TORTS

LUCCHESI V. FREDERIC N. STIMMELL, M.D., LTD.: LETTING THE JURY DECIDE THE QUESTION OF EXTREME AND OUTRAGEOUS CONDUCT FOR THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*,[1] the Arizona Supreme Court held that a physician's failure to attend the delivery of a baby, and his decision not to inform the parents of all the details surrounding their child's birth, created a factual issue whether the conduct was so extreme and outrageous that it constituted a claim for intentional infliction of emotional distress.[2] Determining whether conduct is sufficiently "extreme and outrageous" to establish such a claim is a conceptual problem that courts continually face.

This Comment examines the development of the tort of intentional infliction of emotional distress and discusses the Arizona Supreme Court's analysis of what constitutes extreme and outrageous conduct with specific reference to the *Lucchesi* decision.

LEGAL SETTING AND BACKGROUND

Until the middle of this century, courts refused to recognize an independent cause of action for mental anguish.[3] Courts expressed concern about the difficulty of measuring damages[4] and the opening of a "wide door" for ficticious and fraudulent claims, as well as trivial litigation and actions involving mere bad manners.[5] However, recovery for mental anguish was

1. 149 Ariz. 76, 716 P.2d 1013 (1986).

2. *Id.* at 78, 716 P.2d at 1015. The RESTATEMENT (SECOND) OF TORTS § 46 (1965) states the generally accepted definition of intentional infliction of emotional distress. *See infra* text accompanying notes 36 and 37. This Comment focuses on the definition of extreme and outrageous conduct, one element necessary to establish a cause of action under this tort.

3. Lynch v. Knight, 11 Eng. Rep. 854 (1861) (The law cannot value mental pain or anxiety when the unlawful act causes that alone.); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896) (Illness and subsequent miscarriage, caused by fright due to danger when plaintiff was subjected to careless operation of a horse-car by defendant, held not to constitute a cause of action); PROSSER AND KEETON ON THE LAW OF TORTS, § 12, at 54-55 (W. Keeton, 5th ed. 1984) [hereinafter PROSSER AND KEETON]; Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

4. Prosser, *supra* note 3, at 875. *See* Lynch v. Knight, 11 Eng. Rep. 854 (1861); Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896).

5. Prosser, *supra* note 3, at 877. *See* Spade v. Lynn & Boston Railroad Co., 168 Mass. 285, 47 N.E. 88 (1897) (Plaintiff frightened and subjected to nervous shock as a result of defendant employee's conduct in trying to remove plaintiff from train.); Huston v. Freemansburg Borough, 212 Pa. 548, 61 A. 1022 (1905) (Plaintiff not allowed recovery for fright resulting from explosion caused

not denied altogether. The Restatement of Torts states that if a person's conduct makes them liable for invading the legal rights of another, and emotional distress results from that invasion, the emotional distress may be taken into account in assessing damages.[6] Traditional bases of liability such as assault,[7] battery,[8] false imprisonment,[9] defamation,[10] nuisance,[11] and others[12] became the medium of recovery for intentional emotional disturbances. One commentator termed these damages "parasitic"[13] and successfully predicted that intentional infliction of emotional distress would become an independent basis of liability.[14]

EARLY DEVELOPMENT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS AN INDEPENDENT TORT

The earliest appearance of a separate cause of action for intentional infliction of emotional distress involved the liability of a common carrier for insulting a passenger.[15] This liability soon extended to innkeepers,[16] theatres,[17] and amusement parks.[18] The initial justification for allowing recovery for abusive or insulting language or conduct was the breach of an implied contract to be polite.[19] Later courts found such language or conduct to be tortious based upon the special obligation these businesses, as public utilities,

---

by defendant which plaintiff alleged killed her husband.); Ward v. West Jersey & Sea Shore Railroad Co., 65 N.J.L. 383, 47 A. 561 (1900) (Plaintiff almost run down by a train when defendant's gatekeeper improperly lowered the gates. Court sustained defendant's demurrer.)

6. RESTATEMENT OF TORTS § 47(b) (1934): "If the actor has by his tortious conduct become liable for an invasion of any legally protected interest of another, emotional distress caused by the invasion or by the tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other."

7. Atlantic Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933); Kurpgeweit v. Kirby, 88 Neb. 72, 129 N.W. 177 (1910); Leach v. Leach, 11 Tex. Civ. App. 699, 33 S.W. 703 (1895).

8. DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881); Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937); Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884).

9. Salisbury v. Poulson, 51 Utah 552, 172 P. 315 (1918); Gomez v. Scanlan, 155 Cal. 528, 102 P. 12 (1909); Gadsen Gen. Hosp. v. Hamilton, 212 Ala. 531, 103 So. 553 (1925).

10. Garrison v. Sun Printing & Publishing Ass'n, 207 N.Y. 1, 100 N.E. 430 (1912).

11. Shellabarger v. Morris, 115 Mo. App. 566, 91 S.W. 1005 (1905).

12. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (invasion of the right to privacy); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935) (trespass to land); Black v. Canadian Pac. Ry. Co., 218 F. 239 (W.D.N.Y. 1914) (malicious prosecution); Anthony v. Norton, 60 Kan. 341, 56 P. 529 (1899) (seduction).

13. T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906).

14. Street states, "The treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability." *Id.* at 470.

15. Chamberlain v. Chandler, 5 F.Cas. 413 (C.C. Mass. 1823)(No. 2,575); Cole v. Atlanta & West Point R.R. Co., 102 Ga. 474, 31 S.E. 107 (1897); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899).

16. Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921); DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908); Dixon v. Hotel Tutwiler Operating Co., 214 Ala. 396, 108 So. 26 (1926); McCarthy v. Niskern, 22 Minn. 90 (1875).

17. Weber-Stair Co. v. Fisher, 119 S.W. 195 (Ky. 1909); Interstate Amusement Co. v. Martin, 8 Ala. App. 481, 62 So. 404 (1913); Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938).

18. Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 P. 209 (1904); Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911).

19. Chamberlain v. Chandler, 5 F. Cas. 413 (C.C. Mass. 1823) (No. 2,575); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899); Wheat, *The Liability of the Carrier to Passengers for Injuries by its Servants*, 14 MICH. L. REV. 626, 633 (1916).

had to the public.[20]

Increasingly, courts began allowing recovery for predominantly emotional injury in cases involving extreme misconduct. In 1897, the Queen's Bench, in *Wilkinson v. Downton*,[21] abandoned traditional tort liability as a predicate to recovery of damages for mental suffering. In *Wilkinson*, a practical joker told a woman her husband had been severely injured in an accident, and was in the hospital with both legs broken.[22] The court refused to base the defendant's liability on fraud. Instead, it held that no justification existed for the willful, malicious act and that consequently the plaintiff was entitled to recover for her emotional suffering.[23] In the United States, as early as 1906, the Alabama Supreme Court in *Engle v. Simmons*[24] allowed recovery for intentional infliction of emotional distress. In *Engle*, the defendant's debt collection methods caused the plaintiff severe emotional distress which in turn caused her to miscarry.[25] Commentators interpreted these cases and others[26] as reflecting the courts' acceptance of an independent cause of action for intentional infliction of emotional distress.[27] Apparently it was no longer necessary to tie damages for mental suffering to the violation of a traditional tort. The Restatement of Torts came under heavy attack by scholars for refusing to acknowledge this common law trend.[28]

THE RESTATEMENT DEFINITION OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The American Law Institute amended Section 46 of the Restatement of

20. Cole v. Atlanta & West Point R.R. Co., 102 Ga. 474, 31 S.E. 107 (1897); Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 2 Am. Rep. 39 (1869); Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920).

21. 2 Q.B. 57 (1897).

22. *Id.* at 58.

23. *Id.* at 58-59.

24. 148 Ala. 92, 41 So. 1023 (1906).

25. Defendant came to collect a debt from the plaintiff's husband. After being told that the plaintiff's husband was not home, the defendant continued to harass and threaten the plaintiff, refused to leave, and took an inventory of their household goods. *Id.* at 94, 41 So. at 1023.

26. Great Atlantic & Pacific Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931) (plaintiff, who received a dead rat which had been wrapped by a grocer to resemble a loaf of bread, obtained damages for the physical consequences of the shock). In Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926), the Minnesota Supreme Court allowed recovery for permanently impaired health resulting from nervous shock when defendants accused a young girl of unchastity and threatened to send her to reform school unless she confessed. *See also* Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932) (threatening letter sent by collection agency); LaSalle Extension Univ. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934) (threats of suit and appeal to plaintiff's employer by bill collector); Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936) (bill collector shouted abusive language at plaintiff outside plaintiff's home).

27. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Seitz, *Insults-Practical Jokes- Threats of Future Harm- How New as Torts?*, 28 KY. L. J. 411 (1940); Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222 (1939); Note, *Intentional Infliction of Mental Suffering- A New Tort*, 22 MINN. L. REV. 1030 (1940).

28. Magruder, *supra* note 27, at 1049-52; Prosser, *supra* note 27, at 883-84. The RESTATEMENT OF TORTS § 46 (1934) states:

> Except as stated in sec. 21 to 34 and 48, conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability a) for emotional distress resulting therefrom, or b) for bodily harm unexpectably resulting from such disturbance.

Torts in 1948.[29] The amended Restatement stated that a person who intentionally caused severe emotional distress to another, without a privilege to do so, was liable for the distress caused and for any resulting bodily harm.[30] This "new tort" developed rapidly.[31] The broad phraseology in the 1948 version forced courts to face questions concerning the limits to such liability.[32] Must the actor desire to cause emotional distress?[33] Is it enough that he knew emotional distress was substantially certain to follow?[34] Also, how serious must the actor's conduct be before courts will allow recovery for mental suffering?[35] The Restatement (Second) of Torts, Section 46, established guidelines for answering these questions.[36]

The Restatement (Second) of Torts, published in 1965,[37] provides the

29. Professor Wade attributes this change to scholars like Prosser and Magruder who spoke out strongly against the Restatement of Torts as published in 1934. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 81 (1950). The American Law Institute conceded that the change was necessary to give an accurate picture of present law in the United States. RESTATEMENT OF THE LAW (1948 Supp. at 616).

30. RESTATEMENT OF TORTS § 46 (Supp. 1948)

31. The RESTATEMENT OF TORTS § 46 (1948) was adopted by courts in the following cases: Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292 (1952); Amos v. Prom, 115 F.Supp. 127 (Iowa 1953).

32. RESTATEMENT (SECOND) OF TORTS § 46 (Tent. Draft No.1, Note to Institute 1957). "The rapid development of this new tort,' and the numerous cases in which it has appeared, even since the 1948 revision, have indicated the need for a more limited statement which will set some boundaries to the liability, falling short of the broad statement made in the Section as it now stands." *Id.*

33. PROSSER & KEETON, *supra* note 3, at 60 (4th ed. 1971). *See* Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). In *Mahnke*, the plaintiff's father shot her mother in the head in plaintiff's presence. He then committed suicide by shooting himself thereby causing his blood to be splattered all over plaintiff's face and clothing. The court held that, although in general commission of a murder or suicide is not a tort against an eyewitness, in this case the child has a right of action for mental suffering caused by her father's actions. It was highly probable that the plaintiff would suffer emotional distress at witnessing her father's suicide. By proceeding in conscious disregard of the consequences of his actions, the father demonstrated the requisite intent under this tort.

34. PROSSER & KEETON, *supra* note 3, at 60 (4th ed. 1971). *See* Blakely v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945) In *Blakely*, the defendant committed suicide by cutting his throat in the plaintiff's kitchen. The court held that whether or not defendant's conduct was willful, i.e. to be reasonably anticipated as a natural consequence of such conduct, was a question for the jury.; Price v. Yellow Pine Paper Mill Co., 240 S.W. 588 (Tex. Civ. App. 1922). In *Price*, the pregnant plaintiff's injured husband was brought home to the plaintiff in a shocking condition. The court held the defendant liable for its employee's actions in bringing plaintiff's husband home in such a state as to cause the plaintiff physical and mental suffering.; Boyle v. Chandler, 33 Del. 323, 138 A. 273 (1927) (mishandling of a dead body conducted in reckless disregard of the consequences is intentional and results in liability for the emotional distress suffered by the plaintiffs).

35. Pakos v. Clark, 253 Or. 113, 125-26, 453 P.2d 682, 688 (1969). The *Pakos* court took notice of the evolutionary process of the tort of intentional infliction of emotional distress. The court stated:

> [F]rom a denial of liability for intentionally inflicting emotional distress the Restatement and courts supporting it... drastically changed to the allowance of liability against one who intentionally caused emotional distress without privilege to do so, and later to the present rule which requires that the conduct be extreme and outrageous before liability will attach.

Id.

36. RESTATEMENT, *supra* note 2, and accompanying text. *See also infra* notes 39, 40, 41, 42, 50, 55 and accompanying text.

37. RESTATEMENT (SECOND) OF TORTS § 46 (1965), defines the tort of intentional infliction of emotional distress:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

currently accepted elements of a cause of action for intentional infliction of emotional distress.[38] According to the Restatement (Second), if a person through extreme and outrageous conduct intentionally or recklessly causes another severe emotional distress, that person is subject to liability for the resulting emotional and bodily harm.[39] In the thirty years since the Restatement first acknowledged an independent cause of action for intentional infliction of emotional distress, courts have focused on defining the scope of this tort rather than questioning whether to recognize it at all.[40]

DEFINING "EXTREME AND OUTRAGEOUS CONDUCT"

To recover for intentional infliction of emotional distress, the plaintiff must be the victim of "extreme and outrageous" conduct.[41] The Restatement defines such conduct as that which is utterly intolerable in a civilized community. Outrageous conduct is conduct which would arouse resentment in an average person against the actor.[42]

The Restatement has been criticized for failing to provide clear boundaries for determining what constitutes extreme and outrageous conduct.[43] The Restatement suggests, and courts have held, that determining outrageousness requires a case-by-case analysis.[44]

---

a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

b) to any other person who is present at the time, if such distress results in bodily harm.

This Comment will not address conduct that is covered in subsection 2 of this definition.

38. PROSSER & KEETON, *supra* note 3, at 49-50 (4th ed. 1971).

39. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

40. Sheltra v. Smith, 136 Vt. 472, 392 A.2d 431 (1978). The court in *Smith* stated that since the adoption of the Restatement, the central focus of courts has been on defining the scope of its application: what claims should be considered while denying the trivial and the fictitious.; Golden v. Dungan, 20 Cal. App. 3d 295, 97 Cal. Rptr. 577 (1971). The court in *Dungan* held that courts are faced with difficult problems in determining the kind and extent of invasions that are sufficiently serious to be actionable. Nevertheless, these courts have concluded that the problems presented are not so insuperable that they warrant the denial of relief altogether.; Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977). In *Contreras*, the court found that the trier of fact should determine, taking into account changing social conditions and the susceptibility of the plaintiff, whether the conduct involved was sufficient to constitute intentional infliction of emotional distress.

41. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

42. RESTATEMENT (SECOND) OF TORTS § 46 comment d defines extreme and outrageous conduct as that which is: "to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.' "

43. Rockhill v. Pollard, 259 Or. 54, 485 P.2d 28 (1971). The Oregon Supreme Court found the Restatement definition of extreme and outrageous conduct of minimal aid and "composed of inconsistent generalities with different connotations for different people." *Id.* at 60, 485 P.2d at 31. The court stated:

> "Many members of the community would classify as outrageous conduct [that] which others would describe as rude, callous, or obnoxious. On the other hand, 'utterly intolerable in a civilized community' swings to the other end of the continuum and would seem to exclude much conduct that to us should be classified as actionable." *Id.* at 60, 485 P.2d at 31. The court then suggested a simpler test: determining whether conduct is "outrageous in the extreme." *Id.* This test faces the same shortcomings as the Restatement. Determining what is "outrageous in the extreme" requires a subjective evaluation of the facts. What one person finds outrageous in the extreme, another may see as extremely rude or obnoxious behavior.

44. RESTATEMENT (SECOND) OF TORTS § 46 comment h (1965), states:

Additional comments to the Restatement provide some guidance. Comment d states that liability will not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.[45] To illustrate, in *Bernard v. Cameron and Colby Co. Inc.*,[46] the Supreme Court of Massachusetts affirmed a lower court grant of summary judgment in favor of an employer who, with knowledge of an employee's smoke allergy, transferred the employee to a work area in which smoking was permitted.[47] This holding confirms that the law cannot protect individuals from all offensive contact.[48] Comment d reflects a recognition that we live in a world where constant interaction with people is inevitable.[49] Therefore, society must harden itself to some inconsiderate or unkind acts.

Two additional factors may be considered by the courts in determining whether conduct is extreme and outrageous. First, outrageous conduct may be found in the abuse of a person's position or relation to another where the relation gives the person actual or apparent authority over the other. Outrageousness may also be found in an abuse of a person's relation with another where the relation involves power to affect another's interests.[50] Abuses of such relations often involve landlords,[51] employers,[52] doctors,[53] and collecting creditors.[54] Second, conduct which otherwise would not be extreme and outrageous may become such if the actor proceeds knowing a person's susceptibility to emotional distress or susceptibility due to some physical or mental condition or peculiarity.[55] What is merely rude, obnoxious, or petty oppressive behavior when committed against an average person, may be extreme and outrageous conduct when the actor proceeds with knowledge of the person's sensitivity. In *Bundren v. Superior Ct. of County of Ventura*,[56] a

---

> It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, *in the particular case*, the conduct has been sufficiently extreme and outrageous to result in liability.

Id. (emphasis added). *See also* Midas Muffler Shop v. Ellison, 133 Ariz. 194, 650 P.2d 496 (1982); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977); Hall v. May Dep't. Stores Co., 292 Or. 131, 637 P.2d 126 (1982).

45. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

46. 397 Mass. 320, 491 N.E.2d 604 (1986).

47. *Bernard*, 397 Mass. at 321, 491 N.E.2d at 605.

48. *See supra* notes 41 and 45 and accompanying text.

49. *See supra* notes 41, 45 and 48 and accompanying text.

50. RESTATEMENT (SECOND) OF TORTS § 46 comment e (1965).

51. Newby v. Alto Riviera Apartments, 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976) (landlord abused special relationship between landlords and tenants through continuous harassment and intimidation of tenant).

52. Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977) (employer's use of racial slurs and jokes gave impetus to claim of outrageous conduct based on employer's position of authority).

53. Rockhill v. Pollard, 259 Or. 54, 485 P.2d 28 (1971) (special duties owed by a physician to a patient are appropriate factors to consider in determining extreme and outrageous conduct).

54. Bundren v. Superior Ct. of County of Ventura, 145 Cal. App. 3d 784, 193 Cal. Rptr. 671 (1983) (hospital's debt collection methods called into question when used to collect payment from petitioner who was recovering from a recent surgery); Turman v. Central Billing Bureau, Inc., 279 Or. 443, 568 P.2d 1382 (1977) (defendant threatened to take away blind plaintiff's husband's job and their home if bill was not paid immediately).

55. RESTATEMENT (SECOND) OF TORTS § 46 comment f (1965).

56. 145 Cal. App. 3d 784, 193 Cal. Rptr. 671 (1983).

California appeals court vacated the order of summary judgment in favor of Los Robles Regional Medical Center,[57] questioning the reasonableness of the hospital's method of bill collection. Whether the hospital was reasonable in attempting to collect payment when the petitioner was still recuperating from a recent surgery was found to be an issue for jury consideration.[58]

In addition to outrageous conduct, recovery for intentional infliction of emotional distress requires severe emotional distress.[59] The Restatement rationale for requiring severe emotional distress is the same rationale underlying the requirement that the conduct be outrageous. The law cannot ensure peace of mind. A certain degree of emotional distress is inevitable when living among people.[60] Therefore, the law intervenes only when the distress inflicted is so severe that no reasonable person could be expected to endure it.[61] To determine severity, courts consider the intensity and duration of the distress.[62] Bodily harm is not necessary to recover for mental suffering.[63] Where bodily injury is absent, however, courts may require more in the way of outrage to insure that the claim is genuine.[64]

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN ARIZONA

In 1954, Arizona recognized an independent cause of action for intentional infliction of emotional distress.[65] Arizona courts, however, have been reluctant to grant relief under this tort. Very few claims for intentional infliction of emotional distress reach Arizona juries.[66] Two reasons prevent

57. *Bundren*, 145 Cal. App. 3d at 792-93, 193 Cal. Rptr. at 676.

58. *Id. See also* Ruane v. Murray, 380 N.W.2d 362 (S.D. 1986) (landlord, knowing tenant suffered from psychological problems, had sexual intercourse with her and subsequently harrassed her by intimidation and vocal threats); McCoy v. Georgia Baptist Hosp., 167 Ga. App. 495, 306 S.E.2d 746 (1983) (hospital employee, with knowledge of petitioner's emotional problems surrounding the death of her child, telephoned petitioner and informed her that the body of her child was in the freezer and to "come and get it"); Richardson v. Pridmore, 97 Cal. App. 2d 124, 217 P.2d 113 (1950) (landlord, aware of petitioner's advanced state of pregnancy, unlawfully evicted plaintiff and her husband causing the plaintiff to miscarry).

59. RESTATEMENT (SEOND) OF TORTS § 46 comment k (1965).

60. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965). *See also* Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 47 HARV. L. REV. 1033, 1053 (1936).

61. *See supra* note 59.

62. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965). *See, e.g.*, Golden v. Dungan, 20 Cal. App. 3d 295, 310, 97 Cal. Rptr. 577, 588 (1971); Harris v. Jones, 281 Md. 560, 569, 380 A.2d 611, 616 (1977); Venerias v. Johnson, 127 Ariz. 496, 500, 622 P.2d 55, 59 (1981); Midas Muffler Shop v. Ellison, 133 Ariz. 194, 199, 650 P.2d 496, 501 (1982).

63. RESTATEMENT (SECOND) OF TORTS § 46 comment k (1965). *See, e.g.*, Newby v. Alto Riviera Apartments, 60 Cal. App.3d 288, 297, 131 Cal.Rptr. 547, 553 (1976); Mahnke v. Moore, 197 Md. 61, 69-70, 77 A.2d 923, 927 (1951); PROSSER & KEETON, *supra* note 3, at 64 (5th ed. 1984).

64. PROSSER & KEETON, *supra* note 3.

65. Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954).

66. Cluff v. Farmers Ins. Exch., 10 Ariz. App. 560, 460 P.2d 666 (1969) (court granted motion to dismiss complaint that alleged an insurance adjuster intentionally inflicted mental suffering upon plaintiff to coerce plaintiff to settle her wrongful death claim); Patton v. First Fed. Sav. and Loan, 118 Ariz. 473, 578 P.2d 152 (1978) (defendant's actions involving a loan transaction were not considered unacceptable in the community; summary judgment granted); Midas Muffler Shop v. Ellison, 133 Ariz. 194, 650 P.2d 496 (Ct. App. 1982) (six phone calls by a collection agency over a three month period is not extreme and outrageous conduct, therefore, summary judgment appropriate); Davis v. First Nat. Bank of Arizona, 124 Ariz. 458, 605 P.2d 37 (Ct. App. 1979) (bank's and disability insurer's attempts to rescind loan contract and to restrict coverage of disability policy held to be annoying but not sufficiently extreme and outrageous to permit recovery; summary judgment granted); Joseph v. Markovitz, 27 Ariz. App. 122, 551 P.2d 571 (1976) (in medical malpractice

redress of claims for intentional mental suffering in Arizona. First, the definition used to determine what constitutes extreme and outrageous conduct is very narrow.[67] Second, there is confusion over the proper roles for the court and jury in determining whether this definition is met.[68]

ARIZONA'S DEFINITION OF EXTREME AND OUTRAGEOUS CONDUCT

In Arizona, to sustain a cause of action for intentional infliction of emotional distress, the conduct complained of must fall "at the very extreme edge of the spectrum of possible conduct."[69] If a trial court determines that the conduct does not lie on this "extreme edge," the Arizona Supreme Court has held that the trial court is correct in determining, *as a matter of law*, that the plaintiff has failed to establish a claim for intentional infliction of emotional distress.[70]

Does the jury have a role in Arizona's "extreme edge" test for mental suffering? Comment h to the Restatement (Second) states that the court should determine, in the first instance, whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to permit recovery; but where reasonable people may differ, comment h states that the jury should determine whether the conduct was sufficiently extreme and outrageous to result in liability.[71] The Arizona test, as stated in *Cluff v. Farmers Insurance Exchange*,[72] gave little if any role to Arizona juries for determining whether conduct is sufficiently extreme and outrageous to allow recovery for intentional infliction of emotional distress, by ignoring critical portions of comment h.

In 1980, the Arizona Supreme Court decided *Watts v. Golden Age Nursing Home*.[73] *Watts* renewed Arizona's recognition of comment h of the Restatement.[74] However, the court in *Watts*, again refused to allow the case to

---

action, filing of third-party complaint against plaintiff is not within the purview of extreme and outrageous conduct; summary judgment granted); Watts v. Golden Age Nursing Home, 127 Ariz. 255, 619 P.2d 1032 (1980) (two-day delay in notifying plaintiff of husband's terminal illness held to be unjustifiable neglect but not extreme and outrageous conduct necessary to establish a cause of action for intentional infliction of emotional distress; directed verdict granted).

67. The conduct complained of must fall "at the extreme edge of the spectrum of possible conduct." Watts v. Golden Age Nursing Home, 127 Ariz. 255 at 258, 619 P.2d 1032 at 1035 (1980).

68. *Cluff*, 10 Ariz. App. at 562, 460 P.2d at 668 (1969).

69. *Watts*, 127 Ariz. at 258, 619 P.2d at 1035.

70. *Watts*, 127 Ariz. at 258, 619 P.2d at 1035; *Cluff*, 10 Ariz. App. at 563, 460 P.2d at 669. In *Cluff*, the test for determining whether conduct was sufficiently extreme and outrageous to warrant recovery was articulated as follows:

> Even if the defendant's acts are done 'wilfully, intentionally, and maliciously' with 'intent to inflict mental suffering and emotional distress,' it becomes the duty of the court in the first instance, as society's conscience, to determine whether the acts complained of can be considered as extreme and outrageous conduct in order to state a claim for relief.

Id. at 562, 460 P.2d at 668. The court further states that, if the defendant's conduct fails to meet this test, the trial court may grant the defendant's motion to dismiss. *Id.* at 563, 460 P.2d at 669. The court in *Cluff* cites the RESTATEMENT (SECOND) OF TORTS § 46, comment h, as authority for this test. The test, set forth in comment h, however, states that the court is only to determine whether the defendant's conduct *may reasonably* be regarded as sufficiently extreme and outrageous to permit recovery. Where reasonable men may differ, the decision is one for the jury.

71. *See supra* note 44.

72. *See supra* note 70.

73. 127 Ariz. 255, 619 P.2d 1032 (1980).

74. *Id.* at 258, 619 P.2d at 1035.

go to the jury. It decided, as a matter of law, that a nursing home's two-day delay in informing decedent's spouse of the decedent's terminally ill status was not sufficiently extreme and outrageous to constitute a cause of action for intentional infliction of emotional distress.[75] It was not until the *Lucchesi* decision that the Arizona Supreme Court seemed willing to expand the role given to juries in Arizona in determining the sufficiency of the outrage.

DEFINING EXTREME AND OUTRAGEOUS CONDUCT: THE IMPACT OF *LUCCHESI*

Janet Lucchesi, 21-22 weeks pregnant, went into premature labor with her first child. Dr. Shill, who was Mrs. Lucchesi's personal physician, conferred with Dr. Stimmell, who was the physician on call for the Arizona Perinatal Project at Good Samaritan Hospital.[76] The doctors concluded that the fetus's chance of survival would increase if Mrs. Lucchesi went to Good Samaritan Hospital. Dr. Shill explained to Mrs. Lucchesi that Dr. Stimmell had experience and expertise in difficult deliveries and would be waiting for her at Good Samaritan Hospital.[77] Dr. Stimmell never arrived at the hospital[78] but instead instructed an intern and a third year resident to attend to Mrs. Lucchesi.[79] Due to the difficult delivery the child was decapitated. The doctors did not reveal this fact to the Lucchesis.[80] Mrs. Lucchesi first learned of the decapitation several months later while examining her medical records.[81]

The Lucchesis sued Dr. Stimmell and Samaritan Health Services.[82]

---

75. *Id.*

76. "The Arizona Perinatal Program is a maternal transport system designed to assist the delivery and care of high-risk pregnancies. Under the program, primary and secondary hospitals have the option of transporting high-risk maternal cases to a tertiary hospital (such as Good Samaritan) for the care available at a tertiary center." Lucchesi v. Frederic N. Stimmell, M.D., LTD., 149 Ariz. 76, 77 n.1, 716 P.2d 1013, 1014 n.1. (1986).

77. Testimony conflicted regarding whether Dr. Stimmell said he would be present at Good Samaritan Hospital. Mrs. Lucchesi testified that she understood that Dr. Stimmell would be awaiting her arrival at the hospital. Dr. Stimmell, however, testified that he never agreed to be present to attend to Mrs. Lucchesi. *Id.* at 77 n.2, 716 P.2d at 1014 n.2.

78. Dr. Stimmell received notice within 5 minutes of Mrs. Lucchesi's arrival, which was at approximately 5:45 a.m. At that time he informed the nursing staff that he would not be present for the delivery. He arrived at Good Samaritan Hospital between 8:00 and 9:00 a.m. Mrs. Lucchesi gave birth at 6:25 a.m. *Id.* at 78, 716 P.2d at 1015.

79. After performing an examination of Mrs. Lucchesi, Dr. Partridge, a first year intern, phoned Dr. Stimmell to report abnormal presentation of the baby. Upon being told that delivery was probably inevitable, Dr. Stimmell instructed Dr. Partridge and Dr. MacWhitford, a third year resident, to rupture the membranes and deliver the infant. *Id.*

80. Dr. Stimmell spoke with Mrs. Lucchesi after he arrived at the hospital that morning. He stated that the delivery was traumatic, but did not reveal that the baby had been decapitated. Dr. Stimmell also talked with Mrs. Lucchesi during her hospitalization, and again did not speak of the decapitation. *Id.*

81. Mrs. Lucchesi attempted to discover why she did not receive a Rhogam injection after the delivery. After repeated requests by Mrs. Lucchesi, the hospital sent her records to Dr. Shill. Dr. Shill then informed the Lucchesis of the circumstances surrounding the birth of their baby. *Id.*

82. Lucchesi v. Frederic N. Stimmell, M.D., Ltd. v. Samaritan Health Service, Inc., Maricopa County Superior Court No. C-421383. Gerald J. Strick, J., granted defendant Samaritan Health Service's motion for summary judgment on all claims. He further granted Dr. Stimmell's motion to dismiss the intentional infliction of emotional distress and wrongful death counts, but denied summary judgment on Mrs. Lucchesi's personal injury claim.

Upon review of the appeals court affirmance of Dr. Stimmell's motion for summary judgment,[83] the Arizona Supreme Court found that the evidence concerning Dr. Stimmell's conduct before, during, and after the birth of the Lucchesi child created two factual issues: was Dr. Stimmel's conduct outrageous and did the Lucchesis suffer severe emotional distress.[84] The court held that reasonable minds could differ as to Dr. Stimmell's decision to follow the routine practice of obstetricians of not leaving for the hospital until the delivery room calls with a report on the patient's condition. It is arguable that the doctor's conduct was an extreme and outrageous course of conduct. Therefore, the question was one for the jury and summary judgment in favor of Dr. Stimmell was improper.[85]

Lucchesi also seems to signal a turn toward developing less restrictive definitions of intent and extreme and outrageous conduct. The *Lucchesi* cause of action is based on two grounds: 1) Dr. Stimmell's failure to be present at the hospital, and 2) Dr. Stimmell's failure to disclose all of the facts concerning the delivery of the child.[86] Dr. Stimmell's failure to deliver Mrs. Lucchesi's baby was intentional because he intended not to be present and awaiting her arrival at the hospital. Judge Grant, dissenting in the court of appeals decision, persuasively argued that Dr. Stimmell was aware of the complicated nature of the delivery. His active and intentional decision not to be present at the hospital when Mrs. Lucchesi arrived was sufficient evidence upon which to base a claim for intentional infliction of emotional distress.[87]

Another way to view intent, however, is to ask whether Dr. Stimmell's intent, in staying at home, was to cause Mrs. Lucchesi mental distress. The court refused to accept this definition of intent.[88] Instead, the court suggested that intent and outrageousness could exist even though Dr. Stimmell's conduct was routine practice for obstetricians. Failure to attend in this case, in and of itself, satisfied the elements necessary to support a claim for intentional infliction of emotional distress. As a result of the *Lucchesi* decision, more cases will probably get to the jury.[89]

---

83. Arizona Court of Appeals, Division One, in Lucchesi v. Frederic N. Stimmell, M.D., Ltd, 149 Ariz. 85 , 716 P.2d 1022 (Ct. App. 1985), reversed the trial court's summary judgment in favor of Samaritan Health Service, but affirmed the summary judgment in favor of Dr. Stimmell on the claim for intentional infliction of emotional distress.

84. Lucchesi v. Frederic N. Stimmell, M.D., Ltd., 149 Ariz. 76, 80, 716 P.2d 1013, 1017 (1986).

85. *Id.* at 79-80, 716 P.2d at 1016-17.

86. *Id.* at 78, 716 P.2d at 1015.

87. Lucchesi v. Frederic N. Stimmell, M.D., Ltd., 149 Ariz. 85, 91-92, 716 P.2d 1022, 1028-29 (Ct. App. 1985).

88. The majority opinion for the court of appeals defined intent and outrageousness according to accepted practice among obstetricians. The appeals court refused to recognize that conduct conforming with normal routine practice of obstetricians could constitute a cause of action for intentional infliction of emotional distress. *Lucchesi,* 149 Ariz. at 90, 716 P.2d at 1027. The Arizona Supreme Court disagreed and held that an issue of fact existed as to whether the conduct in question was sufficiently outrageous. *Lucchesi,* 149 Ariz. at 80, 716 P.2d at 1017.

89. Since *Lucchesi,* the Arizona Supreme Court has decided Ford v. Revlon, Inc., 734 P.2d 580 (Ariz. 1987), where the court found ample evidence to support an employee's cause of action for intentional infliction of emotional distress resulting from claims of sexual harrassment. The conduct was held to be extreme and outrageous based upon the following factors:

> Ford [employee] made numerous Revlon managers aware of Braun's [supervisor] activities at company functions. Ford did everything that could be done, both within the announced policies of Revlon and without, to bring this matter to Revlon's attention. Revlon ignored

A more puzzling issue in *Lucchesi* concerns Dr. Stimmell's intent to inflict emotional distress on Mrs. Lucchesi by withholding the information that her baby was decapitated during birth. As the majority opinion of the court of appeals pointed out, revealing the traumatic nature of the birth, rather than withholding it, could have indeed caused Mrs. Lucchesi severe emotional distress.[90] By contrast, the Arizona Supreme Court found that reasonable minds could differ on this point. The court held that the jury should make this determination. *Lucchesi* does not conform to the narrow "extreme edge" test for determining the sufficiency of outrage previously used in Arizona.[91] The Lucchesis complained that Dr. Stimmell failed to disclose all the facts surrounding the birth of their child. Considering the nature of the facts and the emotional state that accompanies the loss of a child, it is unlikely that withholding such information would fall at the extreme edge of the spectrum of possible conduct.[92] What does appear likely, however, is that the *Lucchesi* decision has liberalized Arizona's standard for defining intent and extreme and outrageous conduct.

CONCLUSION

In *Lucchesi*, the Arizona Supreme Court held that a physician's failure to attend a delivery, and his decision not to inform the parents of the full details surrounding their child's birth, created a factual issue of whether the conduct was so extreme and outrageous as to support a claim for intentional infliction of emotional distress. This decision reaffirmed Arizona's adoption of the Restatement of Torts position regarding the proper role of the court and of the jury in determining whether conduct is sufficiently extreme and outrageous to sustain such an action.

In addition, the court in *Lucchesi*, either intentionally or inadvertently, liberalized the definition of what may be accepted as extreme and outrageous conduct and what may be accepted as intent under Arizona law. Dr. Stimmell's failure to attend the delivery of the Lucchesi child, a failure that was the result of Dr. Stimmell's adherence to a professional practice of waiting for a report on the patient's condition prior to leaving for the hospital, could not be categorized as conduct at the extreme edge of the spectrum of possible conduct.[93] Likewise, it is hard to conceive of Dr. Stimmell's failure to inform the Lucchesis of the decapitation of their baby during birth as fitting the "extreme edge" definition. That the court remanded this case for jury consideration indicates the Arizona Supreme Court's willingness to seriously

---

her and the situation she faced, dragging the matter out for months and leaving Ford without redress. Here is sufficient evidence that Revlon acted outrageously.

Id. at 585. However, the Arizona Court of Appeals, in *Lindsey v. Dempsey*, 735 P.2d 840 (Ariz. Ct. App. 1987), refused to overturn a trial courts grant of summary judgment on a claim for intentional infliction of emotional distress. The court found no evidence in the record to support the plaintiff coach's claim that defendant university athletic director used plaintiff "as a tool" until defendant could raise sufficient funds to enable him to hire a "big name coach," or that defendant intended to ruin plaintiff's career by firing him. *Id.* at 844.

90. *Lucchesi*, 149 Ariz. at 90, 716 P.2d at 1027.

91. *See supra* note 76 and accompanying text.

92. *Id.*

93. *Id.*

examine claims for intentional infliction of emotional distress and its reluctance to hastily dismiss them as a matter of law.

Callie A. Bjurstrom