

A PRINCIPLED SOLUTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS

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ABSTRACT: *This article examines negligent infliction of emotional distress, one of the most controversial and least uniform fields of tort law. A review of the judicial and scholarly literature has shown that traditional tort analysis fails. In its stead, the common law has not found an alternative theory of liability that balances the competing interests. Rather, the approach has been to create rules of law based on probabilistic templates. Its dual purpose is to preclude individualized analysis and to limit aggregate liability. This article rejects the current doctrines as inherently arbitrary and proposes a complete overhaul of the law. To find a more principled solution, the notion of duty must be reconceptualized beyond arbitrary divisions and foreseeability of risk. Because of the unpredictable nature of mental injuries and its consequences on the application of the rules of law, the concepts of duty and foreseeability must be distinguished in finer gradations. The formulation of duty should be a dynamic calculus that considers the plaintiff's interests, the defendant's culpability, and the social policy considerations. When such analysis is engaged, it is entirely possible for a more principled theory to coexist with the practical policy of limiting liability. This approach requires that the rules of liability and damage be adjusted to reflect the interests and culpabilities at issue.*

I. INTRODUCTION

Negligent infliction of emotional distress is one of the most important fields of tort law, not because it has the greatest social impact but because it involves a significant interest for which the law is in an "unparalleled state of confusion."¹ Although mental injuries can be as real and severe as physical ones, the law dealing with this interest is anything but principled or uniform. This inadequacy is particularly glaring since the general theories of negligence and accident law are well established in American jurisprudence.² After one hundred years of judicial and scholarly analyses, nearly all states recognize a right to recover for negligent infliction of

1. W.E. Shipley, Annotation, *Right to Recover for Emotional Disturbance or Its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2D 100, 103 (1959); see *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 442 (Wis. 1994) ("The nearly 60 years of court decisions since *Waube* demonstrate that rigid doctrinal limitations on liability to bystanders produce arbitrary, incongruous and indefensible results.").

2. Negligence as a tort theory took root during the early nineteenth century. Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 195 (1926).

emotional distress in some form or another.³ But from this single root, the jurisdictions have branched off into a tangled array of rules in an effort to balance the twin goals of remedying injured plaintiffs and limiting liability to socially tolerable levels.⁴ Although these rules have generally succeeded in the latter goal, they have done so by drawing arbitrary bright lines. The criticism has been legion,⁵ and even courts at the highest levels have candidly conceded the arbitrary nature of these rules.⁶ The current disarray in an important field of tort law stems from a conflict of competing policies.

First, mental and physical injuries differ.⁷ Broken bones, ruptured kidneys, and viral infections can be objectively verified whereas mental injuries elude empirical testing.⁸ Physical injuries and their causes obey certain immutable laws of natural science, whereas the etiology of mental injuries does not conform to neat equations or expectations. Yet few in modern society would question that mental injuries can be as severe and

3. See Douglas Bryan Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781, 792–93 & n.59 (1988).

4. See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1633, 1660 (2002) (“[A]nalysis of this area is rife with confusion.”). Courts have employed an array of concepts such as “parasitic damage,” “impact,” “zone of danger,” “direct/indirect,” and “bystander.” *Id.* at 1633; see *infra* Part II, pp. 813–31 and accompanying notes.

5. See *infra* notes 66, 144 for some of the academic commentary on this subject.

6. See, e.g., *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994) (acknowledging that “[p]erhaps the zone of danger test is ‘arbitrary’” while adopting the rule nevertheless); *Thing v. La Chusa*, 771 P.2d 814, 828 (Cal. 1989) (“[W]e acknowledge [there] must be arbitrary lines to similarly limit the class of potential plaintiffs.”); *Dunphy v. Gregor*, 642 A.2d 372, 381 (N.J. 1994) (Garibaldi, J., dissenting) (“[A] certain degree of arbitrariness is necessary in setting the outer limits of liability in the field of emotional distress in particular.”).

7. Throughout this article, “mental injury” is shorthand for severe mental or emotional injury, and not trivial or evanescent injury, associated with living in an imperfect world. Courts and commentators generally agree that only serious injuries are compensable and that minor injuries such as hurt feelings, temporary fright, and ordinary stress should not be recognized. See, e.g., *Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 380 (3d Cir. 1993) (claims for trivial emotional disturbances are not cognizable); Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1982) (recovery should be limited to genuine and severe mental injuries); see also RESTATEMENT (SECOND) OF TORTS § 436A & cmt. c (1965) (stating mental distress from negligence applies “to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation”); *id.* at § 46 cmt. j (same for intentional tort). But see Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 382–91 (1984) (suggesting a nominal fixed dollar amount of \$400–\$500 for trivial mental injuries). It is beyond the scope of this article to define the medical and psychological nature of a genuine mental injury. See *infra* note 149. I leave this to the courts and factfinders.

8. See *infra* pp. 832–33 and accompanying notes.

devastating as physical ones,⁹ and advances in the mental health profession have legitimized these injuries as genuine harms otherwise worthy of legal recognition.¹⁰

Second, because mental injuries are difficult to verify, courts are naturally wary of opening the floodgates to fraudulent, frivolous, and perhaps even marginal lawsuits.¹¹ Yet such arguments have been described by Prosser as “threshing old straw.”¹² Frivolous lawsuits are endemic to the entire legal system and the concern over fraud and frivolity, though unquestionably legitimate, must be tempered by the principle that for every wrong the law should provide a remedy.¹³

Third, physical injuries are generally inflicted only when the negligent act delivers sufficient force or harmful agent to cause injuries. In most ordinary accidents, such injuries are localized to the time and place of the accident and obey certain natural laws of science.¹⁴ The concept of foreseeability is driven in part by our understanding and expectation of accidents and their consequences, and the predictability of accidents is essential to assign culpability as well as to provide appropriate deterrence. But mental injuries have a transient quality about them, and they are not

9. See *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 113 (Ohio 1983) (“Emotional injury can be as severe and debilitating as physical harm and is deserving of redress.”).

10. From the early twentieth century, scholars recognized that mental injuries were worthy of legal protection. See ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 120–21 (1923) (“With the rise of modern psychology the basis of this caution in securing an important element of the interest of personality was removed.”); see also *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 817 (Cal. 1980) (“That medical science and particularly the field of mental health have made much progress in the 20th century is manifest”); *Jarchow v. Transamerica Title Ins. Co.*, 122 Cal. Rptr. 470, 481 (Ct. App. 1975) (considering an emotional distress as trivial is an “antiquated concept,” and mental trauma can be just as debilitating as physical injuries) (citing POUND, *supra*, at 120); Leslie Benton Sandor & Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment*, 37 ARIZ. L. REV. 1247, 1255 (1995) (finding that, based on advances in modern psychology, mental trauma can be just as debilitating as physical injury).

11. See *Gottshall*, 512 U.S. at 545 (expressing concern of “a flood of relatively trivial claims” due to the etiology of mental injuries) (internal quotation marks omitted); see also *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 569–70 & n.20 (1987).

12. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 54, at 360 (5th student ed. 1984) [hereinafter PROSSER & KEETON].

13. The maxim of English law, *ubi jus, ibi remedium*, states that “for every right, there must be a remedy.” *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 343 (Or. 2001) (citing JAMES DEWITT ANDREWS, *AMERICAN LAW: A COMMENTARY ON THE JURISPRUDENCE, CONSTITUTION AND LAWS OF THE UNITED STATES* 590 (2d ed. 1908)); see OKLA. CONST. art. II, § 6 (providing a remedy for every wrong); WIS. CONST. art. I, § 9 (same). The law of negligent infliction of emotional distress has modified this general maxim “to limit the legal consequences of wrongs to a controllable degree.” *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969).

14. See, e.g., *Allen v. United States*, 588 F. Supp. 247, 407 (D. Utah 1984), *rev’d on other grounds*, 816 F.2d 1417 (10th Cir. 1987).

localized to time and space proximity. The vagaries of each person's mental and emotional fortitude come into play. Horrendous circumstances may result in no lasting injury or evanescent harm. Yet slight abuse may cause significant injuries across a wide swath of victims, and so there is the possibility of limitless and unpredictable liability.

Each of the above considerations is legitimate in its own right, but collectively their tug and pull have offered little guidance for courts to fashion value neutral, practical, and principled rules of law that provide remedies across a broad spectrum of foreseeable plaintiffs while limiting liability to defendants. Over the years, the law has struggled to strike the proper balance, producing a chronicle of "false starts."¹⁵ The end result was not a reasoned compromise, but a series of compromised rules. This flaw is evinced by the common law's¹⁶ adoption at various times of the physical impact, physical manifestation, zone of danger, and bystander tests (in all of their various flavors).¹⁷ While different in formulation, these rules share a common trait: they define a specific situation under which a plaintiff *could* be injured and then affix liability within the confines of that situational template, excluding all other possibilities with the purpose of precluding a case-by-case analysis.¹⁸ If these probabilistic templates covered substantially all of the reasonably foreseeable situations in which plaintiffs could be injured, the debate would be merely academic. In the procession of human events, however, the set of factual circumstances resulting in injury is literally infinite. Without a more principled theory to assign culpability and distribute remedies, the law will continue to exist as random islands of liability in a sea of arbitrary preclusion.¹⁹

15. *Thing v. La Chusa*, 771 P.2d 814, 831 (Cal. 1989) (Kaufman, J., concurring) (quoting Nolan & Ursin, *supra* note 7, at 604); *see* *Dillon v. Legg*, 441 P.2d 912, 924 (Cal. 1968) (noting that the history of negligent infliction of emotional distress does not show the development of a principled rule but rather "a series of changes and abandonments"); *Bass v. Nooney Co.*, 646 S.W.2d 765, 771 (Mo. 1983) ("Further study made it apparent that the requirement of physical injury resulting from the emotional distress merely meant the replacement of one arbitrary, artificial rule with another which was only somewhat less restrictive.").

16. Reference to the "common law" is shorthand for the laws of the various states. By this I do not suggest that the common law acts in the singular or is unified in thought. *See Gottshall*, 512 U.S. at 571–72 (1994) (Ginsburg, J., dissenting) ("The 'common law' of emotional distress exists not in the singular, but emphatically in the plural."). Indeed, I write this article because the common law exists in a state of arbitrary pluralism.

17. *See infra* Part II, pp. 813–31 and accompanying notes. In addition to these tests, the common law has recognized other special circumstances where liability can be found, including miscommunication of death notices and fear of disease cases. *See infra* notes 44–45.

18. *See Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 436 (1997) (noting that the purpose of common law rules was to "deny courts the authority to undertake a case-by-case examination").

19. *Dillon*, 441 P.2d at 925.

Although the common law rules have the advantage of drawing bright lines—enabling mechanical application of rules to facts and sharply limiting liability to the general populace—they do little to distinguish real injuries from the feigned, weigh culpability against the interest violated, and allocate appropriate risks and remedies. In a judicial system founded on reason and fairness, the price of arbitrary rules is high, particularly when courts “freely” admit their rules are really judicial fiats.²⁰ Under this system, the difference between remedy and claim preclusion in an action involving genuine injuries depends on the jurisdiction’s rule of law, the application of which may turn on such inconsequential vagaries as the distance of a “few yards” or the lapsing of a “few minutes.”²¹

In this field, the formulation of duty is the core problem. Duty in negligence actions is substantially defined by foreseeability of risk as measured by the reasonably prudent person. This is the traditional doctrine under *Palsgraf v. Long Island Railroad Co.*, which was devised to limit liability to “within the range of apprehension.”²² Under the general rule, a defendant has a duty of care to not cause physical injury to a foreseeable plaintiff.²³ Ironically, for mental injury claims, *Palsgraf* opens the Pandora’s Box of limitless liability because so many mental injury claims are easily foreseeable.²⁴ So courts and commentators have framed the issue this way: How should the law deal with the entire class of genuinely injured, foreseeable plaintiffs in a way that appropriately limits liability? This question rests on two assumptions: (1) foreseeability defines, in part at least, duty and thus these plaintiffs should be entitled to full remedies but for the social policy considerations; and (2) a defendant’s conduct, once found to fall short of the reasonably prudent standard, is linked to the determination of liability only under a causation analysis and does not bear on defining

20. *Thing*, 771 P.2d at 831 (Kaufman, J., concurring).

21. *See, e.g., Dillon*, 441 P.2d at 915 (noting the arbitrariness of the zone of danger test that delineates liability based on a difference of a few yards); *Arauz v. Gerhardt*, 137 Cal. Rptr. 619 (Ct. App. 1977) (rejecting a claim because the mother arrives at the scene of an accident three minutes later); *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 435 (Wis. 1994) (allowing a cause of action for a mother who arrived at the scene a “few minutes” after the accident).

22. 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, J.); *see infra* pp. 847–53 and accompanying notes for a discussion of the case. *See generally* William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953) (discussing the case).

23. *See infra* note 228, discussing the acceptance of the *Palsgraf* doctrine in American jurisprudence.

24. Various courts and judges have used the Pandora’s Box metaphor in the context of analyzing these claims. *See, e.g., Rowell v. Holt*, 850 So.2d 474, 480 (Fla. 2003); *S. Cent. Reg’l Med. Ctr. v. Pickering*, 749 So.2d 95, 100 (Miss. 1999); *Winslow v. Mont. Rail Link, Inc.*, 38 P.3d 148, 153 (Mont. 2001) (Trieweiler, J., dissenting); *Knaub v. Gotwalt*, 220 A.2d 646, 647 (Pa. 1966), *overruled by* *Niederman v. Brodsky*, 261 A.2d 84 (Pa. 1970).

duty or damages. When the issue is framed in this manner, there is no solution other than drawing bright lines. It is an all-or-arbitrary choice.

A principled solution is built only on a sound theoretical foundation, which may require an alternative construct to the traditional approach when the underlying assumptions no longer hold. The problem is that courts have continued to analyze mental injuries through a physical injury prism. Courts and scholars have viewed reasonable foreseeability and negligent culpability as singular concepts without distinction. But mental injuries differ in etiological and behavioral properties, and so these differences should be considered when fashioning rules of law that reflect the operative reality. Although *Palsgraf* begot the problem by framing duty in terms of foreseeability, the opinion also hints at the solution.²⁵ This article rejects the notion that foreseeability and interest in freedom from mental injuries are singular concepts. Judge Cardozo's key insight was that duty is a term of relation and foreseeability alone need not be the sole determinant.²⁶ A reconceptualization of duty requires distinctions beyond foreseeability.

With this fresh canvas, it is entirely possible to sketch the limits of liability and remedies around the entire class of injured plaintiffs—and, importantly, do so in a more principled manner than under the current all-or-arbitrary scheme. As a first step, this article rejects the situational rulemaking approach of the past one hundred years because such a framework is inherently arbitrary, precluding as a matter of law a broad spectrum of injured plaintiffs. Nor does tinkering around the margins suffice to fix an interminably broken model. This article also rejects the *a priori* assumption that all foreseeable plaintiffs should be entitled to whole relief.²⁷ Rather, it defines duty as the relationship between defendant's culpability and plaintiff's diversity of interests. Claims for mental injuries must be evaluated on a three-part, sliding-scale calculus: an examination of the foreseeable victim's interests, a focus on the defendant's culpability, and society's need to place tolerable limits on liability. This analysis necessitates changes to both the rules of liability and damage, resulting in a more principled liability allocation and remedy distribution.²⁸

Based on these guiding principles, the following rules of law are proposed: (1) for all direct victims (i.e., where the primacy of the wrongful

25. See *infra* pp. 851–53 and accompanying notes.

26. *Palsgraf*, 162 N.E. at 101.

27. See *infra* note 356.

28. Rules of damage determine the remedies available. Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 485 (1982). Rules of liability determine the substantive rules under which liability may or may not be created. *Id.*

conduct was directed at the victim affecting her safety or well-being), the traditional tort laws of liability and damage should apply; (2) for all other foreseeable, collateral victims (i.e., where the injury arises from the knowledge of harm to another), they are entitled to relief only if the defendant's conduct is reckless or more, and only to the limit of economic out-of-pocket losses.

This distinction is made because plaintiffs' interests are different. For direct victims, the interest derives from a fundamental right of self-preservation (the right to be), which undergirds tort law. For collateral victims, their true interest is the safety or well-being of others, which is a derivative right based upon an injury to the primary victims. For this reason and because direct victims are closer in causal proximity to the tortious act, the former is a higher order interest for which a defendant should be liable upon a finding of simple negligence.²⁹ Accordingly, legal culpability should reflect these differences. This general theory of liability navigates the narrow isthmus of limiting liability and imposing a more principled general theory of duty of care.³⁰ Under this analysis, duty is defined in a manner where no foreseeable plaintiff is precluded as a matter of law but where liability is well defined, and in no small measure by the defendant's culpability.

This proposal is not ideal, if providing remedies to all is the yardstick. Apportioning liability is a zero-sum allocation between plaintiffs and defendants. Because legal remedies are not an infinite resource,³¹ the issues at stake are: How large should the pool of remedies be? And how should this pool be apportioned among plaintiffs? The first question deals with liability theory, the one constant in the ever changing field of tort law. The vexing question of liability's limit has produced the all-or-arbitrary choice and the legion of scholarship commenting on that choice.³² The second question addresses the distributive theory of remedies, i.e., whether it is fair to provide full remedies to some injured plaintiffs and not to others based on arbitrary divisions of liability and preclusion. Under the current scheme, remedies are an all-or-nothing distribution. Surprisingly, few scholars have directly analyzed this distribution scheme.³³ Like most difficult legal

29. See *infra* Part IV.B, pp. 853–61.

30. Reference in this article to a "general theory of liability" simply means a principled system of rules. The common law rules are not based on general theories of liability, but are special rules of exception to the presumption of nonliability.

31. *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 435–36 (1997).

32. See *infra* notes 66, 144.

33. Most scholars have only analyzed this issue indirectly in the context of determining the scope of liability. Accepting that the amount of remedies is limited as the legal marketplace

problems, there is no perfect solution in this field, only tradeoffs seeking optimality among the various stakeholders.³⁴ In this regard, a completely satisfactory solution is elusive, as the law must make normative distinctions among varying interests in a world of limited resources. The question is whether the tradeoffs are justified by sound principles and fairness.

II. DEVELOPMENT OF THE COMMON LAW

The development of the law in this field has been well documented by commentators and this article will not repeat a detailed history.³⁵ Nor is the purpose of this article to conduct a jurisdictional survey of the law.³⁶ This article reviews some of the seminal cases in California, Hawaii, and the federal courts. California and Hawaii have been at the forefront of recognizing new theories for mental distress claims,³⁷ and recently federal courts have reviewed the collective common law and fashioned a uniform rule under Supreme Court auspice.³⁸ Thus, the laws in these jurisdictions reflect the leading judicial trends and thoughts in this field, and they provide a basis for this discussion.

A. Early Common Law

Early common law did not recognize claims for mental injuries from negligent acts.³⁹ Mental injuries were assumed to be different from physical

has determined, few commentators have analyzed the distribution of remedies among the plaintiff class in the context of this limitation.

34. Some legal problems have more than one logical solution, and there is no logical way to choose between them. See Pearson, *supra* note 28, at 482.

35. See generally John H. Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 DRAKE L. REV. 717 (1998); Bell, *supra* note 7; David Crump, *Evaluating Independent Torts Based upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439 (1992); Nolan & Ursin, *supra* note 7, at 583; Pearson, *supra* note 28.

36. See Marlowe, *supra* note 3, at 781.

37. See Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1, 3 & n.22 (1979); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1515 n.7 (1985); Sandor & Berry, *supra* note 10, at 1247; Michael Jay Gorbach, Note, *Negligent Infliction of Emotional Distress: Has the Legislative Response to Diane Whipple's Death Rendered the Hard-Line Stance of Elden and Thing Obsolete?*, 54 HASTINGS L.J. 273, 273 (2002).

38. See *infra* Part II.C, pp. 823–31 and accompanying notes.

39. See Pamela Cogan Thigpen, Note, *Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Foundation Hospitals*, 13 PAC. L.J. 179, 181 (1981); see also *Lynch v. Knight*, 11 Eng. Rep. 854, 863 (1861) ("Mental pain or anxiety the law cannot value,

ones, and claimants were deemed less worthy of legal protection.⁴⁰ The justifications for denying these claims are the same policy reasons giving today's courts pause: mental injuries are incalculable, they will lead to a flood of litigation and unlimited liability, they are not proximally related to the defendants' conduct, they are unpredictable, they are the idiosyncratic reactions of less balanced individuals, they are easier to fake or exaggerate, and their damages are speculative.⁴¹ Most of these reasons have long been discredited.⁴² But for years courts have dealt with the problem by denying most mental injury claims, and even modern courts still express a certain distrust of these claims.⁴³

The preclusion of a claim was not absolute. Even early common law courts carved out special circumstances where the egregiousness of the facts could not be overlooked and provided indicia of genuineness, such as the mishandling of corpses and miscommunication of a loved one's death or illness.⁴⁴ These claims were handled on an ad hoc basis, and the results were driven more by a visceral sense of justice than any pretensions of a principled approach toward the larger problem. Indeed, even modern courts

and does not pretend to redress, when the unlawful act complained of causes that alone"); PROSSER & KEETON, *supra* note 12, § 12, at 55 ("Not until comparatively recent decades has the infliction of mental distress served as [an independent tort].").

40. See, e.g., *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 354 (N.Y. 1896), *overruled by* *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961).

41. See PROSSER & KEETON, *supra* note 12, § 54, at 360; Colleen Wilcox Heidenreich, Comment, *Clarifying California's Approach to Claims of Negligent Infliction of Emotional Distress*, 30 U.S.F. L. REV. 277, 283 (1995).

42. Prosser concludes that mental injury is no more difficult to calculate than physical pain; it is not an independent intervening cause, and its consequence can follow directly from negligence; and the law does not protect physical health alone. PROSSER & KEETON, *supra* note 12, § 54, at 360. As discussed later in this article, the key concern is the potential for unlimited and unpredictable liability, which is a legitimate concern. See *infra* Part III.B, pp. 836-42 and accompanying notes.

43. See, e.g., *Okrina v. Midwestern Corp.*, 165 N.W.2d 259, 263-64 (Minn. 1969) (granting relief under zone of danger test when a wall collapsed at a construction site near plaintiff "notwithstanding her unusual susceptibility to the consequences of her fear").

44. See, e.g., *Chelini v. Nieri*, 196 P.2d 915, 917 (Cal. 1948) (negligent casket sealing); *Carey v. Lima, Salmon & Tully Mortuary*, 335 P.2d 181, 183 (Cal. Ct. App. 1959) (negligent embalming); *W. Union Tel. Co. v. Redding*, 129 So. 743, 747 (Fla. 1930) (negligent transmission of medical results); *Strachan v. John F. Kennedy Mem'l Hosp.*, 538 A.2d 346, 353 (N.J. 1988) (negligent handling of corpse); *Lamm v. Shingleton*, 55 S.E.2d 810, 813-14 (N.C. 1949) (negligent treatment of corpse); *Russ v. W. Union Tel. Co.*, 23 S.E.2d 681, 683 (N.C. 1943) (negligent failure to transmit death notice); *So Relle v. W. Union Tel. Co.*, 55 Tex. 308, 313 (1881) (negligent transmission of death notice), *overruled by* *Gulf, Chi. & Santa Fe Ry. Co. v. Levy*, 59 Tex. 563 (1883).

have taken a similar ad hoc approach when faced with new situations for which the traditional framework of tort law fails to provide a neat solution.⁴⁵

Eventually, the law began to recognize mental injury claims in limited ways. As early as 1896, California compensated mental suffering as an aggravation of damages for physical injuries.⁴⁶ These claims were said to be “parasitic” to an independent cause of action for physical injuries, property damages, or contractual rights in most cases.⁴⁷ At the turn of the century, courts started to create narrow rules of independent liability. One such rule allowed recovery where the mental injury manifested into discernable physical symptoms.⁴⁸ Also, since at least 1897, courts began to apply the “physical impact” rule, under which a plaintiff seeking damages for mental

45. For example, there is a line of cases dealing with mental injuries from exposure to harmful agents or disease pathogens, creating special circumstances under which courts have granted relief. *See, e.g.,* *Watkins v. Fibreboard Corp.*, 994 F.2d 253 (5th Cir. 1993) (exposure to toxins); *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985) (same); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (fear of future disease); *Herbert v. Regents of Univ. of Cal.*, 31 Cal. Rptr. 2d 709 (Ct. App. 1994) (fear of future AIDS and cancer). *But see* *Metro-N. Commuter R.R. Co. v. Buckley*, 512 U.S. 424 (1997) (FELA case); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985) (fear of future cancer). The “fear of disease” and “cancerphobia” cases are really claims for negligent infliction of emotional distress. *See* *Ferrara v. Galluchio*, 152 N.E.2d 249, 252 (N.Y. 1958) (allowing a claim for “cancerphobia”—“Freedom from mental disturbance is now a protected interest in this State.”); *see also* Kira Elert, Note, *Dillon v. Evanston Hospital: Illinois Adopts the New Increased Risk Doctrine Governing Recovery for Future Injury*, 34 LOY. U. CHI. L.J. 685, 706 (2003). *See generally* Glen Donath, *Curing Cancerphobia Phobia: Reasonableness Redefined*, 62 U. CHI. L. REV. 1113 (1995). Like the earlier cases involving erroneous death notices and negligent handling of corpses, *see supra* note 44, these cases are best understood as visceral responses to particularly egregious cases in which the facts provide a special indicia of genuineness. The continued reliance on such patchwork justice is precisely why a general theory of liability is needed.

46. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 817 (Cal. 1980) (citing *Sloane v. S. Cal. Ry. Co.*, 44 P. 320, 322 (Cal. 1896)); *see* *State Rubbish Collectors Ass’n v. Siliznoff*, 240 P.2d 282, 285–86 (Cal. 1952); *Deevy v. Tassi*, 130 P.2d 389, 395–96 (Cal. 1942); *see also* *Hill v. Kimball*, 13 S.W. 59, 60 (Tex. 1890) (discussing the issue of independent claims for mental injuries).

47. Mary Donovan, Comment, *Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?*, 41 UCLA L. REV. 1337, 1350 (1994). *See, e.g.,* *Payton v. Abbott Labs*, 437 N.E.2d 171, 176 (Mass. 1982); *Martinez v. Teague*, 631 P.2d 1314, 1319 (N.M. Ct. App. 1981); *Hammond v. Cent. Lane Communications Ctr.*, 816 P.2d 593, 596 (Or. 1991); *see also* PROSSER & KEETON, *supra* note 12, § 54, at 363 (“With a cause of action established by the physical harm, ‘parasitic’ damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned.”).

48. *See, e.g.,* *Webb v. Francis J. Lewald Coal Co.*, 4 P.2d 532, 533 (Cal. 1931); *Sloane v. So. Cal. Ry. Co.*, 44 P. 320, 322–24 (Cal. 1896). Some modern courts still adhere to the physical manifestation rule. *See, e.g.,* *Brueckner v. Norwich Univ.*, 730 A.2d 1086, 1092–93 (Vt. 1999).

injuries must show a contemporaneous physical impact, however slight.⁴⁹ Toward the early twentieth century, most major industrial states adopted the physical impact test.⁵⁰

The physical manifestation and physical impact tests were crude screening devices to weed out fraudulent and frivolous claims.⁵¹ But almost from inception, these rules proved unsatisfactory. Consider, for instance, the physical impact rule. The rule has been criticized for being inherently arbitrary.⁵² It is underinclusive because other victims who did not suffer an impact are clearly foreseeable, but remedy is denied. It is also overinclusive because victims who sustained an impact may recover where there was no genuine mental injury. The logical nexus between impact, a physical event, and mental injury is tenuous at best. So in cases where the injury was severe, courts stretched the meaning of impact to the point of eviscerating the element in the pursuit of heartstring justice. Impact has been held to be a slight blow, an electric shock, a trivial jolt, a forcible seating, dust in the eye, inhalation of smoke, and a horse's defecation on the victim.⁵³ Such strained logic to achieve humanitarian ends effectively undermined the legitimacy of the rule itself, and courts soon looked for other alternatives in search of a more principled approach.⁵⁴ Most jurisdictions have since abandoned the physical impact test.⁵⁵

49. The leading early physical impact cases were *Spade v. Lynn & Boston R.R. Co.*, 47 N.E. 88 (Mass. 1897) and *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896). Subsequently, both New York and Massachusetts, as with most states, abandoned the impact rule. See *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1296–1301 (Mass. 1978); *Battalla v. State*, 176 N.E.2d 729, 729–32 (N.Y. 1961).

50. Archibald Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 263–64 & n.25 (1921); Heidenreich, *supra* note 41, at 284; see, e.g., *Spade*, 47 N.E. at 89; *Mitchell*, 45 N.E. at 355; *Ewing v. Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co.*, 23 A. 340, 340 (Pa. 1892). But see *R.J. v. Humana of Fla.*, 652 So. 2d 360, 362 (Fla. 1995) (adhering to the physical impact test); *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 83–87 (Ga. 2000) (same).

51. See *Dillon v. Legg*, 441 P.2d 912, 917 (Cal. 1968) (stating that a denial of duty rests upon the prevention of fraudulent claims); *Zelinsky v. Chimics*, 175 A.2d 351, 354 (Pa. Super. Ct. 1961) (finding that the purpose of the physical impact rule is to prevent “illusory” or “faked” claims); *Waube v. Warrington*, 258 N.W. 497, 501 (Wis. 1935) (recognizing bystander liability would lead to fraudulent claims); PROSSER & KEETON, *supra* note 12, § 54, at 363 (stating that the impact rule is based on a desired guarantee that the mental injury is genuine). But see *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 552 (1994) (finding the concern underlying the common law tests dealt with limiting liability and had “nothing to do with the potential for fraudulent claims”).

52. See *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir. 1991) (“This rule has been criticized . . . as being arbitrarily underinclusive for there are genuine mental injuries that are not accompanied by a physical injury or impact.”).

53. PROSSER & KEETON, *supra* note 12, § 54, at 363–64.

54. See *Rickey v. Chi. Transit Auth.*, 457 N.E.2d 1, 4 (Ill. 1983) (“A significant reason for [the rule’s] loss of adherents was that courts quickly began to find that the impact requirement

Around the same time that the impact test was being adopted, the common law was also experimenting with the zone of danger test.⁵⁶ This test permits recovery for mental injuries resulting from witnessing harm to another or from fearing harm to oneself, provided, however, she was in the physical proximity of potential harm.⁵⁷ One of the leading cases is *Waube v. Warrington*.⁵⁸ There, a mother witnessed her daughter being struck and killed by a car, and the resulting shock led to mental injury and later her untimely death (the classic bystander scenario as later developed by the California Supreme Court).⁵⁹ The estate sued for negligent infliction of emotional distress. The Wisconsin Supreme Court held that the injury was "out of the range of ordinary physical peril as a result of the shock of witnessing another's danger."⁶⁰ The court relied on *Palsgraf v. Long Island R.R. Co.*, decided seven years earlier, for the principle that a defendant's duty was to use ordinary care to avoid foreseeable physical injuries.⁶¹ Because even physical injury claims are limited to a certain physical zone of danger, the logic went, so too should mental injury claims.⁶² Thus, *Palsgraf*

had been met through minor physical contacts which in reality were insignificant and played trivial or no part in causing harm to the plaintiff.").

55. See, e.g., *id.* at 5 (abandoning the physical impact test); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (same); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 110 (Ohio 1983); see also *Gottshall*, 512 U.S. at 547 (counting only five states that still adhere to this rule) (citing *OB-GYN Assocs. of Albany v. Littleton*, 386 S.E.2d 146 (Ga. 1989); *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991); *Anderson v. Scheffler*, 752 P.2d 667 (Kan. 1988); *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980); *Hammond v. Cent. Lane Communications Ctr.*, 816 P.2d 593 (Or. 1991)).

56. Dissatisfaction with the physical impact test led to the development of the zone of danger test. *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 438 (Wis. 1994). The Wisconsin Supreme Court noted that as of 1987 the majority of jurisdictions have adopted the zone of danger test. *Id.* (citing *Gillman v. Burlington N. R.R. Co.*, 673 F. Supp. 913, 917 n.1 (N.D. Ill. 1987)).

57. Heidenreich, *supra* note 41, at 286. The zone of danger test is set forth in the *Restatement*. RESTATEMENT (SECOND) OF TORTS § 313(2) (1965). See generally Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 AM. L. REG. 141 & nn.3-5 (1902) (discussing the "zone of danger" test).

58. 258 N.W. 497 (Wis. 1935), overruled by *Bowen*, 517 N.W.2d at 439; see Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1040-45 (1936) (discussing the significance of *Waube v. Washington*, and the influence of *Palsgraf v. Long Island Railroad Co.* on *Waube* and its significance on negligent infliction of emotional distress).

59. See *infra* pp. 818-21 and accompanying notes.

60. *Waube*, 258 N.W. at 501.

61. *Id.* at 498, 501 (relying on *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928)).

62. This reliance on *Palsgraf* was not entirely misplaced. *Palsgraf* spoke in terms of "risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." 162 N.E. at 100. There, physical

was the doctrinal precursor to the zone of danger test. The court further reasoned that “the liability imposed by such a doctrine is wholly out of proportion to the culpability of the negligent tort-feasor . . . and enter[s] a field that has no sensible or just stopping point.”⁶³ This concern is as current today as it was when *Waube* was decided in 1935.

Like the physical impact and physical manifestation rules, the zone of danger test does not provide remedies to all foreseeable plaintiffs.⁶⁴ It was adopted as the next generation rule that marginally expanded liability beyond the previous rules and perhaps was arguably more principled. But the zone of danger rule, too, is a crude screening device suffering from the same flaws as its predecessor. Currently, a minority of jurisdictions have adopted the zone of danger test and, interestingly, so too has the Supreme Court in creating a uniform federal common law.⁶⁵

B. The Bystander Test

In 1968, the law took a dramatic turn when the California Supreme Court decided *Dillon v. Legg*.⁶⁶ The facts were simple: a mother was crossing the

proximity was the key factual distinction. See *infra* pp. 849–50 and accompanying notes. But the notion of risk importation means that certain risks extend beyond physical proximity, though in most ordinary accidents the risks are confined to a physical proximity. See *infra* pp. 839–40 and accompanying notes. *Palsgraf* did not stand for the proposition that a defendant owes a duty of care to those in the zone of physical danger. Instead, it held that a defendant owes a duty of care to a foreseeable plaintiff, which in this case involved some form of a physical zone given the nature of the facts. In making physical proximity a legal element vis-à-vis a factual consideration, the Wisconsin Supreme Court misinterpreted the holding and reasoning of *Palsgraf*. The court later admitted its misinterpretation and restated *Waube* as a case decided on “judicial policy” rather than precedent. *Klassa v. Milwaukee Gas Light Co.*, 77 N.W.2d 397, 401–02 (Wis. 1956), overruled by *Bowen*, 517 N.W.2d at 439.

63. *Waube*, 258 N.W. at 501.

64. Pearson, *supra* note 28, at 490.

65. At the time the Supreme Court adopted the zone of danger test for FELA claims, fourteen jurisdictions followed the zone of danger test. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 548 & n.9 (1994).

66. 441 P.2d 912. *Dillon* has produced a slew of academic commentary. *Thing v. La Chusa*, 771 P.2d 814, 825 (Cal. 1989), notes that *Dillon* produced the following articles: Bell, *supra* note 7; John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); Miller, *supra* note 37; Nolan & Ursin, *supra* note 7, at 620; Pearson, *supra* note 28; Richard N. Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell*, 36 U. FLA. L. REV. 413 (1984) [hereinafter Pearson, *Response to Bell*]; Rabin, *supra* note 37, at 1524–26; John David Burley, Comment, *Dillon Revisited: Toward a Better Paradigm for Bystander Cases*, 43 OHIO ST. L.J. 931, 948 (1982); Jeanne S. Gallagher, Note, *Molien v. Kaiser Foundation Hospitals: California's New Tort of Negligent Infliction of Serious Emotional Distress*, 18 CAL. W. L. REV. 101 (1982); Claudia J. Wrazel, Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The “Bystander Recovery” Cases*, 54 S. CAL. L.

street while her infant and daughter walked just ahead of her; the infant was struck and killed by the defendant's car; the daughter was in close physical proximity to the infant but the mother trailed several yards behind and outside the zone of any physical threat.⁶⁷ Before *Dillon*, California allowed recovery only under the zone of danger test.⁶⁸ Reasoning that she was in the zone of danger, the lower court allowed recovery for the daughter but denied the mother's claim because she was outside the zone of danger.⁶⁹ The arbitrariness of the result was apparent—a few yards separated recoverability between mother and daughter, though the mental injuries were equally foreseeable and the defendant's culpability was the same. Simply put, the application of the zone of danger test in this case defied common sense.

Faced with these facts, California created the bystander rule.⁷⁰ Reasoning that mental injuries were foreseeable in the bystander context and describing the facts as egregious, the court allowed recovery for the mother though she had not been in physical danger.⁷¹ Without the bystander rule, the difference between remedy and claim preclusion for the mother was a few yards.⁷² Rather than accepting such an arbitrary division, the court emphasized the foreseeability of the harm to the mother. It balanced the humanitarian concerns and fashioned a three-prong test for bystander liability: (1) whether the plaintiff was located near the accident (spatial proximity), (2) whether the mental injury resulted from "sensory and contemporaneous observation of the accident" (temporal proximity), and (3) whether the plaintiff and the physically injured victim were closely related (relational proximity).⁷³ Although limiting its holding to the three-prong test, the *Dillon* court hinted that there was no good reason why the traditional rules of negligence, including foreseeability, should not govern all cases.⁷⁴

REV. 847 (1981); Thomas C. Zaret, Note, *Negligent Infliction of Emotional Distress: Reconciling the Bystander and Direct Victim Causes of Action*, 18 U.S.F. L. REV. 145 (1983).

67. *Dillon*, 441 P.2d at 914–15.

68. See *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963), *overruled by Dillon*, 441 P.2d at 912.

69. *Dillon*, 441 P.2d at 920.

70. *Id.* at 925.

71. *Id.*

72. *Id.* at 915.

73. *Id.* at 920.

74. *Id.* at 924. The court concluded with the observation: "Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion." *Id.* at 925. Subsequently, about half the jurisdictions adopted the bystander test. See, e.g., *Clohesy v. Bachelor*, 675 A.2d 852, 857 (Conn. 1996). These jurisdictions, however, differ on the

Despite this suggestion, California subsequently restricted *Dillon*. Twenty years later in 1988, the court in *Elden v. Sheldon*⁷⁵ limited *Dillon* when it refused to extend the bystander rule beyond the “immediate family” to unmarried cohabitants.⁷⁶ The obvious problem is that strong emotional bonds are not exclusive to the immediate family or marriage.⁷⁷ The court conceded, as it must, that some relationships outside of marriage can be just as strong as familial ones.⁷⁸ But it reasoned that the state has a strong interest in promoting marriage and that the law needs to limit intolerable burdens on defendants.⁷⁹ The court was candid in its reasons:

Yet we cannot draw a principled distinction between an unmarried cohabitant who claims to have a de facto marriage relationship with his partner and de facto siblings, parents, grandparents or children. The problems of multiplication of actions and damages that would result from such an extension of liability would place an intolerable burden on society.⁸⁰

As the court saw it, the choice was between principles and practicality, and the court sacrificed the former.

A year later in *Thing v. La Chusa*,⁸¹ the court decided a case almost identical in facts to *Dillon*, except that rather than contemporaneously witnessing the accident, the mother arrived on the scene moments later and saw her bloody, unconscious child on the road.⁸² The question in *Dillon* was whether a few yards separated liability. The question in *Thing* was whether a few minutes precluded recovery. The court refused to expand liability and drew a bright line requirement that a bystander must have witnessed the accident contemporaneously.⁸³ Citing academic commentary, it reasoned

interpretation and elements of the *Dillon* three-prong test. See *infra* pp. 822–23 and accompanying notes.

75. 758 P.2d 582 (Cal. 1988).

76. *Id.* at 588.

77. See *id.* at 591 (Broussard, J., dissenting) (“[T]he majority cling to the untenable notion that only married couples can create families which promote society’s interests.”); *Corso v. Merrill*, 406 A.2d 300, 308 (N.H. 1979) (Grimes, J., dissenting) (“Love and affection is not necessarily confined to parenthood or even blood relationship.”). The marriage status per se is not as reliable of an indicator of a strong emotional relationship as an active scrutiny of the underlying facts. See generally Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children’s Long-Term Well-Being*, 9 VA. J. SOC. POL’Y & L. 71 (2001) (significant number of marriages end in divorce in American society).

78. *Elden*, 758 P.2d at 588.

79. *Id.* at 586, 588.

80. *Id.* at 588 (quoting *Borer v. Am. Airlines, Inc.*, 563 P.2d 858 (Cal. 1977) (internal quotation marks omitted)).

81. 771 P.2d 814 (Cal. 1989).

82. *Id.* at 815.

83. *Id.* at 830.

that foreseeability alone was an inadequate barrier against a flood of liability.⁸⁴ Here again it was concerned about the slippery slope to liability oblivion as a few minutes becomes a few hours, contemporaneous presence leads to arrival at the hospital, and so forth to the unlimited reach of logic and imagination.⁸⁵ These were practical considerations for which the court had no principled answer. With this in mind, it followed the *Elden* lead, tossing any pretensions of a principled approach and candidly admitting that there “must be arbitrary lines to similarly limit the class of potential plaintiffs.”⁸⁶

Two years after *Dillon*, the Hawaii Supreme Court decided *Rodrigues v. State*.⁸⁷ The plaintiff there sued the state on the theory that it failed to

84. *Id.* at 826 (citing *Diamond*, *supra* note 66, at 480); Miller, *supra* note 37, at 39–41; *see Thing*, 771 P.2d. at 830 (“[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury.”).

85. *Thing*, 771 P.2d. at 828; *see also* *Justus v. Atchison*, 565 P.2d 122, 136 (Cal. 1977) (denying claim by father who witnessed childbirths that resulted in deaths of infants but did not actually witness the deaths); *Parsons v. Superior Court*, 146 Cal. Rptr. 495, 498 (Ct. App. 1978) (denying claim by parents who came upon the scene of the accident “before the dust had settled”); *Arauz v. Gerhardt*, 137 Cal. Rptr. 619, 627 (Ct. App. 1977) (denying claim by mother who arrived on the scene within five minutes of collision that caused her son’s injury); *Jansen v. Children’s Hosp. Med. Ctr.*, 106 Cal. Rptr. 883, 885 (Ct. App. 1973) (denying claim by mother who witnessed child’s painful death as a result of medical misdiagnosis); *Deboe v. Horn*, 94 Cal. Rptr. 77, 79 (Ct. App. 1971) (denied claim by wife who first witnessed her paralyzed husband in hospital emergency room but did not witness accident). The arbitrary distinctions left several judges questioning out loud where humanitarian concerns stop and liability’s border begins. *See, e.g., Dunphy v. Gregor*, 642 A.2d 372, 381 (N.J. 1994) (Garibaldi, J., dissenting):

Does anyone believe that a mother who is told that her child was killed crossing the street, or that a mother who witnesses the prolonged agony of her child dying as a result of a car accident that she did not see, suffers less emotional distress than the mother who was present at the scene of the accident?

Id.; *Thing*, 771 P.2d at 834 (Kaufman, J., concurring):

By what humane and principled standard might a court decide, as a matter of law, that witnessing the bloody and chaotic aftermath of an accident involving a loved one is compensable if viewed within 1 minute of impact but noncompensable after 15? or 30? Is the shock of standing by while others undertake frantic efforts to save the life of one’s child any less real or foreseeable when it occurs in an ambulance or emergency room rather than at the “scene”?

Id.

86. *Thing*, 771 P.2d at 828. The concurrence noted that neither the majority nor the dissent articulated principled rules, and that the majority “freely—one might say almost cheerfully—acknowledges that its position is arbitrary.” *Id.* at 831 (Kaufman, J., concurring). *See Dunphy*, 642 A.2d at 380 (Garibaldi, J., dissenting) (“I perceive no sufficiently limiting principle in the majority’s standard for deciding who qualifies as an intimate family member.”).

87. 472 P.2d 509 (Haw. 1970).

prevent flooding to his new home. The facts did not fit any of the common law tests, including California's newly pronounced bystander test. Although the court could have ruled that the mental injury was "parasitic" to negligent damage to property,⁸⁸ it instead recognized an interest in freedom from negligent infliction of serious mental distress and created an "independent legal protection" of such an interest.⁸⁹ As in the case of physical injuries, the court determined that general tort principles were sufficient to limit liability to tolerable levels.⁹⁰ Thus *Rodrigues* was the first affirmative pronouncement of duty defined by reasonable foreseeability.⁹¹

Like California, Hawaii learned that foreseeability was too broad of a concept. In *Kelley v. Kokua Sales and Supply*,⁹² plaintiff's decedent died of a heart attack shortly after learning that his daughter and granddaughter were killed in a traffic accident.⁹³ The decedent learned of this tragic news while he was 2,500 miles away in California. Based on the earlier ruling in *Rodrigues*, the court could have determined that the effect of the physical distance on foreseeability was an issue for the factfinder. Instead, it held that the duty of care announced in *Rodrigues* applies to plaintiffs who were located within a reasonable distance from the scene of the accident.⁹⁴ So in Hawaii, physical distance became just another legal constraint against liability, prompting one commentator to note amusingly that Hawaii maintains a "same island" rule.⁹⁵

The promise of *Dillon* and its progeny was a progression toward a general theory of liability applying foreseeability as the measure of liability. But the *Dillon* experiment has produced mixed results. Approximately half the jurisdictions have adopted some form of a bystander rule,⁹⁶ but each jurisdiction has interpreted the three-prong test differently. Although the California Supreme Court created the bystander test, various jurisdictions have taken divergent approaches to bystander liability, putting their own interpretations on the three-prong test (spatial, temporal, and relational

88. See *supra* p. 815 and note 47.

89. *Rodrigues*, 472 P.2d at 520.

90. *Id.* at 520-21.

91. In *Leong v. Takasaki*, the Hawaii Supreme Court reaffirmed the broad principles of *Rodrigues*. 520 P.2d 758 (Haw. 1974). Similar to *Dillon*, the plaintiff was not in the zone of danger and witnessed his step-grandmother killed. *Id.* at 763-66. The court ruled that the three *Dillon* factors were not claim preclusive hurdles, but were instead factors that would be relevant toward determining whether the injuries were genuine and severe. *Id.* at 765-66.

92. 532 P.2d 673 (Haw. 1975).

93. *Id.* at 674-75.

94. *Id.* at 676.

95. Crump, *supra* note 35, at 499-501; see Miller, *supra* note 37, at 11 ("If 2,500 miles is unreasonable, will one, two, or ten miles be reasonable?").

96. This is as of 1994. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 549 & n.10 (1994).

proximity elements). For example, rejecting *Elden*, the New Jersey Supreme Court held that “unmarried cohabitant[s] should be afforded the [same] protections of bystander liability”⁹⁷ The Wisconsin Supreme Court has taken a broad approach toward bystander liability by endorsing “the traditional elements of a tort action in negligence—negligent conduct, causation and injury (here severe emotional distress)—should serve as the framework for evaluating a bystander’s claim.”⁹⁸ Iowa has placed limits on the degree of familial relationship and requires relations “within the second degree of consanguinity or affinity.”⁹⁹ In addition to the relational element, various jurisdictions have interpreted the temporal proximity element differently as well.¹⁰⁰

The bystander rule is not one rule, but really a loose guideline for recovery that has been interpreted into rules with multiple flavors. The California and Hawaii experiences were marked by a giant step forward in the development of a general theory based on reasonable foreseeability, followed by a significant retreat as courts feared a gradual slide into the “fantastic realm of infinite liability.”¹⁰¹ Bright lines were drawn ad hoc as the infinite possibilities of human happenstance presented themselves one by one.¹⁰² Arbitrary results were the practical end product of this experiment, and the bystander rule became just one more compromised rule available to courts to delimit liability.¹⁰³

C. Federal Common Law

Federal courts were no more consistent in dealing with the issue in the context of creating federal common law under the Federal Employers’

97. *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994).

98. *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 442–43 (Wis. 1994).

99. *Barnhill v. Davis*, 300 N.W.2d 104, 108 (Iowa 1981); see RESTATEMENT (SECOND) OF TORTS § 436(3) (1965) (requiring “peril to a member of his immediate family occurring in his presence”).

100. See *Thing v. La Chusa*, 771 P.2d 814, 829–30 (Cal. 1989) (holding the plaintiff was barred because she arrived at scene of an accident moments after); *Bowen*, 517 N.W.2d at 445 (drawing a distinction between contemporaneous perception and subsequent learning of an accident). But see *Corso v. Merrill*, 406 A.2d 300, 307–08 (N.H. 1979) (involving a plaintiff who arrived at scene of accident after hearing the thud of her daughter being hit by a car).

101. *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513, 525 (Cal. 1963), overruled by *Dillon v. Legg*, 441 P.2d 912, 912 (Cal. 1968).

102. *Nolan & Ursin*, *supra* note 7, at 620; see *Thing*, 771 P.2d at 831 (Kaufman, J., concurring) (indicating post-*Dillon* case law marked by confusion and inconsistent results).

103. Cf. *Thing*, 771 P.2d at 833–36 (Kaufman, J., concurring) (arguing *Dillon* should be overruled as inherently arbitrary); Pearson, *supra* note 28, at 448 (arguing *Dillon* is no less arbitrary than zone of danger test).

Liability Act ("FELA").¹⁰⁴ The statute gives railway workers the right to sue for negligence, and the legislative intent was to eliminate traditional defenses to tort liability and to facilitate recovery in meritorious cases.¹⁰⁵ Congress enacted FELA during a period of early American industrial expansion, and its policy was to shift to the industry the burden of the "human overhead," a reference to the inevitable cost of "lost lives, limbs and livelihoods" attributable to the railway enterprise, because workers lacked the economic and bargaining power to negotiate for their safety.¹⁰⁶ Although negligent infliction of emotional distress was recognized as a cognizable theory under FELA,¹⁰⁷ federal courts diverged greatly on the applicable standard.¹⁰⁸

The test case for Supreme Court review was *Gottshall v. Consolidated Rail Corporation*,¹⁰⁹ in which a railway employee suffered post-traumatic stress syndrome after watching a close friend of 15 years die of a heart attack while they were working in unbearable and dangerous weather conditions.¹¹⁰ The facts did not support a claim under the various common law tests, including the physical impact, zone of danger, and bystander

104. FELA creates a cause of action for railway employees who have been killed or injured "in whole or in part from the negligence" of the railway. 45 U.S.C. §§ 51-60 (1986). The Jones Act is FELA's counterpart for seamen. 46 U.S.C. §§ 688-92 (1975).

105. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561 (1987).

106. *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 329-30 (1958); *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 431-32 (1958); *Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 366-67, 380 (3d Cir. 1993) (quoting *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 59 (1943)); see also JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* 129 (Farrar et al. eds., 1976) (noting that in 1924 the railway industry killed 6617 persons and injured another 143,739 persons, most of whom were railway employees).

107. The Supreme Court in *Buell* opened the door to negligent infliction of emotional distress claims, but left the development to the lower courts, commenting only "that FELA jurisprudence gleans guidance from common-law developments." 480 U.S. at 568.

108. After a thorough review of the case law in First, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits, the Third Circuit found "no common discernable principle, test, view or attitude." *Gottshall*, 988 F.2d at 365; see *Plaisance v. Texaco, Inc.*, 966 F.2d 166, 169 (5th Cir. 1992) (allowing recovery for physical manifestation or impact, but not for bystander); *Ray v. Consol. Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991) (adopting physical impact test); *Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir. 1990) (stating unconscionable abuse or outrageous conduct is threshold element of claim); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40 (6th Cir. 1990) (same); *Stoklosa v. Consol. Rail Corp.*, 864 F.2d 425, 426 (6th Cir. 1988) (holding no negligence where injury is not foreseeable); *Moody v. Me. Cent. R.R. Co.*, 823 F.2d 693, 694 (1st Cir. 1987) (stating plaintiff failed to establish causation); *Pierce v. So. Pac. Transp. Co.*, 823 F.2d 1366, 1372 n.2 (9th Cir. 1987) (stating, in dicta, "eggshell" plaintiff rule applies when emotional injury causes physical manifestations of distress).

109. 988 F.2d 355 (3d Cir. 1993).

110. *Id.* at 358-61.

tests.¹¹¹ There was no dispute that the plaintiff's mental injury was genuine and severe, and that it was reasonably foreseeable.¹¹² The trial court held for the defendant on summary judgment and the case was appealed to the Third Circuit. The issue was whether these circumstances precluded as a matter of law a claim under FELA.

The Third Circuit per Judge Nygaard held that the facts supported a cause of action under FELA. It began its analysis by refusing to designate a particular common law test as the definitive test for a FELA claim.¹¹³ Reasoning that FELA was a broad remedial statute specifically enacted to expand rights beyond the common law,¹¹⁴ the court discounted the common law tests as arbitrary and questionable methods for assuring the genuineness of injury.¹¹⁵ Explicitly rejecting legal formalism, the court fashioned a rule that required an initial judicial review for a threshold assurance of an indicia "of genuine and serious mental injury."¹¹⁶ This review looked to the common law for guiding principles, but required less mechanical adherence to rules of law and more "active scrutiny of the facts."¹¹⁷

The Third Circuit then reviewed the claim under the *Dillon* bystander test, but noted that it would be a rare situation in which one railway worker would see a family member injured or killed.¹¹⁸ The practical application of

111. *Id.* at 371–74. The Supreme Court eventually remanded the case to consider the matter under the zone of danger test. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557–58 (1994). Subsequently, the Third Circuit held that the plaintiff did not suffer a physical impact and the working conditions were not sufficiently dangerous to constitute a zone of danger. *Gottshall v. Consol. Rail Corp.*, 56 F.3d 530, 532 (3d Cir. 1995).

112. *See infra* note 125. The plaintiff also exhibited a number of physical manifestations, including lost weight, hospitalization, medical diagnosis of major depression and post-traumatic stress disorder, insomnia, physical weakness, cold sweats, and nausea. *Gottshall*, 988 F.2d at 374.

113. *Gottshall*, 988 F.2d at 365, 369.

114. *Id.* at 367–70. The primary purpose of FELA was to expand the remedies available under common law by eliminating a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561 (1987); *see* 45 U.S.C. § 53 (allowing contributory negligence to reduce recovery); *id.* § 54 (imposing limitation on assumption of risk defenses); *id.* § 55 (prohibiting contracting to limit FELA liability); *id.* § 60 (imposing limitations on employee at-will doctrine to preclude retaliatory discharge); *Kernan v. Am. Dredging Co.*, 355 U.S. 424, 438–39 (1958) (holding that, unlike the common law, negligence per se under 45 U.S.C. § 51 results from violation of any statutory duty regardless of whether statute was intended to protect against specific harm); *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957) (relaxing causation element to causation in fact "even the slightest").

115. *Gottshall*, 988 F.2d at 370.

116. *Id.* at 371.

117. *Id.* (quoting *Outten v. Nat'l R.R. Passenger Corp.*, 928 F.2d 74, 79 (3d Cir. 1991)) (internal quotation marks omitted).

118. *Id.* at 372.

the relational proximity element would nullify the rule in the FELA context.¹¹⁹ The court discarded the relational element as an arbitrary point on a continuum of relationships, and reasoned that the plaintiff was a foreseeable bystander and the closeness of the relationship between the plaintiff and the decedent was a matter for the factfinder. It held that the claim had a sufficient indicia of genuineness based on the facts and common law principles, and then evaluated the claim in light of the traditional tort concepts of breach of duty, causation, and injury.¹²⁰

Thus the court pronounced a general theory of liability for negligent infliction of emotional distress: a claim should be judicially reviewed for a "sufficient indicia of genuineness," a determination that "gleans guidance from common-law [principles],"¹²¹ and upon meeting this burden it is then analyzed by the court and factfinder under traditional tort principles.¹²² In announcing this legal framework, the court made clear that its decision was driven by the legislative intent of FELA, in which Congress, rather than the courts, allocated the economic and social costs, and that the threat of exponential liability to the general populace was not at issue since FELA is limited to the railway industry.¹²³

The Supreme Court per Justice Thomas reversed, opining that the Third Circuit's ruling was "fatally flawed."¹²⁴ As a preliminary matter, the Supreme Court conceded that the injury was genuine and severe, and also reasonably foreseeable.¹²⁵ These facts were not enough, however. Unlike the

119. *Id.*

120. *Id.* at 374.

121. *See supra* note 107. This step in the analysis is best seen as a hybrid factual and legal determination where the courts would act as a gatekeeper against claims most likely to be fraudulent, frivolous, or freakish in nature.

122. *Gottshall*, 988 F.2d at 380. With the caveat that mental injuries must withstand an initial judicial scrutiny, the Third Circuit treated mental injuries no differently than physical ones. *Id.* ("When a claim for emotional injuries shows a sufficient indicia of genuineness so as to create a factual dispute, the same tort principles apply to the employer's liability."). A year after *Gottshall* was announced, the Wisconsin Supreme Court adopted a very similar, two-tiered approach under which the traditional elements of a negligence action are conditioned on a judicial certification of validity based on public policy considerations. *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 442-43 (Wis. 1994).

123. *Gottshall*, 988 F.2d at 372. Invoking *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), Judge Roth dissented and argued the plaintiff was not a foreseeable victim. *Id.* at 383-85 (Roth, J., dissenting).

124. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 551 (1994). Justice Thomas delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Souter joined. *Id.* at 534. Justice Souter filed a concurring opinion. *Id.* Justice Ginsburg filed a dissenting opinion in which Justices Blackmun and Stevens joined. *Id.*

125. *Id.* at 568-69 (Ginsburg, J., dissenting). *Gottshall*'s injuries sufficiently satisfied the physical manifestation test. *See supra* note 112. Moreover, the Supreme Court conceded that the emotional injury was reasonably foreseeable to Conrail, but noted "that qualifier seems to add

Third Circuit's fact specific approach, the Supreme Court endorsed a bright line, rule-based decision. It canvassed the common law and counted fourteen jurisdictions using the zone of danger test and nearly half the states using the more liberal bystander rule.¹²⁶ It then adopted the more restrictive zone of danger test as the exclusive rule for FELA claims.¹²⁷ Although acknowledging that "the zone of danger test is arbitrary," it found the common law's policy considerations to be compelling, "particularly the fear of unlimited liability."¹²⁸

The dissent per Justice Ginsburg observed that the injury was real and severe, and satisfied the common law's physical manifestation test.¹²⁹ It noted that FELA was enacted as a remedial statute whose purpose was to provide remedy where the common law would not have. The inconsistency in the majority approach was apparent—it touted the virtues of the common law and FELA's liberal remedial policies but nevertheless selected a more restrictive, minority rule.¹³⁰ Moreover, the dissent noted that the majority's reference to a singular "common law" was misplaced, and that the common law was decidedly conflicted in this field.¹³¹ Noting that the fear of limitless liability is unwarranted since FELA is limited to railway workers and that

little" and that "nearly any injury could also be reasonably foreseeable." *Gottshall*, 512 U.S. at 533 n.12. This comment simply echoes the same observation made by other courts and commentators that foreseeability is a useless device in these cases.

126. *Gottshall*, 512 U.S. at 548 & n.9, 549 & n.10.

127. *Id.* at 556. The opinion appeared also to have adopted the physical impact test: recovery is allowed for "those plaintiffs who sustain a *physical impact* as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547–48 (emphasis added). But subsequently in *Metro-North Commuter Railroad Co. v. Buckley*, the Supreme Court clarified that physical impact does not mean any physical contact, but contact of the type that causes physical trauma for which mental injuries are then said to be a parasitic claim. 521 U.S. 424, 432–37 (1997).

128. *Gottshall*, 512 U.S. at 557 (internal quotation marks omitted). The Supreme Court identified its primary concern as "unpredictable and nearly infinite liability." *Id.* at 552.

129. *Id.* at 568–69 (Ginsburg, J., dissenting) (quoting PROSSER & KEETON, *supra* note 12, § 54, at 364). Justices Blackmun and Stevens joined in Justice Ginsburg's dissent. *Id.* at 559.

130. *Id.* at 569 (Ginsburg, J., dissenting). Neither the majority nor the dissent explained why the majority was forced to select the more restrictive zone of danger test. The reason is grounded in practical application. As Judge Nygaard noted, "the reality in the railway industry is that there will hardly be a situation where one sees another family member injured while working in the railroad yard." *Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 372 (3d Cir. 1993). Strictly applied, the bystander rule would be a nullity. Unable to devise an alternative proposal, the majority had no choice but to choose the zone of danger test though this test is antiquated and undermines FELA's remedial purpose.

131. *Gottshall*, 512 U.S. at 572 (Ginsburg, J., dissenting).

Congress intended to provide broad remedies,¹³² the dissent endorsed the Third Circuit's approach.¹³³

The *Gottshall* decisions stand as a perfect microcosm of the longstanding judicial struggle to fashion operative rules of law that balance the competing policies.¹³⁴ The two decisions and the various opinions expressed therein represent the competing theories of the ongoing debate. Weighing the humanitarian considerations, the Third Circuit recognized a general theory of liability for mental injury claims in the limited context of FELA claims.¹³⁵ Fearing the potential for unlimited liability even under liberal FELA jurisprudence, the Supreme Court adopted a test that was first devised around the turn of the twentieth century and currently rejected by most common law jurisdictions.¹³⁶ The Third Circuit and the Supreme Court weighed the policies differently, and the judicial methodologies for analyzing these claims reflect their choices. The Third Circuit endorsed a

132. See *id.* at 571–72 (Ginsburg, J., dissenting) (expressing concerns over unlimited liability). But see *Gottshall*, 988 F.2d at 373 (holding an expansion of FELA rights will not place an intolerable burden upon society because the cause of action is limited to railway cases).

133. *Gottshall*, 512 U.S. at 571 (Ginsburg, J., dissenting) (noting that the Third Circuit's method was a "thoughtfully developed and comprehensively explained approach"). The Supreme Court's decision in *Gottshall* signaled a puzzling contraction of FELA rights for mental injuries. Although FELA was enacted to expand the right to recover beyond the common law, see *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987), the Supreme Court contracted FELA liability so that railway workers now have less rights than the general populace with respect to mental injury claims, an anomaly the majority neglected to address. As the Supreme Court admits, the zone of danger test is a more restrictive, minority test under the common law. *Gottshall*, 512 U.S. at 555–57. Subsequently, FELA rights continued to be contracted. In *Metro-North Commuter Railroad Co. v. Buckley*, a worker brought suit for a three-year exposure to asbestos, which increased his risk of death to cancer by one percent to five percent. 521 U.S. 424 (1997). The Supreme Court rejected the argument that asbestos dust was a "physical impact" on the plaintiff. *Id.* at 430–31. Under the common law, such an exposure to dust particles would have been recognized as a "physical impact" event and so recoverable under this most restrictive test. See *supra* pp. 816–17 and accompanying notes.

134. For a general discussion of the *Gottshall* decisions, see Thomas C. Galligan & Jean Paul Picou Overton, *Developments in the Law 1993–1994: A Faculty Symposium, Recent United States Supreme Court Developments in Admiralty*, 55 LA. L. REV. 469, 480–89 (1995) (discussing the Third Circuit and Supreme Court opinions); William T. Krizner, *Is There a Better Standard than the Zone of Danger Test for Negligent Emotional Distress Claims Under the Federal Employers' Liability Act?*, 34 TORT & INS. L.J. 907 (1999); Thomas Phillip Germeroth, Note, *Trapped in the Zone: Emotional Distress Claims Under the Federal Employers Liability Act After Gottshall v. Consolidated Rail Corporation*, 40 ST. LOUIS U. L.J. 203 (1996).

135. *Gottshall*, 988 F.2d at 380–81; see *Ries v. Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1167 (3d Cir. 1992) (Nygaard, J., concurring) ("The development of FELA, like common law principles, should proceed on a case by case, statute by statute basis to reflect changing conditions and values."); *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 437 (Wis. 1994) ("People should not, courts reasoned, be able to sue for everyday minor disturbances.").

136. *Gottshall*, 512 U.S. at 549, 557.

case-by-case fact based approach: “[t]he solution is not found in rules of law so much as in an active scrutiny of the facts.”¹³⁷ The Supreme Court emphasized the primacy of a bright line rule: “[rules] place limits on this potential liability by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover.”¹³⁸ In the end, uniformity was achieved only through finality.

A review of the common law and federal cases shows five points of agreement in this field. (1) Trivial, frivolous, or evanescent injuries should not be cognizable.¹³⁹ (2) Foreseeability as a practical consideration is an inadequate tool for mental injury claims.¹⁴⁰ (3) The fear of a slippery slope to unlimited liability is the most problematic policy consideration.¹⁴¹ (4) The common law tests are arbitrary, a matter “freely—one might say almost cheerfully” admitted by courts themselves.¹⁴² (5) Courts have failed to find a more principled general theory of liability that practically limits liability to predictable levels.¹⁴³ This article, too, accepts these conclusions, but these points of agreement lead us back to the start of the inquiry. The question remains: How should the law treat the universe of foreseeable, genuinely injured plaintiffs?

There are no discernable trends or commonly accepted theories in this field,¹⁴⁴ or in less generous terms the “trouble stems in part from the

137. *Gottshall*, 988 F.2d at 371.

138. *Gottshall*, 512 U.S. at 552. Subsequently, in clarifying its decision in *Gottshall*, the Supreme Court emphasized that the common law’s approach was designed to deny courts the authority to undertake a case-by-case examination. *Buckley*, 520 U.S. at 436.

139. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (“Complete emotional tranquility is seldom attainable in this world; and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.”).

140. See, e.g., *Gottshall*, 512 U.S. at 553, 556–67; *Thing v. La Chusa*, 771 P.2d 814, 818 (Cal. 1989); Pearson, *supra* note 28, at 515; Rabin, *supra* note 37, at 1523–26. *But see infra* note 144 (noting that a few commentators, most notably Bell, have suggested that foreseeability should be the appropriate test). Of course, there is no duty toward unforeseeable plaintiffs.

141. See, e.g., *Gottshall*, 512 U.S. at 552 (“A more significant problem is the prospect that allowing such suits can lead to unpredictable and nearly infinite liability for defendants.”); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 825 (Cal. 1980) (Clark, J., dissenting) (“The fundamental problem is not foreseeing (by unguided hindsight) the consequences of unintentional conduct, but rather realistically limiting liability for those consequences.”).

142. *Thing*, 771 P.2d at 831 (Kaufman, J., concurring).

143. *Molien*, 616 P.2d at 817–19. Many jurisdictions have wandered the judicial wilderness in search of a principled theory of liability. See, e.g., *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 436–42 (Wis. 1994) (describing a sixty-year progression of different rules).

144. A review of the academic literature shows that commentators have been equally divergent in their views. See, e.g., Bell, *supra* note 7, at 347–51 (proposing that mental injuries should be treated no differently than physical injuries and that they should be evaluated under general tort principles of duty, causation, and damage); Crump, *supra* note 35, at 494–505

impoverished conceptual framework employed by most scholars and many courts to analyze negligence claims.”¹⁴⁵ The judicial methods have been practical to the exclusion of principles, and the scale has been decidedly weighted in favor of the policy consideration of limited liability. The common law rules are really exceptions to the general rule against recovery for mental injuries. One need only etch the surface of these rules to understand that at their core were distinctions based on neither legal principles nor factual truths: mental injuries do not always exhibit physical symptoms, they are not limited to such close call situations envisioned in the physical impact or zone of danger tests, there is no reason to believe that only close family members would be hurt by witnessing another physically

(proposing strict limitations on claim based on contractual relationships, independent torts, and limited bystander cases); Julie A. Greenberg, *Negligent Infliction of Emotional Distress: A Proposal for a Consistent Theory of Tort Recovery for Bystanders and Direct Victims*, 19 PEPP. L. REV. 1283, 1310 (1992) (refining the *Dillon* test to take into consideration preexisting relationships in law or fact and proposing specific guidelines to define direct victims); Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. 391, 486–87 (1996) (criticizing law as discriminatory against women and suggesting general application of tort law); Deborah K. Hepler, *Providing Creative Remedies to Bystander Emotional Distress Victims: A Feminist Perspective*, 14 N. ILL. U. L. REV. 71, 78 (1993) (advocating a focus on relationships in bystander situations); Miller, *supra* note 37, at 47 (proposing an expansion of the class of plaintiffs to all foreseeable plaintiffs, but limiting damages to economic out-of-pocket loss); Pearson, *supra* note 28, at 478 (endorsing the zone of danger test as the proper standard); J. Mark Appleberry, Note, *Negligent Infliction of Emotional Distress: A Focus on Relationships*, 21 AM. J.L. & MED. 301 (1995) (proposing refinements to the currently existing rules based on a focus on the underlying relationships, but not a broad overhaul of the current rules); Paul V. Calandrella, Note, *Safe Haven for a Troubled Tort: A Return to the Zone of Danger for the Negligent Infliction of Emotional Distress*, 26 SUFFOLK U. L. REV. 79, 104 (1992) (endorsing the zone of danger test); Donovan, *supra* note 47, at 1395–96 (proposing that foreseeability is sufficient to distinguish genuine injuries, and that the physical injury requirement be abolished); Ethan Finneran, Note, *The Death of the Ensuing Physical Injury Rule: Validating Claims for Negligent Infliction of Emotional Harm*, 10 HOFSTRA L. REV. 213, 237 (1981) (approving generally the *Dillon* rule as the appropriate limitation); Eugene Kontorovich, Comment, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 491–92 (2001) (advocating significant restriction on mental injury claims on the basis that such claims present problems of moral hazard and mitigation of damages); Thomas J. Lo, Note, *Thing v. La Chusa—Public Policy Demands a Limitation on the Bystander Recovery for Infliction of Emotional Distress*, 17 W. ST. U. L. REV. 499, 500 (1990) (proposing limits on bystander liability); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1262–63 (1971) [hereinafter Comment, *Mental Distress*] (proposing a generally applicable tort scheme in which foreseeability is the measure of duty); Michael Phillips, Note, *Drawing the Line: Missouri Adopts the Zone of Danger Rule for Bystander Emotional Distress: Asaro v. Cardinal Glennon Memorial Hospital*, 56 MO. L. REV. 1183, 1199 (1991) (proposing reasonable foreseeability as the test for liability); S. Claire Swift, Note, *Bystander Liability After Dunphy v. Gregor: A Proposal for a New Definition of the Bystander*, 15 REV. LITIG. 579, 600 (1996) (proposing that the bystander test properly defines the limit of how far the common law should go toward creating liability for mental injuries).

145. Goldberg & Zipursky, *supra* note 4, at 1667.

injured or killed, nor is mental injury any more genuine and defendant's conduct any more culpable when the accident is witnessed contemporaneously rather than subsequently communicated. On the other hand, the nature of mental injuries poses significant problems of verification, unpredictability, and limitless potential for which the law must somehow balance.

III. PROBLEMS POSED BY MENTAL INJURIES

A. Floodgates of Fraud and Frivolity

In evaluating theories of recovery, we must acknowledge that mental injuries are different in important ways.¹⁴⁶ Because they are difficult to verify empirically, courts have been naturally wary of fraudulent or frivolous claims. This is a legitimate consideration as is the broader concern that fraudulent claims present a systemic problem to the legal system. In this regard, however, courts have failed to distinguish the purely evidentiary question of the seriousness of an injury from the legal question of whether a duty exists at all.¹⁴⁷ The factfinding process should distinguish severe mental injury from transient, ordinary harm for which the law should not provide remedy.¹⁴⁸ Compensable mental injury is not ordinary and should be proved by appropriate evidentiary methods, whether they be expert testimony, palpable physical symptoms, hospitalization or therapy, parade of fact witnesses independently attesting to the injury, etc., or any combination of these means. It should be the odd trial, if conducted properly by the deliberative bodies, that a plaintiff's bald testimony—"I suffered severe mental injury," supported by a self-serving tear or two—suffices to carry the day.¹⁴⁹

146. There are some commentators who would appear to disagree with this proposition. See, e.g., Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 171, 189 (1992) (suggesting that the dichotomy between physical and mental injuries is meaningless); Sandor & Berry, *supra* note 10, at 1261 (same). But at the heart of their positions is the notion that from a normative perspective mental injuries are no less deserving of remedies, with which I have no quarrels. That mental injuries differ from physical ones in behavioral and etiological characteristics is self-evident.

147. Sandor & Berry, *supra* note 10, at 1249.

148. See *supra* note 7.

149. See *Bowen v. Lumbers Mut. Cas. Co.*, 517 N.W.2d 432, 447 (Wis. 1994) (Wilcox, J., concurring) (stating that more than uncorroborated claims of emotional injury is necessary to survive a motion to dismiss); see also PROSSER & KEETON, *supra* note 12, § 54, at 361 ("It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the

Genuineness of injury is a question of fact and not an issue of law.¹⁵⁰ Judges and juries can adequately distinguish the fraud from the genuine.¹⁵¹ And courts have become more comfortable with the nature of mental injuries as the psychiatric and psychological fields have progressed.¹⁵² “The problem from this perspective is one of adequate proof.”¹⁵³ Fraud, frivolity, and unethical conduct by lawyers and clients are not unique to claims for negligent infliction of emotional distress. They are an unfortunate fact of law practice. There is no reason to believe, however, that claims for mental

circumstances of the case.”). Mental injuries are often marked by physical symptoms, and a strong correlation exists between manifestations of anxiety and physical illness. See RESTATEMENT (SECOND) OF TORTS § 436A cmt. c (noting that transitory, nonrecurring physical phenomena such as dizziness and vomiting are not severe mental injuries); Levit, *supra* note 146, at 184–88 and accompanying notes (citing various studies to support the proposition that psychological distress and physical illness are connected). The *Gottshall* decision was so difficult because the mental injury was clearly severe for which the law provided no relief despite the injury being foreseeable. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 538 (1994); *Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 375 (3d Cir. 1993).

150. See, e.g., *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 821 (Cal. 1980) (stating that determination of a serious and compensable injury should not turn on arbitrary classifications but is a matter of proof to be presented to the trier of fact).

151. The weight and credibility of the evidence is the exclusive province of the factfinder. See, e.g., *Ferrara v. Galluchio*, 152 N.E.2d 249, 252–53 (N.Y. 1958); see also *Elden v. Sheldon*, 758 P.2d 582, 592–93 (Cal. 1988) (quoting *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 681 (Cal. 1974)) (Broussard, J., dissenting) (noting that courts and juries can make sensitive factual determinations; difficulty of measuring loss is insufficient justification to deny compensation); *Bowen*, 517 N.W.2d at 443 (“Detection of false claims is best left to the adversary process.”); *Sandor & Berry*, *supra* note 10, at 1255 (pointing out that matters of proof are for juries and “inappropriate screening of claims by the court at the pleading phase is a usurpation of the jury’s function”).

152. See, e.g., *Rodrigues v. State*, 472 P.2d 509, 519–20 (Haw. 1970) (noting that courts and juries may rely on “sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims”); *Sinn v. Burd*, 404 A.2d 672, 678–79 (Pa. 1979) (finding that medical science can establish a causal link between mental injury and defendant’s conduct); *Bowen*, 517 N.W.2d at 443 (stating that “emotional distress can be established by [medical science rather] than proof [through] physical manifestation.”); see also PROSSER & KEETON, *supra* note 12, § 54, at 361 (finding mental injuries often marked by definite physical symptoms, which are capable of medical or other objective proof); Bell, *supra* note 7, at 351 (noting that the mental health profession has increased in sophistication since advent of physical impact and zone of danger tests); Marlowe, *supra* note 3, at 789 (finding mental distress is no longer viewed as so substantially different from physical injury because of advances in medical and behavioral sciences); Comment, *Mental Distress*, *supra* note 144, at 1248–53 (finding claims for mental injuries can be objectively ascertained by expert medical testimony).

153. PROSSER & KEETON, *supra* note 12, § 54, at 361; see, e.g., *Molien*, 616 P.2d at 818, 820 (finding the essential question is one of proof, whether the plaintiff has suffered a serious and compensable injury; it is entirely possible to allow recovery upon satisfactory evidence of some guarantee of genuineness); *Dillon v. Legg*, 441 P.2d 912, 918 (Cal. 1968) (noting that potential jury error is inherent in the judicial process but is no reason for substituting case-by-case factfinding with artificial and indefensible barrier).

injuries are a quantum more susceptible to fraud or abuse than other causes of action within and outside of tort law.¹⁵⁴ For example, the vast majority of insurance fraud consists of claims for property damage, physical injury, and economic loss;¹⁵⁵ and pain and suffering for whiplash or other soft tissue injuries are no more difficult to fake or exaggerate than a purely mental injury,¹⁵⁶ but these claims have been widely accepted for many years.¹⁵⁷ Moreover, courthouses today are full of marginal lawsuits, whether filed for settlement value, harassment purpose, or other improper motive. Courts have learned to deal with these claims through various means. Procedurally, there are sanctions and rules of attorney supervision.¹⁵⁸ Institutionally, the road to trial is long and expensive, testing the resolve of plaintiffs.¹⁵⁹ But perhaps the most effective tool available is the broad range of discretion inherent in the court's power to shape and contour the litigation as it moves from pleading to trial. Courts have become increasingly adverse to litigation

154. See Sandor & Berry, *supra* note 10, at 1254 ("Accordingly, treating emotional distress as singularly difficult seems disingenuous."). Historically, courts have allowed recovery for pain and suffering for physical ones, mental injuries for intentional torts, and mental injuries in the context of restrictive common law tests. *Dillon*, 441 P.2d at 918–19. These well established causes of action were equally susceptible to fraudulent claims. *Id.*

155. See Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. MIAMI L. REV. 907, 924–33 (1992); Louis J. Papa & Anthony Basile, *No-Fault Insurance Fraud: An Overview*, 17 TOURO L. REV. 611, 611–15 (2001).

156. Bell, *supra* note 7, at 352.

157. PROSSER & KEETON, *supra* note 12, § 54, at 362–63; see, e.g., *Fry v. Dubuque & S.W. Ry. Co.*, 45 Iowa 416 (1877) (allowing recovery for actual suffering of mind and body when they are the "immediate and necessary consequences" of negligence); *Keyes v. Minneapolis & St. Louis Ry. Co.*, 30 N.W. 888, 889–90 (Minn. 1886) (same); *Hargis v. Knoxville Power Co.*, 94 S.E. 702, 703 (N.C. 1917) (same); *Pa. R.R. Co. v. Allen*, 53 Pa. 276, 278–79 (1867) (same); see also *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994) (distinguishing mental injuries from pain and suffering associated with physical injuries) (quoting Pearson, *supra* note 28, at 485 n.45). One commentator has noted that pain and suffering denotes actual pain caused by physical injury, whereas mental injuries are a higher order cognitive reaction to a highly disturbing event. Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1789 n.11 (1995).

158. Rules of procedure anticipate that litigants may act frivolously or fraudulently. Federal and state procedural rules provide remedies against such behavior. See, e.g., FED. R. CIV. P. 11, 37 (providing sanctions for frivolous pleadings and discovery abuses). Many state rules of procedure mirror the Federal Rules. See, e.g., ARIZ. R. CIV. P. 11, 37. In addition, each state provides ethical rules and sanctions for fraudulent behavior by attorneys. See, e.g., ARIZ. R. SUP. CT. 42, Rules of Professional Conduct, ER 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

159. Outside of small claims, civil trials take several years from the filing of the complaint to trial in many jurisdictions. During this time, plaintiffs are subject to various dispositive motions. See, e.g., FED. R. CIV. P. 12(b)(6), 56.

in general, and the frivolous suit swims in hostile waters.¹⁶⁰ Such actions are subject to dismissal, bias, indifference, and downright hostility. Courts have historically been diligent in ferreting out fraudulent and frivolous claims as evinced by the cautious, if not disjointed, development of the law in this field,¹⁶¹ and one suspects they will continue to keep the vigil.

In practice, fraudulent claims are easy to plead but difficult to prove.¹⁶² Attorneys are not quick to take on fraudulent claims, if for no other reason than because such claims have a low probability of success. The road from filing a complaint to proof at trial is pitted with the perils of diligent opposing counsel, judge's acumen, collective common sense of the jury, attorney sanctions, and disciplinary measures. Absent compelling or at least credible facts, it is difficult to present a claim for genuine and severe mental injury without evidence of physical manifestations, treatment by mental health professionals, or other facts augmenting a plaintiff's bare testimony that he suffered.

Further supporting the point is the nature of attorney-client relationships. Lawsuits are costly endeavors. Notwithstanding the ethical ideal, contingent fee arrangements prevalent in personal injury cases are really business partnerships.¹⁶³ The plaintiff provides the business opportunity, and the attorney provides not only the intellectual capital and labor, but also the financial capital in the form of attorney's fees and costs including expert witness fees. Both partners must agree on the venture. Trials for personal injury are often expensive endeavors for fee-risking attorneys. The potential payoff from a claim involving compelling facts may give an attorney the incentive to bring a frivolous or borderline claim for mental injuries, but

160. In 2002, out of 258,876 cases filed in the U.S. District Courts, only 4569 went to trial (constituting 1.8% of cases filed). Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462–63 (2004). In 1962, the comparative figures were 50,320 and 5802 (11.5%). *Id.* The decrease in number and percentage of trials shows a “striking philosophical, ideologically driven view that is hostile to trials.” Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1 (quoting Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit).

161. See *supra* Part II, pp. 813–31 and accompanying notes.

162. Bell, *supra* note 7, at 351 (feigning a psychic injury successfully is no easy matter); Levit, *supra* note 146, at 139, 167–74 (same); Sandor & Berry, *supra* note 10, at 1254 & n.33 (same) (citing *Sinn v. Burd*, 404 A.2d 672, 678–79 (Pa. 1979)); Comment, *Mental Distress*, *supra* note 144, at 1258–62.

163. Bell, *supra* note 7, at 388. Most lawyers are entrepreneurs, and conduct their business with an eye toward economic self-interest. Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 LAW & CONTEMP. PROBS. 293, 295–96 (1984). Although the ethical rules prohibit such self-interest to affect the course of a case, lawyers routinely depart from this ideal standard in their dealings with clients. *Id.* at 296–97.

most attorneys would avoid a pure claim for mental injuries absent significant physical injuries (or perhaps even property damage) in which case the mental injury claim can become a “parasitic” claim, or absent some other salient facts that make a compelling case for the genuineness of the claim. If the facts are compelling enough, self selection would suggest that such claims generally have a higher probability of merit. If they are not, an attorney would be cautious in accepting a case based purely on a plaintiff’s averment of severe mental injury.¹⁶⁴ Accordingly, many attorneys would be reluctant to bring a frivolous claim for mental injury, including the ethically challenged but fiscally sound attorneys.

This does not mean that frivolous or fraudulent claims do not have settlement value. There is no question that such claims are brought, and it can be argued that if the rule of law is relaxed, more frivolous or fraudulent claims would coalesce around the outer edges of the rule.¹⁶⁵ In this regard, mental injury claims are no different from any other claims brought for abusive reasons or nuisance value, or claims supported by perjury or other misleading evidence. Frivolous, fraudulent, and abusive claims are brought everyday across the wide spectrum of law for settlement value or other inappropriate reasons. Trivial mental injury claims are not extraordinary in this regard. They are simply a fact of everyday law practice, and there is no reason to discriminate against mental injury claims just because they share the same problems inherent in the legal system.

The concern for fraudulent and frivolous claims is legitimate. But the judicial system is capable of dealing with the problem, and it does no justice to deny remedies to the vast majority just because some claims may be false.¹⁶⁶ In *Gottshall*, the Supreme Court opined that the concern underlying the common law tests “has nothing to do with the potential for fraudulent claims.”¹⁶⁷ Perhaps Justice Thomas overstated the matter in his attempt to justify the appropriateness of the admittedly arbitrary zone of danger test,¹⁶⁸

164. See Bell, *supra* note 7, at 388 (noting that due to the contingent fee structure of attorney-client relationships, damages of \$400–\$500 are simply not worth pursuing).

165. See Pearson, *Response to Bell*, *supra* note 66, at 428 (noting that small claims may have settlement value even if it would not be worth a trial).

166. PROSSER & KEETON, *supra* note 12, § 54, at 361; see *Dillon v. Legg*, 441 P.2d 912, 918 (Cal. 1968) (noting the possibility that some fraud will escape detection does not justify abdication of judicial responsibility to award damages for sound claims); *Chiuchiolio v. New Eng. Wholesale Tailors*, 150 A. 540, 543 (N.H. 1930) (noting that if it is conceded that judicial system for ascertaining truth is inadequate to defeat fraudulent claims, result is acknowledgement that courts are unable to render justice).

167. *Consol. Rail Corp. v. Gottsall*, 512 U.S. 532, 552 (1994).

168. See *supra* p. 827 and accompanying notes; see also *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 437 (Wis. 1994) (“Courts have historically been apprehensive that psychological injuries would be easy to feign and that suits would be brought for trivial

but he correctly observed that the “more significant problem is the prospect that allowing such suits can lead to unpredictable and nearly infinite liability for defendants.”¹⁶⁹ Fraud and frivolity are matters of evidence, procedure, ethics, and attorney supervision, and the current rules and institutional influences, while imperfect, should provide the appropriate framework for dealing with the issue. Wholesale legal preclusion based purely on this policy consideration is unwarranted and an overreaction to the problem. The most problematic policy consideration is the fear of potentially infinite and unpredictable liability.¹⁷⁰

B. Limits of Infinite Foreseeability

Some commentators have suggested that the common law’s varying tests be abolished in favor of applying the traditional negligence test for duty.¹⁷¹ The premise is that we should have an entitlement to mental tranquility just as we are entitled to be free of wrongfully inflicted physical injuries.¹⁷² This purity of principle is tempting, but ultimately facile. Experience has shown that the general theory of negligence is too impractical.¹⁷³ Although some courts have flirted with the concept of foreseeability, they have either retreated from this position or were overruled.¹⁷⁴ As one court observed

emotional distress more dependent on the peculiar emotional sensitivities of the plaintiff than upon the nature of the tortfeasor’s conduct.”).

169. *Gottshall v. Consol. Rail Corp.*, 512 U.S. 532, 552 (1994); *see Elden v. Sheldon*, 758 P.2d 582, 587 (Cal. 1988) (stressing the need for a “sufficiently definite and predictable test to allow for consistent application from case to case”).

170. *See Rabin*, *supra* note 37, at 1526, 1537. The concern over disproportionate liability is the most lasting policy limitation. *Marlowe*, *supra* note 3, at 790; *see, e.g., Gottshall*, 512 U.S. at 554–57 (expressing concern over infinite liability); *Thing v. La Chusa*, 771 P.2d 814, 826–27 (Cal. 1989) (same); *Kelley v. Kokua Sales & Supply*, 532 P.2d 673, 676 (Haw. 1975) (same); *Carey v. Lovett*, 622 A.2d 1279, 1286 (N.J. 1993) (same).

171. *See, e.g., Bell*, *supra* note 7, at 335; *Nolan & Ursin*, *supra* note 7, at 620–21.

172. *Bell*, *supra* note 7, at 341.

173. Goldberg and Zipursky best summarized the development of the law and its current state of uneasy resignation:

Thus, it is not surprising that what we see by the end of the twentieth century is not a realization of the fault principle in the area of emotional distress, but the realization that the courts are obligated out of practical considerations to restrict its operation, even though the courts cannot justify all or even most of the lines that they are drawing.

Goldberg & Zipursky, *supra* note 4, at 1671.

174. *See, e.g., Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 374–83 (3d Cir. 1993); *Dillon v. Legg*, 441 P.2d 912, 920–21 (Cal. 1968); *Rodrigues v. State*, 472 P.2d 509, 520–21 (Haw. 1970). Because foreseeability is a slippery slope toward infinite liability, some commentators have suggested that liability be extended to all foreseeable plaintiffs, but such recovery should

succinctly, “foreseeability is useless in fixing duty.”¹⁷⁵ After one hundred years of experiment and debate, the collective intelligence of the legal marketplace has rejected foreseeability as too broad a concept, disproportionately assigning liability to defendants under the shibboleth that mental injuries are no different from physical ones and that traditional rules are adequate to deal with the problem.

The fear of pure foreseeability is not only legitimate, but compelling. In any negligence claim, the extent of a defendant’s liability depends on two variables: the extent of liability running to each victim, which I term *severity*, and the number of injured victims, which I term *scope of exposure*. Accordingly, a defendant’s liability can be reduced to a simple formula. If we denote L for a defendant’s total liability, S for severity, and the sum term (1 + . . . + N) for scope of exposure, a defendant’s total liability is represented in the following notation:

$$L = \sum_{i=1}^N S_i \quad , \text{ i.e., the sum term, } L = \sum (S_1 + \dots + S_N).$$

This notation clearly shows the problem. Severity and scope of exposure are largely uncontrollable and unpredictable factors, and therefore so too is aggregate liability. Any given negligent act could produce only a stiff neck in a car accident or 250 deaths in a plane crash. The scope of exposure and severity are matters of chance, and courts will not weigh the culpability against the resulting aggregate liability.¹⁷⁶ The eggshell plaintiff doctrine reflects this attitude: We take plaintiffs as we find them.¹⁷⁷ Although severity could be grossly disproportionate to the defendant’s conduct in some relativistic sense of moral justice, courts have historically imposed the full liability upon a finding of negligence. Any other rule would make the administration of justice difficult as courts must extrapolate foreseeable

be restricted to economic losses and loss of consortium. See Diamond, *supra* note 66, at 479–80, 504; Miller, *supra* note 37, at 36–43, 47.

175. Bro v. Glaser, 27 Cal. Rptr. 2d 894, 919 (Ct. App. 1994). The court continued: “The obvious predicate for these pronouncements is that *emotional distress is always foreseeable*. Thus, if the risk is foreseeable in every instance, some other criterion for establishing duty must be relied upon.” *Id.*

176. Even if a catastrophic accident results in enormous losses, no one would argue that the level of losses in and of itself would require a court-imposed limitation of liabilities. Rabin, *supra* note 37, at 1529 & n.52; see also Magruder, *supra* note 58, at 1044 (“The ultimate stopping point of liability in this class of cases cannot yet be stated.”).

177. The eggshell plaintiff rule applies to plaintiffs with preexisting medical or physical conditions. See, e.g., Munn v. Algee, 924 F.2d 568, 576 (5th Cir. 1991); Bertolone v. Jeckovich, 481 N.Y.S.2d 545, 546 (App. Div. 1984); Vosburg v. Putney, 50 N.W. 403, 404 (Wis. 1891); RESTATEMENT (SECOND) OF TORTS § 461 (1965); PROSSER & KEETON, *supra* note 12, § 43, at 292.

damage vis-à-vis damage attributable to the preexisting condition resulting from the defendant's culpability, and do so in a quantifiably (and epistemologically) justified manner.¹⁷⁸ Ordinarily, most bright line modifications of recoverable damages are imposed through the legislative process as statutory damages, caps or ceilings, or multipliers on damages, which find legitimacy in the representative process and collective will of democracy to impose such value judgments.¹⁷⁹

The problem has been the aggregate scope of exposure, the sum $\Sigma (1 + \dots + N)$. Because N can be a large number of foreseeable plaintiffs, liability is said to be infinite, particularly when severity cannot be controlled or predicted as well.¹⁸⁰ The common law solution to this problem has been to restrict a defendant's duty to a specific subset of foreseeable plaintiffs, and thereby restrict the scope of exposure. This solution is eminently practical, but thoroughly unprincipled. Although restrictive in its approach, the common law is correct to fear unlimited liability for all classes of foreseeable plaintiffs. In any given event, severity and scope of exposure could both reach very high levels, the combination of which could produce disproportionate liability for a defendant whose only culpability was a simple negligent act.

178. PROSSER & KEETON, *supra* note 12, § 43, at 292 (stating that courts will refuse to attempt any division in terms of foreseeable and unforeseeable injuries).

179. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681n(a) (1997) (allowing statutory damages of \$100 to \$1000); Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1964(c) (2000) (allowing treble civil damages for racketeering conduct); Civil Rights Act of 1991, 42 U.S.C. § 1981(a)(b) (2003) (providing maximum compensatory and punitive damages of \$300,000 in Title VII and ADEA claims); KAN. STAT. ANN. § 60-1903 (Supp. 2003) (capping nonpecuniary wrongful death damages to \$250,000); *see also* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1535 (1987); Kontorovich, *supra* note 144, at 515–17. Sometimes, however, courts provide judicial limitations or modifications on damages, including caps or quasi-cap limitations. *See* State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (finding a single-digit ratio likely satisfies due process); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (offering three guideposts for reviewing constitutionality of punitive damages, and suggesting 10–1 ratio of punitive to compensatory damages might be the constitutional limit in most cases).

180. As Rabin notes, there is a distinction between “mass tort liability,” which refers to a single event with a single causal link between the negligent act and injuries producing many injuries, and the type of situation presented by negligent infliction of emotional distress and economic loss claims where injuries are incurred at each link of the causal chain. Rabin, *supra* note 37, at 1515 n.6. A massive train wreck would be an example of a mass tort. *See* Gottshall v. Consol. Rail Corp., 988 F.2d 355, 380 (3d Cir. 1993) (“Imagine that the employer negligently caused a railroad accident in which fifty workers were killed or injured. That the employer’s liability depends, to some extent, on factors that it had no way of controlling is irrelevant for the purpose of imposing liability.”). The scope of exposure, as this article defines it, refers to both a single and multiple causal link accident.

A typical law school problem illustrates the point. A woman drives at 35 mph through a school district with a 25 mph speed limit while preoccupied in a conversation on her cellphone. Suddenly, she realizes that a little boy and his sister are crossing the street. She slams on the brake. Her 4000 pound SUV just misses the little girl by inches, brushing her skirt and arm in the process, but hits the boy squarely. His legs are immediately torn off, and his bloody body is thrown to the sidewalk. Other school children are walking on this sidewalk and witness the horrific accident. The SUV then hits a lamp post, which falls on a passing truck. The passenger in the truck is hit by a glancing blow, but suffers severe physical injuries due to a preexisting medical condition. The truck swerves and hits another lamp post, which falls and rolls along the side of a hill for 50 yards until it ruptures a gas line and triggers an explosion. The explosion sends flying debris in a 100-yard radius, and a random golf-ball-size piece of rock hits a golfer in the head as he is about to tee off and he dies from severe head injuries.

Variations of this falling domino theme have appeared in countless law school exams. The purpose is to show that the causal chain of events resulting in physical injuries goes from reasonably foreseeable to arguably foreseeable to just plain freakish, and liability ends at some point regardless of the tragic consequences. In any analysis of foreseeability and defendant's liability in the context of physical injuries, *Palsgraf* casts its shadow on duty's reach.¹⁸¹ Although a single accident could produce enormous severity, the scope of exposure is in most cases naturally limited by the physical and temporal happenstance of the accident and excludes consequences that could not have been reasonably foreseen.¹⁸² Aside from

181. 162 N.E. 99 (N.Y. 1928) (Cardozo, C.J.).

182. I do not suggest that time and space limitations are *legal* limitations on foreseeability or duty. They certainly are not. The defendant who sets a bomb which explodes years later, or mails a box of poisoned food from California to Delaware, has caused the result and should obviously bear the consequences. PROSSER & KEETON, *supra* note 12, § 43, at 283, *citing* W. Union Tel. Co. v. Preston, 254 F. 229 (3d Cir. 1918); People v. Botkin, 64 P. 286 (Cal. 1901). There are also cancer and toxic tort cases involving long latency periods. *See, e.g.*, Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020 (Md. 1983) (lung cancer from asbestosis development years after exposure). *See generally* Robert J. Rhee, *The Application of Finance Theory to Increased Risk Harms in Toxic Tort Litigation*, 23 VA. ENVTL. L.J. 111 (2004). In such cases where the injury does not immediately follow the wrongful conduct, many jurisdictions apply a special procedural rule (i.e., the discovery rule) to address the statute of limitations issue. *See, e.g.*, Childs v. Haussecker, 974 S.W.2d 31, 37–38 (Tex. 1998). But these cases are driven by unusual facts or a particular disease's etiology, and not by such unknowables as an individual's social fabric and mental fortitude. Most ordinary tort cases involve accident and physical harm that tend to be confined, and thus serve a natural constraint upon foreseeability and physically injured victims. This is not the case with mental injuries.

the catastrophic accident, a negligent tortfeasor typically wreaks havoc on “an unfortunate few.”¹⁸³

Now, consider the mental injuries involved in this hypothetical. Aside from the little boy who suffered grievous physical injuries and related pain and suffering, there are a number of other direct and collateral victims: the boy’s sister who was in the zone of danger—a bystander and a physical impact victim; the children who witnessed this bloody accident; the father who may have run to the accident scene moments later; the mother who may have been 2500 miles away on a business trip; and so forth. Even the most ordinary accident can emanate shock waves of injuries. The various causal effects of the driver’s negligence are eminently foreseeable, and the liability fallout from simple inattention is potentially immense. Although foreseeability sets tolerable limits on most physical injury claims, it provides virtually no limit on liability for mental injuries.¹⁸⁴

183. Rabin, *supra* note 37, at 1532.

184. See Pearson, *supra* note 28, at 515 (“Although foreseeability has generally been considered a requisite for recovery from a negligent defendant, it has never been sufficient in and of itself.”); Rabin, *supra* note 37, at 1526 (“Although [foreseeability] may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm.”); see also *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 553 (1994) (“If one takes a broad enough view, all consequences of a negligent act, no matter how far removed in time or space, may be foreseen.”); *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989) (“[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery. . . .”); *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969) (foreseeability is “like the rippling of the waters, without end”).

The tragic events of the 9/11 terrorist attacks further illustrate the point. Assuming that the events were due to catastrophic negligence of an airline pilot rather than a deliberate act of terror, the extent of the aggregate personal injuries and property damage would be enormous, approximately three thousand lives and about \$90 billion in economic losses of which about \$38 billion was insured. Werner Schadd, *Terrorism—Dealing with the New Spectre*, Swiss Re Focus Report 4 (2002), available at <http://www.swissre.com>. Such catastrophic losses had been contemplated and were foreseeable. See Munich Re Group, *11th September 2001*, available at http://www.munichre.com/publications/302-03092_en.pdf (noting airliner collision in a major city was considered “possible” but not “probable” events by major underwriters); see also *World Trade Ctr. Props., LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154, 158 (2d Cir. 2003) (stating the World Trade Center was insured for \$3.5 billion “per occurrence” indicating that the leaseholder anticipated catastrophic losses). Despite such foresight, it is questionable whether the associated human suffering involved in such a catastrophe can be calculated even though it could have been reasonably foreseeable. Cf. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 2002 WL 32153625 (Aug. 15, 2002) (complaint filed by families of the 9/11 victims against various defendants; complaint asks for \$116 trillion dollars and alleges among other things causes of action for negligence (Count V) and negligent infliction of emotional distress (Count VII)); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 111 (D.C. Cir. 2003) (dismissing some causes of action and defendants).

Common law courts are right to reject foreseeability as the sole measure of duty.¹⁸⁵ Mental injuries are not different from physical ones because they are less debilitating or somehow less worthy of legal recognition. They are different because they are not constrained by time and space proximity and physical laws.¹⁸⁶ A car striking a victim at 100 mph will always produce grievous physical injuries, and so defendants are on notice to refrain from such conduct. But a near miss victim or a bystander to such a horrific accident may or may not develop mental injuries (such is vagary of the human mind). The natural order of things limits liability for physical injuries far more efficiently than any judicial rule of law.¹⁸⁷ Mental injuries, however, often transcend natural limitations and cross the vast expanses of the human mind and heart. They are subject to the peculiar vagaries of the network of human relationships and each person's unique stress tolerance, and their etiology is far less predictable, and thus limiting liability becomes problematic.¹⁸⁸ The negligent event could occur in one place and time, and many days later cause severe injuries 2500 miles away.¹⁸⁹ Compounding the problem is the "universal" nature of mental injuries.¹⁹⁰ One could go through life without suffering from any substantial physical injury, but death, sickness, and misfortune are inevitable.¹⁹¹ Extreme mental distress at one point or another is a certainty. The common law has dealt with these problems by rejecting the notion that all foreseeable plaintiffs are owed a

185. See, e.g., *Freeman v. City of Pasadena*, 744 S.W.2d 923, 924 (Tex. 1988) (rejecting foreseeability to define duty).

186. Compare *Gottshall*, 512 U.S. at 545 ("Emotional injuries may occur far removed in time and space from the negligent conduct that triggered them.") with *Pearson*, *supra* note 28, at 507 ("The geographic risk of physical impact caused by the defendant's negligence in most cases is quite limited, which accordingly limits the number of people subjected to that risk. There is no similar finite range of risk for emotional harm.").

187. The severity and scope of exposure for mental injuries are more difficult to predict than those of typical physical injuries because they depend on unpredictable psychological factors. *Gottshall*, 512 U.S. at 546.

188. See, e.g., *Thing*, 771 P.2d at 826 (finding that, although foreseeability sets limits for physical injury claims, it provides virtually no limit mental injury claims) (citing *Rabin*, *supra* note 37, at 1526); *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988) (foreseeability does not necessarily give rise to a cause of action, and social policy must limit liability); *Borer v. Am. Airlines, Inc.*, 563 P.2d 858, 861 (Cal. 1977) (same).

189. See, e.g., *Kelley v. Kokua Sales & Supply, Ltd.*, 532 P.2d 673, 676 (Haw. 1975).

190. See *Thing*, 771 P.2d at 835 (Kaufman, J., concurring).

191. See, e.g., *Frame v. Kothari*, 560 A.2d 675, 677 (N.J. 1989) (it is expected that injury or death of one member of a family often produces severe emotional distress in others); *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 445 (Wis. 1994) (same). This was the crux of the famous observation: "Life is difficult. This is a great truth, one of the greatest truths." M. SCOTT PECK, M.D., *THE ROAD LESS TRAVELED: A NEW PSYCHOLOGY OF LOVE, TRADITIONAL VALUES AND SPIRITUAL GROWTH* 15 (1978).

duty and by reducing the scope of exposure to only a small, finite subset of foreseeable plaintiffs as a matter of law.

C. Inherent Biases in Common Law Approach

While the above policy reasons drove the debate, there were also subtle biases that affected the development of early common law. These injuries were dismissed as so evanescent, intangible, or peculiar that they cannot be anticipated or reasonably connected to defendant's actions.¹⁹² This was based on an antiquated misconception of science and nature, leading to an attitude that only the weak would ever allow themselves to be injured by fright or emotional trauma.¹⁹³ It was believed that as to the inevitable stresses of living life—the accidents, injuries, deaths, and misfortunes—“a certain toughening of the mental hide is a better protection than the law could ever be.”¹⁹⁴ Thus courts and even early commentators devalued mental injuries, marginalizing them as the idiosyncratic predispositions of the weak and fragile.¹⁹⁵

Commentators have noted a connection between this early attitude and the fact that historically women tended to bring claims for mental distress far more than men.¹⁹⁶ Many of the seminal cases in this field have been brought by women plaintiffs,¹⁹⁷ and the earlier cases showed a distinctly sexist perception of these claims.¹⁹⁸ In early common law, courts marginalized a woman's claim for mental injuries in relation to the defendant's conduct.¹⁹⁹ Mental injury claims are not gender specific, nor

192. See, e.g., *Braun v. Craven*, 51 N.E. 657, 659 (Ill. 1898); *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 355 (N.Y. 1896); *Chittick v. Phila. Rapid Transit Co.*, 73 A. 4, 8 (Pa. 1909). See generally Thigpen, Note, *supra* note 39, at 181.

193. See *Levit*, *supra* note 146, at 172 n.182 (citing *Knierim v. Izzo*, 174 N.E.2d 157, 164 (Ill. 1961) (“Indiscriminate allowance of actions for mental anguish would encourage neurotic overreactions to trivial hurts.”)).

194. Magruder, *supra* note 58, at 1035.

195. See *Goldberg & Zipursky*, *supra* note 4, at 1669 (noting the passing of overtly sexist conceptions of women's interests).

196. See, e.g., *Spearman v. McCrary*, 58 So. 927 (Ala. Ct. App. 1912); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Homans v. Boston Elevated Ry. Co.*, 62 N.E. 737 (Mass. 1902); *Mitchell*, 45 N.E. at 354; *Cohn v. Ansonia Realty Co.*, 148 N.Y.S. 41 (App. Div. 1914); *Lynch v. Knight*, 11 Eng. Rep. 854 (1861); see also Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); Handsley, *supra* note 144, at 391.

197. See, e.g., *Dillon*, 441 P.2d at 913.

198. Prosser notes that some judicial opinions expressed a masculine astonishment that any woman could be frightened or shocked into, for instance, a miscarriage. PROSSER & KEETON, *supra* note 12, § 12, at 55–56.

199. *Id.*

have tort rules been overtly gender discriminatory.²⁰⁰ Nevertheless, the early common law's devaluation of mental injuries built in a structural bias that ultimately disadvantaged women.²⁰¹

Women were not the only class of disadvantaged plaintiffs. In seeking meaningful distinctions, the courts went into the business of weighing the legal value of relationships. In *Elden*, the California Supreme Court refused to extend the *Dillon* bystander rule to unmarried cohabitants and was overt about the discrimination, reasoning that marriage is the most socially productive and fulfilling relationship in the course of a lifetime.²⁰² Although the court professed that its decision was not based on an anachronistic notion of morality,²⁰³ it gave greater value to marriage than cohabitation regardless of the individual nature of the relationship. Relationships were judged along the lines of marriage, degrees of bloodline, and other status classifications. While I do not suggest that these distinctions are inappropriate in all areas of legal inquiry, to the extent that the intent is to determine the strength of human relationship, the distinction is discriminatory and irrational for human emotional bond is not a legal form.²⁰⁴

The value assignments of relationships touch sensitive political and social issues of today. Because almost all states do not recognize same-sex marriages,²⁰⁵ discrimination against unmarried cohabitants cut equally across sexual orientation.²⁰⁶ The dissent in *Elden* raised the same-sex issue directly in criticizing the reliance on marital status as a limit to the bystander rule, and the Third Circuit in *Gottshall* alluded to the intersection of tort law and the inevitable legal and political debate on same-sex relationships.²⁰⁷ Currently, there are no cases that have allowed a plaintiff to

200. Sandor & Berry, *supra* note 10, at 1259.

201. See Chamallas & Kerber, *supra* note 196, at 814.

202. *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988).

203. *Id.* at 587.

204. See *id.* at 591 (Broussard, J., dissenting) ("The state's policy in favor of marriage, however, does not imply a corresponding policy *against* nonmarital relationships. Nor does it imply that the values underlying the state's interest in marriage flourish only within the confines of that institution.") (internal quotation marks omitted).

205. The Massachusetts Supreme Court recognized same-sex marriages. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

206. There is a constitutional right of privacy for same-sex relationships. *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

207. *Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 372 (3d Cir. 1993) (Nygaard, J.) ("[S]tate courts have been wary of the public policy ramifications from recognizing certain relationships for purposes of tort law One can easily see the public policy quagmire states would be bogged in if they recognize other less traditional relationships for the purposes of common law torts."); *Elden*, 758 P.2d at 592 n.2 (Broussard, J., dissenting) ("Though the

recover for mental distress as a result of physical injuries suffered by a same-sex partner, and at least one California appellate court rejected a claim brought by a homosexual partner to recover for mental injury under the *Dillon* bystander test.²⁰⁸ Although California is considered one of the most liberal states in recognizing tort causes of actions,²⁰⁹ a claim by a same-sex partner clearly would not be cognizable under *Elden* absent legislative intervention.²¹⁰ Given that the legitimacy of same-sex privacy rights and marriages is at the forefront of public policy debate,²¹¹ courts would be highly reluctant to tackle such a controversial and politicized issue by granting same-sex partners tort rights arising from marital or blood relations through the otherwise ordinary jurisprudence of negligent infliction of emotional distress.

Although tort law in this field did not develop with a specific eye toward discriminating against certain classes of individuals, courts have applied value laden judgments when determining rules of liability. These judgments then took legitimacy of precedent,²¹² particularly when superimposed over

majority has not directly addressed the question, presumably their position that marriage is the sine qua non to recovery would preclude any gay or lesbian plaintiff from stating a *Dillon* cause of action based on the injury of his or her partner.”).

208. *Coon v. Joseph*, 237 Cal. Rptr. 873, 876–77 (Ct. App. 1987).

209. *Sandor & Berry*, *supra* note 10, at 1247 n.2; *Gorback*, *supra* note 37, at 273 n.1.

210. As discussed, *Elden* created a bright line test by recognizing bystander liability for married couples. In response to *Elden* and the highly publicized death of Diane Whipple (a homosexual woman who was mauled to death by a neighbor’s dogs), the California legislature enacted a new law overruling *Elden*. CAL. CIV. CODE § 1714.01 (Deering Supp. 2002). See *Gorback*, *supra* note 37, at 274–75. Section 1714.01(a) provides: “Domestic partners shall be entitled to recover damages for negligent infliction of emotional distress to the same extent that spouses are entitled to do so under California law.” CAL. CIV. CODE § 1714.01(a) (Deering Supp. 2002).

211. It is clear that the legitimacy of same-sex marriages will occupy the debate within the courts and legislatures. See *supra* note 204. See generally Gary Chartier, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA L. REV. 1593 (2001); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000) (discussing Vermont’s An Act Relating to Civil Unions, 15 VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2000), which provides: “Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage”); Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597 (2002); W. Brian Burnette, Note, *Hawaii’s Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81 (1999) (discussing Hawaii’s Reciprocal Beneficiaries Act, HAW. REV. STAT. § 572C (Supp. 1997), which grants marriage-like benefits to homosexual couples).

212. PROSSER & KEETON, *supra* note 12, § 35, at 217 (stating that American jurisprudence is built on the principle of stare decisis, that appellate decisions establish precedent). Stare

the policy considerations of fraud, frivolity, and infinite liability. This eventually provided a basis to legitimize the rules of law that are at its foundation arbitrary on several levels.²¹³ And these value laden judgments still have a disparate impact on certain classes of people and will continue to do so as long as courts seek legal distinctions in relationships and social status that are best defined by an inquiry into the unique factual circumstances of the case.

D. Nature of Arbitrary Rules

Most would agree that arbitrary laws are not good for society.²¹⁴ A rule can be deemed arbitrary for several reasons. It can be arbitrary because it is not supported by any policy, because it is vague or ambiguous, or because it does not properly weigh the policies for which the rule was promulgated, being either broader or narrower than the underlying policies would suggest.²¹⁵ Regardless of how unprincipled the common law rules are, it cannot be said that they are not supported by any policy consideration and therefore wholly irrational. Nor can it be said that they are vague or ambiguous; to the contrary they are quite specific about their requirements. The problem is that the common law tests are generally underinclusive, at least when viewed through the prism of foreseeable plaintiffs.

Over the years, commentators and courts have explained that the common law tests are instruments, however blunt, to distinguish meritorious claims and limit liability in a way that the traditional notion of duty is simply ill-equipped to handle.²¹⁶ These observations ring true. But they do not fully explain how the various rules came to be. Historically, courts could have gone in different directions. For example, they could have acknowledged claims for mental injuries but limited liability by capping actual damages or limiting recovery to out-of-pocket economic losses.²¹⁷ They could have provided relief only for injuries confirmed by independent

decisus promotes predictability of the law so that the law's results are not seen as arbitrary. See Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 709 (1913).

213. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 309-10 (1978) ("[T]he process at work was the reification of ad hoc social policies into 'values' or 'first principles' that were then conceived to provide determinate—and therefore legitimate—solutions.").

214. See GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 31 (1996) ("Arbitrariness in the definition of the laws violates our essential expectations in living under the rule of law.").

215. Pearson, *supra* note 28, at 478.

216. See *supra* pp. 809-10, 816-18.

217. See, e.g., Miller, *supra* note 37, at 1 (advocating damage limitation to economic loss).

mental health professionals and physical manifestations.²¹⁸ They could have applied the traditional tort rules but imposed a higher evidentiary burden, say, the clear and convincing standard.²¹⁹ Or they could have continued to reject these claims categorically.²²⁰

Courts could have even created a bright line test where, upon a showing of foreseeable injury, the legal cognizability of a claim could be determined by whether the last digit of the civil docket number is even or odd. This "civil docket" rule would be arbitrary on two levels: the rule is underinclusive because not all injuries are remedied and it is internally inconsistent because precluded claims may be just as meritorious absent the rule's application. Of course, in reality, the rule would never pass judicial muster because such flip-of-the-coin justice would be decried as so irrational as to be no justice at all. But to the extent that the common law rules are underinclusive as to injured plaintiffs, do little to distinguish between the genuine and feigned, and serve primarily to limit liability via bright line tests that bear no logical nexus to a defendant's culpability or plaintiff's injury, the analogy is not *so* tenuous. The point is that without a principled approach to defining duty, common law courts as well as the Supreme Court had no practical alternative other than to apply arbitrary tests to serve the very important policy consideration of limiting liability to socially tolerable levels.²²¹

This is not to suggest that the common law rules were entirely lacking any basis in policy or fact. They employed a superficially rational methodology. They could be understood as crude attempts to force mental injury claims into the analytical framework of physical injury claims. The physical manifestation test requires that an intangible mental injury manifests itself into a palpable physical injury or symptoms. The physical impact test conditions mental injury claims on the application of a physical force upon the victim. The zone of danger and bystander tests limit claims

218. See, e.g., Nolan & Ursin, *supra* note 7, at 583 (recovery should be limited to cases of serious emotional distress).

219. Cf. Addington v. Texas, 441 U.S. 418, 431-32 & n.6 (1979) (some jurisdictions require clear and convincing standard to impose punitive damages); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986) (recovery of punitive damages upon clear and convincing evidence of the defendant's evil mind). But see *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1531-32 (1997) (stating that preponderance of evidence is the traditional standard for punitive damages).

220. See Hubert Winston Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 285 (1944) ("Taking all cases decided between 1850 and 1944, the net balance of justice would have been greater had all courts denied damages for injury imputed to psychic stimuli alone.").

221. On this basis, Pearson advocated the zone of danger test as appropriate in light of the policy considerations. Pearson, *supra* note 28, at 516.

to those within a physical and temporal proximity to the accident. Under these frameworks, short intervals of time, distance, and happenstance could separate liability for mental injury just as these random matters could arbitrarily determine accidents and nonevents in everyday life.²²² Viewed this way, defendants and plaintiffs were left to reflect, *There but for the Grace of Court go I*. Although fate may be random, courts should not arbitrate fortune and bad luck and they must ask what is “the cost of such institutionalized caprice, not only to the individuals involved, but to the integrity of the judiciary as a whole.”²²³

IV. DUTY REDEFINED

A. *The Palsgraf Problem*

The common law’s theoretical framework is built on the conceptual foundation applicable to physical injuries. In most routine negligence actions, foreseeability and causation are not routinely contested.²²⁴ Where, however, the negligent act initiates a chain of events creating ripples of injuries, as is the case with many claims for mental injuries, foreseeability becomes the key issue. In this regard, the problem traces back to the doctrinal development of *Palsgraf*.²²⁵ The basic facts of this most celebrated of all tort cases are well known: a man boarding a train was assisted by a railway attendant, who dislodged a package of fireworks; the package exploded on impact, causing a scale to fall on the plaintiff who was standing at one end of the platform; the plaintiff sued on the basis that the railway attendant was negligent.²²⁶ These facts provided Judge Cardozo the opportunity to expound the theory that foreseeability defines duty. In this case, Mrs. Palsgraf was not a foreseeable plaintiff in relation to a package that fell on the train tracks and so there was no duty. On the other hand,

222. Of course, the critical distinction is that short intervals of time, distance, and happenstance in most circumstance have no logical nexus to the injury or foreseeability, unlike accidents involving a physical injury.

223. *Thing v. La Chusa*, 771 P.2d 814, 831 (Cal. 1989) (Kaufman, J., concurring) (emphasis omitted).

224. See, e.g., *Allen v. United States*, 588 F. Supp. 247, 405 (D. Utah 1984) (“In most cases, the factual connection between defendant’s conduct and plaintiff’s injury is not genuinely in dispute.”), *rev’d on other grounds*, 816 F.2d 1417 (10th Cir. 1987). Consistent with this observation, the unforeseeable or freakish accidents are few and far between.

225. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928). Indeed, various courts have invoked *Palsgraf* in this field. See *supra* pp. 817–18 and note 123.

226. *Palsgraf*, 162 N.E. at 99.

Judge Andrews's dissent relied on a proximate cause analysis to reason that the defendant's conduct is legally wrong whenever it falls below the reasonable person standard and causes injury absent practical policy considerations that warrant a limitation of liability.²²⁷ Although the opinion was a 4–3 majority, Judge Cardozo's concept of foreseeability gained prominence in American jurisprudence.²²⁸ Judge Cardozo's opinion was prescient, suggesting in dictum the possibility that negligence could “entail liability for any and all consequences, however novel or extraordinary.”²²⁹ Of course, when the case was decided in 1928, mental injury claims were just being recognized as an independent tort and were generally considered novel.²³⁰

Despite its prominence in law practice and academic review, *Palsgraf* is an enigma in many ways.²³¹ For one, the exact nature of Mrs. Palsgraf's injury was not stated in the opinion. Given that the case dealt with a large explosion and a scale falling on the plaintiff,²³² most readers would assume, without more, that the injury was a physical one.²³³ This assumption is implied by both Judge Cardozo and Andrews, who spoke in terms of “the right to bodily security” and “the safety of others.”²³⁴ In fact, however, the injury for which Mrs. Palsgraf sued was a speech impediment brought on by the accident.²³⁵ At trial, evidence was introduced that Mrs. Palsgraf suffered from “traumatic hysteria.”²³⁶ Judge Cardozo was deliberately elliptical in

227. *Id.* at 103 (Andrews, J., dissenting).

228. The concept was almost immediately adopted by the Restatement. *See* RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965). Nevertheless, *Palsgraf* is far from a universal doctrine. *See* ANDREW L. KAUFMAN, CARDOZO 302 (1998) (arguing that social and economic factors such as spreading of losses to “deep pockets” have resulted in the Andrews approach gaining popularity); *see also* Prosser, *supra* note 22, at 1 (noting disagreement and confusion in treating and interpreting *Palsgraf*).

229. *Palsgraf*, 162 N.E. at 101.

230. *See supra* Part II.A, pp. 813–18 and accompanying notes.

231. Prosser describes *Palsgraf*'s ruling as a “riddle.” Prosser, *supra* note 22, at 28 (citing Thomas Cowan, *The Riddle of the Palsgraf Case*, 23 MINN. L. REV. 46 (1938)).

232. The New York Times reported that the explosion shattered windows, ripped away parts of the train platform, overturned a penny weighing machine, and injured at least thirteen people. *Bomb Blast Injures 13 in Station Crowd*, N.Y. TIMES, Aug. 25, 1924, at 1 [hereinafter *Bomb Blast*].

233. Indeed, the scale hit her arm, hip, and thigh. NOONAN, *supra* note 106, at 127.

234. *Palsgraf*, 162 N.E. at 100, 102.

235. *See* NOONAN, *supra* note 106, at 127 (noting the injury as “a stammer”); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 35 (1990) (same).

236. TORTS STORIES 4 (Robert L. Rabin & Stephen D. Sugarman eds., 2003); *see* NOONAN, *supra* note 106, at 127 (describing the injury as “hysteria”). The nature of the injury was first suggested by a New York Times article on the accident, which described Mrs. Palsgraf's injury as “shock.” *Bomb Blast*, *supra* note 232, at 1. At trial, an expert physician testified “her mind is disturbed.” NOONAN, *supra* note 106, at 127. Subsequently, Mrs. Palsgraf became completely

this regard for if the true nature of the injury was revealed in the opinion it “would have made the accident seem not only freakish but silly, a put-on, a fraud.”²³⁷ Additionally, if the injury was described as “shock,” a quintessential case for negligent infliction of emotional distress, the case would not have had the influence Judge Cardozo intended in the issue of foreseeability and scope of duty as the case would have been easily distinguishable from most other accidents or relegated to the unique jurisprudence of mental injuries.²³⁸

But herein is one of the ironies of *Palsgraf*. When foreseeability was applied to actions for negligent infliction of emotional distress, the concept has historically been problematic.²³⁹ Ultimately, the legal marketplace rejected foreseeability, a concept originally devised to limit liability to “the range of reasonable apprehension,”²⁴⁰ for fear of infinite liability. Instead, in seeking social limits courts have gravitated toward the methodology suggested by Judge Andrews. He recognized that his causation analysis did nothing to curtail the potential for infinite liability,²⁴¹ and so he counseled courts to “take account” of the matter and create “practical” rules of expediency that serve the social policies in determining appropriate limits to liability,²⁴² which is precisely what the common law courts have done in this field.

A second irony of *Palsgraf* arises from another factual ambiguity. The opinion does not indicate the precise distance between the spot of the explosion and the falling scale, mentioning only that the scale was “at the

mute. Walter Otto Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CAL. L. REV. 699, 706 n.25 (1978). Judge Posner speculates that the “likeliest explanation for Mrs. Palsgraf’s speech difficulties is that the accident triggered a latent psychiatric problem that the litigation made even worse.” POSNER, *supra* note 235, at 36.

237. POSNER, *supra* note 235, at 42. Kaufman explains the omission of facts pertaining to Mrs. Palsgraf’s injury by citing one of Judge Cardozo’s lectures: “There is an accuracy that defeats itself by the over-emphasis of details . . . one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement.” KAUFMAN, *supra* note 228, at 297–98; see TORTS STORIES, *supra* note 236, at 5 (noting that the case would have had limited influence if it was recognized as a “shock” case).

238. Judge Cardozo deliberately chose to leave out details to avoid the problem that a “sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight.” KAUFMAN, *supra* note 228, at 298 (quoting BENJAMIN CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS* 1, 7–8 (1931)). At the time, the common law jurisdictions had not even developed the zone of danger test.

239. See *supra* Part II, pp. 813–31 and accompanying notes.

240. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928).

241. PROSSER & KEETON, *supra* note 12, § 43, at 287; see Prosser, *supra* note 22, at 24 (“Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world.”).

242. *Palsgraf*, 162 N.E. at 104 (Andrews, J., dissenting).

other end of the platform, many feet away.”²⁴³ Based on this elliptical reference, Judge Cardozo opined that the defendant’s conduct was not a wrong in relation to the plaintiff “standing far away.”²⁴⁴ Some have questioned the implied great distance, which made the accident seem all the more unforeseeable.²⁴⁵ In fact, the scale was a relatively short distance away, “more than ten feet away” as reported by the New York Times,²⁴⁶ about 25 to 30 feet as estimated by Judge Andrews,²⁴⁷ and about 25 to 40 feet as estimated by one commentator.²⁴⁸ The exact distance, however, did not matter because Judge Cardozo adopted a zone of danger analysis.²⁴⁹ The court’s subsequent response to the motion for reconsideration clarified: “If we assume that the plaintiff was nearer the scene of the explosion than the prevailing opinion would suggest, she was not so near that injury from a falling package, not known to contain explosives, would be within the range of reasonable prevision.”²⁵⁰ Accordingly, *Palsgraf*, a mental injury action masquerading as a physical injury case, incorporates into its foreseeability analysis the notion of spatial relationship between the defendant’s culpability and the plaintiff’s injury, which is found in both the zone of danger test adopted by *Waube* and the bystander test adopted by *Dillon*.²⁵¹

While the problem in this field traces its roots to the doctrinal developments of *Palsgraf*, the opinion leaves clues to a principled solution. Judges Cardozo believed that wrongful conduct does not exist in a

243. *Id.* at 99.

244. *Id.*

245. See POSNER, *supra* note 235, at 39 (stating that the record does not disclose the location of the scale or its distance from the explosion). But see KAUFMAN, *supra* note 228, at 298 (noting that Mrs. Palsgraf’s daughter testified that she was at the newsstand, which “was quite a distance; it was at the other end of the platform”) (emphasis omitted). At trial, Mrs. Palsgraf was asked “And how near were you to the place where the explosion took place?” and she answered “That I can’t exactly tell; I don’t know what train took the explosion.” TORTS STORIES, *supra* note 236, at 3.

246. *Bomb Blast*, *supra* note 232, at 1.

247. *Palsgraf*, 162 N.E. at 105.

248. KAUFMAN, *supra* note 228, at 655 n.31.

249. *Id.* at 298; see *Palsgraf*, 162 N.E. at 101 (“[T]here was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station.”). It is interesting to note that several years later Judge Cardozo spoke specifically in terms of a “zone of danger” when describing the duties of plaintiff and defendant in a railway accident. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104 (1934).

250. *Palsgraf v. Long Island R.R. Co.*, 164 N.E. 564, 564 (N.Y. 1928) (per curiam). Given that Judge Cardozo wrote the opinion, this response was probably written by him. KAUFMAN, *supra* note 228, at 655 n.32.

251. KAUFMAN, *supra* note 228, at 301. See *supra* pp. 817–21 and accompanying notes for a discussion of the zone of danger and bystander tests.

philosophical vacuum. It is defined by a relationship,²⁵² a concept the dissent begrudgingly admitted.²⁵³ The key ideological divide concerned the thing related to. The dissent believed that negligence involves the relationship between individuals, and so the interest protected is the freedom from any injury proximately caused by the defendant.²⁵⁴ Judge Cardozo rejected this view and elevated the argument to a more abstract level.²⁵⁵ Freedom from injury in and of itself was not a protected interest.²⁵⁶ Rather, duty is defined by a relationship between the conduct and the interest at risk.²⁵⁷

In *Palsgraf*, that interest was drawn along the line of foreseeable and unforeseeable plaintiffs. This distinction, however, need not be the sole consideration under which duty is defined. Judge Cardozo spoke in terms of the “diversity of interests.”²⁵⁸ He recognized the possibility of alternative distinctions used to define duty as expressed in this oft-ignored dictum:

There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, e.g., one of bodily security. *Perhaps other distinctions may be necessary.*²⁵⁹

It is apparent that Judge Cardozo considered specific gradations of foreseeability for the diversity of interests involved,²⁶⁰ but the facts of the

252. “Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.” *Palsgraf*, 162 N.E. at 101.

253. *Id.* at 103 (Andrews, J., dissenting).

254. “In an empty world negligence would not exist. It does involve a relationship between man and his fellows, but not merely a relationship between man and those whom he might reasonably expect his act would injure; rather, a relationship between him and those whom he does in fact injure.” *Id.* at 102 (Andrews, J., dissenting).

255. *Id.* at 101.

256. *Id.* (stating that the cause of action is not established by showing damages).

257. *Id.* at 99–100 (defendant’s conduct must be “with reference to” the plaintiff, who “sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another”).

258. *Id.* at 101.

259. *Id.* (emphasis added). Prosser notes that there is almost no authority advancing this dictum. PROSSER & KEETON, *supra* note 12, § 43, at 289. Although the *First Restatement* adopted this dictum, see RESTATEMENT (FIRST) OF TORTS § 281 cmt. g (1934), the *Second Restatement* subsequently rejected the view, RESTATEMENT (SECOND) OF TORTS § 281 cmt. j (1965).

260. Although this concept was accepted by some commentators, others have looked askance at the prospect of creating hair-splitting distinctions, or recognizing broad, unreasonable categories. PROSSER & KEETON, *supra* note 12, § 43, at 289–90.

case did not allow further exploration. In hinting at finer gradations he provided, unknowingly perhaps, the doctrinal key to solving the problem specific to claims for negligent infliction of emotional distress.

In this field, commentators and courts have treated foreseeability, culpability and resulting injury as singular concepts.²⁶¹ The choice has been stark: accept either foreseeability as the measure of duty or arbitrary rules as the limit on liability.²⁶² As for assessed damages, once an injury is determined to be severe and genuine, the inquiry stops and damages do not relate to a defendant's culpability other than through causation. My proposal rejects this analytical framework. We start with this logical certainty: if we accept the premise that defendants owe *some* form of duty to all foreseeable, injured plaintiffs and that foreseeability is an inadequate concept to limit liability to tolerable levels, then *a fortiori* other distinctions are necessary to balance these competing policies. Such distinctions are not only possible, but inevitable.

The common law analysis is lacking not because it makes no distinctions, but because the distinctions made are arbitrary. The analysis fails because, as discussed, mental injuries are unpredictable and transient and because the causal nexus between the negligent act and injury is more elastic.²⁶³ Considering this, we do not expect society to walk on eggshells fearing that any conduct that fails to meet an objective standard of proper behavior may result in significant liability. The universal nature of mental injuries raises the specter of unlimited and unpredictable liability, particularly in a society that has developed an "intolerance of bad luck" to the extent that victims are deemed to be entitled to compensation.²⁶⁴

Ideally, every person should have a right to be free from the imposition of wrongful conduct that would cause injuries. If this were not the case, a dogmatic adherence to deterrence theory aside,²⁶⁵ the philosophical

261. See *supra* Part III.B, pp. 836–42 and accompanying notes.

262. The Supreme Court has recognized the state of the law has been an all-or-arbitrary choice. See *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 438 (1997) (suggesting that some plaintiffs must go without remedies if the rule of law "would on balance cause more harm than good").

263. See *supra* pp. 841–42 and accompanying notes.

264. Jon T. Hirschoff, *Recent Developments in the Law of Torts—Introduction*, 51 IND. L.J. 463 (1976); see *Carey v. Phipps*, 435 U.S. 247, 254–55 (1978) (stating that a central goal of tort law is to compensate persons) (citing 2 FOWLER V. HARPER & FLEMING JAMES, LAW OF TORTS § 25.1, at 1299 (1956)); *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 318 (2d Cir. 1999) (same).

265. Deterrence theory of torts provides that tort laws exist primarily to regulate conduct and to deter socially unproductive conduct. See *Goldberg & Zipursky*, *supra* note 4, at 1646–47 (discussing that the deterrence theory does not fully explain the nature and justification of tort law).

justification for compensation would be undermined. But it is not enough to characterize a plaintiff's interest as freedom from mental injuries inflicted by the defendant as this would lead invariably back to a foreseeability analysis. Where traditional analysis fails, an alternative approach is required.²⁶⁶ Foreseeability and genuine injury are prerequisite requirements to assert a mental injury claim—the start of the inquiry and not the end.²⁶⁷ The question remains: What is a wrong?

A wrong does not exist in a vacuum. Duty is a term of relation. Although the same conduct produces the same mental injuries in two plaintiffs, it does not follow that the defendant is equally liable to both. For physical injury claims, the relation was cut along foreseeability. In *Palsgraf* terms, it matters whether Mrs. Palsgraf was injured by a falling scale at the other end of the train platform or whether she was injured by the package of explosives falling directly on her, even though the resulting injury and culpable conduct may have been the same. For mental injury claims, the relation is between culpability and the interest violated. This notion is independent of foreseeability, causation and any arguable right to mental tranquility. The relationship between a plaintiff's interest and defendant's culpability is a dynamic calculus, the end product of which should affect both the rules of liability and damage. Because mental injuries are transient, unpredictable and universal, the class of foreseeable plaintiffs is a large, amorphous group who are increasingly connected in this modern era by technological advances in transportation and communication. Because the causal links differ from plaintiff to plaintiff in this universe, we can fairly ask: What is the nature of plaintiff's interest? How and why was the plaintiff injured? How does the defendant's conduct relate to the plaintiff's interest and injury? To answer these questions, we start with the interests at stake.

B. Classes of Plaintiff's Interests

This article identifies two broad interests at stake that divide the universe of foreseeable plaintiffs into *direct* and *collateral* victim classes. The direct

266. Speaking as to a claim for future medical monitoring in FELA actions, the Supreme Court suggested: "The reality is that competing interests are at stake—and those interests sometimes can be reconciled in ways other than simply through the creation of a full-blown, traditional, tort law cause of action." *Buckley*, 521 U.S. at 444.

267. Foreseeability and severe injury are the first level analysis in these claims. Without either, the plaintiff would have no claim. No court or commentator has ever suggested that unforeseeable plaintiffs are entitled to relief. Moreover, few commentators have suggested that trivial claims should be compensated. *But see* Bell, *supra* note 7, at 382–91 (suggesting a nominal fixed dollar amount of four hundred dollars to five hundred dollars for trivial claims).

victim class is defined by the circumstance where the defendant's act or omission adversely affects the victim's sense of personal safety or personal interests. Personal interest does not include interest in the well-being of others. In one sense, the well-being of others is of personal interest, but here the interest defined is that of the autonomous self.²⁶⁸ The direct victim class is a close approximation of the plaintiff class if mental injuries behaved more like physical ones and did not have their transient, unpredictable quality. The direct victim class includes the physical impact and zone of danger tests because the defendant's negligence can be said to be "directed" at the victim.²⁶⁹ It recognizes the special circumstances where the common law has long permitted recovery though they do not fairly fit into any of the standard tests, those situations including mishandling of corpses and fear of disease cases.²⁷⁰ Importantly, the direct victim class expands liability to a whole host of situations where the common law may not recognize a cause of action. These can encompass situations where a defendant and a plaintiff have a preexisting relationship in fact or law—attorney/client,²⁷¹ insurer/insured,²⁷² creditor/debtor,²⁷³ physician/patient,²⁷⁴ former intimate partners,²⁷⁵ etc.—in addition to situations where the defendant's conduct fails to be sufficiently extreme and outrageous for the purposes of a cause of

268. The distinction made here is that the defendant's conduct must have a primary effect on the plaintiff. A defendant's conduct is said to be like a stone thrown in a pond, with "ramifying consequences, like the rippling of the waters, without end." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 553 (1994) (quoting *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969)) (internal quotations omitted). The question is not whether each procession of human events and causality was foreseeable, but whether the defendant's conduct threatened the plaintiff directly.

269. I do not imply a scienter element that is higher than the negligence standard of care. *See* RESTATEMENT (SECOND) OF TORTS § 283. Negligent conduct can be intentionally directed against a particular victim without malicious intent, or can apply against the victim without any forethought. *See* *Ochoa v. Superior Court*, 703 P.2d 1, 10 (Cal. 1985) (defendant's negligence is "by its very nature directed at" plaintiff).

270. *See supra* notes 44–45. Erroneous transmission of death notices fall into the collateral interest class because the injury arises out of the death or injury of another though the information later proves to be false.

271. *See, e.g.,* *Lawrence v. Grinde*, 534 N.W.2d 414, 416, 423 (Iowa 1995) (cause of action not recognized).

272. *See, e.g.,* *Crisci v. Sec. Ins. Co. of New Haven, Conn.*, 426 P.2d 173, 175, 179 (Cal. 1967) (claim for emotional distress arising from an insurance dispute).

273. *See, e.g.,* *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1059, 1064–65 (Md. Ct. Spec. App. 1986) (cause of action not recognized).

274. *See, e.g.,* *Burgess v. Superior Court*, 831 P.2d 1197, 1198 (Cal. 1992); *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 770 P.2d 278, 278 (Cal. 1989); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 814, 821 (Cal. 1980). These cases are discussed further *infra* pp. 858–60.

275. *See, e.g.,* *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993) (claim for emotional distress arising from cruel and callous acts by a former intimate partner).

action under intentional infliction of emotional distress but that is nevertheless directed at the plaintiff and is socially undesirable.²⁷⁶

On the other hand, the collateral victim class is comprised of those injured where the defendant's conduct results in death or injury to another, and such death or injury is either witnessed by or communicated to the victim. The collateral victim class includes bystanders who satisfy the common law tests in all of its different flavors.²⁷⁷ It also encompasses those who would fail to meet the common law tests, including bystanders who are closely related to the victim but fail the relational element, or non-bystanders who fail the spatial or temporal elements of the *Dillon* test. So this class includes closely related persons by fact (e.g., like the friend of fifteen years in *Gottshall*),²⁷⁸ the "near miss" bystander (e.g., those who immediately arrive at the scene of the accident like the mother in *Thing*),²⁷⁹ and those who were closely related to the accident victim regardless of the proximity of distance or time (e.g., like the father who was 2500 miles away in *Kelley*).²⁸⁰

If foreseeability is the sole measure of duty and liability, then this dichotomy between direct and collateral victims would be just another arbitrary bright line. A distinction without principle is no distinction at all, and the proposed dichotomy would suffer the same flaw as the common law rules, no better or worse. But my thesis depends on foreseeability only as a prerequisite to recovery, an inquiry into whether a duty *could* exist or not. Once it is determined that a defendant owes *some* level of duty, then the issues are the scope of that duty and the type of liability imposed. These matters do not depend on foreseeability. This dichotomy between direct and collateral interests is justified on three levels.

First, as a normative proposition, the interests of direct victims rank higher than those of collateral victims. For direct victims, the fundamental derivative interest is a right to self-preservation. While it would be incongruous to discuss a class of ordinary tort claims in terms of an elevated

276. See, e.g., *id.* at 600. In *Boyles*, the defendant videotaped a sexual encounter with the plaintiff, and then showed the tape to various people. Upon learning of this indecency, the plaintiff suffered severe mental injuries and sought psychological counseling. The Texas Supreme Court declined to recognize a cause of action for negligent infliction of emotional distress under these facts, reasoning that tort law should not compensate "for every instance of rude, insensitive or distasteful" conduct though that conduct may result in foreseeable mental injuries. *Id.* at 602.

277. See *supra* Part II.B, pp. 818–23 and accompanying notes.

278. *Gottshall v. Consol. Rail Corp.*, 566 F.3d 530, 532 (3d Cir. 1995).

279. *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989).

280. *Kelley v. Kokua Sales & Supply, Ltd.*, 532 P.2d 673, 676 (Haw. 1975).

philosophical discussion of natural rights,²⁸¹ and that is not the intent here, the interest derives from a person's fundamental right to exist, which is consistent with the interest to be free of harm from wrongful conduct as recognized by traditional tort law.²⁸² At its core, tort law involves a transactional connection between a plaintiff and a defendant, where the defendant has acted upon the plaintiff in a manner that causes injuries.²⁸³ Under this framework, a direct victim is the party acted upon and is closest in transactional proximity to the culpable conduct, and the defendant and plaintiff stand together as conjoined participants in an accident.²⁸⁴

Conversely, the true interest of a collateral victim is the safety or well-being of others. The injury here derives from a violation of another person's interest in self-preservation. Liability is best understood as derivative of the relationship with the primary victim, whether in fact by some preexisting relationship or in law by a temporal and spatial connection to the accident.²⁸⁵ Unlike the common law bystander, a collateral victim has a derivative right to sue based on a relationship to the accident, meaning that the contemporaneous witnessing of the accident may be sufficient to merit remedy even if the plaintiff is not "closely related" as defined by the common law.²⁸⁶ In these cases, however, we must recognize that the connection between defendant and collateral victim is a quantum more distant and causality is more elastic.

The interest of direct victims is of a higher order because "all duties are derivative from the fundamental and inalienable right of self-

281. Pearson, *Response to Bell*, *supra* note 66, at 415–16. Bell justified a freedom from mental injuries as an entitlement under a Rawlsian "original state" analysis. Bell, *supra* note 7, at 341–44 (relying on J. RAWLS, A THEORY OF JUSTICE 11–12 (1971)). Pearson criticized this approach on the basis that Rawls did "not deal with rules of law at this low a level of abstraction." Pearson, *Response to Bell*, *supra* note 66, at 415.

282. RESTATEMENT (SECOND) TORTS § 7 (1965). There is an inverse principle in tort law as well. The right to self-protection and self-preservation is a defense to a tort claim, i.e., the right to commit an otherwise tortious act on another. *See generally* DAN B. DOBBS, THE LAW OF TORTS § 70, at 159 (2000).

283. Goldberg & Zipursky, *supra* note 4, at 1684 (citing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 81 (1995)).

284. *Id.*

285. *See id.* at 1664 n.99 (liability is a "derivative" action arising from the familial relationship similar to wrongful death and loss of consortium actions).

286. These are primarily plaintiffs who witness a traumatic accident, and who suffer severe injuries as a result. In the previous hypothetical involving the negligent driver in the school zone, the school children who witness a gruesome accident are foreseeable victims. *See supra* pp. 839–40. Of course, those who are not "closely related" to the accident victim and who are not present at the scene of the accident are certainly unforeseeable victims.

preservation.”²⁸⁷ Those who have been harmed by fear for self are really the primary victims, and the others’ harms are secondary and derive from the threat to the primary victim. This is so even though the injuries are qualitatively or normatively indistinguishable, arise from the same negligent act and are equally foreseeable. This conclusion can be reached by comparing two hypothetical scenarios. The first scenario is the classic bystander fact pattern: a defendant’s negligence physically injures Harry and the damages are calculated at \$100; his sister, Sally, witnesses the accident and suffers mental injuries calculated at \$100; both Harry and Sally are equally foreseeable; both injuries are real and severe. The second scenario is a variation of *Palsgraf*: the defendant’s negligence caused mental injury on Harry, who was in the zone of danger; Sally was off in the distance, safely away from any physical peril; Sally witnessed the imminent danger to her brother, but instead of suffering mental injury she fainted and broke her arm. In both scenarios, we assume that the jurisdiction does not make a normative distinction between physical and mental injury; that damages are legislatively capped per occurrence at \$100; that remedies are limited under statute to the “primary” victim, which the statute does not define but is left to the interpretation of the courts; and that both Harry and Sally suffered foreseeable injuries valued at \$100. Who gets the damages? The problem is one of distributing remedies, and the solution depends on whose interest ranks higher. I propose that the more deserving plaintiff in both cases is Harry, who was the focal recipient of the defendant’s negligence and causally nearer to the accident. Only because of Harry’s injury was Sally, too, injured; and so Sally’s injury is derivative of Harry’s and is further down the causal chain of events. This is not to suggest that Sally is not deserving of legal protection, but that her interest is of a lesser order in a world of limited remedies.

287. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 181 (1953). Strauss explained Thomas Hobbes’s theory of the natural right to self-preservation:

If, then, natural law must be deduced from the desire for self-preservation, if, in other words, the desire for self-preservation is the sole root of all justice and morality, the fundamental moral fact is not a duty but a right; all duties are derivative from the fundamental and inalienable right of self-preservation. There are, then, no absolute or unconditional duties; duties are binding only to the extent to which their performance does not endanger our self-preservation. Only the right of self-preservation is unconditional or absolute.

Id. Strands of this philosophy have appeared in tort doctrines. *See, e.g.,* *Laidlaw v. Sage*, 52 N.E. 679, 685 (N.Y. 1899) (holding that a defendant who deliberately caused the injury of another in an effort to save himself is not liable for battery and noting “self-preservation is the first law of nature”).

Second, the above public choice problem illustrates the main deficiency in a foreseeability analysis. Foreseeability has been a singular concept measured only by the reasonable person standard. This concept generally works for physical injuries due to the expected properties of physical injuries and accidents. Because the ripple effects of a negligent act extend far broader for mental injuries, the classification of direct and collateral interests serves as a gradation of reasonable foreseeability. Just as the chain of causal links is scrutinized to determine whether an accident was foreseeable or freakish in physical accidents, the causal elasticity and the varying interests can be scrutinized to qualitatively distinguish the otherwise singular concept of foreseeability. My observation is that direct victims are closer in proximity to the negligent act and the defendant, and their personal interests are of a higher order in relation to the negligent conduct. These facts are relevant to whether liability should attach and under what circumstances, and therefore they can and should be considered in determining both the rules of liability and damage.²⁸⁸

Third, evidence of the dichotomy between direct and collateral interests is seen in existing case law where courts have struggled to find principled alternatives to the all-or-arbitrary choice. After announcing *Dillon*, California continued to experiment in this field. The decisions in *Thing* and *Elden* reflected a growing dissatisfaction with a trend toward a pure foreseeability test, or a variant thereof.²⁸⁹ New factual circumstances continued to test the old doctrines, and California searched for other solutions.

In *Molien v. Kaiser Foundation Hospitals*,²⁹⁰ a hospital misdiagnosed a woman as having syphilis.²⁹¹ The wife believed that she contracted the disease from her husband, and subsequent tensions led to a divorce.²⁹² The husband sued the hospital for negligent infliction of emotional distress.²⁹³ The hospital correctly argued that the husband could not satisfy the three-prong *Dillon* test.²⁹⁴ The court acknowledged that the husband was not a bystander in the mold of *Dillon*, but nevertheless held that the husband was a foreseeable plaintiff.²⁹⁵ Reasoning that misdiagnosis of the wife's

288. See *infra* Part V.A, pp. 865–67 and accompanying notes for a discussion of the proposed standard.

289. See *supra* pp. 820–21 and accompanying notes.

290. 616 P.2d 813 (Cal. 1980).

291. *Id.* at 814.

292. *Id.* at 814–15.

293. *Id.* at 815.

294. *Id.*

295. *Id.* at 816.

condition could equally affect the husband's mental tranquility, the court held that the husband was a "direct victim" of the defendant's negligence.²⁹⁶

Subsequent cases have elaborated on the distinction between direct and indirect victims. In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*,²⁹⁷ a mother and son sought psychiatric treatment for family problems. In the course of therapy, the doctor molested the son and the mother brought suit for her mental injuries.²⁹⁸ The court permitted the action. It first reasoned that the therapist owed a duty not only to the mother and son individually but also to the "family relationship," and therefore he should have known that molestation would "directly injure" the mother as well as the parent-child relationship.²⁹⁹ This reasoning allowed the court to conclude that although the physical abuse was directed at the son, "the therapist's tortious conduct was accordingly directed against both."³⁰⁰

Three years later, in *Burgess v. Superior Court*, a mother sued a doctor for mental injuries caused by her post-delivery learning of injuries to her child during delivery.³⁰¹ The court announced that California has two "theories" of recovery: the bystander theory under *Dillon* and the "direct victim" theory under *Molien*.³⁰² The mother did not contemporaneously witness the injuries to her child because she was under anesthesia, thus failing the *Dillon* test. But the court found liability based on the "direct victim" theory. In seeking to clarify an admittedly confusing dichotomy created by *Molien* and *Marlene F.*,³⁰³ the court held that a cause of action exists in cases where a duty arising from a preexisting relationship created by fact or law is breached and this preexisting relationship determines whether a plaintiff was a "direct victim."³⁰⁴

The line of cases in *Molien*, *Marlene F.*, and *Burgess* did not provide clear guidelines on the distinction between "direct" and "bystander"

296. *Id.* at 816–17. The court's analysis was guided by the Hawaii Supreme Court's decision in *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970). See *supra* pp. 821–22 and accompanying notes.

297. 770 P.2d 278 (Cal. 1989).

298. *Id.* at 279.

299. *Id.* at 282.

300. *Id.* at 283.

301. 831 P.2d 1197, 1198–99 (Cal. 1992).

302. *Id.* at 1197.

303. *Id.* at 1200 (noting that the "direct victim" designation has tended to obscure, rather than explain the problem).

304. The "direct victim" theory applies where there is a breach of duty "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of relationship between the two." *Id.* at 1201 (quoting *Marlene F.*, 770 P.2d at 282) (internal quotation marks omitted).

victims.³⁰⁵ Interestingly, all three cases involved a doctor-patient relationship and mental injuries arising from this relationship.³⁰⁶ The analyses, taken together, are driven with the end in mind—not letting healthcare providers get away with negligence or other more egregious conduct—and the existence of a doctor-patient relationship in each of these cases was convenient to fit the “direct victim” theory. The cases show, however, that California latched on to some intuitive sense of a distinction in the varying interests of plaintiffs.³⁰⁷ In proposing the dichotomy between direct and collateral victims, this article does not adopt the California line of cases. It presents a set of principles under which analysis becomes less arbitrary than under the current scheme; and so the concept advanced here is conceptually broader and, hopefully, clearer in the statement of the rule and its application.

The concept of direct and collateral victims has been recognized in other areas of tort law. Similar to claims for negligent infliction of emotional distress, actions for negligent infliction of economic loss pose the same problem of a large, indeterminate class and the potential for liability *ad infinitum*.³⁰⁸ The ripple effects of negligently inflicted economic loss are an ever-widening arc of foreseeable consequences. In these cases, courts have generally refused to recognize a cause of action.³⁰⁹ But similar to the way

305. Even the California Supreme Court has admitted that the distinction between “bystander” and “direct” victim has created an “amorphous nether realm” and has contributed to the difficulty in defining duty. *Thing v. La Chusa*, 771 P.2d 814, 823 (Cal. 1989). Commentators have suggested the same. See Pearson, *supra* note 28, at 515 (finding the distinction is “analytically unsound”); Sandor & Berry, *supra* note 10, at 1269 (finding the distinction does not provide sufficient guidelines).

306. Commentators have suggested that the distinction rests on a “special relationship” defined in *Marlene F.* See Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1 (1992); Greenberg, *supra* note 144, at 1286.

307. See *infra* note 343 for a discussion of the post-*Molien* cases.

308. Rabin, *supra* note 37, at 1526.

309. See, e.g., *Dundee Cement Co. v. Chem. Labs., Inc.*, 712 F.2d 1166, 1169 (7th Cir. 1983); *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 128 (Iowa 1984). Almost as corollary to the rule against economic loss, the law proscribes recovery for negligent infliction of emotional distress brought about by economic loss. See, e.g., *Branch v. Homefed Bank*, 8 Cal. Rptr. 2d 182, 184–85 (Ct. App. 1992) (“We restate that which we believe to be settled law, namely that damages for emotional distress are ordinarily not recoverable in an action for negligent misrepresentation when the injury other than the emotional distress is only economic.”); see Sandor & Berry, *supra* note 10, at 1268 (“The proscription against recovery for emotional injury when the underlying harm is economic is nearly universal.”). The general prohibition against recovery applies to situations where there is an interference with an existing contract or where there is no contract at all. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) (Holmes, J.) (“A tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other. . . .”); *Byrd v. English*, 43 S.E. 419 (Ga. 1903) (no contractual relationship).

the law has carved out special exceptions in the field of negligent infliction of emotional distress,³¹⁰ the law of negligent infliction of economic loss has recognized special circumstances on an ad hoc basis.³¹¹ In particular, a discernable line of cases has recognized an exception in the area of professional services.³¹² In analyzing this line of cases, Rabin distilled the legal principle: When the intended beneficiary is “directly” harmed—a concept indicating that the plaintiff was one of a small class particularly intended to benefit from the defendant’s activity—recovery is granted; on the other hand, if the plaintiff is one of a general category of potential third-party beneficiaries, such as investors or lenders who might rely on an accountant’s audit statement, recovery is denied.³¹³ In these cases, courts have distinguished direct and collateral economic loss as best they can, sometimes drawing arbitrary lines where the concern for widespread liability outweighs the particular interest of the case.³¹⁴

Absent infinite resources to compensate for every “wrong,” a finer grade of distinction is needed. Accordingly, we can distinguish between harm caused when the stone is thrown into the pond, and the ripple effect of harm further along in the causal chain. Therefore, the article’s dichotomy between direct and collateral victims is rational, supported by traditional tort principles, and is less arbitrary.

310. See *supra* pp. 814–15 and notes 44–45 (discussing special circumstances such as erroneous death notices, mishandling of corpses, and cancerphobia cases).

311. See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) (allowing recovery for economic losses of fishermen after oil spill); see also *In re Exxon Valdez*, 104 F.3d 1196, 1198 (9th Cir. 1997) (barring recovery for Alaska natives’ economic losses after an oil spill); *In re Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991) (urging other remedies for economic loss); Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1 (1994) (suggesting recovery for economic losses be barred due to alternative remedies).

312. Rabin, *supra* note 37, at 1527 & n.42 (citing *Earp v. Nobmann*, 175 Cal. Rptr. 767, 778–80 (Ct. App. 1981) (real estate broker); *Brousseau v. Jarett*, M.D., 141 Cal. Rptr. 200, 203–04 (Ct. App. 1977) (physician); *Cooper v. Jevne*, 128 Cal. Rptr. 724, 728–29 (Ct. App. 1976) (architect); *M. Miller Co. v. Cent. Contra Costa Sanitary Dist.*, 18 Cal. Rptr. 13, 15 (Dist. Ct. App. 1961) (engineer)).

313. *Id.* at 1527–28 (analyzing *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) (Cardozo, J.); *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922) (Cardozo, J.); and their progeny); cf. *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807–08 (9th Cir. 1992) (denying motorist’s claim for losses from higher gasoline prices resulting from the Exxon Valdez oil spill).

314. Rabin, *supra* note 37, at 1538; see *Sandor & Berry*, *supra* note 10, at 1248, 1274–75 (distinguishing between “primary, direct victim” and other collateral victims in proposing a standard for negligent infliction of emotional distress for economic losses).

C. Classes of Defendant's Culpability

The next step in the analysis is to examine culpability of defendants. Culpability is defined as blameworthiness.³¹⁵ Aside from strict liability, which is irrelevant in this field, tort law encompasses three general categories of culpability: intentional, recklessness, and negligence.³¹⁶ *Intentional* is a broad concept in torts, encompassing not only purpose, but also knowledge or belief.³¹⁷ Intent includes the actor who wishes to cause the event in the sense of motive, and the one who believes that the consequences are substantially certain to occur.³¹⁸ It is a subjective standard that inquires into the defendant's actual knowledge.³¹⁹

Recklessness is the next level of culpability. The Restatement defines it as when a defendant knows or has reason to know of facts which would lead a reasonable person to realize that his act or intentional omission not only creates an unreasonable risk of harm, but also that "such risk is substantially greater than that which is necessary to make his conduct negligent."³²⁰ Some jurisdictions recognize recklessness as "quasi-intent" culpability, often characterized by the descriptive "willful, wanton, and reckless," which is a functional equivalent to the Restatement definition.³²¹ The test of recklessness is more subjective than the test of negligence, but it

315. BLACK'S LAW DICTIONARY 385 (7th ed. 1999); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 552 (1993).

316. Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 471-72 (1992). There is an argument that in between strict liability and negligence is "slight negligence," and between negligence and reckless is "gross negligence." See *id.*; Edwin H. Byrd, III, Comment, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1400-01 (1988). This article does not split these hairs, and will instead use intentional, reckless, and negligent as the standard categories of a defendant's culpability.

317. Criminal law further distinguishes "intentional" between purpose and knowledge. Simons, *supra* note 316, at 470-71 & n.15. However, in torts, purpose and knowledge collapse into the single category of intentional torts. *Id.* at 471.

318. RESTATEMENT (SECOND) OF TORTS § 8A (1965). For example, in battery, "[i]t is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him." *Id.* § 13 cmt. c. Nevertheless, "intent" or "purpose" in the narrower sense of "motive" plays a limited role in tort law. For example, the tort of malicious prosecution requires that the defendant institute criminal proceedings against another "primarily for a purpose other than that of bringing an offender to justice. . . ." *Id.* § 653(a) (1977).

319. James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1143 (2001). But see RESTATEMENT (SECOND) OF TORTS § 8A (1965) (incorporating the "substantial certainty" standard).

320. RESTATEMENT (SECOND) OF TORTS § 500 (1965). In defining reckless, the *Restatement* states that the harm is a "physical harm." For obvious reasons, physical harm is not applicable here.

321. See PROSSER & KEETON, *supra* note 12, § 34, at 212-13 (noting that unreasonable disregard of a known or obvious risk so great as to make it highly probable that harm would follow).

does not require specific awareness of a risk. It suffices that the defendant had “reason to know.”³²² Accordingly, recklessness has both a subjective component (awareness of a potential for serious injuries) and an objective component (conduct assessed as negligent).³²³

Negligence is the next level of culpability. “Negligence is a failure to do what the reasonably prudent person would do under” the circumstances.³²⁴ This person is a legal fiction,³²⁵ who embodies the “community ideal of reasonable behavior, determined by the jury’s social judgment” and value.³²⁶ The law imputes the reasonably prudent person with the wherewithal to foresee harm to a victim in all the permutations of foreseeable consequences. The standard of conduct is objective, representing the “ideal.”³²⁷

Although tort law recognizes a spectrum of culpability, courts have compartmentalized intentional and negligent infliction of emotional distress theories for mental injury claims. The two theories exist not as two points on a continuum of culpabilities, interests and remedies, but as discrete divides where some foreseeable plaintiffs are remedied and many more simply fall through the doctrinal cracks.

It is well settled that courts recognize claims for mental injuries when they are the product of intentional and outrageous conduct.³²⁸ Although “courts were initially reluctant to adopt the separate tort of intentional infliction of emotional distress,”³²⁹ sometime around 1930 they began to

322. RESTATEMENT (SECOND) OF TORTS § 12 (1965).

323. Henderson & Twerski, *supra* note 319, at 1143 (citing RESTATEMENT (SECOND) OF TORTS § 500 (1965)).

324. PROSSER & KEETON, *supra* note 12, § 32, at 175.

325. The reasonably prudent person is commonly described as “abstract,” “hypothetical,” and “mythical.” For a discussion, see generally PROSSER & KEETON, *supra* note 12, § 32, at 174–75. See, e.g., *Collins v. Altamaha Elec. Membership Corp.*, 260 S.E.2d 540, 541–42 (Ga. Ct. App. 1979); *Massey v. Scriptor*, 258 N.W.2d 44, 47 (Mich. 1977); *Ryder v. Murphy*, 124 N.W.2d 238, 240 (Mich. 1963); *Trentacost v. Brussel*, 412 A.2d 436, 440 (N.J. 1980); *Mikkelsen v. Quail Valley Realty*, 641 P.2d 124, 126 (Utah 1982).

326. PROSSER & KEETON, *supra* note 12, § 32, at 175.

327. A.P. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 9 (Methuen & Co., Ltd. 3rd ed. 1928) (“He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen.”).

328. Scholars, rather than courts, led the development of this tort. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982). Givelber cites Magruder, *supra* note 58, and William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939), as the most influential articles. *Id.* at 42 n.1.

329. Melanie L. Carpenter, Note, *Petersen v. Sioux Valley Hospital: Reckless Infliction of Emotional Distress*, 38 S.D. L. REV. 359, 370 & n.123 (1993) (citing Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort: “Outrage,”* 38 A.L.R.4th 998, 1002–03 (1985)). Similar to claims for negligent infliction of emotional distress,

recognize claims involving extreme and outrageous conduct.³³⁰ These claims can be brought without meeting any artificial limitations or tests, and a claimant need only show outrageous conduct that caused some mental injury.³³¹

In an action for intentional infliction of emotional distress, culpability is the prime focus. The early law of intentional torts was concerned primarily with preserving peace and social order rather than with protecting a right to be free of mental injury.³³² The modern law of intentional infliction of emotional distress is probably less concerned with the dangers of social disorder, but a plaintiff who shows extreme and outrageous conduct will “seldom lose because the emotional distress is not severe enough.”³³³ Extreme and outrageous conduct has been defined as conduct that exceeds all bounds usually tolerated by decent society, and of a nature especially calculated to cause severe mental distress.³³⁴ Where such unacceptable conduct leads to injuries, the law imposes the full range of penalties which is said to be punitive.³³⁵ The extent of liability is great, including out-of-pocket economic loss, damages for the injury, and potential punitive damages. But courts are less concerned with the scope of exposure since intentional infliction of emotional distress is almost always directed at a particular individual or finite group of individuals and few in our society engage in such outrageous conduct necessary to impose liability, and so there is no issue of a wider exposure liability to the general populace.

these claims were cited for the difficulties in proving damages, fraudulent claims, and a “flood of litigation.” *Id.* at n.124.

330. PROSSER & KEETON, *supra* note 12, § 12, at 60. Petty insult or indignity lacks, from its very nature, any assurance that the mental distress is genuine, serious, and reasonable. *Id.* at 59.

331. See Heidenreich, *supra* note 41, at 282. The *Restatement* has formulated a definition of intentional infliction of emotional distress, which has been adopted by many jurisdictions: “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.” RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). Most jurisdictions have adopted functionally the same standard. See, e.g., Hubbard v. United Press Int’l, Inc., 330 N.W.2d 428, 438–39 (Minn. 1983) (recognizing intentional infliction of emotional distress as an independent tort).

332. See THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 139–75, 353–78 (Little, Brown & Co. 5th ed. 1956); Smith, *supra* note 220, at 194.

333. Pearson, *supra* note 28, at 486; see also Givelber, *supra* note 328, at 42–43 (stating the action “in practice tends to reduce to a single element—the outrageousness of the defendant’s conduct”).

334. See, e.g., Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1, 4 (7th Cir. 1972); Meyer v. Nottger, 241 N.W.2d 911, 918 (Iowa 1976); see also RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (characterizing the standard as conduct that goes “beyond all possible bounds of decency and . . . utterly intolerable in a civilized community”).

335. Thing v. La Chusa, 771 P.2d 814, 829 (Cal. 1989).

On the other hand, claims for negligent infliction of emotional distress do not focus so much on the defendant's culpability. So long as the defendant's conduct is deemed to be below the "ideal" standard, the focus becomes whether the foreseeable plaintiff was injured in one of the defined situational templates.³³⁶ The negligence could be slight, on par with reaching for a cup of coffee in a car at precisely the wrong moment, but in the eyes of the law the act would be sufficient to produce potentially great liability for mental injuries unless the law steps in to limit such exposure.³³⁷ Yet the negligence could be patent, perhaps even bordering on recklessness, but there is no liability absent a specific set of factual markers.

V. PROPOSED STANDARD

A. Generally Applicable Rules

Like other difficult areas of tort law, this field has been problematic because the traditional framework breaks down under the factual circumstances presented by these cases. Judicial and scholarly analyses have tended to compartmentalize rules of liability and damage, and have created an intellectual inertia, hindering critical analysis.³³⁸ In proposing an alternative theory, this article lays out two benchmarks. One, any general theory of liability should be neutral in principle, and its rules should apply evenly to all segments of society. Two, the new theory should serve the underlying policy considerations: weed out fraud and frivolity; limit liability to socially tolerable levels; and allocate the social costs fairly between plaintiff and defendant and among foreseeable plaintiffs.

Consistent with Judge Cardozo's suggested principles in *Palsgraf*,³³⁹ this article proposes an analysis requiring a three-part calculus of (1) examining the classes of plaintiff's interests, (2) weighing the defendant's culpability against the interests affected, and (3) allowing rules of *liability* and *damage* to apportion the risks in a balanced manner. The following set of generally applicable rules is proposed. Because the class of direct victims is limited to

336. See *supra* Part II, pp. 813–31 and accompanying notes.

337. Miller observes that even those who are more sympathetic to compensating victims may be disturbed by the imposition of liability disproportionate to blameworthiness. Miller, *supra* note 37, at 19.

338. Cf. Daniel A. Farber, *Recurring Misses*, 19 J. LEG. STUD. 727, 737 (1990) (discussing the problem with scholarly analyses of increased risk harms and the problems of intellectual compartmentalization of analysis). Miller is credited with attempting to jointly use rules of liability and damage in this area. Miller, *supra* note 37.

339. PROSSER & KEETON, *supra* note 12, § 43, at 289–90.

a small group and their interests are of a higher order, claims can be evaluated under generally accepted tort principles of duty, proximate cause and damage. These mental injury claims are treated no differently than physical injury claims. This has the benefit of a certain purity of principle consistent with physical injury claims, including the provision of actual damages.³⁴⁰ On the other hand, the class of collateral interests poses far more difficult problems. The potential scope of exposure is broadly distributed, amorphous, and unpredictable. Because the interest is of a lesser normative order, a defendant's culpability should be higher to impose liability. Such a heightened culpability requirement serves as a mechanism to contain liability, resulting in liability proportional to culpability. For this class of interest, a modification of both rules of liability and damage is needed. Collateral victims are entitled to relief only if the defendant's conduct is reckless or more, and damages should be limited to economic losses.³⁴¹

Culpability plays a significant role in determining the extent of the total liability, which makes logical and practical sense.³⁴² So long as a defendant's conduct is merely negligent, the scope of exposure is limited to direct victims, either physically or mentally injured. If the law stopped at this point, few would argue that liability could be potentially infinite as the

340. See RESTATEMENT (SECOND) OF TORTS §§ 903-905 (1965).

341. See *id.* §§ 904(2), 906. Miller was the first commentator to propose limiting damages to economic losses. He advocated opening up the class of plaintiffs to all foreseeable plaintiffs, but limiting all damages to economic losses. Miller, *supra* note 37, at 38-47. Subsequently, Diamond also endorsed the concept of awarding only economic loss damages to all foreseeable plaintiffs. Diamond, *supra* note 66, at 479-80. Miller noted that his proposal for limiting damages to economic losses "may smack of irony" since the injury itself is not remedied, but justified the approach based on reason and policy. Miller, *supra* note 37, at 40. This article agrees with the approach and justification to the extent the limitation is applied to the class of collateral victims. Moreover, there could be justification for allowing collateral victims full remedies upon a finding of recklessness. See *infra* p. 882. But this article takes a more cautious approach.

342. For a formulaic representation of the rules, liability operates under a three factor calculus where a defendant's liability is a function of culpability and plaintiff's interests: $L = f[C(n,r) \times V(d,c)]$, where $C(n) \times V(c) = 0$, $C(r) \times V(c) = D(e)$, and $C(n,r) \times V(d) = D(a)$. The term $V(d,c)$ denotes the division of all foreseeable plaintiffs into direct and collateral victims; the term $C(n,r)$ denotes the division of negligence and recklessness; and the term $D(a,e)$ denotes the division of actual and economic damages. Because $C(n) \times V(c) = 0$, we can anticipate that many potential victims would be precluded from liability as a defendant's culpability would not exceed simple negligence. Thus, scope of exposure and severity are limited significantly while there remains the potential for remedies across the entire class of foreseeable plaintiffs. As discussed, the formula to determine liability for physical injuries under the common law is: $L = \sum (S_1 + \dots + S_N)$. The key difference between this and the above formulation is the interplay of the defendant's level of culpability in determining total liability. This is the connection the common law and academic commentary have not recognized.

scope of exposure would not be a quantum greater than that for physical injuries, and most would argue that the rule would be no more or less arbitrary than the physical impact or zone of danger tests. In the larger scheme of things, direct victims are not so much the concern. The focus of the debate has always been: Why is the broad class of foreseeable collateral victims not remedied?

My central thesis is that there is a relationship between culpability and the different interests of the plaintiff.³⁴³ As the defendant's conduct slides down the scale of culpability from intentional to negligent conduct, less moral blame attaches, which should be accounted for in etching the limits of liability.³⁴⁴ The proposal suggested here exposes a defendant to liability only if her conduct is commensurate with the risks imposed on the plaintiffs' various interests. Defendants then proportionally bear the risk of injuries through adjustments in the rules of liability and damage.

In addition to the theoretical considerations, defining duty in this manner is justified by the following practical considerations: (1) it limits liability, (2) it is faithful to the principles of proportionality and fairness underlying Anglo-American jurisprudence, (3) it borrows principles from well-established tort causes of action and theories of remedy, and (4) it has a symmetrical deterrence effect on defendants and plaintiffs.

343. This connection between culpability and a tortfeasor's relationship to the victim is seen in a line of California post-*Molien* cases. In *Bro v. Glaser*, the California Court of Appeals analyzed twenty-six post-*Molien* cases, and concluded that the appropriate test for determining direct victim liability is a balancing of (1) whether a preexisting consensual relationship existed between the victim and tortfeasor and (2) the degree of outrageousness in the tortfeasor's behavior. 27 Cal. Rptr. 2d 894, 906 (Ct. App. 1994).

344. Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 588-92 (1933). I realize that, strictly speaking, an intentional tort does not require a malicious intent to harm, the classic textbook case being *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891). See RESTATEMENT (SECOND) OF TORTS § 8A. But in most circumstances where intentional conduct results in significant injuries, for example battery or intentional infliction of emotional distress, a specific intent to harm or a callous disregard of the substantial certainty of such harm is found. Cases of "innocent" intentional conduct resulting in severe emotional distress are few and far between. As to intentional torts against property such as trespass or conversion, the argument for some level of moral culpability is less evident. In any event, such torts should rarely result in severe emotional distress by the very nature of the harm absent compelling or aggravating circumstances such as insurance disputes, which typically involve catastrophic or significant changes in one's life.

B. Limitation of Liability

Although compensation remains a fundamental goal of accident law,³⁴⁵ compensation must stop when its burdens become disproportionately heavy on defendants. We have seen that the policy of limiting liability and unpredictability is the fundamental concern of the common law in this field.³⁴⁶ At this point in the experience, the law has generally accepted the conclusion that foreseeability does not adequately curtail either severity or scope of exposure. Given this premise, if we believe defendants owe some level of duty to all foreseeable plaintiffs, then as a matter of logical certainty either the rules of liability or damage, or both, must be modified.

Of course, this argument is open to the criticism that it puts the cart before the horse. If limiting liability was an end to itself and these rules are a means to that end, they are no different from the common law rules. The common law *did* modify the rules of liability by not recognizing liability outside of certain situations for the specific purpose of limiting liability. And there would be no credible criticism of the common law rules for drawing the lines taken.³⁴⁷ Any proposal for a general theory of liability should find legitimacy outside of this circular argument, and limitation of liability should be a litmus test for whether the proposed rules are *practical* rather than whether they are *principled*.

C. Proportionality

When courts refer to “infinite” or “unlimited” liability,³⁴⁸ the references are really shorthand for liability that is grossly disproportionate to the

345. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 294 (1970). Calabresi categorized the cost of accidents into primary, secondary, and tertiary costs. Primary costs result directly from the injuries suffered in an accident. These include the economic losses (e.g., medical bills, lost wages, etc.) and intangible damages such as pain and suffering. Secondary costs are costs to society once an accident occurs. These costs include lost productivity and deterrence effects on social behavior. Tertiary costs are costs associated with the administration of the judicial process. *Id.* at 26–31.

346. *See supra* Part III.B, pp. 836–42 and accompanying notes.

347. In Pearson’s view, the arbitrariness of the common law tests in fact served a legitimate policy consideration. Pearson, *supra* note 28, at 484–85. He argues that common law tests are more like traffic regulations because “[t]here are occasions in which a policy will suggest more than one rule that will satisfy it, with no logical way of choosing between them.” *Id.* at 482.

348. *See, e.g.*, *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 546, 557 (1994); *Thing v. La Chusa*, 771 P.2d 814, 819 (Cal. 1989); *Williams v. Baker*, 572 A.2d 1062, 1069–70 (D.C. 1990); *Johnson v. Ruark Ob/Gyn Assoc.*, 395 S.E.2d 85, 99 (N.C. 1990) (Meyer, J., dissenting); *Wilder v. City of Keene*, 557 A.2d 636, 638 (N.H. 1989); *Kloepfel v. Bokor*, 66 P.3d 630, 635 (Wash. 2003); *Finnegan ex rel. Skoglund v. Wis. Patients Comp. Fund*, 666 N.W.2d 797, 802 (Wis. 2003).

underlying culpability. Courts are not adverse to imposing high liability in an absolute dollar sense, or liability having a severe relative consequence on a defendant.³⁴⁹ Nor do defendants have some fundamental right to be free of excessive liability in an absolute sense.³⁵⁰ The concern is for fundamental fairness.³⁵¹ Anglo-American jurisprudence abhors disproportionate penalties.³⁵² This is the central philosophy of crime and punishment.³⁵³ This philosophy is reflected in the Constitution, which requires fundamental fairness. The imposition of civil damages, too, must withstand constitutional analysis and be proportional to the underlying culpability.³⁵⁴ The concern for fairness underpins tort doctrines as well.³⁵⁵

A plaintiff's interest and her right to remedy are only parts of the equation.³⁵⁶ A defendant, too, has a right to be free of disproportionate punishment. In tort law, fairness is determined by weighing the liability to the culpability. Negligent culpability is based on an objective standard of care. The reasonably prudent person is "a fictitious person, who never has existed on land or sea,"³⁵⁷ and no person can consistently live up to this standard. It is largely a matter of fate that a moment's carelessness will result in legal liability.³⁵⁸ Speaking in the context of claims for negligently

349. See, e.g., Cheryl D. Block, *Liquidations Before and After Repeal of General Utilities*, 21 HARV. J. ON LEGIS. 307, 334 (1984) (stating liquidation is a corporation's death); Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1725 (2002) (involving \$54 billion in liabilities incurred for asbestos, and another \$200 to \$265 billion more in the future) (citing STEPHEN J. CARROLL ET AL., RAND INSTITUTE FOR SOCIAL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 53, 77 (2002)).

350. Punitive damages impose excessive liability on a defendant, but they are a well-established part of tort law. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring) (stating as far back as 1868, when the Fourteenth Amendment was adopted, punitive damages were part of the American common law of torts).

351. See *Moran v. Ohio*, 469 U.S. 948, 955 (1984) ("[N]otions of fundamental fairness . . . are at the heart of Anglo-American law. . .").

352. Rabin, *supra* note 37, at 1534.

353. *Id.* at 1533–34. Proportionality analysis is required under the Fifth, Eighth, and Fourteenth Amendments of the Constitution. Courts must compare "the gravity of the offense," understood to include not only the injury caused but also the defendant's culpability, with "the harshness of the penalty." *Solem v. Helm*, 463 U.S. 277, 292 (1983).

354. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) ("Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness.").

355. For example, proportional liability is the central concept in the doctrine of comparative negligence. See *infra* p. 876–77 and accompanying notes.

356. See Pearson, *Response to Bell*, *supra* note 66, at 416 ("I agree with Professor Bell that psychic well-being is an important value. But that is where analysis should begin rather than end.").

357. PROSSER & KEETON, *supra* note 12, § 32, at 174.

358. For example, aside from freakish accidents and random happenstance, there will rarely be an accident amongst the interactions of reasonably prudent persons. But in reality, most

inflicted economic loss, Rabin observed that "it would make no sense to hold a careless driver responsible for the massive economic losses suffered when he brings traffic to a standstill in the Brooklyn Battery Tunnel during the rush hour."³⁵⁹ It follows then, absent natural limitations like those found in accidents producing physical injuries, the law must impose legal limits on disproportionate liability when culpability is simply a failure to conduct oneself to an unachievable standard of behavior.

Tort law must apportion liability "based upon conduct which is socially unreasonable."³⁶⁰ For mental injuries, a simple act of carelessness can lead to disproportional liability as seen in the earlier hypothetical concerning the negligent driver in a school zone.³⁶¹ Where a negligent act primarily impacts a small group of direct victims, the scope of exposure is limited. So while severity may nevertheless be high, as may be the case with a physical injury accident, liability is said to be commensurate with culpability. Outside of this, the law can and should impose limitations where the scope of exposure can be high, and so liability becomes disproportional in light of the experience of the law in this field. If, however, culpability extends beyond simple carelessness and a defendant's conduct is said to be in reckless disregard of the safety of others, then a commensurate increase in exposure to liability should naturally follow.

Consider again the earlier hypothetical of the negligent driver in a school zone.³⁶² If the driver was speeding 60 mph, instead of 35 mph, and she was aware that she was driving through a school zone with a 25 mph speed limit, then it may not offend the notion of fairness if she is liable for the physical injuries to the boy who was struck, the mental injury suffered by his sister who was in the zone of danger, and economic losses to all other foreseeable plaintiffs. Liability is reasonably capped to actual damages for injuries to the boy and girl, and in addition whatever provable out-of-pocket economic losses for all other foreseeable victims.

A natural order exists within the law of torts. The scope of exposure is an inverse function of culpability. Victims of intentional infliction of injuries

people in the course of their lives will be involved in many accidents, one of the most common being auto accidents.

359. Rabin, *supra* note 37, at 1536.

360. PROSSER & KEETON, *supra* note 12, § 2, at 6.

361. See *supra* p. 839. "Thus, much of the behavior that is adjudged actionably negligent is merely the product of ordinary human fallibility—'deficiencies in knowledge, memory, observation, imagination, foresight, intelligence, judgment, quickness of reaction, deliberation, coolness, self-control, determination, courage or the like'—in a complex and danger-laden environment." Miller, *supra* note 37, at 19 (quoting Edgerton, *Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 867 (1926)).

362. See *supra* p. 839.

are fewer in number than those of recklessness because few in our society would engage in extreme and outrageous behavior that exceeds the bounds of all human decency. In addition to the self-constraints of human decency, the existence of a cause of action deters such conduct. Similarly, there is less recklessness than negligence, which is commonplace. Culpability and scope of exposure are naturally linked, and at each level of culpability the law can assign liability proportionately and consistent with these natural tendencies.

The rules of damage reflect a natural affinity toward proportionality. Severity depends on two factors: (1) the extent of the actual damages suffered and (2) the type of assessable damage. The extent of the actual damages is a matter of (bad) luck and independent of culpability or scope of exposure. The clearest example of this is the eggshell plaintiff rule. But severity also depends on the type of assessable damages, which the law controls. There are a number of rules that affect severity: damage caps, multipliers, and comparative apportionment.³⁶³ These modifications have little practical relevance. As discussed, caps and multipliers are generally found in statutes and not in the common law scheme. In addition, a comparative fault scheme has little application in mental injury cases.³⁶⁴ Instead, proportionality in the rules of damages is incorporated into the types of assessable damages, i.e., actual versus punitive damages. Punitive damage is the most severe form of civil monetary penalty. It is reserved for outrageous and unconscionable conduct. Intentional conduct carries with it the greatest exposure to punitive damages. Recklessness in most cases would not lead to excessive damages,³⁶⁵ and a simple negligence action should not result in punitive damages. This article then throws into the mix economic loss damages, a portion of a plaintiff's actual damages. Therefore, the layers of assessable damages can be used to award remedies proportionally to defendant's culpability.³⁶⁶

363. See *supra* note 179 and accompanying text (discussing caps and multipliers); see *infra* pp. 876–77 (discussing comparative negligence).

364. Comparative negligence cases involve two active participants in an interrelated course of conduct that results in an accident. While we can strain to imagine cases where comparative fault could be at issue, the prototypical mental injury claim arises where a defendant's negligence inflicts severe trauma on a passive victim either directly or derivatively. Accordingly, comparative fault would have sporadic application at best.

365. PROSSER & KEETON, *supra* note 12, § 9, at 40–41. Punitive damages are often available for “reckless” conduct in at least one sense of that term—a “deliberate disregard of the interests of others that the conduct may be called wilful or wanton.” *Id.* § 2, at 10.

366. See *Beacon Bowl, Inc. v. Wis. Elec. Power Co.*, 501 N.W.2d 788, 797 (Wis. 1993) (“The damage that negligence caused to Beacon Bowl is not out of proportion to the culpability inherent in negligent conduct related to electricity.”).

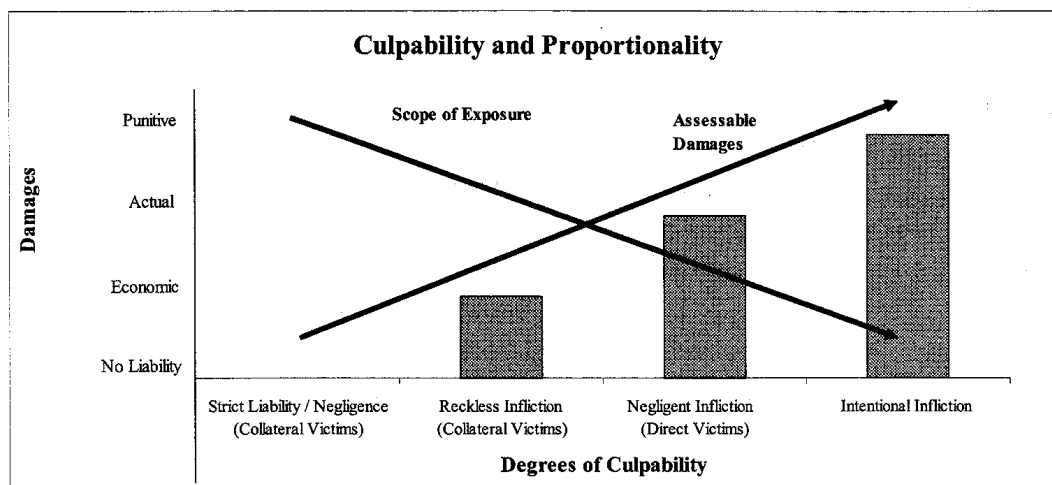
Rules of probability also show a natural proclivity toward proportionality. We expect that intentional conduct would more likely result in a finding of liability as jurors would be naturally inclined to recognize and punish outrageous conduct by finding liability.³⁶⁷ In the above example, the driver recklessly driving 60 mph through a school zone will more likely be found liable than the negligent driver. Negligence is a value judgment that applies evolving community standards of the appropriate standard of care.³⁶⁸ Many cases of negligence could be close calls.

The proposal here is consistent with these natural tendencies of proportionality found in tort law. The rules of damage and liability should reflect a weighing of the defendant's culpability *and* the plaintiff's interests. These rules should be modified so that they relate to the scope of exposure. In the realm of physical injuries, the rules of law do not make modifications based on plaintiffs' interests. Rather, only the rules of damage are modified based on level of culpability, in other words the imposition of punitive damages for intentional torts. But mental injuries need an alternative legal construct. The natural tendencies in tort law supporting proportionality constitute the foundation for fundamental fairness, and achieving proportionality requires adjustments in the rules of damage assessment. And so damages are adjusted between the collateral and direct victim classes according to the order of the interests, reflecting their relative importance.

Under the proposed classification of the universe of foreseeable plaintiffs, the scope of exposure naturally increases as culpability decreases from intentional to reckless to negligence. In other words, the size of the potential class of victims is a function of the degree of culpability. Conversely, the type of assessable damage is inversely related to the scope of exposure as it decreases from punitive to general to economic damages as culpability decreases. These two effects create a natural equilibrium that works well in fairly apportioning liability and remedy. Incorporating this equilibrium into the rule of law is not only consistent with tort principles, but also has the effect of limiting aggregate liability proportionally. The figure below schematizes the relationship among the plaintiffs' interests, the defendants' culpabilities, assessable damages, and the scope of exposure.

367. "It is plausible, however, to assume that the likelihood of liability increases as a defendant's behavior becomes more dangerous (that is, as its social costs increase)." John C. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 970 (1984) (positing that uncertainty affects people's incentives to comply with the law).

368. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c.



There is an argument that assessable damage should be a function of culpability, and not the scope of exposure. In other words, why do some reckless defendants have less exposure in terms of assessable damages than some negligent defendants when their culpability is higher? This is a fair question. Ordinarily, the risk of punitive damage increases with greater culpability. This general rule still applies for direct victims to the extent that the cause of action is based on culpability sufficient to bring an intentional or reckless infliction of emotional distress. As for collateral victims, this general rule would not apply since damages are limited to economic losses. Exceptions to a general rule are made when there is a separate policy reason that outweighs the normal considerations of the rule itself. In this case, the limit of economic losses is justified by an overarching policy consideration of achieving proportionality and a normative proposition that the collateral interest, while protected under circumstances of higher culpability, is secondary and subservient to the direct interest. This exception is a compromise in furtherance of providing a framework for broad based relief while at the same time limiting liability to socially tolerable levels. Furthermore, as discussed below, I believe there is a principled basis to provide general damages to collateral victims, and this would be consistent with the principles outlined in this article.³⁶⁹

A related concept to proportionality is equitable redistribution of remedies. We can consider the assignment of liability as the expression of preferences for the distribution of remedies. Apportioning liability between defendants and plaintiffs is a zero sum proposition. Although less categorical, the zero sum tendency applies as well between classes of

369. I do not suggest this extension, however, as a matter of experimental prudence. See *infra* p. 877.

plaintiffs to the extent that the available pool of remedies for various classes of plaintiffs approaches intolerable limits.³⁷⁰

Under the common law, remedies are concentrated in a small group of plaintiffs who meet its situational tests while all others are excluded as a matter of law. Curiously, while many have directly criticized the allocation of liability between plaintiffs and defendants, few have asked whether the common law's remedy distribution is fair as among the plaintiff class. The proposal here applies to all foreseeable plaintiffs, though neither recovery nor the extent of recovery is assured. It has the effect of redistributing remedies across the broader class of foreseeable plaintiffs. It would probably not affect the aggregate liability to defendants under the current state of the law, at least not materially so.³⁷¹ Rather the greatest practical effect of this proposal is that remedies are redistributed across a broader class of victims. Many plaintiffs who would fail to qualify under the common law tests would benefit, while the gains would be offset by a clear shortfall for the common law bystanders.³⁷² Under this proposal, the interests of the bystanders as well as other bystanders who would not satisfy the *Dillon* test are deemed to be collateral, and therefore access to and availability of remedies are limited by the defendant's commensurate duty. Nevertheless, the proposal is more equitable to the entire universe of potential plaintiffs.

D. Precedent in Common Law

Recklessness has not been as important in tort law as intentional or negligent conduct.³⁷³ This is perhaps because the doctrinal benefits are outweighed by the difficulty of proving a higher standard of culpability,³⁷⁴ or because reckless culpability often gets subsumed into a negligence or intentional action.³⁷⁵ Nevertheless, recklessness has its niche in certain common law tort theories, one of the major ones being in the insurance field. About half the jurisdictions recognize an independent tort of insurance

370. Obviously, if the available pot of remedies increases, all members of the plaintiff class could benefit.

371. *See infra* Part V.G, pp. 881–82.

372. *See infra* Part V.G, pp. 881–82.

373. Simons, *supra* note 316, at 472.

374. *Id.*

375. In the majority of tort cases, liability turns on proof of intent or negligence, so that recklessness is irrelevant marginalized as a distinctive scienter element. DOBBS, *supra* note 282, § 27, at 52.

bad faith.³⁷⁶ While ordinarily a breach of a contract does not create a tort, a bad faith cause of action is grounded in the unique relationship between insurers and insureds.³⁷⁷ A bad faith action arises when an insurer breaches the duty of good faith and fair dealing that is implied in all contracts,³⁷⁸ and such a breach is said to be reckless. This duty is contractual in origin, but begets a tort cause of action because of the special nature of an insurance arrangement.

In most jurisdictions that recognize bad faith actions, a defendant's culpability must exceed a simple breach of contract lest the contract action merges into a tort.³⁷⁹ In New York for instance, a bad faith action exists only if the insurer's conduct is in "gross disregard" of the insured's interests, exhibiting a conscious or knowing indifference.³⁸⁰ This gross disregard standard strikes a fair balance between two extremes by requiring more than simple negligence and less than a dishonest motive.³⁸¹ The culpability described here is similar to a reckless or quasi-intent state of mind.

Arizona has a different formulation of bad faith. A bad faith action arises "when the insurer's conduct is 'consciously unreasonable'" (i.e., when its improper actions permit an inference of imputed knowledge).³⁸² The tort of bad faith has been described as a "hybrid cause of action, sharing elements of both a negligence action and an intentional tort."³⁸³ The first element requires a determination of whether the insurer's actions are objectively unreasonable.³⁸⁴ The second element inquires into the defendant's state of

376. BARRY OSTRAGER & THOMAS R. NEWTON, *HANDBOOK ON INSURANCE COVERAGE DISPUTES*, § 12.1, at 732-44 (10th ed. 2000).

377. Insurance policies are unique contracts in that they are purchased for protection against calamity, and not for commercial advantage. *See, e.g.,* *Noble v. Nat'l Am. Life Ins. Co.*, 624 P.2d 866, 867 (Ariz. 1981); *Egan v. Mut. of Omaha Ins. Co.*, 598 P.2d 452, 456 (Cal. 1979). Accordingly, some states have implied a fiduciary relationship; others have recognized it as simply "special." *See, e.g.,* *Rawlings v. Apodaca*, 726 P.2d 565, 571 n.3 (Ariz. 1986) (special relationship); *Frommoethelydo v. Fire Ins. Exch.*, 721 P.2d 41, 44 (Cal. 1986) (fiduciary relationship).

378. *See, e.g.,* *Crisci v. Sec. Ins. Co.*, 426 P.2d 173, 176 (Cal. 1967) (defining liability for an insurer in bad faith actions).

379. *See, e.g.,* *Ward v. Fireman's Fund Ins. Co.*, 731 P.2d 106, 109 (Ariz. Ct. App. 1986) (allowing insurers to deny claims if they are "fairly debatable").

380. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24, 27-28 (N.Y. 1993) (holding that insurers' conduct must constitute gross disregard of insured's interests).

381. *Id.* at 28.

382. *Walter v. Simmons*, 818 P.2d 214, 221 (Ariz. Ct. App. 1991) (citing *Trus Joist Corp. v. Safeco Ins. Co.*, 735 P.2d 125, 134 (Ariz. Ct. App. 1986)).

383. STEVEN PLITT, *ARIZONA LIABILITY INSURANCE LAW* § 5.1, at 250 (1998); *see* *Henderson & Twerski*, *supra* note 319, at 1143 (stating reckless standard combines a subjective component of awareness of risk and an objective standard applicable to the objective negligence of the conduct).

384. PLITT, *supra* note 383, § 5.1, at 250.

mind, whether the insurer knowingly or recklessly disregarded the interests of the insured, a subjective standard.³⁸⁵

Insurance bad faith actions provide remedies where the contractual damages alone do not make the plaintiff whole. The culpability requirement is high because any lower level of culpability is mostly covered by the underlying contract action. Although limited to insurance actions, we can view bad faith as an example of an interstitial cause of action that provides remedies across a spectrum of culpability (honest breach of contract, negligence, reckless, and intentional conduct).³⁸⁶

We also see the modification of rules of liability and damage in the shift from the doctrine of contributory negligence to comparative negligence. In early common law, the negligence of the plaintiff that contributes to the cause of her injury was an absolute bar to recovery.³⁸⁷ Contributory negligence was justified by the argument that the plaintiff did not come with “clean hands”³⁸⁸ or that the plaintiff’s negligence was considered an intervening event breaking the causal chain.³⁸⁹ Contributory negligence is unfair because even though both parties were negligent, the plaintiff bears the entire risk and consequence of mutual negligence.³⁹⁰ Typically, “negligence constitutes mere inadvertence or inattention, or an error in judgment, and it is unlikely that forethought” of liability was considered by either party.³⁹¹ In this regard, the doctrine of contributory negligence shares an important characteristic with the common law rules for negligent infliction of emotional distress: these rules of liability disproportionately shift the risks to the plaintiff. The unfairness of contributory negligence is

385. *Id.*

386. Indeed, some jurisdictions allow recovery of damages for emotional distress as a part of a bad faith claim. Jeffrey E. Thomas, *Crisi v. Security Insurance Co.: The Dawn of the Modern Era of Insurance: Bad Faith and Emotional Distress Damages*, 2 NEV. L.J. 415, 427–28 & n.99 (2002) (counting nine jurisdictions that routinely allow emotional harm damages, including Alabama, Arizona, Colorado, Montana, Nebraska, North Dakota, Oklahoma, Rhode Island, and Texas).

387. RESTATEMENT (SECOND) OF TORTS § 463 (1965); see generally Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978) (discussing the rationale and limited efforts for a contributory negligence rule).

388. See, e.g., *Davis v. Guarnieri*, 15 N.E. 350, 360 (Ohio 1887).

389. See, e.g., *Ware v. Saufley*, 237 S.W. 1060, 1061–62 (Ky. 1922); *Gilman v. Cent. Vt. Ry. Co.*, 107 A. 122, 124–25 (Vt. 1919). In this vein, the argument is similar to the early argument used to deny liability for negligent infliction of emotional distress claims.

390. Pearson, *supra* note 28, at 480–81. Pearson opines that the rule is “arbitrary because it treats persons the same who ought to be treated differently by barring recovery for plaintiffs found responsible for 100 percent of the causative negligence as well as those only slightly negligent.” *Id.* at 481.

391. PROSSER & KEETON, *supra* note 12, § 67, at 469.

“readily apparent,”³⁹² and since its inception the rule has been criticized for its harshness.³⁹³

Prosser notes that as of 1982, some 40 states abolished the contributory negligence doctrine in favor of the more equitable comparative negligence rule.³⁹⁴ Instead of a rule of liability preclusion, these states apportion liability through an adjustment of the rules of damage and liability.³⁹⁵ Comparative negligence allocates liability based on a comparative apportionment of culpability.³⁹⁶ Under the pure comparative negligence method, a defendant is only liable for the percentage of her fault.³⁹⁷ This is a pure rule of damage, and liability is not precluded at all. Under the modified comparative fault method, the plaintiff can only recover if his fault is equal or less than the defendant’s, and his recovery is limited to the defendant’s percentage of fault.³⁹⁸ This rule involves both an adjustment to the rule of liability and to the rule of damages.

There is a direct analogy to be drawn between the modified comparative negligence rule and my proposal for collateral victims. Both involve an adjustment to the rule of liability based on a measure of defendant’s culpability. Modified comparative negligence precludes liability when a plaintiff’s fault is equal to or greater than the defendant’s; my proposal precludes liability when defendant’s culpability does not exceed simple negligence. Moreover, both involve an adjustment to the rule of damages. Modified comparative negligence caps plaintiff’s recovery of damages to defendant’s culpability; my proposal caps damages to economic loss. By adjusting the rules of liability and damage, the law of modified comparative negligence more equitably apportions liability between defendant and

392. *Id.* at 468–69.

393. *See, e.g.,* Haeg v. Sprague, Warner & Co., 281 N.W. 261, 263 (Minn. 1938) (recognizing harshness of contributory negligence); *see also* Leon Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 36 (1944). *See generally* Charles L. B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1934).

394. PROSSER & KEETON, *supra* note 12, § 67, at 471.

395. Contributory negligence was abolished both judicially and legislatively. *See, e.g.,* Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975); Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431, 438–39 (Fla. 1973); PROSSER & KEETON, *supra* note 12, § 67, at 473 nn.39–40 (list of state statutes adopting comparative negligence).

396. Comparative negligence and comparative fault are not usually applied to intentional torts. *See* David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 441 (1985). In addition, assumption of risk, as a defense to torts of recklessness, negligence, and strict liability, is sometimes viewed as analogous to the doctrine of consent in intentional torts. *See* Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: Theory of Full Preference*, 67 B.U. L. REV. 213, 248–58 (1987).

397. PROSSER & KEETON, *supra* note 12, § 67, at 472.

398. *Id.* at 473.

plaintiff. The same can be said for the proposed rule here regarding collateral victims.

E. Deterrence

There are two prominent strands of thought on the ultimate purpose of tort law. Corrective theory of tort law posits that tort law is remedial and that compensation for injuries is the primary goal.³⁹⁹ The deterrence theory posits that tort law is regulatory and that deterrence and maximization of social utility are the primary goals.⁴⁰⁰ Some have even tried to reconcile the two.⁴⁰¹ This article does not take a position on which is dominant (if there is one). Nor does a specific discussion of the law of negligent infliction of emotional distress provide a proper forum to explore these theories with a more detailed analysis.⁴⁰² But it should not ruffle any doctrinal feathers to say that the optimal tort law should not only compensate the deserving victims, but should also deter undesirable social behavior.⁴⁰³ One of the fundamental goals of tort law is to prevent accidents through appropriate deterrence.⁴⁰⁴ In this field, there are two behaviors that require deterrence. First, defendants should be deterred from injuring plaintiffs. Second, plaintiffs should be deterred from filing fraudulent and frivolous cases, and perhaps even marginal ones as well.⁴⁰⁵ The proposal here has a symmetrical deterrence effect on both defendants and plaintiffs.

For defendants, increased liability will not deter the negligent defendant. It is the rare individual that constantly weighs the costs/benefits of every ordinary act.⁴⁰⁶ Rather the lack of constant forethought results in everyday

399. See, e.g., Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 113-14 (1990); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, § 7-42 (1983).

400. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

401. See, e.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

402. I merely propose the self-evident proposition that deterrence of wrongful conduct is a good thing in society. Some commentators have suggested that tort law has indeed been successful in deterring accidents. See, e.g., CALABRESI, *supra* note 345, at 69.

403. See Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 713 (1965) ("I take it as given that the principal functions of 'accident law' are to compensate victims and reduce accident costs.").

404. See CALABRESI, *supra* note 345, at 26-27.

405. Only genuine and severe injuries should be compensated, and most borderline cases would not involve such injuries or a tenuous connection between such an injury and a defendant's conduct.

406. Pearson, *Response to Bell*, *supra* note 66, at 417.

negligent accidents. To the extent that current accident laws seek deterrence, most people are already on notice that any negligent conduct could result in a lawsuit, and my proposal will probably have little or no measurable effect on negligent defendants. The deterrence argument is more plausible as culpability increases from the purely objective to subjective. Under the common law scheme, regardless of how reckless a defendant acts and so long as that conduct is not deemed extreme or outrageous, she is shielded from liability for intentional infliction of emotional distress; and in the realm of negligence the defendant is still shielded so long as the plaintiff fails to fit within the common law situational templates. In this system, the reckless and the negligent roam free with impunity subject only to limited pockets of liability. It is a scheme that does not consistently deter socially undesirable conduct.⁴⁰⁷ Under the proposed rules here, all defendants are on notice of potential widespread liability for reckless and intentional conduct. Accordingly, it has a deterrent effect on a defendant who knows or has reason to know his conduct is reckless.

For plaintiffs, the proposed rules deter the filing of frivolous, fraudulent, or borderline claims. Claims by direct victims are more likely to be genuine because the victims are closer in proximity to the wrongful conduct. Any potentially fraudulent or frivolous claims can be dealt with by the rules of evidence, procedure, and attorney supervision. As imperfect as these methods may be, there is little danger of a large structural threat to the integrity of the courts or public faith in the judicial system because the class of plaintiffs is limited. The potential for fraud is greatest when the plaintiff is not the direct victim of the defendant's conduct.⁴⁰⁸

The court system is crowded with people who look to the law to compensate for any intrusion into a perceived notion of a right to an idealized sense of personal tranquility. The concern is less with outright fraud, which is difficult to execute, than with the borderline case where there is some disturbance to a person's tranquility arguably connected to a negligent act.⁴⁰⁹ Marginal cases are the product of a plaintiff's subjective conviction that she is entitled to compensation and an enterprising or indiscriminant attorney's willingness to take a chance on such cases. These cases test the limits of the law because they skirt the divide between genuine injury and ordinary knocks in life. By granting only economic loss damages to collateral victims, the question of fraud and frivolity naturally dissipates. Trivial claims do not result in significant out-of-pocket economic

407. See, e.g., *supra* pp. 854–55 and notes 270–76.

408. Sandor & Berry, *supra* note 10, at 1254 & n.35.

409. See Pearson, *Response to Bell*, *supra* note 66, at 426 (“[T]he typical claim for emotional harm would be trivial.”).

losses. Since there is no potential for the "homerun" case, there is no incentive to sue absent severe mental injuries with concomitant economic losses, which together serve as practical indicia of genuineness far better than the common law's situational rules. It is unlikely that a charlatan or a slightly injured victim and his lawyer would risk the vagaries and expenses of a lawsuit to recover finite economic losses, which he must have incurred to bring the lawsuit in the first place as an element of the cause of action.⁴¹⁰

F. Potential Problem

An argument can be made that this proposal would swallow the independent tort of intentional infliction of emotional distress. Rather than plead the more difficult intentional tort, plaintiffs may instead opt for the negligence action.⁴¹¹ One commentator notes that if a broad based negligence action is available there would be no incentive to plead the more difficult intentional tort, thus eviscerating the intentional tort altogether.⁴¹² The Alaska Supreme Court considered this issue and reasoned that a negligent infliction claim could render its intentional counterpart meaningless.⁴¹³ The duplication or overlap problem, however, is more illusory.

By definition, intentional infliction of emotional distress involves conduct directed at a particular person (i.e., a direct victim). Where a defendant's conduct is not extreme or outrageous, the negligent infliction

410. Miller argues that economic damages could still be a significant amount. Miller, *supra* note 37, at 40. But there is the potential for a Catch-22 situation created by the limitation on damages: a plaintiff could incur attorney's fees and costs that exceed the total economic losses, making a lawsuit impractical. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245-46 (1975) (discussing that under American rule, a prevailing party cannot recover attorney's fees unless mandated by statute or contract); Bell, *supra* note 7, at 164 (noting the problem of attorney fees); David T. Schaefer, Note, *Attorney's Fees for Consumers in Warranty Actions—An Expanding Role for the U.C.C.?*, 61 IND. L.J. 495, 498 (1986) (explaining the American rule of attorney's fees). It could be that an exception to the American rule on attorney's fees is warranted, whether by judicial or statutory mandate, and that attorney's fees and costs should be allowed to be pleaded as a part of the economic damages. Miller suggests that attorney's fees need to be recoverable as a part of the damages. Miller, *supra* note 37, at 40 n.218. Notably, insurance bad faith torts are an exception to the American rule and allow the recovery of attorney's fees and costs as a part of the compensable damages. See, e.g., *Alyeska Pipeline*, 421 U.S. at 259 (allowing attorney's fees as damages); *Rawlings v. Apodaca*, 726 P.2d 565, 577 (Ariz. 1986) (same).

411. See *supra* pp. 863-65, for a discussion of the difference between negligent and intentional infliction of emotional distress actions.

412. Crump, *supra* note 35, at 454-55.

413. *Hancock v. Northcutt*, 808 P.2d 251, 257-58 (Alaska 1991).

claim would provide a legal remedy.⁴¹⁴ For collateral victims, the remedy is provided only upon reckless conduct. If there is an overlap or conflict with current theory, it is here. The Restatement provides a *Dillon*-like bystander rule (i.e., a collateral victim) for an intentional tort in a situation where a plaintiff witnesses an immediate family member subject to extreme and outrageous conduct.⁴¹⁵ Under my proposal, the conduct need not be intentional or outrageous, just reckless disregard of the potential for mental injury, and the direct victim need not be an “immediate family” member.

Moreover, where extreme and outrageous conduct can be demonstrated, the remedies are proportional to the culpability, and a defendant is subject to the full panoply of punishments including punitive damages. The possibility of punitive damages is a powerful incentive for defendants to act responsibly, and for plaintiffs to pursue an intentional tort where facts warrant. On the other hand, where a defendant’s conduct falls short of this ignominious measure, she may still be liable for a less culpable conduct which may result in lesser liability. There is no conflict with or duplication of an intentional tort. Rather, the proposal provides a spectrum of actions across a broad range of culpabilities and injuries, and there are no gaps where a defendant can escape liability as a matter of law for committing a wrong. This is consistent with the principle that liability and remedy be proportionally distributed.

G. Net Effect

How would this proposal affect the aggregate liability of defendants? This is the ultimate practical question. Of course, there is no empirical data or experience. I believe (educated guess is probably more accurate) that the aggregate liability would be approximately the same or less even than under the current common law inclusive of the *Dillon* bystander rule. There are two effects at work here. First, the range of a defendant’s duty of care is broader. Direct victims not only include those satisfying the common zone of danger and physical impact tests, but also a host of other plaintiffs who would not be entitled to remedies under the common law.⁴¹⁶ The collateral

414. See *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 819 (Cal. 1989) (intentional torts will support an award of damages for emotional distress alone in cases involving extreme and outrageous conduct).

415. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965); see *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 334–35 (D.C. Cir. 2003) (interpreting the “immediate family” requirement of RESTATEMENT (SECOND) OF TORTS § 46 (1965) for intentional infliction of emotional distress to nieces and nephews under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1976)).

416. See, e.g., *Bogard v. Employers Cas. Co.*, 164 Cal. Rptr. 578 (Ct. App. 1985) (no liability for negligent handling of an insurance claim); *Trinity Universal Ins. Co. v. Cowan*, 906

victim class is larger than the common law bystander test as well. Those who fail to satisfy the three-prong *Dillon* test could potentially recover, including plaintiffs who fail to satisfy the spatial proximity test.⁴¹⁷ Second, duty owed and assessable damages are limited for a significant number of potential plaintiffs. Bystander liability comprises the largest segment of claims in this field. For this class, the standard of care is the more restrictive standard of recklessness, which as noted before is less prevalent in conduct and is more difficult to prove.⁴¹⁸ Even if recklessness is proved, damages are limited to recovery for economic loss. Thus, there is a significant offset between the two effects of broadening the universe of plaintiffs and restricting the standards of recovery.

The proposal here would probably result in no material change or would slightly decrease the aggregate liability, but not by leaps and bounds. I also add that a credible argument can be made within the analytical framework of this article that victims of recklessness should be allowed recovery for actual damages.⁴¹⁹ In essence, the standard would be the same as the one set forth by the Restatement's bystander rule for an intentional tort, less the "immediate family" requirement.⁴²⁰ Additionally, if this were the case, the argument for duplication and overlap would be far stronger as the difference between reckless and intentional could sometimes be a hair's width. Whether this expansion would tip the scale of proportionality is a question of judgment and experience from the application of the proposed rules. It could very well do so, and for this reason, my proposal stakes out a more cautious middle ground. It remains to be seen whether this proposal will be accepted by the collective intelligence of the legal marketplace, and whether adjustments will be needed based upon the experience of the law.⁴²¹

S.W.2d 124, 130 (Tex. App. 1995), *rev'd* 945 S.W.2d 819, 823 (Tex. 1997) (holding no liability for negligent disclosure of sexually explicit photos). The field of insurance bad faith is potentially a major area in which negligent infliction of emotional distress could apply. See Bauman, *supra* note 35, at 720; Thomas, *supra* note 386, at 433-41.

417. See *supra* Part II.B, pp. 818-24.

418. For non-bystanders who fail to satisfy the temporal or spatial proximity elements, there would also be an evidentiary problem that would work as a natural barrier against recovery. Because these plaintiffs were not at the accident and did not contemporaneously witness it, evidence must be gotten from the direct victim, if he survived, or from other witnesses. Proving recklessness without direct testimony from the plaintiff would be a quantum more difficult.

419. Additionally, this article has not explored the possible use of evidentiary rules, particularly the standards of proof, as a means to achieve a principled proportionality. I did not do this because the modifications of damages would achieve similar results and would in fact serve as a better deterrent.

420. See *supra* p. 881 and accompanying notes.

421. For this ambivalence, I take shelter in Holmes' observation: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, THE COMMON LAW 1

VI. CONCLUSION

The law of negligent infliction of emotional distress exists today in an uneasy state of judicial resignation. Like a mediocre meal, it is decidedly unsatisfactory but one that must be taken for lack of choice. Courts and scholars know that the current rules of law are arbitrary, and that is the problem. Arbitrary results are an anathema to Anglo-American jurisprudence. Cases giving rise to genuine, foreseeable mental injuries are legion. They do not simply arise in the context of the common law's situational templates. If they did, this field of law would not have produced so much debate. They can arise in the context of commercial and personal relationships, relationships created by fact or law, ordinary accidents, foreseeable accidents, mass toxic tort catastrophes, exposure to disease and other infinite possibilities of chance and bad luck that connect various people in the mystery we call life. Many fortuities will not fit squarely within the common law tests, and thus their claims will be precluded as a matter of law for no other reason than the rules are the rules.

While the common law rules serve the important policy consideration of limiting liability, they do so without principle and appropriate weighing of other policies. For this reason, they are arbitrary. Early courts could rely on such venerable concepts as judicial restraint and *stare decisis* to deny new or untested theories of liability. But the social expectations of compensation and protection for mental tranquility have progressed and the genie cannot be put back in the bottle. The myriad of issues and policies in this area have been vetted by a hundred years of case law and scholarly analyses, and courts today should pick up the pieces and construct a principled approach that is not so "arbitrary" and yet so "limitless."

Where traditional analysis fails to properly weigh the competing policies, an alternative is required to construct a more principled approach to the problem. Such an alternative theory must avoid defining duty in the context of an all-or-arbitrary choice. Foreseeability and genuine injury should be prerequisites to recovery, rather than the definition of recoverability. Reasoned distinctions are needed to provide satisfactory solutions to this complex social problem. This article suggests that duty be defined as a relationship between a plaintiff's interest and a defendant's culpability. This approach balances the competing interests, and provides a uniform, value neutral approach for these claims. There are several key benefits of this approach: it provides potential remedies across the universe of foreseeable plaintiffs; it limits liability to predictable levels; it satisfies the principle of

(1881). Only experience will show whether this article will find acceptance in whole or in part in the legal marketplace, or whether it will be relegated to the obscurity of dusty law stacks.

proportionality and fairness; and its principles borrow from other time-tested concepts of tort law. Thus, the approach is based on sound principles and policies, and the rules can be practically applied.

The proposal is not without drawbacks. For collateral victims, the notion of duty is far more restrictive and available remedy is partial. The practical import is that the price for enlarging the class of total plaintiffs is paid with higher barriers to recovery and remedy. Collateral victims are precluded from recovery unless the defendant's conduct is reckless, a high level of culpability is present, and remedy is limited to economic losses. A large segment of the cases in this field arise from a bystander context. Many claims for injuries would not involve reckless conduct or proof of such conduct would not be available and so many could go without remedies. For this reason, proponents of bystander liability based on a negligence standard of care will no doubt criticize this approach. But I reiterate that no proposal in this area is ideal as apportioning liability will always be a zero sum allocation.

The ultimate policy choice for the courts is whether they can countenance *Dillon*-type "closely related" plaintiffs (i.e., parents and siblings) going without remedies when the defendant's conduct is merely negligent. This article suggests an alternative choice. The unfortunate economics is that every proposal in this area of law will be flawed from the standpoint of remedying genuinely injured, foreseeable plaintiffs. Tort law not only referees the transactions between plaintiffs and defendants, but also between potential plaintiffs who must share the available pool of remedies. There are only solutions that are more optimal, in principle and in practice, serving the interests of plaintiffs, defendants, and society more equitably. My proposal is the tradeoff necessary for a principled theory of recovery in an imperfect world.