before the negligence issue becomes vital. Foreseeability may be a relevant factor for the judge to consider; other factors may be and are usually more important in the determination of the defendant's duty; *the fact of risk in the particular case is what actually took place as a result of defendant's conduct, not what was foreseen by the actor as likely to take place*, and it

42. Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

43. See generally Green, *Duties, Risks, Causation Doctrines*, 41 Texas L. Rev. 42 (1962); James, *Scope of Duty in Negligence Cases*, 47 Nw. U.L. Rev. 778 (1953); Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1 (1953); Morris, *Duty, Negligence and Causation*, 101 U. Pa. L. Rev. 189 (1952).

44. In Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) Cardozo presented the most famous enunciation of the foreseeability concept: "The risk reasonably to be perceived defines the duty to be obeyed . . . ."

45. Bloustein, 1963 Ann. Survey Am. L. 363. See generally Ehrensweig, *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case*, 8 U. Chi. L. Rev. 729 (1941); Green, *The Thrust of Tort Law*, 64 W. Va. L. Rev. 1 (1961).

> is this risk that must be brought into focus by the courts' judgment on the duty issue.[46]

Obviously, if this approach to the duty issue is employed by the court, the traditional tests of impact and zone of danger become largely irrelevant because they depend on foreseeability as the exclusive criterion of defendant's duty. They do not take Green's "other factors" into account in determining the duty owed others.[47]

Even if the more traditional approach to the duty question is used and the foreseeability of the particular risk marks the limit of defendant's duty, the mechanical impact and zone of duty tests are still of little relevance when the injury sustained is solely a mental one. If the concern is to determine the existence of a duty to prevent negligent intrusions upon the mental security of others, why should physical impact upon them or their presence in a zone of possible bodily injury have any bearing on the existence of that duty? The English courts, after struggling with the illogical results produced by the zone of physical danger approach, have upheld claims of those shocked at the apprehension of injury to another, by extending the range of foreseeability to include mental harms.

Shock as a cause of action in Great Britain was first recognized in *Dulieu v. White & Sons*.[48] In that case, plaintiff's shock arose out of fear for her own safety when defendant drove his horses into a pub. However, Kennedy, J. stated that, "The shock, when it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to one's self."[49] This limitation was explained on the grounds that it was not ". . . reasonably . . . to be expected" that one would be shocked at another's injury.[50] This dictum barred claims for shock at witnessing harm to others.

The famous case of *Hambrook v. Stokes Bros.*,[51] established that fear for the safety of one's children is sufficient for a cause of action where negligence directly toward the plaintiff is admitted. There defendant's negligently parked truck rolled down a steep hill striking one of plaintiff's children. The plaintiff, standing just beyond a curve in the street, saw the driverless truck crash into a nearby building and realized that it must have passed the place where she had just left her children. Fearful for their safety, she rushed to the spot and learned that one of them had indeed been struck. The resulting

46. Green, *supra* note 43, at 58.
47. Raymond v. Paradise Unified School District of Butte County, 218 Cal. App. 2d 1, 8, 131 Cal. Rptr. 847, 851 (Dist. Ct. App. 3d Dist. 1963) lists factors a court should consider in determining whether the defendant has a duty to the particular plaintiff. They include: the persons with whom the defendant is dealing, children, adults and so forth; the relative ability to adopt practical means of preventing injuries; the ability of the parties to shift or spread the risk of loss; judicial precedence; the prophylactic effect of a rule imposing liability and the "moral imperatives" the judges share with fellow citizens.
48. [1901] 2 K.B. 669.
49. *Id.* at 675.
50. *Ibid.*
51. [1925] 1 K.B. 141.

shock led to her death.[52] It is not certain from the opinion whether the plaintiff herself was in any physical danger. However, the court did not have to discuss that question because the defendant had admitted negligence to the plaintiff and relied on a defense that because her shock was not for herself but for her children it was not compensable. The court held that once negligence to the plaintiff was admitted, it was irrelevant whether the shock was occasioned by fear for one's self or fear for one's children.

Hay (or Bourhill) v. Young was the next English case to consider a claim of mental anguish occasioned by shock at another's injury.[53] The plaintiff heard a loud crash caused by the collision of defendant's motorcycle with an automobile about fifty feet from where she stood. She did not see the accident itself, but did see some blood on the highway. The noise and the sight of the blood gave her such a shock that she suffered a miscarriage. She was neither in danger of physical harm nor in fact shocked at the apprehension of harm to anyone else.[54] The court based its decision on the ground that the plaintiff was outside the zone of physical danger and therefore not foreseeable. Lord Porter stressed in his opinion that the range of foreseeability should include emotional as well as physical danger.[55] The latest English decision to deal squarely with the question, *King v. Phillips*,[56] finally rejected the zone of physical danger as the limit of foreseeability. In *King*, the plaintiff standing at a window heard a scream and looking out saw, from a distance of seventy yards, the defendant's taxicab back over her son's tricycle. She did not see the child struck; in fact he had been only slightly injured. However, the mother alleged nervous shock as a result of the incident. The opinions by two of the Lords Justices are significant because they settled two questions on the extent of foreseeability. First, the onlooker need not be within the area of physical injury to himself; the relevant area is one of emotional shock. Secondly, the shock need not be based on fear for one's self.[57] While the status of claims arising from emotional distress at fear for another's safety remains in some doubt in England,[58] the English courts have progressed beyond the arbitrary results of the zone of physical danger formula and have extended duty to encompass a zone of mental danger. It is fair to assume that future English decisions will hinge recovery

52. While the mother did not actually see her child struck, the case does not stand for recovery for shock at the news of an accident. "[T]he shock resulted from what [she] . . . either saw or realized from her own unaided senses, and not from something someone told her . . . ." Hambrook v. Stokes Bros., *supra* note 51, at 152.

53. [1942] 2 All. E.R. 396.

54. "She merely heard a noise, which upset her, without having any definite idea . . ." as to what had occurred. *Id.* at 406.

55. *Id.* at 409.

56. [1953] 1 Q.B. 429.

57. See the opinions of Singleton, L.J., and Denning, L.J., in King v. Phillips, *supra* note 56, at 437-40.

58. Each of the three Lords Justices in King v. Phillips, *supra* note 56, based his decision on slightly different grounds so that the extent of liability to those outside the area of physical risk remains unclear. Goodhart, *Emotional Shock and the Unimaginative Taxicab Driver*, 69 Law Q. Rev. 347, 353 (1953).

on the factual question of whether the defendant under the circumstances of the particular case could foresee that the plaintiff would suffer mental anguish at the apprehension of harm to another.

This extension of foreseeability to encompass an area of mental harm has not been adopted in American jurisdictions. The American Law Institute has noted the reluctance of the courts to alter the prevailing rule, and has deleted from its draft the Caveat to the first Restatement of Torts which declared that the Institute expressed no opinion on the liability of a negligent tortfeasor to those outside the scope of physical peril.[59] Unless the defendant's negligence has created an unreasonable risk of bodily harm to the plaintiff, the current draft version of the Restatement Second imposes no liability upon the defendant for the mental anguish suffered by the plaintiff as a result of his fear for another's safety.[60] Moreover, the American cases that have been cited as holding that those outside the scope of physical peril have a cause of action for their mental anguish are not in fact authority for that proposition.[61]

Some of the American courts have attempted to go beyond the mechanical impact and zone of duty limitations and analyze the basic reasons for the restriction on liability.[62] A recent example of this approach and one that may serve as an illustration of the countervailing policy factors that lead to the restriction is the decision of the California Supreme Court in *Amaya v. Home Ice, Fuel & Supply Co.*[63] The facts present the classic case of a mother seeing her child run down by the defendant's negligently driven vehicle and experiencing severe shock at the occurrence. The trial court sustained the defendant's general demurrer. In a unanimous decision the District Court of Appeals reversed,[64] holding that the defendant did have a duty to the mother even though she was beyond the area of physical harm. The California Supreme Court in a 4 to 3 decision reversed, reasoning that a defendant owed no duty to prevent emotional shock to a mother caused by her seeing defendant's negligent injury to her child.[65] The court determined that a rational result in cases

59. Restatement, Torts § 313 (1934).

60. Restatement (Second) Torts § 313, comment (Tent. Draft No. 5, 1960). "The Advisors are unanimous in wishing to retain the Caveat, for its possible effect upon the courts—although it must be conceded that it has thus far had no effect. The Reporter [Prosser] is in sympathy with this position, and feels that there should be liability to a mother who suffers a heart attack when she sees her child killed before her eyes. He is compelled, however, to recognize that the decisions are otherwise. The Council are agreed that the Caveat should go out, and the definite rule of non-liability should be stated." Restatement (Second), Torts, Note to Institute, § 313 (Tent. Draft No. 5, 1960).

61. Prosser, Torts 181 (2d ed. 1955) cites, Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Gulf, C & S. F.R. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906); Cohn v. Ansonia Realty Co. 162 App. Div. 791, 148 N.Y.S. 39 (1st Dep't 1914), as cases permitting recovery for mental distress by one outside the zone of physical harm. However, in both *Spearman* and *Cohn* that issue was not raised, and in *Gulf* recovery was based on the contract between the common carrier and its passengers.

62. Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Barber v. Pollock, 104 N.H. 379, 187A.2d 788 (1963); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

63. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

64. 23 Cal. Rptr. 131 (Dist. Ct. App. 1st Dist. 1962).

65. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963). It should be noted that

like *Amaya* could only be achieved by balancing the individual's interest in mental security against the countervailing interests of social policy. Recognizing that the determination of a duty did not depend solely on foreseeability but upon manifold considerations of public policy, the court did not limit itself to the impact or zone of duty limitations. Listed under the headings of "The Administrative Factor" and "The Socio-Economic and Moral Factors" are the policy reasons that compelled the court to limit liability for mental anguish.[66] Under the first heading the opinion expressed a two-fold fear, one based on the standard of proof necessary in such claims, the other, aroused by the spectre of limitless liability for mental pain. The court doubted whether, "the law has now become sufficiently responsive to scientific reality . . ." to insure the validity of such claims.[67] It deplored the "parade of expert medical witnesses . . ." that are ushered before a jury of inexperienced laymen who must decide the outcome.[68] Added to this question of proof was a judicial fear of unlimited liability. The court asked: how serious must the shock be to be actionable; must some close relationship exist between the plaintiff and the injured party; how close must the plaintiff be in time and space to the impact?[69] The court could supply no answers to these questions and was not satisfied with the limitations that have been proposed by others.[70] Indeed the *Amaya* opinion suggests that the search for definite limits "may be an inherently fruitless one."[71]

Under the second heading, "The Socio-Economic and Moral Factors," the court stated that extending liability beyond the zone of physical harm would hamper the general social utility derived from the use of our highways. Doubt was raised as to the ability of our present system of insurance to absorb the far-reaching extension of liability that would result.[72] The final factor taken into account to limit liability was the defendant's lack of moral culpability in the *Amaya* situation. The court recognized that defendants in cases of *intentional* infliction of physical injury have been held liable for the resulting mental anguish suffered by those beyond the zone of physical harm. But the opinion ascribed this to the moral guilt of the activity. To impose a similar burden on the merely negligent actor, the court stated, would result in liability completely out of proportion to his moral wrong.[73]

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the decision presumably did not reflect the reasoning of the majority of the permanent court. Justice Tobriner disqualified himself, having heard the case in the Court of Appeals where he authored the unanimous opinion in favor of the plaintiff. Justice White was appointed *pro tempore* to hear the case in his absence.

66. *Id.* at 310-15, 379 P.2d at 522-24, 29 Cal. Rptr. at 42-44.
67. *Id.* at 312, 379 P.2d at 523, 29 Cal. Rptr. at 43.
68. *Ibid.*
69. *Id.* at 312, 379 P.2d at 524, 29 Cal. Rptr. at 44.
70. Prosser, *op. cit. supra* note 61, at 181 suggests limiting recovery to cases where the threatened injury upon the other person is a serious one, where the parties are members of a family, and where the plaintiff saw the accident or the immediate results of it.
71. 59 Cal. 2d 295, 313, 379 P.2d 513, 524, 29 Cal. Rptr. 33, 44.
72. *Id.* at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.
73. *Ibid.*

Concerning the first administrative problem enunciated in its decision, namely the difficulty of distinguishing valid claims, the court admitted that "it has become almost trite . . ." to criticize decisions based on fears of invalid claims.[74] Indeed it has. Judicial fear of false claims, as a justification for denying litigants an opportunity to bring actions in our courts, was one of the first barriers to be removed by modern courts in recognizing a cause of action for mental distress.[75] This same fear can be advanced as easily in many personal injury actions, physical as well as emotional. Recovery is allowed daily in our courts for anxiety occasioned by plaintiff's fear for his own safety and at fear for the safety of others if the plaintiff also was physically threatened,[76] or if the defendant intentionally caused injury to a third party.[77] The problem of proving the reality of plaintiffs' mental distress in these cases has not prevented the claimants from being able to bring their actions.

No doubt, substantial difficulties exist in the second administrative area, namely, what are the ultimate boundaries of liability? Cases are not decided in a vacuum and courts ". . . can not fashion a rule for the case at bench without reflecting on the fact that there will be other such cases, other plaintiffs."[78] On the other hand, it is through case by case adjudication that the law develops, and it is not to be expected that a single decision will establish a timeless standard for the limits of legal interests. A number of authorities have attempted to fashion arbitrary limits on the extent of a negligent actor's liability for mental distress.[79] However, even a lengthy list of such limits of liability for future cases may prove of little help in deciding whether to extend liability in the present situation. Because a search for definite limits is an "inherently fruitless one" the lack of such clearly defined boundaries should not be used to determine whether a particular claim is worthy of consideration. The dissent in the *Amaya* case reasoned that because "morally and legally, there should not be liability in any such general situation is no reason for holding that, morally and legally, there should not be liability in the limited situation."[80]

Passing to the second group of policy considerations, labeled the "Socio-Economic & Moral Factors," the court in *Amaya* asserted that recognizing the plaintiff's claim would have intolerable social consequences. Increased liability would lessen the individual's incentive to perform socially useful acts because

74. *Id.* at 311, 379 P.2d at 522, 29 Cal. Rptr. at 42.

75. The New York Court of Appeals has stated: "In the difficult cases, we must look to the quality and genuiness of the proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the courts and jury to weed out the dishonest claims." Battalla v. State, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38 (1961).

76. Cases cited note 30 *supra.*

77. Cases cited note 14 *supra.*

78. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 313, 379 P.2d 513, 524, 29 Cal. Rptr. 33, 44 (1963).

79. Prosser, *supra* note 70.

80. 59 Cal. 2d 295, 316, 379 P.2d 513, 526, 29 Cal. Rptr. 33, 46.

of a fear of numerous law suits. It would also produce an undesirable economic effect by increasing the insurance costs necessary to spread the risk adequately.[81] There are no factual data, economic or otherwise, given in the opinion to support these conclusions. Moreover it is at once apparent that such adverse effects would result only if allowing such claims produced a substantial increase in the number of actions for mental shock. It is not at all clear that a flood of claims would necessarily follow from extending liability in cases similar to *Amaya*.[82] Even assuming that allowing recovery would extend the zone of risk, it has been clearly demonstrated that traditional zone of risk theories are of little practical importance in determining the cost of enterprise liability that is for the most part a product of actuarial techniques.[83] The lack of any conclusive demonstration of the effects upon insurance rates and economic activities in general by extending recovery in cases like *Amaya* raises the question whether the courts should consider such factors at all in deciding where a defendant's duty lies. A legislative analysis rather than a judicial estimate would seem to be required before the true effect upon insurance rates of extending liability could be determined.

Absence of moral guilt on the part of the negligent actor is the last factor used to limit liability in the *Amaya* case.[84] Generally, lack of moral culpability has been no barrier to the courts in establishing a duty in negligence actions and has certainly not restricted liability to the first person affected by the defendant's conduct. In the so-called "rescue cases," the defendants' morality or lack of it has not prevented the courts from extending a duty to one injured while attempting to aid another who had been placed in a position of danger through the defendants' negligence.[85] An evil motive was not required to justify extension of liability for mental anguish in cases based on breach of contract,[86] trespass,[87] or negligent mutilation of the corpse of a loved one.[88] If it is true

81. *Id.* at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.

82. Maryland established recovery for mental distress by those within the zone of physical danger in Bowman v. Williams, 164 Md. 387, 165 Atl. 182 (1933), the next case in the Maryland Court of Appeals to test that limit arose nineteen years later, Resavage v. Davis, 199 Md. 479, 86 A.2d 879 (1952). Likewise the last case on the appellate level in England to deal squarely with the question was King v. Phillips, [1953] 1 Q.B. 429.

83. Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 Yale L.J. 554, 574 (1961).

84. 59 Cal. 2d 295, 315, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45.

85. Parks v. Starks, 342 Mich. 443, 70 N.W.2d 805 (1955); Sarratt v. Halston Quarry Co., 174 S.C. 262, 177 S.E. 135 (1934); Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921). Similarly a defendant's moral position has not prevented his liability from being extended to cover plaintiff's injuries resulting from subsequent medical malpractice; Kansas City So. R.R. v. Justis, 232 F.2d 267 (5th Cir. 1956), *cert. denied*, 352 U.S. 833 (1956); Pullman Palace Car Co. v. Bluhm, 109 Ill. 20 (1884); Thompson v. Fox, 326 Pa. 209, 192 Atl. 107 (1937). Neither the defendant's morality, nor the unforeseeability of the injury has restricted liability when the negligent injury aggravated a latent disease or defect; Sentilles v. Inter-Carribbean Shipping Corp., 361 U.S. 107 (1959); Flood v. Smith 126 Conn. 644, 13 A.2d 677 (1940), or caused death to a plaintiff with an "eggshell skull," Dulieu v. White & Sons, [1901] 2 K.B. 669.

86. Gulf, C. & S.F.R. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906).

87. Acadia, Cal., Ltd., v. Herbert, 54 Cal. 2d 328, 353 P.2d 294 (1960).

88. Owens v. Liverpool Corp., [1939] 1 K.B. 394.

that tort law is moving away from the concept of liability based on fault to liability based on loss distribution, moral guilt is of even less weight in determining liability. As Prosser has observed, "if the loss is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's innocence."[89]

CONCLUSION

The present treatment of claims arising from shock and grief at the apprehension of injury to another when experienced by one in a position of bodily safety is governed by rules "which are divergent in their theoretical bases, inconsistently applied, and misapplied to situations where their purposes are not apt [leading] . . . to results, which, to a layman of ordinary intelligence must appear hopelessly inconsistent."[90] Presence within a vague "zone" of physical injury is a prerequisite in many jurisdictions before a claim can be asserted for an injury that is in no way related to any physical impact upon the plaintiff or his fear of it. Some jurisdictions that do permit plaintiff within the zone to recover for his mental distress require him to apportion his shock between that caused by fear for himself and that caused by fear for another.[91] Others allow recovery for the total shock.[92] If a plaintiff sees her husband killed in a collision she will not recover for her mental anxiety unless she can satisfy either the impact or zone of danger tests. However, if that same plaintiff witnesses the negligent handling of his corpse, recovery may be granted.[93] A mother seeing one of her children burned to death as the result of defendant's negligence in an accident in which she also had been injured, was denied recovery for her mental suffering at seeing her child die.[94] Yet she may recover for her anguish concerning the possible effects of her injuries upon her unborn child.[95] It has been noted that such decisions are "not a triumph of reasoning."[96]

A solution has been proposed to deal with these claims for mental anguish on a more rational ground. Brody advises, "the courts dealing with the problem on a case to case basis, should determine the degree of relationship between the observer and the victim necessary to permit recovery . . . ."[97] A decision by the court establishing whether a duty existed in the circumstances of a particular case would insure the desired consistency. One jury would not be able to grant recovery for mental anguish to one who was merely a friend of the injured party, while another jury could deny recovery to the wife or mother of the one injured. In determining whether a duty should exist to one shocked at

89. Prosser, *supra* note 43, at 17.
90. Brody, *Negligently Psychic Injuries: A Return to Reason*, 7 Vill. L. Rev. 232, 256 (1961).
91. Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959).
92. Bowman v. Williams, 164 Md. 387, 165 Atl. 182 (1933).
93. Blanchard v. Brawley, 75 So. 2d 891 (La. App. 1954).
94. Lessard v. Tarca, 20 Conn. Supp. 295, 133 A.2d 625 (Conn. Super. 1957).
95. Rosen v. Yellow Cab. Co., 162 Pa. Super. 58, 56 A.2d 398 (1948).
96. Lambert, 28 NACCA L.J. 33, 57 (1961).
97. Brody, *supra* note 90, at 245.

injury to another, the court could take into account the relevant circumstances such as the degree of relationship between the parties, the severity of the injury and the proximity of the plaintiff to the scene. Once the court determines whether a duty should be imposed, the jury, under the usual standards for determining the weight of the evidence, could then decide whether the defendant failed in his duty. Liability would result if the defendant, in the circumstances of the case, should have reasonably foreseen fright or shock severe enough to cause substantial injury in a normally constituted person. Such an approach, recommended by numerous authorities,[98] adopted in the English courts,[99] and advanced by the dissent in the *Amaya* decision,[100] would obviate the necessity for the mechanical rules surrounding the claims for mental distress at the apprehension of injury to another.

PAUL T. MURRAY

OBSCENITY: *ROTH* GOES TO THE MOVIES

In 1915 the United States Supreme Court held that movies were no more than a form of commercial entertainment, and were not to be regarded in the same class as other communication media.[1] It was not until 1952 that the Court reversed this judgment and held that motion pictures clearly convey information and thought, and thus are entitled to the guarantees of free speech provided by the first and fourteenth amendments.[2] However, the Court was quick to add that "it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas."[3] Thus it becomes proper to ask which movies will not receive the protection of the Constitution. This comment will concern itself with movies that contain material relating to sex, and the possible limitations[4] of the protection which may be afforded to them.

In *Roth v. United States*,[5] the United States Supreme Court held that if the presentation of the material falls within the category of "obscenity [it] is not within the area of constitutionally protected speech or press,"[6] because

98. Blessing, *The Right to Mental Security*, 16 U. Fla. L. Rev. 540, 568 (1964); Brody, *supra* note 90; 2 Harper & James, Torts 1035-38 (1956).
99. Owens v. Liverpool Corp., [1939] 1 K.B. 394.
100. 59 Cal. 2d 295, 316, 379 P.2d 513, 526, 29 Cal. Rptr. 33, 46.

1. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 244 (1915) (". . . [T]he exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded . . . as part of the press of the country or as organs of public opinion."
2. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). See note 12 *infra*.
3. *Id.* at 502-03.
4. *E.g.*, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). See generally, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Near v. Minnesota, 283 U.S. 697 (1931); American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954).
5. 354 U.S. 476 (1957).
6. *Id.* at 485.