

# UNDERTAKINGS AND SPECIAL RELATIONSHIPS IN CLAIMS FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

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*Courts impose a number of barriers to recovery for negligently inflicted emotional harm. Whether or not these barriers are justified in suits between strangers, this essay argues that they are inappropriate both when the defendant has a special relationship to the plaintiff and when the defendant has undertaken a duty of care that implicates the plaintiff's emotional well-being. A hospital caring for mother and her newborn infant should be liable for the mother's emotional harm on ordinary negligence principles if it loses the baby. The essay also considers whether the defendant should be permitted to contract out of the responsibility.*

## I. UNDERTAKINGS AND SPECIAL RELATIONSHIPS CREATING TORT DUTIES

A defendant's duty is often determined by his undertakings to or special relationships with the plaintiff. There is nothing unusual or controversial about this proposition. Yet when a defendant negligently inflicts emotional harm without also inflicting physical injury, some courts or lawyers have ignored the defendant's undertaking to act for the interest of the plaintiff, with the result that the defendant's undertaking to provide care is negated or substantially diminished by rules of law imposed by the courts. This Essay argues that in emotional harm cases, as well as in physical injury cases, courts should honor the duties created by the defendant's special relationships and by his undertakings to care for the plaintiff.

The word tort sometimes evokes a picture, not of persons in special relationships, but of injury caused to the plaintiff by an utter stranger. Automobile collisions are like this. In stranger cases, the defendant usually does not know the person he injures. Even if the defendant knows the victim, the relationship between

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the two is seldom of legal significance; instead, ordinary negligence standards apply.

But the stranger case, typified by the automobile collision, represents only one class of tort cases. The other large class of cases involves defendants and plaintiffs whose rights and duties turn in part on a preexisting relationship between them. Their relationship might derive from their status,<sup>1</sup> but it may also be derived from some kind of undertaking by the defendant to exercise care for the plaintiff.<sup>2</sup> An undertaking resembles a promise, but it need not count as a formal contract or even an express undertaking. Many undertakings are in fact expressed by action rather than by explicit words, or expressed only by the tacit understandings of the parties. The medical doctor who accepts a patient in his professional role is undertaking to treat the plaintiff and to do so with at least the care customarily exercised by medical doctors in his type of practice, whether or not he verbalizes his undertaking.

If a medical doctor were not in a relationship with the plaintiff by reason of his tacit undertaking to furnish care or otherwise, then he would be a stranger. That would mean he owed no duty to relieve the plaintiff's suffering; he could pass by on the other side, leaving the plaintiff to die. Once the doctor has undertaken care, however, his undertaking imposes a duty recognized in tort law. He can no longer ignore his patient, and if he does so, he will be liable for any harm resulting to the patient.<sup>3</sup>

The undertaking of care is also usually understood to describe the nature of care owed. The stranger's duty of care is described by rules of law (often "reasonable care"), but when the defendant's duty arises from his undertaking, the duty is described, at least in part, by the undertaking itself. For example, when a practitioner undertakes to act only as a chiropractor and not as a medical doctor, he undertakes to use only the knowledge, skills, and type of treatment used by chiropractors and cannot be faulted for failure to administer a drug that even a novice medical doctor would know is necessary.<sup>4</sup> The medical doctor, in contrast, must exercise the care of medical doctors in the same type of practice or specialty. The practitioner's implicit undertaking—how he "held himself out" to the patient—initially<sup>5</sup> defines the care required in both cases.<sup>6</sup>

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1. Recognized categories of special relationships include: (1) carrier-passenger, (2) innkeeper-guest, (3) invitor-invitee or possessor of land open to the public and one lawfully upon the premises, (4) employer-employee, (5) school-student, (6) landlord-tenant, and (7) custodian-ward. *See* 2 DAN B. DOBBS, *THE LAW OF TORTS* § 317 (2001 & Supp. 2007).

2. Conversely, a special relationship between the parties often implies an undertaking by one of them.

3. *See Hill v. Medlantic Health Care Group*, 933 A.2d 314, 328–29 (D.C. Cir. 2007).

4. *See, e.g., Piazza v. Behrman Chiropractic Clinic, Inc.*, 601 So. 2d 1378, 1380 (La. 1992).

5. But courts may intervene to insist on minimum standards. *See infra* Part VII.

6. *Clark v. Univ. Hosp.-UMDNJ*, 914 A.2d 838, 841–43 (N.J. Super. Ct. App. Div. 2006) (holding that hospital's medical resident who held himself out as a "doctor" was not entitled to avoid liability under any lesser standard). If he professes to be a specialist, he

The law of undertakings, then, would enforce a duty of care for the plaintiff's emotional well-being when the defendant has undertaken to render such care. But courts have traditionally imposed various special burdens and limitations on stand-alone emotional harm claims. Many courts have said that the plaintiff cannot recover for emotional distress unless it was either the product or the cause of negligently inflicted physical harm, more or less eliminating claims for negligently inflicted emotional harm that stand alone, apart from physical injury or at least physical manifestation of the harm.<sup>7</sup> In some settings, they have added other obstacles to recovery.<sup>8</sup> Yet a defendant's explicit or implicit undertakings, or the special relationships out of which they arise, are at the moral heart of many tort cases. The undertaking initiates a tort duty commensurate with what the defendant has undertaken. That principle should apply no less in claims for emotional distress than it does in physical injury cases.

## II. NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS: HISTORICAL PATTERNS

Courts firmly accept recovery for negligently inflicted emotional distress as damages parasitic to physical harm, that is, as a form of pain and suffering. But negligently inflicted stand-alone emotional distress is a different matter. Stand-alone claims for emotional distress do not assert that the distress resulted from physical harm or bodily impact. For this reason they cannot count as pain and suffering that results from bodily injury.<sup>9</sup> The question then becomes whether the negligent infliction of emotional harm alone is itself a tort.

Courts have slowly, but more or less constantly, changed their answers over the last one hundred years or so as they have struggled to deal with negligently inflicted stand-alone emotional harm. In so doing, they have left the ground littered with fossilized rules and have created many paths to confusion. Happily, details are not required to sketch the main case-patterns.

Two major historical patterns are grounded in what courts once spoke of as fright or shock.<sup>10</sup> The first pattern involved some immediate physical threat to

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is held to the standard of the specialty. *Wall v. Stout*, 311 S.E.2d 571, 578 (N.C. 1984) (“[W]hen a physician holds himself out as a specialist, he is required to bring to the care of his patients more than the average degree of skill possessed by general practitioners.”).

7. 2 DOBBS, *supra* note 1, §§ 308, 312.

8. For example, the zone of danger rule in “bystander” cases. *See Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979); 2 DOBBS, *supra* note 1, § 309.

9. *See* 2 DOBBS, *supra* note 1, § 308.

10. *E.g.*, *Bowman v. Williams*, 165 A. 182, 184 (Md. 1933) (holding action permissible for “nervous shock or injury caused without physical impact, by fright” if there is substantial physical injury following). Some courts continue to lace opinions with the language of fright and shock and associate it with a sudden event, which may have led to the unstated assumption that only a definite and immediate threat of physical harm will trigger liability. *E.g.*, *Vosburg v. Cenex-Land O’Lakes Agronomy Co.*, 513 N.W.2d 870, 873–74 (Neb. 1994) (requiring a sudden event). Two commentators go so far as to say that the tort claim was “designed” to reject recovery except for “serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature.” James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad:*

the plaintiff—a sudden, dramatic incident. The 1896 decision in *Mitchell v. Rochester Railway Co.* exhibits this pattern.<sup>11</sup> The plaintiff, pregnant, was almost run down by a negligently managed team of horses, which the driver brought under control only when they had come within inches of the plaintiff's face. She was frightened and suffered physical harm—a miscarriage. The *Mitchell* court insisted that infliction of stand-alone emotional harm could not be a tort. That meant that the plaintiff had no action for the emotional harm directly caused by the defendant. Because the defendant was not liable for the emotional harm itself, the defendant could not be liable for physical harm that resulted from the emotional harm.<sup>12</sup>

Over the years, courts rejected *Mitchell's* requirement of impact or bodily harm. They did not adopt ordinary negligence-foreseeability rules, though. Instead, they insisted that the plaintiff must prove the reality of emotional distress by showing that it resulted in physical harm or physical symptoms.<sup>13</sup> More recently, a number of courts have begun to drop that requirement and say that the plaintiff in a *Mitchell*-type fright could recover, even without resulting physical symptoms, provided that her distress was severe or medically diagnosable.<sup>14</sup>

The second pattern is the bystander pattern. It is similar except that the plaintiff herself is not the person harmed or threatened with harm. In this pattern, the plaintiff witnesses or perhaps later learns of harm threatened to or inflicted upon another person. For example, a mother may see her child run down by the defendant driver.

The history of bystander cases is similar, too. Courts originally rejected the bystander's claim unless the bystander was herself in the zone of danger.<sup>15</sup> Some of the courts implied or held that being in the zone of danger was not quite enough; the plaintiff must have feared for her own safety and not merely for the fate of another nearby person.<sup>16</sup> More recently, some courts have concluded that a plaintiff who was not in the zone of danger could recover for her emotional harm if

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*Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C.L. REV. 815, 827 (2002).

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

12. *Mitchell* is the reverse of the “parasitic damages” case in which the defendant tortiously causes physical harm which then results in emotional harm or other forms of suffering.

13. 2 DOBBS, *supra* note 1, § 308.

14. *Bovsun v. Sanperi*, 461 N.E.2d 843, 849 (N.Y. 1984); *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85, 97 (N.C. 1990) (requiring psychosis, chronic depression, “or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so”).

15. *Waube v. Warrington*, 258 N.W. 497 (Wis. 1935), *abrogated by Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432 (Wis. 1994). This rule is still applied in FELA cases and in some states today. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544–55 (1994).

16. *Waube*, 258 N.W. at 499 (“[T]he emotional distress or shock must be occasioned by fear of personal injury to the person sustaining the shock, and not fear of injury to his property or to the person of another.”).

she could prove several specific facts. For example, under this regime, one rule requires the plaintiff to be present and to see or otherwise perceive with her senses the injury to her child or family member.<sup>17</sup> In more flexible formulations, these factors are applied as guidelines rather than as hard and fast rules.<sup>18</sup> Even in jurisdictions following a flexible approach, the plaintiff must ordinarily show that the person harmed or threatened was a close family member such as a child, parent, or spouse, and that if the plaintiff did not perceive the injury as it happened, then she at least arrived at the scene before things had changed very much.<sup>19</sup>

This sketch of rules omits a great deal of technical parsing, but that is not the job of this Essay. The point instead is to focus on characteristics shared in both the first or direct pattern represented by *Mitchell* and the second or bystander pattern.

As already indicated, both kinds of emotional injury claims are based on negligence, not intent, and both involve claims for stand-alone emotional harm not resulting from physical injury. Two other shared characteristics of these claims are important.

*First*, both patterns arise in and are typified by claims against strangers. That is to say that the defendant has not undertaken any special duty to the plaintiff; he owes the duty that strangers owe to each other, no more. *Second*, in both patterns, the cases are bounded by a conception that is seldom spelled out in detail when courts state the rules—judges are thinking of sudden, dramatic events, as the fright and shock language of the old cases suggests. The runaway horses nearly trample the plaintiff or a truck runs down the plaintiff's child as she watches. The pattern of cases as well as their fright and shock language indicates that courts have often linked emotional distress with a sudden event, limited in time. This conception of emotional distress is reflected in the older language of the courts, which characterizes the claim as one for "fright" or "shock."

Yet emotional distress, even severe emotional distress, can result from torts that do not arise in a sudden dramatic event. For example, a physician may negligently diagnose a patient, telling her she has terminal cancer when in fact she is healthy. Would the cases preclude the patient's recovery for stand-alone emotional harm on the ground that she has no physical injury, or (perhaps inately) on the ground that, the diagnosis being false, she is not in the zone of danger?

### III. RECOGNIZING UNDERTAKINGS IN EMOTIONAL DISTRESS CASES

No dramatic, sudden event or even a physical threat of immediate harm can be seen in the case of a physician who negligently diagnoses cancer in a healthy patient, so that case does not fall into one of the core historical case

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

18. *E.g.*, *Groves v. Taylor*, 729 N.E.2d 569, 572 (Ind. 2000).

19. *Bowen*, 517 N.W.2d at 444–45 (holding that the plaintiff must witness an extraordinary event, meaning that the plaintiff need not see or hear the accident itself but could arrive at the scene a few minutes later and witness some of its effects); 2 DOBBS, *supra* note 1, § 309.

patterns. However, in the historical cases, the parties were in the stranger category. In contrast, the physician is not a stranger to the patient. In accepting a physician–patient relationship, the physician has undertaken care for the patient’s well-being. Some courts even describe a physician as a fiduciary,<sup>20</sup> although that characterization is not necessary to say that he has implicitly undertaken care.

When defendants have undertaken care for the plaintiff that includes care for emotional well-being, a ground for liability comes into play that is far different from the ground upon which stranger liability is based. The undertaking itself should determine the defendant’s duty and its extent, just as it does in other tort cases where liability is based on undertakings.<sup>21</sup>

This proposition has consequences. The extraordinary rules that courts have imposed as hurdles for the plaintiff in emotional distress claims—rules that in practice require sudden, dramatic events and in some states physical injury—have no place in policy or logic where the defendant has undertaken a duty.<sup>22</sup>

The point is not limited to direct, *Mitchell*-type cases. Undertakings of care by the defendant can affect bystander cases, too. The limiting rules such as the zone of danger rule or its alternatives would become irrelevant if the physician undertook care for the plaintiff or a class that included the plaintiff.

A number of cases support and illustrate these propositions. In *Molien v. Kaiser Foundation Hospitals*, a doctor was allegedly negligent in misdiagnosing syphilis in his patient, a married woman.<sup>23</sup> The doctor directed her to tell her

20. See *Walk v. Ring*, 44 P.3d 990, 999–1000 (Ariz. 2002) (noting discovery rule under the statute of limitations affected by fiduciary obligation to disclose); *Stafford v. Shultz*, 270 P.2d 1, 8 (Cal. 1954) (“[T]he fiduciary relationship of physician and patient excused plaintiff from greater diligence in determining the cause of his injury . . .”).

21. See, e.g., 2 DOBBS, *supra* note 1, § 321.

22. See *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995). In *Chizmar*, the Alaska Supreme Court stated:

[W]henever a defendant stands in a contractual or fiduciary relationship with the plaintiff and the nature of this relationship imposes on the defendant a duty to refrain from conduct that would foreseeably result in emotional harm to the plaintiff, the plaintiff need not establish a physical injury in order to recover for the negligent infliction of emotional distress.

*Id.*; cf. *Corgan v. Muehling*, 574 N.E.2d 602, 606 (Ill. 1991) (holding that “the zone-of-physical-danger rule is patently inapplicable to direct victims” where therapist sexually exploited client).

The old requirement that some physical condition must result from the infliction of emotional harm has been eliminated in a number of cases, including undertaking and special relationship cases. See *Campbell v. Delbridge*, 670 N.W.2d 108, 113 (Iowa 2003). In *Campbell*, the healthcare providers negligently failed to check the patient’s chart, which would have revealed his objection to receiving blood. *Id.* at 109. Nevertheless, the provider gave him blood after an operation. *Id.* The court held that the providers owed a duty of care to the patient not to negligently inflict emotional harm regardless of physical injury. *Id.*; see also *Larsen v. Banner Health Sys.*, 81 P.3d 196, 203–07 (Wyo. 2003) (holding relationship created a duty to the mothers where hospital switched babies of two patients); 2 DOBBS, *supra* note 1, § 308.

23. 616 P.2d 813 (Cal. 1980).

husband, which she did. It is not hard to imagine the painful scene and the never-ending suspicion. The patient believed her husband had had extra-marital affairs and had communicated the disease to her. The marriage broke up. The husband sued, alleging that, as it turned out, the doctor's diagnosis was wrong in the first place; neither the patient nor her husband had syphilis.

Two traditional elements are missing here. First, no sudden physical event like the runaway horses in *Mitchell* caused the husband's distress. Second, the husband's role as a non-patient was that of a bystander who was not himself in any zone of danger. Nevertheless, the court held that the allegations stated a good claim for the husband's stand-alone emotional distress.<sup>24</sup> Neither the bystander rules requiring sensory perception of injury to another, nor physical harm, nor a threatened impending physical injury were required.

Other cases play variations on the special relationship or undertaking theme. A therapist treating both mother and minor son sexually molests the son but not in the mother's presence. Upon discovery, the mother has an emotional harm claim in her own right.<sup>25</sup> The bystander-presence rule did not bar the claim. Mortuaries that secretly harvested and sold organs from dead bodies were held responsible for the emotional distress of relatives who later learned of the practice. Not only the plaintiffs who actually contracted for funeral services but also other close relatives aware of the funeral or cremation could recover for emotional distress upon learning of the indignities inflicted upon their family members.<sup>26</sup> Again, the usual limitations on emotional harm claims did not apply. Perhaps more obviously, an obstetrician undertakes to care for both mother and unborn child. His negligent delivery of the child that causes oxygen deprivation and harms the child violates his duty to the child and also to the mother. Consequently, he is liable to the mother for her emotional distress, even though she was unaware of the child's injury at the time it was inflicted.<sup>27</sup>

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24. Some of the broad language in *Molien* suggested to some readers that the court was permitting recovery of emotional harm any time emotional harm was foreseeable. That broad reading of *Molien* was explicitly rejected by the same court in *Burgess v. Superior Court*, 831 P.2d 1197, 1201 (Cal. 1992), but *Molien* remains good law on its facts.

25. *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 770 P.2d 278, 283 (Cal. 1989).

26. *Christensen v. Superior Court*, 820 P.2d 181, 191 (Cal. 1992). Although the alleged acts of the defendants were intentional and obviously wrong, the case can be thought of as one of negligence, not intentional infliction of emotional distress. That is because the defendants created a *risk* of emotional distress but did not intend to inflict it. The case can also be thought of as an intentional infliction case if the mortuaries are deemed reckless and recklessness is thought to show intent.

27. *Burgess*, 831 P.2d at 1202-03. See also *Larsen*, 81 P.3d at 206 (holding in case where babies of two mothers switched at birth and upon discovery more than 40 years later, mother and daughter can maintain a negligence action for standalone emotional injuries—"[W]here a contractual relationship exists for services that carry with them deeply emotional responses in the event of breach, there arises a duty to exercise ordinary care to avoid causing emotional harm."). California does not permit parents to recover for loss of filial consortium. The court held that the plaintiff could not recover for loss of the child's society but could recover only for the emotional distress arising from the "abnormal event" and "reacting to the unexpected outcome of her pregnancy." *Burgess*, 831 P.2d at 1209.

In all the cases just mentioned, the ordinary bystander rules would foreclose a recovery for emotional distress. None of the plaintiffs was in a zone of danger. (Indeed, there is no zone of danger at all in a false-positive misdiagnosis.) Nor were any of the plaintiffs a percipient witness to the negligence and injury caused by the defendant. But those rules did not apply in the cases just sketched. Liability was appropriate in those cases because the courts understood from the relationship of the parties that the defendant undertook to provide care and protection against emotional harm.<sup>28</sup>

The undertaking or special relationship also explains some of the cases of liability that were previously regarded as exceptions to the usual rules, notably cases of liability for mishandling dead bodies<sup>29</sup> and those imposing liability for erroneous telegraphic death messages,<sup>30</sup> where courts did not impose the zone of danger or the sensory perception limitation.<sup>31</sup> Equally, courts can simplify and clarify the law by recognizing undertakings and special relationships so that courts

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28. In *Molien*, the court sought to explain why bystander rules did not control by saying that the plaintiff was a direct victim, not a bystander. 616 P.2d at 816-17. Later, in *Burgess*, the court made it clear that the "direct victim" terminology only alluded to the special relationship or undertaking. 831 P.2d at 1200-01. "Direct victim" suggests that the issue is to be resolved by asking whether it is direct rather than by asking about the duty undertaken, so that terminology is less helpful and is appropriately discarded.

29. Most courts have not awarded emotional distress damages for negligent mishandling, although some have done so. Where the defendant who mishandles the body is one who had undertaken care for the plaintiff's emotional well-being, as where the defendant is a mortuary contracting to provide embalming or burial, liability for negligent infliction of emotional distress is most readily understood not as an exception or as an arbitrary rule but as exemplifying the undertaking-relationship principle. Whether negligence suffices in Arizona is perhaps not clear. In *Hale v. Brown*, the court rejected a claim for wrongfully embalming a body without specifically stating a rule on the questions of negligence vs. intent. 323 P.2d 955, 958-59 (Ariz. 1958). In *Tomasitis v. Cochise Memory Gardens, Inc.*, the defendant cemetery negligently sold the same gravesite to two different persons, then had to disinter a body buried there because the site was owned by another person. 721 P.2d 1166, 1166-67 (Ariz. Ct. App. 1986). The defendant did not appeal a jury's modest compensatory damages verdict for the plaintiff and the court took that as a concession that the claim was actionable. *Id.* at 1167. It went on to affirm a punitive award because of the cemetery's cavalier disinterment and reburial—without notice to the plaintiff and without giving the plaintiff an opportunity to be present or to have a priest consecrate the new burial site. *Id.* at 1168. The decision is probably consistent with a view that excludes liability for negligence. Most recently, *Ramirez v. Health Partners of Southern Arizona* insisted that negligence was not enough in the context of organ donations; in line with the statute on that subject, liability would be based only upon bad faith. 972 P.2d 658, 668-69 (Ariz. Ct. App. 1998).

30. *Wadsworth v. W. Union Tel. Co.*, 8 S.W. 574 (Tenn. 1888). Substantial federal preemption makes many of these cases pragmatically obsolete. *See W. Union Tel. Co. v. Conway*, 112 P.2d 857 (Ariz. 1941).

31. *E.g.*, *Lando v. State*, 351 N.E.2d 426 (N.Y. 1976).



would not find themselves rejecting the emotional distress claim, only to impose liability for breach of privacy or some other tort.<sup>32</sup>

Significant limitations accompany liability for undertakings. One is that courts usually make the defendant's duty co-extensive with his undertaking, and no greater. What he undertook is commonly constructed from our cultural understanding of the relationship he accepted. For example, doctors as well as therapists may undertake care for the patient's well-being, including emotional well-being, but lawyers drafting business documents probably do not undertake any such thing.

A second limitation is that the defendant is held liable only to those persons covered by his undertaking. For example, in the obstetrician case, the doctor presumably undertook care for the mother and child but not for the father. So the father's emotional distress at the brain damage suffered by his child through the doctor's negligence would not be actionable unless he met the jurisdiction's rules for stranger recovery.<sup>33</sup> This means that fear of unlimited lawsuits that so often causes emotional distress in judges and lawyers is wholly misplaced when it comes to duties based on undertakings or special relationships. Only those in the relationship with the defendant or to whom he undertakes a duty could possibly recover based on the undertaking. Persons who are not beneficiaries of the undertaking must meet the rules applied to strangers.

#### IV. FAILURE TO RECOGNIZE UNDERTAKINGS AS A BASIS FOR EMOTIONAL HARM CLAIMS

Recognizing that special relationships or undertakings create duties to protect against emotional harm is not radical. In fact, it is exactly in line with the usual rule that courts will enforce duties undertaken by the defendant, and with the equally important rule that duties may be undertaken by entering into a relationship that implies such duties.

Yet the principle is not discussed in some cases, presumably because lawyers did not brief it. Where the court is not apprised of the cases discussed here or their underlying principles, there is a substantial chance that the court will come up with a strange and unfortunate application of the zone of danger rule or some other limitation.

In a decision of the District of Columbia Court of Appeals, the defendant undertaker contracted to embalm the body of the plaintiff's husband for an open-casket funeral service and to ship the body to Texas.<sup>34</sup> The defendant negligently embalmed the body, leaving it drenched with fluid, covered with skin slips, blisters, and discolorations. The face and neck were swelling, and a catheter tube inserted during the deceased's hospitalization had not been removed.

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32. *E.g.*, *Reid v. Pierce County*, 961 P.2d 333, 338 (Wash. 1998) (denying the claim for emotional distress but recognizing potential liability on the same facts on an invasion of privacy theory).

33. *Carey v. Lovett*, 622 A.2d 1279, 1287-88 (N.J. 1993).

34. *Washington v. John T. Rhines Co.*, 646 A.2d 345, 346 (D.C. 1994).

Given that a modern mortuary exists not merely to dump a body in the ground but to minimize the survivor's grief and to bring as much dignity as possible to final burial, it would be hard to say the mortuary undertook no duty of care to avoid further grief. The court did not address the undertaking issue at all, however. Instead, it dismissed the widow's claim because, of all things, she was not in the zone of danger. It was, of course, true that no one was in danger of physical harm, but to make that the basis for exculpating a gross mistreatment of the plaintiff's late husband is to say that undertakers are always immune from a duty of care. The undertaking was to the plaintiff and she was within the zone of emotional danger recognized by that undertaking. Cases like this would not survive a regime of law based upon a fair assessment of the duty undertaken by the mortuary, even though strangers who undertook nothing would be under no duty at all.

New York, one of the states most adamantly opposed to emotional harm recovery, recognized the right to recover in the case of a "wrongful and abusive ejection by a hotel or innkeeper, indignant expulsion or removal from a public facility, or ejection by a common carrier."<sup>35</sup> That makes sense. Innkeepers and carriers are in a special relationship that implies duties undertaken in line with social expectations of the time. Yet New York failed to perceive that the relationship and undertaking form the basis for the rule. Consequently, the court has gone on to hold that while a hospital may be liable for emotional distress to family members of a patient whose dead body was lost,<sup>36</sup> the hospital is not liable for a family's emotional distress when it loses a living baby.<sup>37</sup> The rational and just basis for liability in living baby cases as well as dead body cases would be apparent if the New York courts had begun with the relationship of the parties or the duty undertaken by the hospital.

Another instance in which restrictive rules of law are imposed to protect a faulty defendant in spite of the defendant's undertaking occurs when the defendant tests the plaintiff for HIV/AIDS and negligently reports that the plaintiff is infected. The defendant may even perform a negligent re-test and confirm the frightening first report. The plaintiff in such cases eventually discovers that she is free from the virus, but in the meantime, she has suffered emotionally and may always have fears and uncertainties. Courts are divided,<sup>38</sup> but some of them have rejected liability here, even though it is apparent that the defendant has undertaken a professional duty of care to the plaintiff in making and reporting the test.<sup>39</sup>

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35. *Johnson v. Jamaica Hosp.*, 467 N.E.2d 502, 504 (N.Y. 1984) (citations omitted). A few states, including New York, have now overruled the traditional duty of the carrier to use the highest practicable care for the passenger's safety, substituting the reasonable care standard. *See Lowrey v. Montgomery Kone, Inc.*, 42 P.3d 621, 622 (Ariz. Ct. App. 2002); *Bethel v. N.Y. City Transit Auth.*, 703 N.E.2d 1214, 1214-15 (N.Y. 1998). This does not seem to alter the rule in *Johnson*, but it perhaps raises a question.

36. *Lando v. State*, 351 N.E.2d at 426 (N.Y. 1976).

37. *Johnson*, 467 N.E.2d at 505.

38. *See* 2 DOBBS, *supra* note 1, § 311.

39. *Compare* *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 363-64 (Fla. 1995) (rejecting liability for negligent AIDS diagnosis or test—no liability without impact), *and Heiner v. Moretuzzo*, 652 N.E.2d 664, 670 (Ohio 1995) (rejecting liability for negligent

These cases seem unjustified in light of the long legal tradition recognizing that a defendant may undertake a duty that courts will enforce. At the very least, courts surely should offer some kind of explanation why the defendant who has undertaken care for the plaintiff escapes liability when he breaches his undertaking. Where there is an undertaking, via a special relationship or otherwise, the explanation that there is no sudden event or zone of danger is no explanation at all.

## V. CONCERNS ABOUT EMOTIONAL DISTRESS RECOVERIES

To say that undertakings to protect the plaintiff against emotional harm should be respected and enforced is not to say that adjudication of emotional distress claims raises no problems.

Before alluding briefly to some of the problems, I want to state explicitly that appropriate emotional distress claims deserve redress in some form. Emotional distress is real and poisons the living of life and the pursuit of happiness. Anyone who is not a sociopath has experienced distress and can recognize it in others. Even sociopaths probably can recognize the situations that promote emotional distress in others. That fact makes it easy in many cases to conclude that the plaintiff's emotional distress is real and would naturally follow from the defendant's negligent acts. A mother who sees her child run over and crushed by a negligently driven truck is very likely to suffer distress, perhaps all her life.

What reasons for the concern, then, about emotional distress recoveries? The claim that emotional distress cannot be proved and that special rules must then be applied to limit recoveries is not justified. In many cases that come before the courts, we would be surprised if the plaintiff did *not* suffer emotional distress. Most parents would be distressed to see their child run down, most patients would be distressed to hear a diagnosis of AIDS, and most victims of sexual exploitation by their trusted therapist would be distressed. Many of these parties will also suffer serious psychiatric problems as a result.

Even if it is true that some emotional distress claims cannot be adequately proved, that does not call for a rule barring all claims. We do not bar all claims for pain because in some cases we doubt that the pain is real. Instead, we judge each case on its own merits—the essence of the judicial method and the essence of justice, which is wholly about the individual's claim, not about the demerits of the claims of others.

Once we put aside the exaggerated and misdirected arguments that emotional distress may be feigned, the problem with emotional distress damages becomes clear. What damages awards are appropriate for pain and for emotional distress? Aside from damages meant as compensation for medical or therapeutic expenses, there is no obvious answer.

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AIDS diagnosis or test), *with Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000) (recognizing liability predicting New York law), *Chizmar v. Mackie*, 896 P.2d 196, 205 (Alaska 1995) (recognizing liability), *and Bramer v. Dotson*, 437 S.E.2d 773, 774–75 (W. Va. 1993) (recognizing liability).

Uncertainty about appropriate awards carries several price tags. We may be awarding too much or too little, possibly a serious distortion of the rule of law either way. The uncertainty magnifies the role of conscious or unconscious bias in the decision makers; left without guidance, they may act on their likes and dislikes of the parties, unrelated to the harm done. More likely, we are sometimes awarding too much and at other times awarding too little, or at least we might think so if we only had a basis for judging. Some similarly situated plaintiffs will receive vastly different awards, so the uncertainty in measuring emotional harm damages works against the principles of even-handedness.

The uncertainty has strategic consequences in settlement, too. The open-endedness of the claim makes it easy for plaintiffs to hope for too much and it frightens defendants. The parties cannot easily estimate the range of probable verdicts and that in turn makes settlement more unlikely, or conversely, makes settlement based on the defendant's fear of virtually uncontrolled verdicts all too likely.

Instead of constructing elaborate rules to permit recovery for some foreseeable emotional harms and denying recovery for other foreseeable emotional harms, we might be studying the real problem—meaningful measures of emotional harms. This is not to suggest bureaucratic solutions such as caps or fixed ratios between damages for physical harm and emotional harm. Such approaches are too unprincipled; they necessarily disrespect the individual and his claim.

Yet there are possible sources of guidance about appropriate awards for emotional harm. Those sources may also offer hope for more even-handed emotional harm recoveries. Guidelines offer some possibilities. Guidelines might rely, not on bureaucratic rules, but on factual scenarios that help a jury individualize recoveries in the context of a broad range of possible harms.<sup>40</sup> Another possibility is even simpler—permit the jury to rate the severity on a scale of, say 1–10, then provide a suggested range of awards on the scale.<sup>41</sup>

Unlike solutions based ratio rules and caps, solutions like these offer the possibility of bringing order and relative even-handedness to the damages awards for emotional distress and other forms of pain. Considerable effort has gone into making and remaking the tangled rules that have no principle but are merely designed to exclude a large number of claims. If we sought to adjudicate all just claims based on the defendant's negligence and foreseeable emotional harm, we could focus on the measurement of damages. In doing that, we would have every reason to believe newer measurements of damages could make the law simpler, more even handed, more just, and more sensible.

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40. See Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. REV. 908, 916 (1989).

41. See Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2078–79 (1998).

## VI. DIFFICULTIES AND ALTERNATIVES IN THE USE OF UNDERTAKINGS ANALYSIS

To recognize undertakings in emotional harm cases is exactly in line with fundamentals of tort law that reach back to its early roots. If you do nothing to save my horse from its disease, you are not liable; you have no duty to act for my benefit. But if you are my veterinarian and neglect to treat my horse properly, you are liable for your negligence. In such a case, you have undertaken to act and to do so with the care expected of veterinarians. The provenance for this principle is old as well as sound: it dates back to the 1300s.<sup>42</sup>

Formal undertakings, spelled out in words, present few analytical problems. But most undertakings are likely to be only implicit in words used or actions taken. There is nothing startling or worrisome about that; the same is true in ordinary contract cases. More specifically, the defendant's undertaking might be manifested only in the relationship he accepts. A veterinarian must act in accord with the role and care of a veterinarian; that is what his conduct objectively conveys when he undertakes his calling. That is the principle addressed in this Essay. It is one of the root ideas in tort law, even if it has sometimes escaped the notice of busy lawyers and judge's clerks.

The role of undertakings in tort law is well-established, even when the undertaking is implicit rather than explicit, as where it is derived from the special relationship between defendant and plaintiff. Even so, courts may find it difficult to know exactly what the defendant undertook to do, a question that must largely turn on the facts of each case except where courts have recognized formal relationships that create a duty.

In the veterinarian's case, we think he must be understood to have undertaken the duties of care that go with his calling or his relationship to the plaintiff whose animal he treats. Even if he did not subjectively intend to meet the standards of other vets or the standards of reasonable care, he gives the appearance of doing so by proclaiming himself a veterinarian, and that objective manifestation of his undertaking should control, just as it does with formal contract claims.<sup>43</sup>

Customs, social understandings, and the cultural background all combine to say the vet undertook a duty of care for the plaintiff's horse. But if we ask whether he also undertook a duty of care for the plaintiff's emotional well-being, so that he would be liable for the plaintiff's emotional distress if he negligently

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42. *Waldon v. Marshall*, Y.B. Mich. 43 Ed. 3, fol. 33, pl. 38 (1370), *printed and translated in* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 81 (1949); *see also* *Steinson v. Heath*, 3 Lev. 400, 83 Eng. Rep. 750 (K.B. 1694) (“[C]ase lies for non-feasance, against my shepherd for negligent keeping my sheep, against my carter for negligent keeping my horses, and for not repairing a bridge by which I am to pass . . . against a chaplain, for not reading prayers, against an innkeeper, who refuses to lodge me . . .”).

43. *E.g.*, *Hill-Shafer P'ship v. Chilson Family Trust*, 799 P.2d 810, 815 (Ariz. 1990) (“[M]utual assent is based on objective evidence, not on the hidden intent of the parties.”); *Donovan v. RRL Corp.*, 27 P.3d 702, 709 (Cal. 2001) (“The objective manifestation of the party's assent ordinarily controls . . .”).

allowed the horse to die, the answer is probably no. Although the vet may have foreseen that the owner will be distressed if his horse is negligently killed, there is little in his role as a vet to suggest that the parties expected protection from emotional distress. The vet is, after all, licensed to treat animals rather than humans, even if humans may suffer distress at his mistreatment. Quite likely, then, the vet would be liable for emotional distress only if a stranger would be liable.<sup>44</sup> The same may be true of some other case of physical harms in special relationships.

But consider the case of the physician who negligently misdiagnoses a serious illness like AIDS or who sexually exploits his patient, in both cases causing emotional distress. Did the physician undertake not only to diagnose and treat but also to protect the patient from adverse emotional consequences that arise from negligent misdiagnosis or from sexual activity with the patient? Distress resulting from negligent misdiagnosis seems inseparable from the duty to use care in the physician's core undertakings.

It is less clear that the doctor who undertakes physical care for his patient also undertakes not to risk emotional harm by exploitive sexual behavior with his patient where the patient appears to consent.<sup>45</sup> It is even less likely that most lawyers undertake any kind of emotional protection for their clients,<sup>46</sup> although we should remember that both could face liability in some circumstances where strangers would be liable.<sup>47</sup> How is a court to know what the doctor or lawyer undertook if the social understandings of the doctor-patient or lawyer-client relationship do not make this clear? And does that question show that undertakings are not a good basis for liability?

On the most pragmatic level the questions just raised present no problem. The plaintiff has the burden of proof. If she presents a case in which judges and jurors<sup>48</sup> cannot be sure what the defendant undertook, the plaintiff will lose for

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44. In fact, courts treat animals as personal property and reject liability to the owner for emotional distress resulting from negligent physical harm to the animal. *Oberschlake v. Veterinary Assoc. Animal Hosp.*, 785 N.E.2d 811, 812-13 (Ohio Ct. App. 2003). This is the same rule applied to strangers who injure the owner's pet. The rule completely protects the veterinarian who castrates a dog without the owner's permission from all liability for negligence if the castrated animal is worth just as much as a fully equipped model. *Ponder v. Angel Animal Hosp., Inc.* 762 S.W. 2d 846, 847 (Mo. Ct. App. 1988).

45. Note that if the patient does not profess consent, or that if the doctor should recognize the patient's incapacity to consent, the doctor may be subject to liability for battery. *See* 1 DOBBS, *supra* note 1, §§ 96-98.

46. Lawyers performing routine tasks, drafting ordinary contracts, trying criminal actions, and the like do not appear to be undertaking any responsibility for the client's emotional well-being, even though all clients may suffer emotional distress if their case is negligently handled and lost. *See* 2 DOBBS, *supra* note 1, § 492.

47. For example, intentional or negligent physical injury plus parasitic, etc.

48. This Essay does not explore the respective roles of judges and juries. However, standard tort doctrine normally makes the existence and scope of a duty a question for judges, not juries. *See* *Iseberg v. Gross*, 852 N.E.2d 251, 257 (Ill. App. Ct. 2006) ("Whether a defendant has voluntarily undertaken a legal duty to a plaintiff is a question of law.") (quoting *Rogers v. Clark Equip. Co.*, 744 N.E.2d 364, 366 (Ill. App. Ct.

lack of sufficient evidence in the same way that she will lose any case that depends upon undertakings if she cannot sustain her burden of showing that the defendant undertook to use care to protect her from the particular invasion she now claims.<sup>49</sup>

The pragmatic answer, however, does not assist the lawyer who needs to find arguments or evidence that can help show an undertaking. The defendant's professional standards and ethics might help us appreciate what doctors or other professionals think they are undertaking, but it might not be so wise to generate statistical studies or public questionnaires on this topic. On the whole, courts usually believe they know what was and was not implicitly undertaken when the defendant entered into a recognizable relationship, simply because judges know what other humans in society know, and most of us have some kind of an idea what a doctor is taking upon himself when he accepts a patient.

In contrast, if the court understands the nature of the defendant's relationship with the plaintiff to be purely financial or a purely mechanical service, the court will almost certainly conclude that the defendant did not undertake to use reasonable care for the plaintiff's emotional well being independent of physical harm. In such a case, then, the negligent defendant would not be liable in the absence of physical harm that either causes or results from the plaintiff's emotional distress. The house painter who paints the plaintiff's house in the wrong color may be liable for breach of contract and the cost of repainting, but he is probably not liable for the homeowner's distress over the color. The lawyer who undertakes a representation on financial matters is not liable to the client for emotional distress resulting from negligent representation.<sup>50</sup>

When a court is not sure that a defendant has undertaken to use reasonable care to protect the plaintiff's emotional well-being, dismissal of the claim on the ground that the plaintiff has produced insufficient argument or evidence of the undertaking is a possibility already noticed. Broadly speaking, two other possibilities remain for imposing responsibility.

First, the defendant, who did not undertake a special duty to the plaintiff, may still be liable under the same conditions that would make a stranger liable.

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2001))). So far as duty depends on construing the undertaking, familiar contract law also holds that the interpretation of contracts is for the judge, not the jury. *E.g.*, *Hammonds v. Hartford Fire Ins. Co.*, 501 F.3d 991, 997 (8th Cir. 2007) (“[D]etermining the rights and obligations arising from the contract . . . presents a question of law, rather than a question of fact.”); *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983) (“The task of interpreting a contract is generally performed by a court rather than by a jury.”). However, where the existence or scope of a contract turns on the existence of particular historical fact, the existence of that fact would be a question for the jury. *John Sommer Faucet Co. v. Commercial Cas. Ins. Co.*, 99 A. 342, 343 (N.J. 1916) (“[W]hen the construction of a written instrument depends upon extrinsic facts, as to which there is a dispute, its construction is a mixed question of law and fact, and presents a jury question, under proper instructions from the court.”).

49. *E.g.*, *Jefferson County Sch. Dist. R-1 v. Gilbert*, 725 P.2d 774, 766–77 (Colo. 1986) (holding school's provision of crossing guard for children leaving school at the end of the day was not an undertaking to post a guard for children coming to school).

50. *See Reed v. Mitchell & Timbanard, P.C.*, 903 P.2d 621, 626 (Ariz. Ct. App. 1995).

This is the bystander case where the bystander meets the zone of danger or other criteria imposed by the particular court.<sup>51</sup>

Second, courts may supplement the duties undertaken by the defendant with duties imposed by court. This idea raises theoretical, policy, and justice issues considered next.

## VII. CONTRACT AND UNDERTAKINGS

When courts are uncertain whether the defendant undertook to protect the plaintiff from emotional harm, they might still find it congenial to require reasonable care for the plaintiff's emotional well-being independent of any undertaking in some instances. One basis might be allied to the idea that once an actor begins a course of conduct, he must carry it out with reasonable care.<sup>52</sup> Another is the idea that even if the medical doctor does not undertake to provide emotional support for his patient, he should not undermine his undertaking to provide physical care by carrying on a sexual exploitation he can foresee will cause emotional harm.<sup>53</sup> Other grounds for extending the duty beyond the narrow scope of the defendant's undertaking might be built on policies that forbid disclaimers of liability in certain situations.

These ideas raise theoretical and policy questions. Is the undertaking, after all, merely a contract? If the basis for liability is purely contractual, then the limits of the contract might be the limits of the duty. In that case, courts could not impose duties of care collateral to the contract itself. In fact, defendants might even argue for a companion to the economic loss rule.<sup>54</sup> Translated to the emotional harm arena, the argument based on the economic loss rule would be that the bare existence of a contract between the parties would rule out liability for emotional harm unless the contract (undertaking) specifically created such liability. Finally, an undertaking viewed as merely a contract could ordinarily be modified by the parties to exclude liability for emotional harm.

But courts have not traditionally viewed tort undertakings as merely contracts.<sup>55</sup> The older common law was the law of tort, not contract. And as shown

51. See *supra* text accompanying notes 15–19.

52. *Muthukumarana v. Montgomery County*, 805 A.2d 372, 396 (Md. 2002) (holding if defendant “does indeed act for the benefit of another, he must act in a reasonable manner”); *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098, 1110 (N.M. 2003) (“[E]very person has a duty to exercise ordinary care for the safety of others, when that person does choose to act.”). Distinguish this rule of responsibility for negligently carrying out positive actions from the undertaking rule, which recognizes a duty to use care based on express or implied assurance or promise.

53. This is not to suggest that all sexual contact would be exploitative—that depends on the independence of the patient and her emotional state. Nor is it to suggest that emotional harm would always be foreseeable.

54. See 2 DOBBS, *supra* note 1, § 452 (Supp. 2007); Dan B. Dobbs, *An Introduction to Non-statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713 (2006). For a general discussion, see Symposium, *Dan B. Dobbs Conference on Economic Tort Law*, 48 ARIZ. L. REV. 687 (2006).

55. See 1 DOBBS, *supra* note 1, § 3.



above, that old law of tort included undertakings as a basis of liability.<sup>56</sup> Formally, tort law was expressed in the writs of Trespass and Trespass on the Case. Out of these grew the writ of Assumpsit—the writ that became the basis for contract claims.<sup>57</sup> The name of this contract writ, Assumpsit, meant “he undertook” or “he has undertaken” or “he has taken upon himself.” So undertakings, originally an idea in tort, also became a contract idea. Consensual transactions are thus historically a part of both tort and contract law. The fact that a duty is derived from an undertaking does not automatically make it exclusively a contract duty. When the defendant undertakes care that affects physical or emotional security, most often we see the duty as one in tort rather than contract.

That is not the end of the issue, however. Although courts may conceive of the undertaking as creating a tort duty, they might still hold that the nature and scope of the tort duty is determined exclusively by the undertaking. In other words, courts might refuse to impose any obligations except those created by the undertaking and those that would be owed to a non-contracting party or stranger in any event. That would mean that the defendant could undertake a duty and wholly or partly disclaim it in the same breath. Put more favorably to the defendant, for a duty arising out of a consensual transaction such as the defendant’s undertaking, the undertaking being the only basis for liability, the limits of the undertaking mark the limits of the defendant’s duty.

The proposition is logical, but it is not universal law. For instance, product liability was originally grounded in express or implied warranties and thus reflected the seller’s undertaking.<sup>58</sup> Strict tort liability rules rather than warranty rules now determine many personal injury cases, leaving less discussion of the seller’s warranty-undertaking. Even so, strict liability, like warranty liability, is historically grounded in the perception that the manufacturer at least implicitly undertakes to provide a product with some minimum degree of safety and one that is the product it appears to be—say, milk, not merely a toxic white liquid. Functionally, strict tort liability and warranty liability together comprise a single system which recognizes the seller’s unavoidable undertaking to provide milk, not toxins, when he sells his product as milk. Strict tort liability begins with something that looks like an implicit undertaking but ends with a rule of law imposed by courts that cannot be varied in personal injury cases by the seller’s contract or disclaimer.<sup>59</sup> In this functional analysis, the limits of the undertaking are thus not the limits of the defendant’s duty.<sup>60</sup>

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56. Thus the undertaking to act as shepherd created a tort obligation to carry out the undertaking. See *Waldon v. Marshall*, Y.B. Mich. 43 Ed. 3, fol. 33, pl. 38 (1370), printed and translated in FIFOOT, *supra* note 42.

57. 1 DAN B. DOBBS, *THE LAW OF REMEDIES* § 4.2(3) (2d ed. 1993).

58. *Greenman v. Yuba Power Products, Inc.* initiated the strict tort liability movement. 377 P.2d 897 (Cal. 1963). Under what is now called the economic loss rule, the defendant’s undertaking remains the limit of his obligation when it comes to purely financial damages, divorced from physical harm to person or property. See *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965).

59. RESTATEMENT (THIRD) OF TORTS, PRODS. LIAB. § 18 (1998) (stating no exculpatory provision bars or reduces otherwise valid products claim “for harm to persons”). The defendant need not give a warranty at all, U.C.C. § 2-316 (2003), but that

The same point is demonstrated in other areas of disclaimer law. Statutes aside,<sup>61</sup> hospitals have no duty to accept patients. Their duty of care to patients arises only because they undertake care by admitting patients to the hospital, and that undertaking does not cover forms of care to be provided by private physicians.<sup>62</sup> Yet, the hospital is not permitted to contractually eliminate its undertaking of care; it must still use the kind of reasonable care required of all hospitals. This is the famous *Tunkl v. Regents of University of California* case.<sup>63</sup> On the other hand, a practitioner who purports to provide health care can clearly limit his duty by undertaking to provide only a specific kind of care. For example, he can limit his undertaking so that he is under a duty to provide only chiropractic, not medical care.<sup>64</sup> In *Boyle v. Revici*,<sup>65</sup> the practitioner limited his treatment for cancer to purely experimental treatments. This was a permissible constriction of his duty of care.<sup>66</sup>

Defendants might argue that cases like *Tunkl* are not comparable to cases in which a defendant undertakes care for the plaintiff but attempts to exclude liability for negligence that results in emotional harm. The argument would state that, as with the product manufacturer, physical harms are the special province of tort law but that emotional harms are not. Hence, the argument would go, the defendant cannot contractually constrict his undertaking of reasonable medical care but can constrict his undertaking to exclude liability for negligently inflicted emotional harm. To be specific, this reasoning would say that the physician (not a

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will not exempt him from strict liability for personal injury, and if he does give a warranty, he may not limit his liability for personal injury damages, U.C.C. § 2-719(3) (2003).

60. The next step would be to recognize that even a plaintiff who does not meet the bystander rules may have a stand-alone emotional harm claim as a user or consumer of a defective product when she witnesses a horrible death of another caused by the defective product. Only a few cases have taken this step, sometimes in language that is now a little out of date. See *Gnirk v. Ford Motor Co.*, 572 F. Supp. 1201, 1202–03 (D. S.D. 1983) (holding mother as user of defective product could recover for serious emotional harm resulting from watching product cause death of her child and court need not consider zone of danger rules); *Kately v. Wilkinson*, 195 Cal. Rptr. 902, 909–10 (Ct. App. 1983) (holding purchaser and passenger of defective boat could recover for serious emotional harm resulting from watching boat inflict fatal injuries on a close friend). A number of other cases refuse to go this far. E.g., *Straub v. Fisher & Paykel Health Care*, 990 P.2d 384 (Utah 1999). The point remains, however, that courts are free to and do impose duties arising out of the undertaking that go beyond the undertaking itself.

61. Statutes require emergency screening and treatment, 42 U.S.C. § 1395dd (2000), and nondiscriminatory admission by hospitals receiving certain federal funds, 42 C.F.R. § 124.603 (2007). See 1 DOBBS, *supra* note 1, § 255.

62. 1 DOBBS, *supra* note 1, § 250 (Supp. 2007).

63. 383 P.2d 441 (Cal. 1963) (holding release in advance of hospitalization released hospital from liability for negligence and other wrongful acts was invalid as against public policy).

64. On the principle that he limits his duty to the care he holds himself out to provide. E.g., *Piazza v. Behrman Chiropractic Clinic, Inc.*, 601 So. 2d 1378 (La. 1992).

65. 961 F.2d 1060 (2d Cir. 1992).

66. The point may at times be addressed in terms of assumed risk. This type of assumed risk, distinct from comparative fault, is now generally taken to reflect a limitation on the defendant's duty of care. See 1 DOBBS, *supra* note 1, § 212.

therapist) could contractually provide that he undertakes care for the patient's physical well-being, but that even if he is negligent in delivering such care, he is not liable for stand-alone emotional harm.

Fiduciary cases suggest that an argument cast in this way is too broad to accept. Fiduciary relationships and undertakings are relevant. They resemble emotional harm claims because they do not involve undertakings to protect against physical harm. Instead, they usually entail undertakings to protect from financial harm, or, perhaps less often, undertakings to protect from special kinds of emotional harm such as those represented by privacy invasions.<sup>67</sup>

The question is whether a fiduciary can contractually limit the scope of his fiduciary relationship to immunize himself for what, without such a limitation, would amount to a breach of his fiduciary duty. The answer is that sometimes he can and sometimes he cannot, perhaps depending somewhat on the nature of the duty involved, its social and personal significance, the breadth of the restriction on that duty, and the plaintiff's range of options.

Two examples show why there can be no invariable rule about contractual limitations in fiduciary cases. In certain cases where a religious institution undertakes a relationship with particular individuals or groups within the religious body, courts have found a fiduciary duty running from the institution to the individuals.<sup>68</sup> A fiduciary relationship can be found when an altar boy submits to the sexual advances of a priest,<sup>69</sup> a minor with a potential church career is molested by his priest-mentor,<sup>70</sup> a church member is individually pressured by

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67. The term "confidential relationship" may be used instead of "fiduciary relationship" in such cases. See *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So. 2d 990, 996–97 (Miss. 2006) (holding health insurer did not owe fiduciary duty to insured but did owe a duty of confidence as to medical information and could be liable if it revealed such information even to a single person); *Humphers v. First Interstate Bank of Or.*, 696 P.2d 527, 531–32 (Or. 1985) (holding actionable breach of confidence, but not "privacy" invasion). Breach of confidence/privacy invasion cases represent specific instances of emotional harm.

68. See *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 429–30 (2d Cir. 1999) (emphasizing priest's relationship with abused boy in special groups, field trips, and the like); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 n.6 (5th Cir. 1998) (emphasizing jury instruction that "the primary relationship between a minister and a parishioner is not a fiduciary one, and that Baucum could not be held liable for breaching his fiduciary duties unless he 'acquired and abused' influence and 'betrayed' confidences learned in a 'relationship of trust'"); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 766 (M.D. Pa. 2007) (stating Pennsylvania "decisions suggest a rule holding that, when a plaintiff had a special relationship with the defendant priest and diocese, such as counseling or participation in church-sponsored activities, a fiduciary relationship will be found to exist and the plaintiff's breach of fiduciary duty claim will be recognized"); *F.G. v. MacDonell*, 696 A.2d 697, 704 (N.J. 1997) ("[B]y accepting a parishioner for counseling, a pastor also accepts the responsibility of a fiduciary").

69. *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1219–20 (Me. 2005); cf. *Martinelli*, 196 F.3d 409, 428–29 (noting, among other things, abused boy was member of priest's church group interested in liturgical reforms).

70. *Doe v. Liberatore*, 478 F. Supp. 2d 742, 771 (M.D. Pa. 2007).

the church to act against her own interests or those of her family,<sup>71</sup> or a couple trusts the priest in marriage or other counseling.<sup>72</sup> Secular therapy or counseling, of course, also entails a fiduciary relationship.<sup>73</sup> It would be odd to the point of hypocrisy for a court to recognize a duty founded on the confidence reposed in a priest or secular counselor and at the same time to say that the priest can freely abuse his parishioner if he has posted a notice that he rejects any fiduciary duty.

The opposing example involves lawyers. Lawyers are undoubtedly in a fiduciary relationship with their clients with respect to financial transactions and interests, and lawyers are liable in tort for breach of such duties. One fiduciary duty is to avoid conflicts of interests. Yet in some instances the law permits attorneys to contract out of that duty by obtaining the client's consent to the conflict.<sup>74</sup>

The physical injury and fiduciary cases suggest that undertakings in emotional harm cases require outcomes that are as divergent as the outcomes in the religious and lawyer fiduciary cases. On analogy to *Tunkl*, a therapist would

71. Cf. *Davis v. Church of Jesus Christ of Latter Day Saints*, 852 P.2d 640, 646 (Mont. 1993) (holding various forms of church pressure on member to coerce settlement of a claim against the church, fiduciary relationship is question of fact), *overruled by Gliko v. Permann*, 130 P.3d 155, 159 (Mont. 2006) (holding existence of fiduciary relationship is a question of law that can be decided on summary judgment). *But cf. Berry v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 879 A.2d 1124, 1131 (N.H. 2005) (holding where church did not report child abuse and allegedly counseled mother of child not to report it but to keep the matter within the church, no fiduciary duty was shown because "the plaintiffs did not allege that the elders acquired influence over them or that their confidence had been reposed in the elders"). Distinguish holdings that such a claim is barred by the First Amendment. *E.g.*, *Franco v. The Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198, 208–09 (Utah 2001) (holding that claims against the church for gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty are barred by the First Amendment).

72. *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988); *Doe v. Evans*, 814 So. 2d 370, 375 (Fla. 2002) (holding diocese had fiduciary duty to take reasonable steps to control sexually predatory priests who counsel vulnerable individuals); *F.G. v. MacDonell*, 696 A.2d 697, 704 (N.J. 1997) (holding that a clergyman's sexual misconduct with a parishioner who has consulted with the clergyman for counseling could constitute a breach of a fiduciary relationship).

73. *Horak v. Biris*, 474 N.E.2d 13, 17 (Ill. App. Ct. 1985); *Roy v. Hartogs*, 366 N.Y.S.2d 297, 299 (N.Y. Civ. Ct. 1975); *see also Purdy v. Fleming*, 655 N.W.2d 424, 435 (S.D. 2002) (recognizing, "in normal circumstances," that a fiduciary relationship exists with secular counseling). In *Horak*, a social worker had sexual relations with defendant's wife during the course of the couple's secular marriage counseling. 474 N.E.2d at 15. The court stated:

[T]he very nature of the therapist-patient relationship . . . gives rise to a clear duty on the therapist's part to engage only in activity or conduct which is calculated to improve the patient's mental or emotional well-being, and to refrain from any activity or conduct which carries with it a foreseeable and unreasonable risk of mental or emotional harm to the patient.

*Id.* at 17.

74. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 (2000).

presumably not be allowed to negate his undertaking to provide emotional and mental health treatment by also eliminating his duty to do so. On the other hand, a lawyer handling a financial matter might well be permitted to limit his fiduciary undertaking to exclude liability for emotional harm that results from a fiduciary breach, if indeed the fiduciary duty would extend to emotional protection in the first place when it comes to purely financial dealings. Alarmists may claim this analysis calls for results that differ according to context and policy and provides only debilitating uncertainty. Such a claim is off the mark. The uncertainty is only the uncertainty required to decide cases on their facts rather than on overarching fears and ideologies.

### CONCLUSION

Cases, policy, justice, and common law traditions suggest that when the defendant undertakes to care for the plaintiff in a way that implicates the plaintiff's emotional well-being, the special restrictive rules generated by courts to prevent emotional harm recoveries should not apply. Instead, courts should consider the undertaking itself when they determine the existence and scope of a defendant's duty. A mortuary that undertakes to prepare a body for an open-casket funeral is clearly undertaking to care for the survivors' emotional interests and clearly in breach of the undertaking when it presents a decaying and negligently prepared body. Liability in the case of such an undertaking should not be rejected on the basis of the restrictive rules courts apply to claims of emotional harm caused by strangers. The hospital that undertakes care for mother and baby should not escape liability for emotional harm when it loses the baby. Its undertaking should suffice to create the duty of care and, very largely, to define it.

In some cases, courts may wish to confine the duty to protect from emotional harm strictly to the duty undertaken and equally to permit the defendant to impose whatever limitations he wishes on his undertaking. In other instances, however, courts should supplement the undertaking with rules of law that refuse to permit undue restrictions on the care undertaken. A therapist or religious leader should not be permitted to contract out of his very clear undertaking to use care to promote the patient's emotional well-being.

The common sense and traditional legal concepts behind these propositions are straightforward. The defendant is responsible according to the tenor of his undertaking, express or implied, and responsible as well for carrying out that undertaking with reasonable care.

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