RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ATTENDANT TO ECONOMIC LOSS: A REASSESSMENT

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> Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.... I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices. We should know, if thus informed, that magic words and incantations are as fatal to our science as they are to any other.[1]

I. INTRODUCTION

The California Supreme Court[2] has led the nation in creating new avenues of tort recovery. One class of plaintiffs that has made very little headway, however, is the class suffering economic damage. And, specifically in the area of negligent infliction of emotional distress[3] attendant to economic

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1. BENJAMIN NATHAN CARDOZO, *The Growth of Law, and the Method of Judging, reprinted in* SELECTED WRITINGS OF BENJAMIN CARDOZO 211, 215 (Margaret E. Hall ed., 1947).

2. We will be drawing largely (but not exclusively) on California cases for several reasons. First, the state is widely known for shaping the contours of tort law; it is certainly in the vanguard with respect to compensation for emotional injury. Second, the state's "liberal tendencies rigorously test the received wisdom behind" doctrinal restrictions on recovery. *See* Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss*, 37 STAN. L. REV. 1513, 1515 n.7 (1985).

3. In this Article, we analyze recovery for emotional distress in tort only because that is the avenue of recovery most commonly pursued. An action for emotional distress, however, may arise in a number of contexts: strict liability (*see, e.g.*, Shepard v. Superior Court, 142 Cal. Rptr. 612 (Ct. App. 1977) (emotional distress damages recoverable in strict liability consonant with stated purpose of strict liability doctrine to relieve plaintiff of burden of proof inherent in pursuing negligence actions)); nuisance (Edwards v. Talent Irrigation Dist., 570 P.2d 1169 (Or. 1977)); trespass (Adams v. State, 357 So. 2d 1239 (La. Ct. App. 1978)).

In general, emotional distress damages are not recoverable in a breach of contract action. *See, e.g.*, Edmund v. Tyler Bldg. & Constr. Co., 438 So. 2d 681 (La. Ct. App. 1983);

injury, the class of plaintiffs bringing suit has had little success. While courts have dramatically expanded recovery for emotional distress when the underlying injury is not economic, courts almost universally deny recovery when it is.

Emotional distress claims generally arise in one of two situations: either the plaintiff is the primary, direct victim of the defendant's negligent conduct, or the plaintiff's emotional distress arises from witnessing injury to a third person.[4] Although direct actions—those in which the plaintiff is the primary victim of the defendant's negligence—are the focus of this Article, we explain the policy considerations behind, and rules governing, percipient witness or bystander claims as well. The line between the two types of actions is far from clear, hence it is necessary to comprehend both to achieve a cogent understanding of this area of tort law.

Consider a case in which a plaintiff suffers emotional distress arising from the defective construction of her dream home. Improper grading and soil compaction, both a direct result of the homebuilder's negligence, causes standing water and ground saturation. The dampness results in significant structural damage to the home, forcing the plaintiff to move into a rental apartment until her dream home can be repaired. The repairs continue for seven years subjecting the plaintiff to significant inconvenience and stress. At various times during the seven year period, the plaintiff is completely displaced from her home and thus unable to carry out the functions that most of us consider commonplace but integral to our daily lives. The plaintiff's inability to entertain in her home causes her family business to suffer. When she is able to inhabit her home, her life is constantly disrupted by workers, foul, moldy odors, and ongoing construction. As a result, the plaintiff suffers deep anxiety,

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RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981). However, if the contract, by its nature, puts the defendant on notice that a breach of that contract could result in mental suffering by the plaintiff, then emotional distress damages may be recoverable. *See, e.g.*, Ross v. Forest Lawn Memorial Park, 203 Cal. Rptr. 468, 474 (Ct. App. 1984) (cemetery manager who agreed to permit mother to hire a private guard to watch the gravesite of her child and later changed his position, forcing mother to beg and plead for permission when she was already under great emotional stress, was liable for mother's emotional distress); Windeler v. Scheers Jewelers, 88 Cal. Rptr. 39 (Ct. App. 1970) (a jeweler who mishandled heirlooms was held liable for emotional distress damages). *See also*, J. L. Jones, Annotation, *Mental Anguish as Element of Damages in Action for Breach of Contract to Furnish Goods*, 88 A.L.R.2d 1367 (1963); Thomas R. Trenkner, Annotation, *Recovery for Mental Anguish or Emotional Distress, Absent Independent Physical Injury, Consequent Upon Breach of Contract with Sale of Real Property*, 61 A.L.R.3d 922 (1975) (recovery for mental distress or its physical consequences permitted when caused by breach of contract in connection with the sale of real property).

4. The distinction between the "bystander" and "direct victim" cases is an important one. Bystander liability is premised on a defendant's breach of duty to refrain from causing emotional distress to those who witness conduct which causes harm to a third party. *See* Burgess v. Superior Court, 831 P.2d 1197, 1200 (Cal. 1992). Because these cases raise the specter of unlimited liability, the court has severely circumscribed the class of bystanders to whom a duty will be owed. *See* Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989).

In contrast, "direct victim" liability is premised on a duty owed by the defendant to the plaintiff that is either imposed by law, assumed by the defendant or arising out of a special relationship between the plaintiff and the defendant. *See Burgess*, 831 P.2d at 1201. In direct victim cases, the limits set forth in the bystander line of case law have no direct application. "Rather, the well-settled principles of negligence [comprised of (1) duty, (2) breach of duty, (3) a proximate causal connection between the negligent conduct and the resulting injury, and (4) actual loss or damage] are invoked to determine whether all elements of a cause of action...are present in a given case." *Id.*

tension, depression and outbreaks of excema. She also sees a therapist and takes prescription medication for her depression.[5]

Most courts faced with these facts would not recognize the plaintiff's right to recover damages for emotional injuries against the negligent homebuilder for the simple reason that most courts would not recognize the homebuilder's duty to avoid inflicting emotional distress in the first instance. Generally, when the underlying injury is economic, the precedents run strongly against recovery[6] because it is believed that serious emotional distress is not an inevitable consequence of the loss.[7] Courts may allow recovery, however, if they find that, for whatever reason, the distress naturally ensues from the negligent conduct.[8] In the past, these "exceptional" cases have been decided without uniformity and in an arbitrary "[non]-precedent-sanctioned manner,"[9] an approach which results in purely subjective decision-making. This type of *ad hoc* decision-making is problematic because it does not provide the lower courts and litigants with the ability to predict what type of behavior will result in liability. Accordingly, "the case law in the field [of negligent infliction of emotional distress] is in an almost unparalleled state of confusion...."[10]

"[A]ny attempt at a consistent exegesis of the authorities in the area is likely to break down in embarrassed perplexity."[11] The current confusion in the state of the law is symptomatic of courts' failure to distinguish the purely evidentiary question of the seriousness of a plaintiff's injury from the legal question of whether a defendant's conduct at issue breached a duty the law recognizes.

It is erroneous to assume that emotional distress cannot naturally flow from economic injury.[12] In our example for instance, it is easy to find that the distress naturally ensued from the negligent behavior because homes pertain to the most intimate of arrangements. Homes are an inseparable aspect of family life, providing most persons with a sense of comfort and security. In essence, they are as integral to personhood as property can be. A claim such as the plaintiff's in our example carries with it its own indicia of genuineness. A rule that would bar the plaintiff from recovering for her distress simply because her underlying injury is economic in nature would serve no purpose dictated by

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5. These facts are derived generally from Salka v. Dean Homes, Inc., 22 Cal. Rptr. 2d 902 (Ct. App. 1993), *rev. granted*, 26 Cal. Rptr. 2d 476 (1993), *and dismissed and remanded*, 32 Cal. Rptr. 2d 543 (1994).

6. *See infra* text accompanying notes 151–56.

7. *See, e.g.*, Merenda v. Superior Court, 4 Cal. Rptr. 2d 87, 91 (Ct. App. 1992).

8. For instance, courts have made exceptions to the general rule of nonrecovery when the nature of the item damaged should have put the defendant on notice that the plaintiff would suffer emotional distress if, in fact, damage occurred. *See, e.g.*, Windeler v. Scheers Jewelers, 88 Cal. Rptr. 39 (Ct. App. 1970) (a jeweler who mishandled heirlooms was held liable for emotional distress damages).

Even before courts allowed recovery for emotional distress absent an actual physical impact to the plaintiff, most courts would allow a plaintiff to recover in cases of negligent transmission of telegrams (*see generally* Johnson v. State, 334 N.E.2d 590 (N.Y. 1975)) or the negligent mishandling of a corpse (*see* Allen v. Jones, 163 Cal. Rptr. 445 (Ct. App. 1980)).

9. Bro v. Glaser, 27 Cal. Rptr. 2d 894, 902 (Ct. App. 1994).

10. 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).

11. *Id.*

12. What is more, this notion raises the issue of causation, not of duty.

public policy, but rather, would merely serve to shift the cost of the negligent behavior from the tortfeasor to the innocent victim. Such a result seems untenable, yet is the common and likely outcome.

Relying on courts to create exceptions to the general rule of nonrecovery in "exceptional" situations presents an equally unworkable solution. Courts should resolve issues of liability by "application of the principles of tort, not by the creation of exceptions to them. 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."[13] The better approach would be to adopt general standards to test the genuineness and seriousness of emotional distress in any particular case without reliance on antiquated duty rules to bar claims at the pleading stage.

We are not arguing that a plaintiff whose claims arise from a typical financial arrangement in a prosaic business setting should recover. Rather, in our example, the homebuilder stands in a special relationship to the homeowner; a relationship that preexists the breach and makes emotional distress resulting from it foreseeable. In essence, the homebuilder is the plaintiff's emotional fiduciary. Because in the typical business arrangement parties assume the risk of economic loss, nothing suggests the particularly damaging emotional trauma foreseeable in the example above. There, the special relationship between homebuilder and homeowner, and the essential nature of the home itself, makes recovery appropriate. The same is true in a variety of contexts. The relationship between doctor and patient, insurer and insured, lender and borrower, employer and employee, and even lawyer and client may involve or place at risk one's emotional well being, and thus may support liability when emotional injury results from the relationship.

As our example makes clear, when courts focus on the nature of the underlying loss as the *sine qua non* of an actionable claim, specifically that it be non-economic in nature, many deserving plaintiffs are left without recompense. The premise underlying this Article is that categorical thinking should not defeat a deserving plaintiff's claim for emotional distress damages, that tort law should protect emotional well-being from invasion by others,[14] and, finally, that the nature of the underlying harm should not be determinative of recovery. As long as courts are going to have to deal with emotional distress claims,

13. Dillon v. Legg, 441 P.2d 912, 925 (Cal. 1968).

14. We assume that individuals are entitled to emotional well-being. For a full discussion of the two approaches traditionally used to determine whether an entitlement exists, *see* Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury,* 36 U. FLA. L. REV. 333, 341 (1984). In that article, Professor Bell discusses both the instrumental approach—which begins by envisaging the desirable society and creating entitlements that will create it—and the original approach—which begins with a recognized authority and awards entitlements as that authority seems to dictate. *Id.* Professor Bell argues that instrumentalists would recognize the entitlement to emotional well-being because to do so would serve the societal goals of efficiency, wealth distribution and justice. Further, the originalists would recognize the entitlement because emotional well-being is too integral to our humanity to surrender. *Id.* at 341–43. Professor Bell notes that these conclusions may be easily accepted with regard to significant psychic injury. They may not be so easily accepted with regard to insignificant or trivial psychic injury. *Id.*

In an article responding to Professor Bell, Professor Pearson argues that Bell's reading of both the instrumental and original approach is misguided, and that neither can be used to support an entitlement to emotional well-being. *See* Richard N. Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell,* 36 U. FLA. L. REV. 413, 414–15 (1984). A complete discussion of these approaches is beyond the scope of this Article.

regardless of the nature of the underlying injury, the need for a workable approach to the decisional task becomes imperative.

Some conceptual coherence can be found in the disparate decisions in this area by focusing on the existence or nonexistence of the special relationship that we describe. Then, building upon that framework, we suggest an approach that would provide courts an analytically sound method to decide claims of negligent infliction of emotional distress by focusing first on whether a duty has been breached and, after answering that question, only then turning to the evidentiary question of the seriousness of the harm caused by that breach. Recognition of the relationship as definitional of the parameters of liability will meet the concerns of most courts because liability will be finite.

First, this Article examines the underlying policy issues that have served to bar recovery for negligently caused emotional distress. Next it examines the traditional rules courts have used to limit recovery. For the most part, such rules have been unnecessary, but what is more, unsuccessful at achieving their desired results. Finally, this Article proposes a test that will resolve some of the more difficult as well as subtle policy issues raised by emotional distress actions.

II. HISTORY OF EMOTIONAL DISTRESS TORTS

Denial of recovery for emotional injury negligently caused has a long and venerable history.[15] The reasons courts give for denying recovery are as many as they are varied, and more confusing than clear. The early common law refused to recognize any legal right to emotional tranquility.[16] Though it is a fundamental principle of our judicial system that for every wrong there is a remedy,[17] courts deemed that emotional wrongs simply did not rise to the level

15. *See, e.g.*, Borer v. American Airlines, Inc., 563 P.2d 858, 862 (Cal. 1977) (court refused to recognize a nonstatutory cause of action in negligence for loss of parental consortium); Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) (negligence is not actionable unless it involves a legally cognizable right).

16. *See generally* Note, *Negligent Infliction of Emotional Distress: New Horizons After* Molien v. Kaiser Foundation Hospitals, 13 PAC. L.J. 179, 181 (1981). However, the early history of tort law does provide some examples of torts based on emotions, such as alienation of affection or seduction. Those torts, however, were based on the belief that women were property. *See* Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 140 n.15 (1992) (citing Fundermann v. Mickelson, 304 N.W.2d 790, 791 (Iowa 1981) (abolishing alienation of affection cause of action, stating that the doctrine was rooted in the antiquated idea of wives as property)).

Courts now recognize a cause of action for the intentional infliction of emotional distress. *Negligent Infliction of Emotional Distress: New Horizons After* Molien v. Kaiser Foundation Hospitals, *supra*, at 183. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965). When a defendant's conduct is extreme and outrageous, courts grant recovery for intentionally inflicted, severe emotional distress absent any attendant physical injury. *See* Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 218 (Cal. 1970) ("the courts of this state have...acknowledged the right to recover damages for emotional distress alone, without consequent physical injuries, in cases involving extreme and outrageous intentional invasions of one's mental and emotional tranquility"); State Rubbish Collector's Ass'n. v. Siliznoff, 240 P.2d 282, 286 (Cal. 1952) ("Greater proof that mental suffering occurred is found in the defendant's conduct...than in physical injury...."). If the conduct is intentional and unreasonable, plaintiffs may only recover when foreseeable physical injury results. *Id.* In the intentional infliction cases, outrageous conduct is the assurance of the genuineness of the claim. *Id.*

17. Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470, 481 (Ct. App. 1975) (citing Crisci v. Security Ins. Co., 426 P.2d 173, 178 (Cal. 1967)).

of legally cognizable harms.[18] In the case of *Lynch v. Knight*,[19] the plaintiff claimed that the defendant turned her husband against her by charging her with immoral behavior. The court dismissed her claim because the emotional harm alleged did not reasonably flow from the underlying injury, slander. The *Lynch* court stated "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone...."[20]

Because, like the *Lynch* court, most courts accepted the normative position that the law should not reward the plaintiff with the "eggshell" psyche, it was simple to categorize emotional injuries as somehow different from other injuries deemed deserving of compensation, even when they were not so different.[21] And, once that difference was assigned, as is so often the case, it was endowed with apparent reality. As a result, even today, those who suffer from physical harm are readily compensated;[22] those who suffer from emotional trauma, whatever the underlying injury, are deemed to be weak and suffering an idiosyncratic, self-inflicted harm, which should and will in many instances go uncompensated.[23]

This dilemma arises out of powerful but unstated assumptions about human nature. In an article discussing the growing recognition of "ethereal," relational torts, Professor Levit eloquently argues that the dichotomous treatment given physical and emotional harm represents a highly individualistic view of humanity, and discounts the meaning and importance of contacts between persons that are not physical. This perspective, that only physical injuries "count," is inauthentic and ignores individual dignity and autonomy.[24] The elevation of "legal form over emotional substance" is a reflection of both

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18. *See, e.g.*, Mitchell v. Rochester Ry. Co., 45 N.E. 354 (N.Y. 1896).

19. 11 Eng. Rep. 854, 863 (1861).

20. *Id.* The *Lynch* opinion is an example of the traditional devaluation of emotional injuries stemming in part from gendered judicial decision-making, a topic discussed *infra* at notes 69–82 and accompanying text. The *Lynch* decision recognized the common law rule that allowed husbands, but not wives, to recover for loss of consortium. At common law, the benefit that the husband had in the consortium of his wife was considered of material value, because she cooked, cleaned and tended to children of the union. As such, the value of the consortium to the husband could be estimated in dollar figures. Contrariwise, the wife's interest in the husband was considered merely emotional and, thus, noncompensable. *Lynch*, 11 Eng. Rep. at 863. Therefore, the redress for what appears to be an identical loss was gender-differentiated. *See generally* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

21. The construction of differences is what the law is about. *See* Levit, *supra* note 16, at 191 (discussing the law's creation of differences and the importance of recognizing intangible, probabalistic injuries as worthy of recompense); Martha Minow, *Foreward: Justice Engendered*, 101 HARV. L. REV. 10, 13 (1987) (discussing the legal treatment of difference). "[W]omen are compared to the unstated norm of men, 'minority' races to whites," and emotional injuries to physical ones. Minow, *supra* at 13.

22. In personal injury cases, plaintiffs are compensated not only for harms that constitute immediate consequences of the negligent act, but also for all *sequelae* of the occurrence. In fact, the established rule is to impose liability on the defendant for all damages actually inflicted, even if the plaintiff is thin-skulled. *See* Bell, *supra* note 14, at 402.

23. It is easy to discount those harms that seem to be a product of the mind rather than the physical world, and thus to somehow blame the victim for not mitigating her own harm. This point is made clearly by Professors Chamallas and Kerber. Chamallas & Kerber, *supra* note 20, at 818.

24. *See* Levit, *supra* note 16, at 189; Shipley, *supra* note 10, at 104, § 3 (noting that "the human organism [is a] unit which is essentially indivisible," with the mental component being as important as the physical component).

the law's systemic need for predictability and "the longevity of traditional systems of doctrinal classification" once adopted.[25]

Today, society places greater importance on emotional well-being than it has in the past, and in response, courts have begun to grant recovery for emotional injury in greater numbers.[26] No one can gainsay, however, that numerous theoretical and practical problems inhere in the current state of the law of negligent infliction of emotional distress. The following section of this Article will set forth the policy considerations courts have grappled with in adjudicating cases of this nature and will bring those problems and their solutions into clear focus.

III. POLICY CONSIDERATIONS

An effective approach to the economic injury cases is best formulated by first evaluating the policy goals of negligence law, then developing a model most capable of meeting those goals. Although the policy goals are clear, the restrictive rules currently in effect in most jurisdictions are not necessary, nor, ironically, conducive to accomplishing them. To illustrate that point, this section undertakes to explain and evaluate the policies at work in this area of tort law.

Paramount among the policy objectives that support the bar to recovery for emotional harm, whatever the underlying injury, are fear of fraudulent claims, a flood of law suits, and unlimited liability out of all proportion to fault.[27] There also exists the correlative fear that an intangible, emotional injury simply cannot be reduced to a dollar figure. Moreover, even if it could be, emotional injury is too speculative to measure if not too trivial to bother with.[28] Thus, the very nature of emotional injury reinforces the perceived need to delimit the scope of legal liability.

A. Fear of Fraudulent Claims

Fear of fraudulent claims has been at the heart of courts' reluctance to grant recovery for negligent infliction of emotional distress.[29] It is true that intangible injury is susceptible to manufacture or inflation. Consequently,

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25. Levit, *supra* note 16, at 171.

26. *See infra* text accompanying notes 112, 116, & 121. Most jurisdictions still deny recovery for emotional injury unless plaintiffs can prove that they have suffered physical injury. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 361 & n.5 (5th ed. 1984). Jurisdictions that do not adhere to the physical injury or manifestation requirement usually impose some other doctrinal obstacle to recovery. *Id.*

27. In an article arguing for full recovery for emotional injuries, Professor Bell notes that these concerns are, in fact, a small aspect of a larger concern—reduction of accident costs. Reducing the number and severity of injury-causing accidents and making sure that the reduction itself does not cost more than the savings in accidents avoided is arguably of primary importance in tort law. *See* Bell, *supra* note 14, at 347.

28. *See generally* RESTATEMENT (SECOND) OF TORTS § 436A; 3 FOWLER V. HARPER & FLEMING JAMES, Jr., THE LAW OF TORTS § 18.4 (1986); KEETON ET AL., *supra* note 26, § 54.

29. *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 917 (Cal. 1968) ("The denial of 'duty' [to avoid negligent infliction of emotional distress] in the instant situation rests upon the prime hypothesis that allowance of such an action would lead to successful assertion of fraudulent claims."); Waube v. Warrington, 258 N.W. 497, 501 (Wis. 1935) (The liability imposed by allowing recovery for mental suffering caused by witnessing another's danger would "open the way to fraudulent claims....").

courts fear that juries will be unable to distinguish the "real" intangible injury from the false or fraudulent one; and, only a *per se* rule denying all claims can avoid this danger.[30]

The argument that emotional injury is unique in that it tends to be fraudulent proceeds from a doubtful factual assumption. Indeed, some physical injuries, such as whiplash, back pain and other soft tissue damage are probably easier to feign than is severe emotional distress.[31] Accordingly, treating emotional distress as singularly difficult seems disingenuous. Emotional injury is often marked by definite and serious symptoms, physical or otherwise. In fact, it is generally accepted within the medical community that a strong correlation exists between manifestations of anxiety and physical illness.[32] Hence, successfully inventing an emotional injury is difficult at best,[33] but, in any event, the sophistication of the medical profession can help courts to ferret out nonmeritorious claims.[34]

Of course, the potential for fraud is greatest when the plaintiff is not the primary victim of the defendant's negligent conduct.[35] In contrast, when the plaintiff is the primary victim, such as when there is economic loss and attendant emotional distress, the policies of preventing fraudulent claims will rarely be implicated. Furthermore, the objectively verifiable nature of an economic injury provides indicia of genuineness in and of itself.

But, all that aside, the possibility of fraud is present, to some extent, in all cases, not simply negligent infliction of emotional distress cases or even those that involve only intangible injuries. Even assuming *arguendo* that a proportion of all negligent infliction of emotional distress claims brought will be fraudulent, the possibility that some fraud may go undetected does not justify substituting "artificial and indefensible barriers" to recovery in finding that there is no duty for case-by-case resolution.[36] The judiciary cannot abdicate its responsibility to award damages for sound claims because to do so is difficult. A plaintiff's interest in emotional well-being and retributive justice is simply more important than administrative ease.

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30. *Dillon*, 441 P.2d at 917.

31. Professor Bell made this point persuasively in his article. *See* Bell, *supra* note 14, at 352 (citing Deziel v. Difco Labs., 268 N.W.2d 1, 15–16 (Mich. 1978)).

32. *See* Levit, *supra* note 16, at 184–88. The author cites studies to support the proposition that psychological stress induces physical changes, and plays a role in the onset of disease.

33. *See* Sinn v. Burd, 404 A.2d 672, 678–79 (Pa. 1979) (medical science can establish causal link between psychic injury and injury-producing event). *See also* Levit, *supra* note 16, at 143 (author traces the development of modern psychology which resulted in classification of mental illnesses, greater understanding of the etiology of mental illnesses, and comprehension of the interdependence of physiological and psychological health); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1258–62 (1971) (author argues that mental trauma can be easily confirmed and documented).

34. Rodrigues v. State, 472 P.2d 509, 512 (Haw. 1970) ("In judging the genuiness of a claim of mental distress, courts and juries may look to 'the quality and genuiness of proof and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims.'").

35. Courts are concerned with the possibilty of fraudulent claims when the alleged injury is caused by witnessing an injury to a third person. *See, e.g.*, Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 522 (Cal. 1963), *overruled on other grounds by* Dillon v. Legg, 441 P.2d 912 (Cal. 1968); Tobin v. Grossman, 249 N.E.2d 419, 422 (N.Y. 1969); Waube v. Warrington, 258 N.W. 497, 501 (Wis. 1935).

36. *See Dillon*, 441 P.2d at 918.

B. Fear of Trivial Claims

The fear of fraudulent claims is closely related to the fear that recognition of a duty to avoid infliction of emotional distress would lead to a flood of litigation—most of it trivial.[37] This is a tempting argument to succumb to; yet, "courts are charged with the responsibility of dealing with cases on their merits, whether there be few or many."[38] Simply put, the very fact that many cases are filed and litigated shows the need for a coherent and comprehensive scheme of legal redress.[39]

The triviality argument is more complex than this, however. Historically, courts have assumed that emotional injury is intrinsically less serious than physical injury,[40] so mental tranquility is not something that we can or should always expect.[41] Furthermore, emotional injury is both experienced and caused by most persons at some time during their lives; it is an unavoidable aspect of the human condition. Some courts find that this "universality" of emotional distress renders the interest in mental tranquility "inherently unsuitable to legal protection."[42]

While at first blush the triviality argument seems cogent, it is in fact misleading and should be considered obsolete.[43] Advances in modern psychology have made it clear that mental trauma can be just as debilitating as physical trauma, even more so.[44] While it is a fact that we do not want trivial claims to be litigated, the problem is one of proof that should be determined by the trier-of-fact.[45] In other words, jurors can and should draw on their own experience to determine whether and to what extent the defendant's conduct caused the emotional distress suffered and when the distress is serious enough to warrant compensation.[46] The inappropriate screening of claims by the court at the pleading phase is a usurpation of the jury's function.[47]

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37. *See, e.g.*, Cosgrove v. Beymer, 244 F. Supp. 824, 825–26 (D. Del. 1965) ("Emotional disturbance...is normally in the realm of the trivial."); Payton v. Abbot Labs., 437 N.E.2d 171, 179 (Mass. 1982).

38. *Dillon*, 441 P.2d at 917 n.3. *See* Schultz v. Barberton Glass Co., 447 N.E.2d 109, 111 (Ohio 1983). *See also* KEETON ET AL., *supra* note 26, § 54. ("It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied.").

39. *Dillon*, 441 P.2d at 917 n.3.

40. *See* Levit, *supra* note 16, at 172 (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....")).

41. *See* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936) ("a certain toughening of the mental hide is a better protection than the law could ever be").

42. Thing v. La Chusa, 771 P.2d 814, 835 (Cal. 1989) (Kaufman, J., concurring); Bell, *supra* note 14, at 383.

43. *See* Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470, 481 (Ct. App. 1975) ("The argument that emotional distress is a trivial injury is an antiquated concept...; research has shown that mental trauma can be just as debilitating as physical paralysis.").

44. *Id.* (citing EZRA POUND, INTERPRETATIONS OF LEGAL HISTORY 120 (1923)).

45. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 818 (Cal. 1980) ("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 circumstances of the case.").

46. *Id.* at 821; State Rubbish Collector's Assn. v. Siliznoff, 240 P.2d 282, 286 (Cal. 1952).

47. *Molien*, 616 P.2d at 821; Ferrara v. Galluchio, 152 N.E.2d 249, 251 (N.Y. 1958).

C. Fear of Unlimited Liability

The specter of unlimited liability poses yet another obstacle to recovery. Traditionally, courts have adhered to the belief that each negligent act would give rise to potentially limitless claims;[48] yet, compelling "socioeconomic and moral factors" mitigate against imposing such crushing liability on any defendant.[49] Courts are reluctant to burden defendants when the social utility of their activities outweighs the interest with which it clashes.[50] Furthermore, some courts have believed that our system of insurance will be unable to absorb the cost of extending liability to cover emotional harms.[51] And, finally, because the tort system is based on the concept of "fault," many courts have felt it necessary to insure that a defendant is morally culpable before imposing liability.[52]

While we can agree that a line must be drawn somewhere so that the burden imposed on the defendant is not unreasonable, the validity of the line is of greater importance than its mere existence. Solicitude for the negligent actor should lessen as the blameworthiness of his conduct increases and its social utility decreases.[53] Where the concern is to avoid imposing excessive "punishment" upon a defendant, we must ask "whether it is fair to leave the burden of the loss instead on the innocent victim."[54] Fairness in this context must encompass both consistency in treatment of like claims and competency in that the rules used to achieve the goals of the tort system must reflect meaningful choices.[55]

D. Fear of Speculative Damages

The speculative nature of emotional distress damages presents a slightly different problem. The argument is that damages for emotional injury cannot be ascertained with any degree of certainty,[56] and money is not an adequate means of redress.[57] Specifically, courts fear that juries will award excessive damages when presented with sympathetic plaintiffs.

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48. *See* Kelley v. Kokua Sales & Supply, Ltd., 532 P.2d 673, 676 (Haw. 1975) ("Without a reasonable and proper limitation of the scope of the duty of care owed by appellees, appellees would be confronted with an unmanageable, unbearable, and totally unpredictable liability."). *See also* Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 524–25 (Cal. 1965), *overruled on other grounds by* Dillon v. Legg, 441 P.2d 912 (Cal. 1968); Tobin v. Grossman, 249 N.E.2d 419, 423 (N.Y. 1969).

49. *See* Thing v. La Chusa, 771 P.2d 814, 818–19 (Cal. 1989) ("[S]ocioeconomic and moral factors mandate that there be some limit to the liability of the negligent actor.").

50. *See Amaya*, 379 P.2d at 524.

51. *See id.* at 525.

52. *See, e.g., id.*

53. *See Thing*, 771 P.2d at 819.

54. KEETON ET AL., *supra* note 26, § 54, at 361.

55. See Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 16 (1992) (citing Thing v. LaChusa, 771 P.2d at 830–36).

56. *See* Bell, *supra* note 14, at 353; William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 41–42 (1956).

57. *See, e.g.*, Turpin v. Sortini, 643 P.2d 954, 964 (Cal. 1982) (a monetary award cannot in any meaningful sense compensate the plaintiff); Borer v. American Airlines, Inc., 563 P.2d 858, 860 (Cal. 1977) ("[M]oney damages do not afford an accurate measure of loss or suitable recompense...."); Howard v. Lechter, 366 N.E.2d 64, 65 (N.Y. 1977). *See also* RESTATEMENT (SECOND) OF TORTS, § 436A; HARPER & JAMES, *supra* note 28, § 18.4; KEETON ET AL., *supra* note 26, § 54.

But, uncertainty is inherent in our tort system; few injuries can be translated into dollars with absolute accuracy. Damages for emotional injury are surely as certain as damages for other intangible injuries, such as lost future earnings, which are routinely allowed.[58]

What is more, psychic pain is no more subjective than physical pain. Thus, valuation should be no more difficult in negligent infliction of emotional distress cases than it is, for example, in personal injury cases involving pain and suffering.[59] And, pain and suffering is one of the most significant items of recovery in most personal injury cases.[60] In such cases, courts are quite sanguine about permitting juries to use highly probabilistic evidence in awarding damages.[61] In fact, tort law is subject to strident criticism for the inconsistency with which it treats emotional injuries and pain and suffering.[62] Recovery for what is in essence an emotional harm is available to any physically injured plaintiff without regard to physical consequences,[63] and, in instances where the injury is normally accompanied by pain, without the necessity of expert testimony.[64] Courts even award pain and suffering to the plaintiff with the "eggshell skull."[65]

Interestingly, courts do not treat emotional injury resulting from physical impact differently from the way they treat pain and suffering. In fact, courts refer to that variety of emotional injury as pain and suffering. The only difference between the two is the element of physical pain. Yet, medical research would suggest that physical and emotional pain are not qualitatively

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58. See Bell, *supra* note 14, at 354–55. Looking at lost future earnings provides an instructive example. To determine future earnings, a jury must speculate about hypothetical future events—how long the plaintiff will or would have lived, what kind of jobs he would have held, what the salary for those jobs would have been, etc. It would be disingenuous to suggest that uncertainty is not characteristic of this process. The same degree of uncertainty is inherent in awards for damage to reputation, loss of consortium and wrongful death, all of which are routinely allowed. For a general discussion of compensation for intangible injuries, see Stanley Igber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778–781 (1985).

59. *See* Jarchow v. Transamerica Title Co., 122 Cal. Rptr. 470, 482 (Ct. App. 1975) (stating that the problem of speculative damages in mental distress cases does not present any greater problems than it does in personal injury cases involving pain and suffering); Battalla v. State, 176 N.E.2d 729, 732 (N.Y. 1961) ("[T]he question of proof in individual situations should not be the arbitrary basis upon which to bar all actions...."); Bell, *supra* note 14, at 354.

60. Pain and suffering includes physical pain, fear, anxiety, humiliation, grief, depression, etc. *See* Bell, *supra* note 14, at 402–03 (citing Capelouto v. Kaiser Found. Hosps., 500 P.2d 880 (Cal. 1972)).

61. *See* Bell, *supra* note 14, at 345. *See, e.g.*, Cook v. Ross Island Sand & Gravel Co., 626 F.2d 746 (9th Cir. 1980) (affirming award of $35,000 for pain and suffering for 2.5 minutes plaintiff was alive while drowning); McAleer v. Smith, 791 F. Supp. 923 (R.I. 1992) (plaintiffs could supplement their wrongful death action with general survival claims for decedent's conscious pain and suffering); *Capelouto*, 500 P.2d at 885 (Even in the absence of any explicit evidence showing pain, the jury may infer such pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain.); Beagle v. Vasold, 417 P.2d 673, 681 (Cal. 1966) ("Every case which has considered the issue [of pain and suffering]...has emphasized the difficulty faced by a jury in attempting to measure in monetary terms compensation for injuries as subjective as pain....").

62. See Bell, *supra* note 14, at 402, for a complete discussion of the differing treatment afforded psychic injuries and physical injuries.

63. 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, 5 n.31 (1979).

64. *See* Bell, *supra* note 14, at 402 (citing *Capelouto*, 500 P.2d at 884–85).

65. *See* Bell, *supra* note 14, at 402 (citing *Capelouto*, 500 P.2d at 884–85).

different.[66] In any event, it seems fatuous to suggest that money should be less important to those suffering emotional harms than it is to those suffering physical harms.[67] Once one accepts the premise that money damages are sufficient compensation for any intangible injury that is without market value, one forgoes the claim that damage awards do not accurately reflect a plaintiff's injury.[68]

E. Devaluation of Emotional Injury

In addition, an often unarticulated basis for courts' reluctance to grant recovery for emotional injury is the societal devaluation of emotional injury.[69] In an excellent article illuminating the history of emotional torts, Professors Martha Chamallas and Linda K. Kerber persuasively argue that the cause of the devaluation of emotional injuries compared to physical injuries is due in part to gender differentiation.[70]

Not coincidentally, emotional distress claims have historically been brought most often by women.[71] The two paradigm cases of emotional injury are the pregnant plaintiff who suffers a miscarriage because of emotional distress,[72] and the mother who suffers emotional distress from witnessing injury to her child.[73] In the nineteenth century, claims for emotional injury

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66. See Bell, *supra* note 14, at 402–03, wherein the author fully discusses the similarities between physical and emotional pain.

67. Professor Levit made this point in her article. *See* Levit, *supra* note 16, at 189.

68. For a full discussion of this point, see Bell, *supra* note 14, at 354. Tort damages are awarded without any requirement that they be spent in a particular fashion, that is, to actually remedy the wrong which occurred. For instance, a plaintiff who recovers for injury to her back is not required to spend her award on physical therapy. What any plaintiff might do with her recovery is irrelevant. The sole inquiry should be whether she has suffered an invasion of a legally protected right. Thus, for critics to deride recovery for emotional distress because it is noncompensable is simply specious, unless they criticize all compensation for intangible injury.

69. For a full discussion of the devaluation of emotional injuries, see Levit, *supra* note 16, at 137. The author focuses on the increasing uncertainty in tort law, particularly with regard to what she terms "ethereal" torts; causes of action for intangible or emotional injuries.

70. Chamallas & Kerber, *supra* note 20, at 827–34. *See also* Cleveland, Cin., Chi. & St. Louis Ry. v. Stewart, 56 N.E. 917, 922–23 (Ind. App. 1900) (denying mother's suit for fright and nervous prostration from witnessing train negligently threaten her daughter's life); Mitchell v. Rochester Ry., 45 N.E. 354, 355 (N.Y. 1896) (denying recovery to a woman who suffered a miscarriage after almost being struck by a horse-drawn carriage), *overruled by* Battalla v. State, 176 N.E.2d 729 (N.Y. 1961).

71. *See* Chamallas & Kerber, *supra* note 20, at 844 n.120. The authors cite to a study of 40 fright-based negligence cases; 35 were brought by women and five were brought by men. *See* Chamallas & Kerber, *supra* note 20, at 844 n.120 (citing Leon Green, *"Fright" Cases*, 27 U. ILL. L. REV. 761 (1933)).

72. *See* Chamallas & Kerber, *supra* note 20, at 814. In the case of Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (1888), Mary Coultas suffered a near miss at a railroad crossing which caused shock, a prolonged illness, a miscarriage and impaired memory and eyesight. 13 App. Cas. at 223. The Privy Council denied her recovery against the negligent train operator because her injury was remote and because, in its judgment, a normal person would not suffer physical injuries as a result of the accident. 13 App. Cas. at 222. Because women were considered frail, dependent and given to hysteria in any event, their fright-based injuries were trivialized and not legally cognizable. Chamallas & Kerber, *supra* note 20, at 826.

73. *See* Chamallas & Kerber, *supra* note 20, at 814, 838. In the case of Waube v. Warrington, 258 N.W. 497 (Wis. 1935), the court considered the case of a mother who witnessed her daughter struck and killed by a negligent driver, suffered severe emotional distress, and died less than a month later. The husband/father brought a wrongful death action but it was dismissed as the court found that the driver owed no duty to the mother. 258 N.W. at 497, 501.

were governed by the physical impact rule.[74] Emotional injury caused by anything less than an assault on physical integrity was not actionable,[75] and the courts developed a number of doctrinal obstacles to recovery for emotional harm. Hence, as in the two paradigm cases, the claims of women plaintiffs were classified as "emotional" and were routinely denied,[76] even though anxiety, fright and even depression are themselves "physical" in the sense that they produce symptoms that are readily visible to the eye or ear, such as changes in voice or facial expression, involuntary muscle activity, flattened or heightened affect and so on.[77]

This classification was not logically compelled but rather a product of gendered thinking. Legally cognizable injuries "[were] socially constructed so that the gender of the person claiming a loss [affected] the legal conceptualization of the harm."[78] Professor Prosser recognized that "[i]t is not difficult to discover in the earlier opinions a distinctly masculine astonishment that any woman should ever allow herself to be frightened or shocked into a miscarriage."[79]

Emotional distress, of course, is not gender specific and the tort rules governing negligent infliction of emotional distress have never been overtly gender specific, either. Even so, gender disparity has influenced the development of the law: persons who have suffered shock or fright induced symptomatology have been disadvantaged by categorization of their harm as "emotional." So, "this apparently gender-neutral hierarchy of values" has benefited men and has "burdened women."[80] It is important to recognize this latent, structural bias to fully understand why courts have been so reluctant to grant recovery for emotional harms.[81] "[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...."[82] It is only by noting which ideals are foreclosed by the legal system—and why—that we can come to this understanding.

The aforementioned policy objectives—limiting fraudulent claims, a flood of litigation, and excessive liability out of proportion to fault—are clear. However, the rules courts have adopted to achieve these policies "do not always achieve a balance between an injured plaintiff's claim for compensation and the societal and institutional objectives to be served by limiting claims."[83]

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74. *See infra* text accompanying notes 84–102.
75. *See infra* text accompanying notes 84–102.
76. *See* Chamallas & Kerber, *supra* note 20, at 814.
77. KEETON ET AL., *supra* note 26, § 12, at 56.
78. Chamallas & Kerber, *supra* note 20, at 816.
79. KEETON ET AL., *supra* note 26, § 12, at 55–56.
80. Chamallas & Kerber, *supra* note 20, at 814.
81. An analogy made by Professors Chamallas and Kerber is to the structural bias in the work force. The gender pay gap is attributable, in part, to the fact that most women in the work force are stuck in low paying jobs—the so called "pink ghetto." Low compensation in these jobs may appear gender neutral because the few men holding them are also disadvantaged. But, the structural bias stems from the devaluation of jobs traditionally dominated by women. Chamallas & Kerber, *supra* note 20, at 845.
82. 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).
83. Davies, *supra* note 55, at 3.

IV. ASSESSING AND EVALUATING THE EXISTING RESTRICTIVE RULES

This section will examine the historic progression of negligent infliction of emotional distress generally. In it, we argue that, for the most part, the rules adopted by the courts lack both effectiveness and validity. Then, Section V examines four rules most commonly used to limit recovery for emotional distress in economic injury cases specifically. This examination reveals that recovery can be expanded while still maintaining limits on the extent of a defendant's liability and providing reasonable assurances that fraudulent and trivial claims will not be successfully litigated.

A. "Impact," "Injury" and "Zone of Danger" Rules

When a plaintiff has suffered an impact[84] which has been accompanied by emotional distress, most jurisdictions would recognize, at least, the potential for recovery.[85] Under the "impact rule," a plaintiff can recover for emotional distress caused by witnessing injury to a third person only if the plaintiff also suffers some actual physical impact from the same force.[86] Doctrinally, this is important because "parasitic" damage—emotional damage attendant to physical injury—has long been recognized as a valid item of recovery.[87] The impact serves as a surrogate for personal injury, and thus, the emotional harm can be deemed "parasitic" to the "real" underlying injury. This is a fiction which the courts are more than willing to indulge.[88] At the same time, courts have found impact in minor contacts with the person which play no part in causing the real harm, and in themselves, can have no importance at all.[89]

Like its common law progenitor, the injury rule requires tangible proof of the intangible injury, but focuses on the injury itself rather than on how it was caused. It requires a plaintiff to demonstrate some physical illness, injury or other manifestations of her emotional injury.[90] The injury rule is far from clear, however, as to "just what conditions or symptoms should be deemed to

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84. The impact and injury rules require some actual, physical injury caused by the defendant's actions. This Article distinguishes "physical injury" from "physical manifestations," the latter referring to symptomatology arising from emotional distress suffered as a result of the defendant's action.

85. *See* KEETON ET AL., *supra* note 26, § 54, at 362–63.

86. *See, e.g.*, Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980) (bombardment of x-rays which resulted in pregnant woman having to abort her child constituted sufficient physical impact to sustain recovery for emotional distress). *But see* Howard v. Bloodworth, 224 S.E.2d 122 (Ga. Ct. App. 1976) (son who learned of mother's death in an automobile collision barred from recovery because he suffered no physical impact); Hatfield v. Max Rouse & Sons N.W., 606 P.2d 944 (Idaho 1980) (man whose farm equipment was auctioned at too low a price failed to allege physical impact to recover for emotional distress); Little v. Williamson, 441 N.E.2d 974 (Ind. Ct. App. 1982) (brother who was not injured when neighbor's dog grabbed sister's puppy out of her arms and killed it was not entitled to recover for his emotional distress, even though he was standing next to his sister, as he suffered no physical impact in the attack).

87. Chamallas & Kerber, *supra* note 20, at 820; Magruder, *supra* note 41, at 1048–49.

88. Chamallas & Kerber, *supra* note 20, at 820.

89. *See, e.g.*, Daley v. La Croix, 179 N.W.2d 390, 394 (Mich. 1970). The *Daley* court notes that one Georgia circus case reduces the impact rule to a farce by finding "impact" where the defendant's horse evacuated his bowels into the plaintiff's lap. *Id. See also* Interstate Life Accident Co. v. Brewer, 193 S.E. 458 (Ga. Ct. App. 1937) ("impact" was found where the defendant merely tossed coins harmlessly against plaintiff's body).

90. KEETON ET AL., *supra* note 26, § 54, at 362–65.

qualify as the requisite 'injury,' 'illness,' or other physical consequence."[91] Courts established the impact and injury rules to insure the genuineness of the harm and weed out fraudulent and trivial claims because courts believed that serious emotional distress would likely manifest itself in discernible and deleterious physical symptoms.[92]

A minority of courts still require a contemporaneous physical impact as the injury necessary to recover.[93] Most jurisdictions have held, however, that all that is necessary for an "injury" is the presence of physical manifestations of emotional distress.[94]

Rules which look to the genuineness or seriousness of the injury suffered seem logically to serve as a barrier to fraudulent and trivial claims and to limit the number of potential plaintiffs.[95] But, "[t]he life of the law has not been logic: it has been experience."[96] In practice, both the impact and the injury rule bear no relation to the emotional injury actually suffered.[97] And, interpreted liberally, as they most often are, they allow the most trifling impact[98] or the slightest manifestation[99] to suffice. Thus, the rules encourage "extravagant pleading and distorted testimony."[100] One must ask, then, if these barriers to recovery are at all desirable or necessary. Most fundamentally, the underlying premise—that only a physical harm that is easily proved is corroborative of the genuineness of the claim[101]—is simply misguided. The dichotomy between

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91. KEETON ET AL., *supra* note 26, § 54, at 364.

92. *Daley*, 179 N.W.2d at 394.

93. *See, e.g.*, Ryckeley v. Callaway, 412 S.E.2d 826 (Ga. 1992) (in claim for negligent infliction of emotional distress, some impact to plaintiff which causes physical injury must be alleged); Wishard Mem. Hosp. v. Logwood, 512 N.E.2d 1126 (Ind. Ct. App. 1987) (person can recover damages for mental anguish only when it is accompanied by, and results from, a physical injury); Johnson v. Ruarck Obstetrics & Gynecology Assoc., 365 S.E.2d 909 (N.C. Ct. App. 1988) (no physical injury required where the occurrence producing the mental stress caused some actual physical impact); Yoon Fou Saechoa v. Matsakoun, 717 P.2d 165 (Or. Ct. App. 1986) (brother and sister who did not suffer a direct physical injury could not recover for emotional distress caused by seeing their brother struck and killed by a car).

94. The following states no longer require physical injury: California (Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980)); Hawaii (Leong v. Takasaki, 520 P.2d 758 (Haw. 1974) (physical injury requirement is "artificial" and should be used only to show degree of emotional distress)); Iowa (Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981)); Louisiana (Chappetta v. Bowman Transp., Inc. 415 So. 2d 1019 (La. 1982)); Maine (Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982)); Missouri (Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983)); Montana (Versland v. Caron Transp., 671 P.2d 583 (Mont. 1983)); Nebraska (James v. Lieb, 375 N.W.2d 109 (Neb. 1985)); Ohio (Paugh v. Hanks, 451 N.E.2d 759, 765 (Ohio 1983) ("[s]erious emotional distress can be as severe and debilitating as physical injury and is no less deserving of redress")); West Virginia (Heldreth v. Marrs, 425 S.E.2d 157 (W. Va. 1992)); and Wyoming (Gates v. Richardson, 719 P.2d 193 (Wyo. 1986)).

95. *See Molien*, 616 P.2d at 818 (The primary justification for the physical injury rule appears to be that it serves as a screening device to minimize fraudulent and trivial claims.).

96. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe ed., Belknap Press 1963) (1881).

97. *See* Davies, *supra* note 55, at 25. Professor Davies argues that these rules are unworkable because, while they may limit claims, they are both over- and under-inclusive. *See also* Magruder, *supra* note 41, at 1066–67.

98. *See, e.g.*, Homans v. Boston Elevated Ry. Co., 62 N.E. 737 (Mass. 1902) (impact was a slight blow); Zelinsky v. Chimics, 175 A.2d 351 (Pa. 1961) ("any degree of physical impact, however slight" suffices); Porter v. Delaware, L. & W.R. Co., 63 A. 860 (N.J. 1906) (impact was dust in the eye).

99. *See, e.g.*, Vance v. Vance, 408 A.2d 728, 733–34 (Md. 1979).

100. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 820 (Cal. 1980).

101. *Id.* at 818.

physical injury and emotional harm is meaningless,[102] especially when the physical harm that often suffices for the courts is de minimis and in essence a legal fiction.

A third rule used by courts to limit recovery—one that will seldom be implicated in the economic injury cases—is the "zone of danger" rule. In order for a plaintiff to recover, she must be within the zone of danger created by the defendant's conduct, and witness harm to another or fear personal physical harm to herself.[103] The premise behind the rule is that the parameters of the duty to avoid infliction of emotional distress should be concomitant with the parameters of the duty to avoid creation of the risk of physical harm.[104]

Like the impact and injury rules, the zone of danger rule grew out of the belief that emotional harm suffered in the context of physical danger is more likely to be genuine and serious than harm suffered by one remote from such danger.[105] Moreover, if close proximity to physical harm is required, whether or not physical impact actually occurs, the class of potential plaintiffs will be quite small. Presumably, only a few persons will be within the zone of danger; thus, the defendant will owe a legal duty to a very few.[106]

B. Duty as a Threshold Limitation

"Nowhere is the application of duty principles more heterodox" than in the negligent infliction of emotional distress arena.[107] Those courts that do not look solely to the underlying physical nature of the injury most often use a duty analysis to limit recovery. That is, most courts do not recognize, as a matter of law, a duty to avoid infliction of emotional distress. This begs the question, however, which should instead be whether the victim's interests are entitled to legal protection. "[Duty] is a shorthand statement of a conclusion rather than an aid to analysis in itself."[108] Imposing a duty merely secures protection for an interest deemed legally cognizable.[109]

During the past several decades, the California Supreme Court has eliminated a wide variety of limitations on recovery in tort by expanding the

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102. *See supra* text accompanying notes 24–25.

103. *See* Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 514 (Cal. 1963) (no duty owed to plaintiff mother who witnessed infant son negligently run over by defendant because she was not within the "zone of danger" created by the defendant's conduct), *overruled on other grounds by* Dillon v. Legg, 441 P.2d 912 (Cal. 1968). A majority of jurisdictions have rejected the impact rule in favor of the zone of danger rule, and most still follow it. *See, e.g.*, Bovsun v. Sanperi, 461 N.E.2d 843, 848 (N.Y. 1984).

104. For a full discussion of the zone of danger rule, see Davies, *supra* note 55, at 20–23.

105. *See, e.g.*, Waube v. Warrington, 258 N.W. 497, 501 (Wis. 1935).

106. *See, e.g.*, Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969); Davies, *supra* note 55, at 9–10 (The author argues that these rules reduce the likelihood that "collateral" plaintiffs will be allowed to sue and recover. "Collateral" cases involve victims who are not foreseeable as well as persons to whom the consequences of the negligent behavior seem de minimis as compared to the harm suffered by others affected.).

107. Merenda v. Superior Court, 4 Cal. Rptr. 2d 87, 90 (Ct. App. 1992); Davies, *supra* note 55, at 8.

108. Dillon v. Legg, 441 P.2d 912, 916 (Cal. 1968).

109. *Merenda*, 4 Cal. Rptr. 2d at 90 (citing Christensen v. Superior Court, 820 P.2d 181, 190 (Cal. 1991) ("Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.")).

concept of duty.[110] Rather than focusing on the plaintiff's status or the defendant's invaded interest, the court has emphasized that it is the nexus between the injury causing act and the injury itself which determines whether a duty exists, and, ultimately, whether recovery can be had.

Thus, it seems to follow that the type of loss suffered—economic or otherwise—is ultimately irrelevant to the question of recovery. That is, there is nothing distinctive about emotional injury arising from economic loss in and of itself that should require the courts to deny recovery. Even so, incongruously, courts still analyze cases in which emotional injury is alleged as if the type of underlying loss is all important. This result—denial of recovery solely on the basis of the economic character of the loss—"suggest[s] a systematic failure of the tort liability system to treat victims of...economic loss consistently with other kinds of injury claimants."[111] Instead, it is the nature of the relationship between the plaintiff and the defendant and the nexus between the act and the injury that should be determinative of whether a duty exists.

The California courts determine the existence of duty by relying on the criteria enunciated in *Biakanja v. Irving*:[112]

> (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.[113]

In the context of negligent infliction of emotional distress, the clearest example of this loosening of restrictions is *Dillon v. Legg*,[114] where the court allowed a mother, in no physical danger herself, to recover when she suffered

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110. *See infra* text accompanying notes 114–44. *See also Dillon*, 441 P.2d 912 (recognizing a duty of care to bystander who witnesses harm to another); Rabin, *supra* note 2, at 1518 n.20 (citing Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (abolishing traditional categories of duties to entrants on land)); Rabin, *supra* note 2, at 1519 n.22 (citing Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (recognizing therapist's duty to warn in some circumstances)); Rabin, *supra* note 2, at 1519 n.23 (citing Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669 (Cal. 1974) (recognizing a general right of spousal consortium in cases of disabling injury)).

111. Rabin, *supra* note 2, at 1514.

112. 320 P.2d 16 (Cal. 1958). Ironically, *Biakanja*, the seminal duty case, involved an economic loss. There, a notary public negligently drafted a will, causing the beneficiary to lose a portion of the estate and, consequently, to suffer emotional distress. The beneficiary sued the notary and recovered because the "end and aim" of the transaction was to provide for the efficient passing of the estate. As such, the notary "must have known" that his negligence would cause the beneficiary to suffer the loss that she ultimately suffered. *Id.* at 19. Thus, by viewing cases of emotional injury where the underlying loss is economic in their historical perspective, we see that the economic loss dimension of the case has been unimportant, as we argue it should be.

113. *Id.*

114. 441 P.2d 912 (Cal. 1968). Ms. Dillon sued Mr. Legg for negligent infliction of emotional distress caused when Mr. Legg drove his car into Ms. Dillon's infant daughter as she legally crossed the street. Both Ms. Dillon and another daughter saw the accident in which her infant daughter died. Although the surviving daughter was within the "zone of danger," and thus allowed recovery, Ms. Dillon, witnessing the same event, was denied recovery because she was not physically put in peril by the defendant's conduct. Ms. Dillon claimed that she "sustained great emotional disturbance and shock and injury to her nervous system" by witnessing the accident. *Id.* at 914. The California Supreme Court reversed the lower court, overruling the zone of danger rule and focused instead on the foreseeability of the emotional distress. *Id.* at 920.

emotional distress from witnessing a car run over her young daughter.[115] While *Dillon* is a bystander case,[116] and thus not immediately relevant to the direct victim cases that are the focus of this Article,[117] the *Dillon* court's discussion of foreseeability as the determining factor in selecting the plaintiffs owed a duty has become the leading exegesis on the desirability of expanding recovery for emotional distress.[118]

The *Dillon* court determined that a defendant owes a duty when it is reasonably foreseeable that her conduct could cause emotional distress severe enough to cause injury in a reasonable person:[119]

> Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed

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115. *Id.*

116. These actions arise when a "bystander" or "percipient witness," in no danger herself, witnesses injury to another.

117. *See supra* note 4 for a discussion of the distinction between direct victim and bystander cases.

118. The process of gender differentiation also exists in the growth of the aforementioned rules. *See* Chamallas & Kerber, *supra* note 20, at 819–24. They note that in explaining the expansion of negligent infliction of emotional distress, and the jettisoning of the rules that historically limited recovery, most commentators focus on advances in medicine and psychology which inform our current understanding of emotional harms as "real." Thus understood, physical impact, injury, illness or other manifestations are not necessary to ensure the genuineness of a claim. *See* Chamallas & Kerber, *supra* note 20, at 819–24.

True as this explanation may be, it does not go far enough. It does not explain *why* these changes have occurred nor *why* they are significant.

> Degendered accounts of the evolution of the law governing fright-based injuries fail to...acknowledge the possibility that the 'progression' of the law is related to changing societal views of women.... Further,...sex-neutral accounts of the law tend to obscure the gender significance of the basic legal hierarchy that places material property rights above relations and emotions.

See Chamallas & Kerber, *supra* note 20, at 823.

In *Dillon*, Justice Tobriner, writing for the court, stressed that the plaintiff was a mother and not a mere bystander. Professors Chamallas and Kerber argue that Justice Tobriner made conscious use of gender, both to argue for the genuineness of the claim and the foreseeability of the injury. Chamallas & Kerber, *supra* note 20, at 857. They argue that *Dillon* exemplifies the law's regard for a mother's anguish and reflects the political ideology of the 1960's. *Dillon* could not have been decided without the deep societal shift that had been taking place which recognized the rights of women and of mothers in particular. Chamallas & Kerber, *supra* note 20, at 860.

Dillon was decided during very turbulent years in American history. The 1960's marked the end of the cold war period in which a demand for security in foreign affairs also informed our domestic ideology. Chamallas & Kerber, *supra* note 20, at 859. During this period, marriage and motherhood were held in high regard and the parent-child relationship "took on almost mythic proportions." Chamallas & Kerber, *supra* note 20, at 859 (citing E. MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA (1988)). The mother was considered a symbol of security and stability. Chamallas & Kerber, *supra* note 20, at 859.

This ideology was sustained even as women left the home for the work force in increasing numbers. Chamallas & Kerber, *supra* note 20, at 859. The fact that society valued children and privileged the mother surely influenced the *Dillon* court's thinking. The *Dillon* decision is also congruent with the more activist feminist ideology beginning to burgeon during the 1960's and 1970's as it "pushed against marginalization of recurring injuries in the lives of women and gave women a claim of legal right." Chamallas & Kerber, *supra* note 20, at 861.

119. *Dillon*, 441 P.2d at 919.

> category; no immutable rule can establish the extent of that obligation for every circumstance of the future.[120]

The *Dillon* court disapproved of the earlier decisions that had denied recovery based on public policy, stating it was inappropriate to deny recovery simply because defining liability was difficult and imposing a duty would open the door to potential fraudulent or inadequate claims.[121] The court noted, however, that its ruling was confined to the situation where the emotional distress resulted in physical injury.[122]

Since *Dillon* was decided, courts have expanded the classes of plaintiffs allowed to recover for emotional distress claims. In *Molien v. Kaiser Foundation Hospitals*,[123] a husband brought an action against a hospital and doctor for emotional distress resulting from the defendants' incorrect diagnoses and treatment of his wife for syphilis.[124] The wife suspected her husband of extramarital affairs, leading to tension and hostility in the marriage, and ultimately to divorce.[125] Although the court held that this was a direct victim rather than a bystander case,[126] it adopted the *Dillon* court's use of foreseeability[127] and held that the risk of harm to the husband by the negligent diagnosis of syphilis to his wife was reasonably foreseeable.[128]

The *Molien* court also went a step beyond the pure duty/foreseeability analysis used by the *Dillon* court, holding that a plaintiff would not be barred from recovery because he did not suffer physical injury as long as some guarantee of genuineness can be found in the circumstances of the case.[129] The

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120. *Id.* at 920. To determine whether emotional injury was reasonably foreseeable, and thus whether the defendant owed a duty to the injured party, the court created three guidelines:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Id.

Many jurisdictions that recognize "bystander" claims still confine legally cognizable actions to those wherein the bystander is within the zone of danger. New York requires the plaintiff to plead and prove both a familial relationship with the primary victim and location within a zone of danger. *See* KEETON ET AL., *supra* note 26, at 365–66. *See also* Chamallas & Kerber, *supra* note 20, at 821.

121. *Dillon*, 441 P.2d at 914. *See also* Thing v. La Chusa, 771 P.2d 814, 819 (Cal. 1989).

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

123. Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980).

124. *Id.* at 814.

125. *Id.* at 814–15.

126. *See generally id.* at 816–17; Rickey v. Chicago Transit Auth., 428 N.E.2d 596 (Ill. Ct. App. 1981); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983).

127. "Such reasonable foreseeability does not turn on whether the particular [defendant] as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen." *Molien*, 616 P.2d at 816.

128. *Id.* at 817.

129. *Id.* at 821. The court noted that legal scholars have opined that artificial barriers to recovery such as the physical injury requirement are unnecessary. *Id.* at 818. The Ohio court in *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983), stated: "Because other standards exist to test the authenticity of plaintiff's claim for relief, the requirement of resulting physical injury, like the requirement of physical impact, should not stand as another artificial bar to recovery, but merely

court stated that the continued attempt to distinguish physical and psychological injury was unwarranted and anachronistic,[130] and that, in any event, physical injury, as it had been liberally defined, was a poor screening device for false claims.[131] The court held that the physical injury requirement was both overinclusive and underinclusive.[132] It is overinclusive in that any physical injury suffices, no matter how slight;[133] it is underinclusive in that it results in the rejection of valid, provable claims at the pleading stage.[134] And, finally, the court concluded that the physical injury requirement encouraged "extravagant pleading and distorted testimony."[135]

In declining to require a physical injury requirement, the *Molien* court was guided by the holding and rationale of *Rodrigues v. State*,[136] noting the need for the emotional distress to be genuine and "serious." The *Rodrigues* court stated that "serious mental distress may be found where a reasonable

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be admissible as evidence of the degree of mental or emotional distress suffered." *Id.* at 765 (quoting Leong v. Takasaki, 520 P.2d 758, 762 (Haw. 1974)). *See also* Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 365 (3d Cir. 1993) (claim for negligent infliction of emotional distress under the Federal Employers' Liability Act (FELA) does not require accompanying physical injury or physical contact); Gammon v. Osteopathic Hosp. of Maine, Inc., 534 A.2d 1282 (Me. 1987) (plaintiff not required to show physical impact, objective manifestation, underlying or accompanying tort, or special circumstances to recover for negligent infliction of emotional distress); Foltz v. State, 797 P.2d 246, 259 (N.M. 1990) ("[P]hysical manifestation should not be the *sine qua non* by which to establish damages resulting from emotional trauma").

But see the *Restatement (Second) of Torts* which states in relevant part: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." RESTATEMENT (SECOND) OF TORTS § 436A (1965). Based on § 436A of the *Restatement*, Pennsylvania requires that physical harm must accompany emotional distress in order to state a cause of action. Armstrong v. Paoli Mem. Hosp., 633 A.2d 605, 609 (Pa. 1993).

See also Payton v. Abbott Labs, 437 N.E. 2d 171, 175 (Mass. 1982), for a listing of numerous jurisdictions that require a showing of physical manifestation as a precondition to recovery for emotional distress.

130. *Molien*, 616 P.2d at 814.

131. *Id.* at 820.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* Eighteen states have also abandoned the physical injury requirement. *See* Farmers & Merchants Bank v. Hancock, 506 So. 2d 305 (Ala. 1987); *Molien*, 616 P.2d 813; Morris v. Hartford Courant Co., 513 A.2d 66 (Conn. 1986); Leong v. Takasaki, 520 P.2d 758 (Haw. 1974); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Chappetta v. Bowman Transp., Inc., 415 So. 2d 1019 (La. Ct. App. 1982); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); Johnson v. Supersave Markets, Inc., 686 P.2d 209 (Mont. 1984); James v. Lieb, 375 N.W.2d 109 (Neb. 1985); Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987); Battalla v. State, 176 N.E.2d 729 (N.Y. 1961); Wetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983); Sinn v. Burd, 404 A.2d 672 (Pa. 1979); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987); Hunsley v. Giard, 553 P.2d 1096 (Wash. 1976) (dicta); Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).

136. 472 P.2d 509 (Haw. 1970). In allowing a couple to recover for flood damage to their home, the Hawaii Supreme Court held that the question of whether a defendant will be liable should be solved by application of general principles of tort law, including the concept of foreseeability. *Id.* at 520–21.

Hawaii has since restricted the class of plaintiffs bringing suit for emotional distress arising from property damage to those who can prove attendant physical injury or mental illness. 53 HAW. REV. STAT. § 22, ch. 663 (1986).

man,[137] normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[138] The *Rodrigues* court arrived at this standard by examining the exceptions to the general rule of non-recovery that courts had carved out. That examination made clear that exceptions were created when the particular circumstances of the case guaranteed the genuineness of the claim.[139] Thus, the court proposed to adopt this standard as a uniform rule rather than continuing to limit recovery to exceptional situations.[140]

Pleading and proof of serious and genuine emotional injury required by *Rodrigues*, and later adopted by the *Molien* court, seems to strike a balance between the interests of the plaintiff in emotional well-being and the interest of the defendant in being free from overly burdensome liability because it imposes some limit on the number of plaintiffs who may sue, while not limiting them by use of meaningless criteria.

In a more recent decision, the California Supreme Court once again redefined the duty analysis. In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*,[141] the court allowed a mother whose son had been molested to recover for her own emotional injury. The mother sought psychiatric help for her son and herself to assist them in dealing with family problems. During the course of treatment, the therapist had private sessions with the son and the therapist molested him. In allowing the mother to recover, the court stressed that the therapist owed a duty to the mother herself because of the special patient/therapist relationship between them.[142] The court stated that damages for severe emotional injury are recoverable "when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two."[143] The existence of a duty "depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability."[144] Thus, foreseeability is a threshold requirement but not a predicate to the determination of whether a duty exists, the gravamen of the action.

At first glance, *Marlene F.* appears to be an expansion of reliance on duty in direct actions. In actuality, however, *Marlene F.* represents a "renewed emphasis in California on a perceived need to limit liability of defendants for

137. In discussing the "reasonable man" standard, Professors Chamallas and Kerber argue that courts have long viewed emotional injury suffered by women to be unworthy of recovery, presumably because women are hypersensitive. They argue that courts necessarily compare female to male, therefore, non-pregnant individuals. They argue that the "reasonable man" standard marginalizes women and institutionalizes society's inclination to minimize certain types of injuries simply because they have been historically thought of as "feminine." Chamallas and Kerber applaud the "feminization" of tort law, in which the notion of physical harm is expanded to encompass "women's experience...in the socially constructed experience of motherhood." Chamallas & Kerber, *supra* note 20, at 862.

138. *Molien*, 616 P.2d at 819–20 (quoting *Rodrigues*, 472 P.2d at 520).

139. *See Rodrigues*, 472 P.2d at 519.

140. *Id.* at 519.

141. 770 P.2d 278 (Cal. 1989).

142. *Id.* A special relationship between a plaintiff and a defendant may require the defendant to act even when the defendant has not created any risk of harm to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

143. 770 P.2d at 282.

144. *Id.* at 281.

damages arising solely from emotional harm."[145] By focusing on special relationships and affirmative undertakings to act, the court minimized the risk that one negligent act will give rise to unlimited liability to all foreseeably affected by the act by limiting the class of plaintiffs able to sue. Seen in this light, the *Marlene F.* approach is sensitive to the need for proportionality between liability and fault.

Three years later, the California Supreme Court clarified the "special relationship" test first enunciated in *Marlene F.*[146] In *Burgess v. Superior Court*, the court stated that "a cause of action to recover damages for negligently inflicted emotional distress will lie...in cases where a duty arising from a preexisting relationship is negligently breached."[147] The *Burgess* court stated that the presence of a preexisting relationship is what defines a direct victim.[148] However, neither *Marlene F.* nor *Burgess* provide guidelines to determine which preexisting relationships will suffice to support a claim for negligent infliction of emotional distress.[149] We argue that where there is a preexisting relationship in which a party stands in the position of an emotional fiduciary for another, as in our homeowner example,[150] liability would be appropriate. Consider also a lender's wrongful foreclosure on a borrower's residence. The borrower's injury for the loss of her home would likely far surpass the monetary value of the property itself and the pecuniary loss attendant to it. In that context, recovery for emotional distress would also be appropriate.

V. ECONOMIC LOSS AS THE UNDERLYING INJURY

The proscription against recovery for emotional injury when the underlying harm is economic is nearly universal.[151] That proscription is

145. Davies, *supra* note 55, at 11.

146. Burgess v. Superior Court, 831 P.2d 1197 (Cal. 1992). The *Burgess* court held that a mother may recover, as a direct victim, for negligent infliction of emotional distress against a physician who injured her child during delivery.

147. *Id.* at 1201.

148. *Id.*

149. *Marlene F.*, 770 P.2d 278; *Burgess*, 831 P.2d 1197. For instance, courts have traditionally denied recovery to clients who suffered emotional distress arising from attorney malpractice. If the existence of a special relationship meets the threshold requirement for recovery, courts will have to come to grips with why existence of the relationship is not enough to grant recovery in the legal malpractice area. Professor Davies made this point in her article as well. Davies, *supra* note 55, at 36–37. *See, e.g.*, Quezada v. Hart, 136 Cal. Rptr. 815 (Ct. App. 1977). For an argument for allowing recovery in the legal malpractice arena see Rabin, *supra* note 2, at 1520. The author argues that the economic aspect of legal malpractice actions should not be a barrier to recovery. Shifting the loss to the negligent attorney can be justified, as attorneys are better able to spread the loss of careless lawyering than victims are. Further, imposition of liability has a deterrent effect on careless lawyering. Rabin, *supra* note 2, at 1520.

150. *See supra* text accompanying note 5.

151. *See, e.g.*, Branch v. Homefed Bank, 8 Cal. Rptr. 2d 182, 186 (Ct. App. 1992) (emotional distress damages are not recoverable in a negligent misrepresentation action when the injury is primarily economic); Davis v. Hall, 94 S.E. 274 (Ga. Ct. App. 1917) (recovery for mental suffering not permitted when landlord negligently maintained a sprinkling system which damaged plaintiff's property); Gulf, C. & S.F.R. Co. v. Trott, 25 S.W. 419 (Tex. 1894) (claim for mental suffering cannot be maintained in an action for damages based on negligent conduct which causes damage to property but no physical injury).

This type of action is distinguishable from a plaintiff who suffers direct physical injury from the defendant's actions or a plaintiff who fears personal injury to herself or others due to the defendant's negligent act.

problematic, however, in that using the economic nature of the underlying injury as a factor to limit recovery is both over- and under-inclusive. It is too broad because economic loss includes a myriad of types of losses, some of which courts allow recovery for, and does not provide a meaningful basis upon which to distinguish which losses are compensable. It is too narrow because economic loss shares important similarities with other intangible losses for which courts routinely allow recovery.

Most courts permit emotional distress damages only in situations where there is proof of physical impact or injury,[152] intentional conduct,[153] bad faith[154] or outrageous conduct.[155] These requirements serve as a means for the court to minimize fraudulent claims.[156] But, if courts stick rigidly to these categories the result is to completely disallow most valid claims for negligent infliction of emotional distress attendant to economic loss. This section will examine each of these categories and argue that these four specific limitations on recovery are not appropriate exclusionary factors, and other indicia of

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152. *See supra* notes 84–102 and accompanying text. *See also* McMeakin v. Roofing & Sheet Metal Supply Co., 807 P.2d 288 (Okla. 1990) (plaintiff who watched as defendant roofers negligently collapsed his roof and destroyed his house was not entitled to emotional distress damages because the court held that he was not in fear of personal injury from the event); RESTATEMENT (SECOND) OF TORTS § 436A (1965).

153. *See, e.g.*, Branch v. Homefed Bank, 8 Cal. Rptr. 2d at 186 (Emotional distress damages are not recoverable in a negligent misrepresentation action when the injury is primarily economic; however, if the misrepresentation was intentional, the emotional distress does not have to be accompanied by a physical injury.).

Emotional distress type damages are also an element of damages in the intentional torts of trespass and nuisance. The *Restatement (Second) of Torts* states that where there has been a trespass to land, recovery includes:

1) The difference in the value of the land before and after the harm;
2) Loss of use of the property; and
3) Discomfort and annoyance to the occupant of the property.

RESTATEMENT (SECOND) OF TORTS § 929 (1965) (emphasis added). An award for emotional harm is separate and distinct from any award for damage to the plaintiff's proprietary interests. *Id. See also* KEETON ET AL., *supra* note 26, at 360.

Once an action for trespass or nuisance has been established, a plaintiff can recover damages including the element of mental suffering as long as the distress is proximately caused therefrom. Herzog v. Grosso, 259 P.2d 429, 433 (Cal. 1953). *See also* Kornoff v. Kingsburg Cotton Oil Co., 288 P.2d 507 (Cal. 1955) (severe nervous distress and mental anguish recoverable in a trespass action even though no physical injury to the person); French v. Ralph E. Moore, Inc., 661 P.2d 844 (Mont. 1983) (in actions for trespass, nuisance and negligence from contamination by gasoline fumes, plaintiff's damages for mental anguish were recoverable); Senn v. Bunick, 594 P.2d 837 (Or. Ct. App. 1979) (mental anguish recoverable in trespass case when landowners property was damaged by water when defendant's property development reshaped the stream).

154. *See, e.g.*, Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967) (plaintiff was entitled to recover emotional distress damages when defendant insurance company refused, in bad faith, to settle plaintiff's claim); Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470 (Ct. App. 1975) (negligent infliction of emotional distress damages permitted when defendant title company refused, in bad faith, to remove a cloud on plaintiffs' title); Quezada v. Hart, 136 Cal. Rptr. 815 (Ct. App. 1977) (in a legal malpractice action based upon a quiet title action, plaintiff not allowed recovery for negligent infliction of emotional distress where there was no evidence of intentional conduct or bad faith).

155. Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973) (insured may recover emotional distress damages from insurer where insurer withheld insurance payments maliciously and without probable cause in order to deprive insured of the benefits of his policy); Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470 (Ct. App. 1975), *overruled on other grounds by* Soto v. Royal Globe Ins. Corp., 229 Cal. Rptr. 192 (Ct. App. 1986).

156. *Crisci*, 426 P.2d at 179.

trustworthiness can suffice in claims for economic injury and attendant emotional distress.[157]

A. Physical Injury

As we argue in Section IV. A., a plaintiff's lack of physical injury should not, of itself, limit her recovery for emotional distress damages.[158] However, many courts still retain the physical impact or injury requirement as a precursor to recovery for negligent infliction of emotional distress in all contexts. *Fournell v. Usher Pest Control* exemplifies the problems inherent in doing so.[159]

In *Fournell*, the Supreme Court of Nebraska denied recovery to a plaintiff for emotional distress damages arising from the defendant's negligent termite inspection of the plaintiff's prospective home. Based on a report that indicted that there had been previous and limited termite damage but no current infestation, the plaintiff purchased the home. In May or June of 1978, she discovered that the home was completely infested with termites causing extensive damage to the house. The plaintiff became severely depressed after the termite discovery and was hospitalized in a psychiatric facility on three separate occasions (July, August and September of 1978) for suicidal tendencies and depression. Evidence showed that "her mental and emotional disturbance was caused by the discovery of the termite infestation and damage to her home."[160]

The *Fournell* court adopted section 436A of the *Restatement of Torts* which states: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."[161]

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157. Other courts have noted that "where, as here, the claim is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced." *Id. See also supra* notes 30–36 and accompanying text for a policy discussion on prevention of fictitious claims.

158. *See supra* text accompanying notes 101–02.

159. 305 N.W.2d 605 (Neb. 1981), *overruled by* James v. Lieb, 375 N.W.2d 109, 111 (Neb. 1985). The *James* court overruled *Fournell* to the extent it was in conflict with the *James* court's opinion. 375 N.W.2d at 111. The *James* court held that in bystander cases (distinguished from direct victim cases such as *Fournell*), the zone of danger rule was overruled, and a foreseeability test was adopted to determine recovery for negligent infliction of emotional distress. *Id.* at 117. The *James* court also rejected the necessity of a concurrent physical injury requirement in bystander cases. *Id.* at 116.

160. *Fournell*, 305 N.W.2d at 606.

161. RESTATEMENT (SECOND) OF TORTS § 436A (1965). *See also* Love v. Cramer, 606 A.2d 1175 (Pa. 1992) (plaintiff stated cause of action for negligent infliction of emotional distress because complaint alleged physical manifestation of emotional suffering such as depression, nightmares, stress, and anxiety); Hammon v. Central Lane Communications Ctr., 816 P.2d 593 (Or. 1991) (wife could not recover for emotional distress based on failure of 911 emergency telephone systems to promptly respond to wife's call for medical assistance for her husband because wife sustained no physical injury); Muchow v. Lindblad, 435 N.W.2d 918 (N.D. 1989) (family members of woman whose body was found in river failed to state cause of action for negligent infliction of emotional distress stemming from investigation of woman's death because they failed to establish the necessary bodily harm); Wright v. Coca Cola Bottling Co., 414 N.W.2d 608, 609 (S.D. 1987) ("The authorities generally recognize a cause of action for negligently causing some foreseeable emotional distress accompanied by bodily harm.").

Based in part on that section, the court held that the plaintiff was not entitled to emotional distress damages because, at the time of the termite discovery, she was not physically injured nor did she fear physical injury to herself or others.[162] The court stated that liability for emotional distress is "predicated on conduct deemed negligent because it involves an unreasonable risk of causing bodily harm to a person, not damage to property."[163]

In a dissenting opinion, however, Judge Krivosha opined that section 436A of the *Restatement of Torts* is: "outmoded and should be rejected. While the *Restatement* rule quoted may reduce the number of claims made, it is totally out of step with modern medical knowledge. To suggest that a psychological injury is not as grievous as a physical injury is to ignore reality."[164]

The validity of emotional harm should be recognized in economic injury cases, as it is in other causes of action, separate and distinct from a physical injury requirement, rather than attendant to one. The reasoning of Judge Krivosha in the *Fournell* dissent is most persuasive and should be adopted.

Interestingly, the *Restatement* is based in part on early English law which denied recovery for negligently inflicted emotional distress if there was no physical injury.[165] However, by 1901, English law abandoned the physical injury requirement, finding that the emotional distress was recoverable absent impact or contemporaneous injury.[166]

As noted previously, many courts have adopted the present English rule and currently allow recovery for emotional distress without the impact or injury requirement.[167] Some courts have also expanded recovery to allow emotional distress damages in suits alleging economic injury, but the theories of recovery differ from jurisdiction to jurisdiction. Louisiana, for instance, allows recovery for emotional distress when there is negligent damage to property.[168] The Louisiana courts have established four categories appropriate for recovery of emotional distress damages resulting from injury to one's property.[169] The

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162. *Fournell*, 305 N.W.2d at 607.

163. *Id.*

164. *Id.* at 608 (Krivosha, J., dissenting). Judge Krivosha went on to state that "[o]ne need not think very long on the matter before one recognizes and concludes that an emotional injury is as serious as, and often more serious than, a physical injury. The damages caused by emotional injuries oftentimes take much longer to heal than a physical injury would." *Id.* at 611. *See also supra* text accompanying notes 31–34, 58–68.

165. Victorian Rys. Comm. v. Coultas, 13 App. Cas. 222 (1888) (The plaintiff was severely frightened when defendant gatekeeper negligently allowed her to cross railroad tracks close to an oncoming train; although plaintiff suffered "severe nervous shock, fainted and experienced impairment of her eyesight and memory," the trial court held that she could not recover absent physical injury.).

166. Dulieu v. White & Sons, [1900–03] All E.R. 353 (1901).

167. *See supra* text accompanying note 94.

168. Emond v. Tyler Bldg. & Constr. Co., 438 So. 2d 681 (La. Ct. App. 1983) (mental anguish damages caused by injury to home were allowable to homeowners against designer of defective foundation); Lambert v. Allstate Ins. Co., 195 So. 2d 698 (La. Ct. App. 1967); Nickens v. McGehee, 184 So. 2d 271 (La. Ct. App. 1966) (lessors liable to lessees for damages for mental pain and suffering incident to destruction of lessee's property as a result of a fire caused by defect in wiring); Hayward v. Carraway, 180 So. 2d 758 (La. Ct. App. 1965) (law of Louisiana recognizes and permits recovery of damages for mental anguish resulting from injury to one's property).

169. There are four general categories of cases allowing emotional distress damages from injury to one's property:

1) where the property was damaged by an intentional or illegal act;

categories were established to help "limit recovery to cases where both the mental injury and the causal relation to the property damage are clearly established."[170] These criteria are not exclusive factors[171] and recovery for emotional distress is proper when the plaintiff can show that his or her emotional distress is a direct result of the damage to the plaintiff's property.[172] The emotional distress must be severe, not merely a result of the usual worry or anxiety attendant to property damage.[173]

The leading jurisdictions which have abandoned the physical injury requirement for various causes of action involving emotional distress appropriately recognize that a plaintiff can experience severe and debilitating emotional distress without a contemporaneous physical injury. This rationale also holds true when the underlying injury is economic. Because physical injury is not often a component in economic cases, requiring such a precursor to recovery is not a rational basis to weed out improper claims of emotional distress. Therefore, as the Louisiana cases show, emotional distress, pled in the context of an economic injury, should not be limited to cases where the plaintiff is also physically injured.

B. Intentional Conduct and Bad Faith

Recovery for emotional distress in property damage cases is permitted in trespass and nuisance actions because they are intentional torts.[174] However, in trespass actions, recovery for emotional distress is permitted even if the trespass is caused by an "error in judgment."[175] Additionally, some courts permit damages for emotional distress if the defendant's conduct is only negligent as a matter of law, as long as there is some indicia of intentional conduct or bad faith.[176]

Many courts have also expanded recovery to negligence actions if the defendant's actions interfered with the use and enjoyment of the plaintiff's land.[177] The interference of "use and enjoyment" of another's land is the

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2) where the property was damaged by acts giving rise to strict or absolute liability;

3) where the property was damaged by activities amounting to a continuous nuisance; and

4) where the property was damaged under circumstances where the owner was present or nearby at the time the damage occurred and suffered psychic trauma in the nature of or similar to a physical injury as a direct result of the incident itself.

Bode v. Pan Am. World Airways, Inc., 786 F.2d 669, 673 (5th Cir. 1986); Farr v. Johnson, 308 So. 2d 884, 885–86 (La. Ct. App. 2d Cir. 1975).

170. Elston v. Valley Elec. Mbrshp. Corp., 381 So. 2d 554, 556 (La. Ct. App. 2d Cir. 1980).

171. *Id.*

172. *Id.* (although not present at the time of the property damage, plaintiff was permitted damages for emotional distress when defendant negligently replaced an electrical transformer which caused damage to plaintiff's home).

173. *Id.*

174. KEETON ET AL., *supra* note 26, § 13, at 76.

175. *See, e.g.*, Adams v. State, 357 So. 2d 1239 (La. Ct. App. 1978) (emotional distress permitted when a state employee cut down plaintiffs' tree in an error of judgment, thinking the tree was on a state right of way).

176. Lee v. Bank of America, 267 Cal. Rptr. 387, 390 (Ct. App. 1990) ("Damages for emotional suffering are allowed when the tortfeasor's conduct...contains elements of intentional malfeasance....").

177. Edwards v. Talent Irrigation Dist., 570 P.2d 1169 (Or. 1977). The *Edwards* court stated that "[t]his also appears to be the rule in most jurisdictions that have considered the issue."

essence of a nuisance action, an intentional tort.[178] In effect, by allowing for emotional distress damages in negligent interference cases, these courts are stating that factors can be present, other than the intentionality of the defendant's conduct, to show that the plaintiff's claim is not fraudulent.[179]

Many courts focus on the intentionality of the defendant's conduct as a means of limiting emotional distress actions in economic cases; and certainly, intentional conduct or a showing of bad faith can provide an indicia of trustworthiness to a plaintiff's claim. However, this artificial line disallows valid claims of negligent infliction of emotional distress resulting from economic damage even though other factors are present to provide the requisite trustworthiness of plaintiff's claims.

The better approach would focus not merely on the defendant's conduct but rather on the injury itself and the emotional distress suffered to determine the validity of the plaintiff's claim. It appears obvious that both intentional and negligent acts can cause serious emotional distress.

By focusing merely on the acts of a defendant as a dividing line between recovery and non-recovery, plaintiffs deserving recovery are summarily and unfairly denied the opportunity to prove their claims. An innocent plaintiff should not be forced to bear emotional distress damages without the ability to recover, simply because she had the misfortune of being the victim of a negligent act rather that an intentional one. Furthermore, there appears to be no valid rationale to deny recovery in other economic damage cases when emotional distress is widely permitted in actions for negligent interference of the use and enjoyment of land.[180] Especially in the context of property damage, the damage itself provides the trustworthiness of the plaintiff's claim for emotional distress, just as physical injury can provide the trustworthiness of a claim for pain and suffering.

C. Outrageous Conduct

Courts also allow recovery for emotional distress attendant to economic loss when the defendant's conduct is outrageous. In *Branch v. Homefed Bank*, the plaintiff accepted an offer of employment with the defendant bank and left his current employ based on representations by the defendant regarding certain economic benefits.[181] The benefits never materialized and when the plaintiff requested such benefits, he was retaliated against and ultimately left his position.[182] The jury awarded the plaintiff both economic damages as well as emotional distress damages.[183]

Id. at 1170. *See also* French v. Ralph E. Moore, Inc., 661 P.2d 844 (Mont. 1983) ("[D]amages for mental anguish are recoverable in a negligence action where the claim is that the defendant has interfered with the use and enjoyment of plaintiff's land.").

178. KEETON ET AL., *supra* note 26, § 87, at 619. "Nuisance is a tort that protects the interest of those who own or occupy land from conduct committed with the *intention* of interfering with a particular interest—the interest in use and enjoyment" of plaintiff's property. KEETON ET AL., *supra* note 26, § 87, at 622 (emphasis added).

179. *See, e.g.*, Edwards v. Talent Irrigation Dist., 570 P.2d 1169.

180. *See, e.g., id.*

181. 8 Cal. Rptr. 2d 182, 182–83 (Ct. App. 1992).

182. *Id.* at 183–84.

183. *Id.* at 184.

On appeal, the award for economic damages was affirmed. However, the award for emotional distress damages was reversed.[184] The *Branch* court stated "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."[185] The *Branch* court reasoned that although the emotional distress could be anticipated and the defendant's conduct was blameworthy, the conduct was not outrageous.[186] Thus, the court stated, "[r]ecovery for worry, distress and unhappiness as the result of damage to property, loss of a job or loss of money is not permitted when the defendant's conduct is merely negligent."[187] The court went on to state that "recovery for the inevitable distress resulting from finding oneself the victim of a negligent tortfeasor is, however, limited to economic loss unless malice, breach of a fiduciary duty, physical injury or impact, or some other unusually extreme or outrageous circumstance, can be shown."[188]

In *Branch*, the plaintiff was a direct victim due to the preexisting relationship between the plaintiff/employee and the defendant/bank.[189] Given a preexisting relationship where the defendant's conduct is blameworthy and the emotional distress suffered is foreseeable, a defendant should not be able to escape liability because the conduct does not fall squarely within numerous, haphazard exceptions to the general rule of nonrecovery.[190]

VI. SOLUTION

Under our test, the *Branch* plaintiff might have recovered, as long as his injury was severe, and based precisely on the existence of the special relationship between employer and employee.[191] This first prong of our test has its genesis in the *Marlene F.* and *Burgess* definition of "direct victim."[192] The threshold question courts should ask is whether the defendant owes a duty to the plaintiff—either one implied by law, assumed by the defendant or arising out of a preexisting special relationship with the plaintiff. If not, then the plaintiff is

184. *Id.* at 187.
185. *Id.* at 184–85.
186. *Id.* at 187.
187. *Id.* at 186.
188. *Id.*
189. *See generally, id. See also* Bro v. Glaser, 27 Cal. Rptr. 2d 894, 910 (Ct. App. 1994) (noting there was a preexisting relationship between Branch and Homefed Bank).
190. Unfortunately, the *Branch* court did not state the type or extent of the emotional distress suffered by the plaintiff. If the emotional distress was trivial and not severe, recovery should not have been allowed on these grounds.
191. We do not argue that the *Branch* plaintiff would have recovered, only that the special relationship at work in that case might have supported liability.
192. Several commentators have examined the approach suggested by the *Marlene F.* court and have recommended that courts adopt "special relationship" criteria as a means of limiting claims. *See, e.g.*, Davies, *supra* note 55; 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 (1992). However, those commentators have done so in a much broader context than this Article presents. Professor Davies examines all direct actions for emotional distress, examining whether such actions should be considered a viable basis for recovery. She looks at *Marlene F.* in that very broad context. Professor Greenberg argues for an integration of bystander and direct victim claims, and evaluates the *Marlene F.* approach in that light. We do not make such broad arguments. Thus, many of the problems with the *Marlene F.* approach noted by those commentators do not apply in the narrow context that this Article presents. Their work, however, provides much insight into *Marlene F.* and has been particularly valuable to us.

not in the class having a protected interest in emotional well-being. If so, then the jury must decide, based upon the second prong of our test discussed *infra*, whether liability should be imposed.

By requiring a plaintiff to establish duty through specific and concrete rules, we propound a predictable approach to determine whether a claim for emotional distress is actionable. When the duty is imposed by law or assumed by the defendant, most courts and commentators will have no difficulty imposing liability. Those are the easy cases because there is no fairness issue implicated by the court's recognition of the duty. But neither should the special relationship category of cases pose significant problems. Courts have used special relationships as a basis for finding duty in other contexts and should have no administrative problem doing so in this context. Again, we are not advocating that any business relationship will suffice to impose liability. In the typical business setting, the defendant and plaintiff will not have the kind of special relationship *Marlene F.* and *Burgess* describe because each party has assumed the risk of the business transaction. If one refers back to our example of the plaintiff homeowner, it is clear that the preexisting special relationship between the homebuilder and the plaintiff, one in which the homebuilder is almost an emotional fiduciary of the plaintiff, is not like the typical business relationship.

The approach we advocate responds to the need for proportionality between fault and liability by limiting actionable claims in a way the pure foreseeability approach does not.[193] "Although [foreseeability] may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm,"[194] because some emotional harm is always foreseeable.[195] Therefore, if foreseeability alone is to circumscribe duty, a defendant's liability could be infinite because each negligent act could give rise to any number of claims.[196] Conversely, our approach virtually eliminates the fear that one negligent act will result in crushing liability by limiting the protected class to a small group of clearly identifiable plaintiffs.

While the case-by-case approach to duty potentially extends the scope of duty owed, courts can still foreclose a plaintiff from recovery at the outset by finding that no duty exists. Unless the law clearly imposes a duty, the defendant clearly assumes it or it exists by virtue of the relationship between the plaintiff and the defendant, a court will not recognize the plaintiff's claim. This approach is specific, concrete and easy to apply. But, instead of barring all

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193.
> We do not believe that the traditional tort principle of foreseeability, standing alone, properly defines the scope of a defendant's duty in an action for damages for negligently inflicted emotional distress. Rather we believe that a plaintiff's right to recover emotional damages caused by mere negligence should be limited to those cases where the defendant owes the plaintiff a preexisting duty.

Chizmar v. Mackie, 895 P.2d 196, 203 (Alaska 1995).

194. *See* Thing v. La Chusa, 771 P.2d 814, 826 (Cal. 1989) (citing Rabin, *supra* note 2, at 1526).

195. Bro v. Glaser, 27 Cal. Rptr. 894, 919 (Ct. App. 1994).

196. In fact, one court has noted that foreseeability is really a non-standard: "in all but the most obvious of cases a harm is 'foreseeable' only if, in the final analysis, a court or jury says that it is." Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 522 (Cal. 1963), *overruled on other grounds by* Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

claims at the outset, it allows a court to weigh all circumstances before making a decision.[197]

The second prong of our test would require the plaintiff to plead and prove serious emotional injury such that "a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[198] The intangible nature of emotional distress damages necessitates some indicia of genuineness to weed out fraudulent and trivial claims. Under this standard, the plaintiff with the "egg shell" psyche will not recover. Although ultimately juries will determine if the plaintiff has indeed suffered serious and genuine emotional distress,[199]courts can exercise some control over unfettered jury decisions by adequately instructing the jury as to the proper definition of serious emotional distress.[200]

The Hawaii court derived its objective standard from the standard stated in the *Restatement (Second) of Torts*[201] for determining severe emotional injury in the intentional tort arena.[202] So, illustratively, definitions of severe emotional distress found in intentional infliction cases should be instructive to juries deciding negligent infliction of emotional distress cases. As an additional safeguard, juries may look for the presence of other indicia of genuineness already recognized by courts: physical injury,[203] substantial damage arising from an independent, related cause of action,[204] or outrageous conduct.[205] While not appropriate limitations to the bringing of suit in the first instance, these criteria are perfectly valid indicators of the genuineness of the harm suffered. Thus, if a plaintiff can show that she was deprived, for instance, of personal property, then she can reasonably have been said to have suffered serious injury.[206] In the context of emotional distress arising from economic damage, the requisite guarantee of genuineness will often be found in the objectively verifiable damage to the plaintiff's independently protected interest—the interest in property, finances, etc.

In conjunction with the duty rules relied upon in *Marlene F.* and *Burgess*, the requirement of serious and genuine injury will impose meaningful limitations on recovery of damages, while at the same time insuring accountability for negligent conduct in a fair and rational manner. Further,

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197. Further, as in any other tort, the principle of proximate causation will limit the scope of liability. A plaintiff may be unable to prove that a defendant's conduct proximately caused the emotional distress suffered.

198. Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970). *See also* RESTATEMENT (SECOND) OF TORTS, § 46, cmt. j, at 77 (1965) ("The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it.").

199. "[A] jury is capable of determining whether the emotional distress claimed to have been sustained is 'serious' or 'severe.'" Sacco v. High Country Independent Press, Inc., 896 P.2d 411, 425 (Mont. 1995). California has delegated this duty to the jury in the direct victim line of cases. *See* Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980).

200. "It is for the court to determine whether, on the evidence severe emotional distress can be found; it is for the jury to determine whether on the evidence, it has in fact existed." RESTATEMENT (SECOND) OF TORTS, § 46, cmt. j, at 78 (1965).

201. *See* RESTATEMENT (SECOND) OF TORTS, § 46, cmt. j, at 77 (1965).

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

203. *Molien*, 616 P.2d at 821.

204. *Id.*

205. *Id.*

206. *See, e.g.*, Crisci v. Security Ins. Co., 426 P.2d 173, 179 (Cal. 1967); Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470, 483 (Ct. App. 1975).

adoption of this approach makes some analytical sense of the cases decided as exceptions to the general rule of nonliability as they, too, seemed to give great weight to the relationship existing between the plaintiff and defendant.

Negligent infliction of emotional distress claims attendant to economic loss have been inappropriately and unfairly denied to plaintiffs seeking redress for their injuries. The cases that have allowed recovery have been decided on an *ad hoc* basis leading to arbitrary results, leaving litigants with no gauge as to the outcome of future claims. Furthermore, understanding the gendered nature of emotional injury allows one to deconstruct this area of decisional law and therefore, examine its validity. The existing structure of emotional distress law becomes clear when we note what possibilities it forecloses. As noted in this Article, there is no logical, valid distinction between this type of injury and other intangible injuries that have traditionally been allowed as appropriate damages for a jury to consider. Thus, such claims should not be forestalled at the pleading stage and the trier of fact should be permitted to determine whether the claim is in fact genuine. This Article argues for that currently foreclosed result.

Our two-prong test, requiring a duty and severe emotional distress, enables courts to consistently apply a standard and appropriately places the burden of loss on the negligent defendant rather than the innocent plaintiff. This test meets the need for judicial efficiency as it minimizes the possibility of fraudulent claims, unlimited liability and speculative damages while giving lower courts and litigants clear guidelines to follow in determining whether certain conduct will result in liability.