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CASE COMMENT

DES and Emotional Distress: *Payton v. Abbott Labs*

In Payton v. Abbott Labs, the Massachusetts Supreme Judicial Court held that no cause of action exists for negligently inflicted emotional distress absent physical harm. The author analyzes Payton in relation to the historical development of mental and emotional distress in the law of torts. The author argues that the physical harm requirement is arbitrary and unreasonable and that it often precludes the litigation of serious claims.

“If the plaintiff is to recover every time that her feelings are hurt, we should all be in court twice a week.”¹

I. DES SPAWNS ADDITIONAL CLAIMS

Diethylstilbestrol (DES)² first appeared on the market as a miscarriage preventative in 1947, and until 1971, physicians commonly prescribed the drug for millions of pregnant women.³ In 1971, medical studies identified DES as a possible cause of clear-cell adenocarcinoma,⁴ a fast spreading and often fatal form of can-

1. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939).

2. DES is a man-made compound of the female hormone estrogen. See 35 PHYSICIANS' DESK REFERENCE 1055 (1981).

3. See Weitzner & Hirsh, *Diethylstilbestrol — Medicolegal Chronology*, 1982 MED. TRIAL TECH. Q. 145; Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 964 (1978).

4. See Greenwald, Barlow, Nasca & Burnett, *Vaginal Cancer after Maternal Treatment with Synthetic Estrogens*, 285 NEW ENG. J. MED. 390, 390-92 (1971); Herbst, Ulfelder & Proskanzer, *Adenocarcinoma of the Vagina — Association of Maternal Stilbestrol Therapy with Tumor Appearance in Young Women*, 284 *id.* at 878 (1971). These studies prompted congressional hearings, and in November 1971, the Food and Drug Administration contraindicated DES for use by pregnant women. “[I]n view of the fact that a statistically significant association has been demonstrated between the use of diethylstilbestrol in early pregnancy and the occurrence of adenocarcinoma of the vagina in the offspring, this drug . . . is contraindicated for use in pregnancy.” 36 Fed. Reg. 21,537 (1971).

The drug, however, is still prescribed today. It is presently approved for use as an es-

cer. This disease has attacked the reproductive organs of many women whose mothers ingested DES.⁵ Research also linked DES to adenosis, abnormal vaginal and cervical growths commonly found in DES daughters.⁶

Many women exposed to DES before birth have filed suits against the drug companies that produced the synthetic hormone.⁷ Those plaintiffs sought recovery for abnormalities of their reproductive organs or clear-cell adenocarcinoma — physical conditions which the plaintiffs alleged were the result of their mothers' ingestion of DES.⁸ Brenda Payton, representing a class of approximately 4,000 women,⁹ claimed no physical harm as a result of her

trogen replacement in cases of hormone deficiency; in therapy to prevent the incidence of postoperative hemorrhage; in treatment of some cases of cancer; and for suppression of lactation. 35 PHYSICIANS' DESK REFERENCE 1055-57 (1981).

5. Medical researchers discovered that DES interferes with the formation of normal genital tissue at a critical time in the development of the fetus. The earlier in pregnancy a mother receives DES, the greater the chances are that her daughter will develop one of the abnormalities associated with the drug. Herbst, *Current Health Status of DES-Exposed Mothers, Daughters and Sons*, 29 CONSULTANT 234 (1980). Initially, researchers feared that the incidence of adenocarcinoma in the daughters might be tragically high, but that fear has not proven true. The risk is now set at about one in every 100,000 women, to age 24, who were exposed to DES before birth. Hammond & McLaughlin, *Judge Rules Mass. Women May Sue Drug Firms over DES Risks*, Boston Globe, Aug. 1, 1979, at 6, col. 1.

6. The Food and Drug Administration requires the following warning on DES, which is still sold: "Vaginal adenosis has been reported in 30% to 90% of postpubertal girls and young women whose mothers received diethylstilbestrol . . . during pregnancy The significance of this finding with respect to potential for development of vaginal adenocarcinoma is unknown. Periodic examination of such patients is recommended." 40 Fed. Reg. 32,773 (1975).

The Payton court characterized adenosis as "benign." Payton v. Abbott Labs, 386 Mass. 540, 542, 437 N.E.2d 171, 173 (1982). Another court described these growths as "pre-cancerous." Sindell v. Abbott Labs., 26 Cal. 3d 588, 588, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, cert. denied, 449 U.S. 912 (1980).

7. See Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1980), aff'd, ___ Mich. ___, ___ N.W.2d ___ (Feb. 6, 1984) (No. 64712); Lyons v. Premo Labs., 170 N.J. Super. 183, 406 A.2d 185 (Super. Ct. App. Div. 1979); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (Super. Ct. Law Div. 1980); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981).

8. For an analysis of the many complex hurdles that these DES daughters face, see generally Abrahams & Musgrave, *The DES Labyrinth*, 33 S.C.L. Rev. 663, 663-71 (1982).

9. The class included all women: "1) who were exposed to diethylstilbestrol ("DES") *in utero*; 2) whose exposure occurred in Massachusetts; 3) who were born in Massachusetts; 4) who [were] domiciled in Massachusetts when they receive[d] notice of this action; and 5) who have not developed uterine or vaginal cancer." Payton v. Abbott Labs, 83 F.R.D. 382, 386 (D. Mass. 1979).

Not mentioned in the class action suit were DES sons, who have frequently been found to suffer structural abnormalities in their reproductive tissue and to a lesser degree, sterility. See generally Abrams, *Genital and Semen Abnormalities in Adolescent Males Exposed to*

exposure to DES but alleged that she is "anxious and emotionally upset"¹⁰ over the possibility of developing clear-cell adenocarcinoma in the future. She brought suit in federal district court in Massachusetts¹¹ against Abbott Labs and five other DES manufacturers.¹² The district court, finding no controlling precedent, certified four questions of law to the Massachusetts Supreme Judicial Court. The first question posed¹³ was whether Massachusetts recognized a right of action for negligently inflicted emotional distress absent any evidence of physical harm. The supreme judicial court responded in the negative, holding that even when emotional distress results from an increased statistical likelihood of contracting serious disease in the future, no cause of action in negligence exists absent any evidence of physical harm. *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982).

Payton dealt with an issue that has troubled the judiciary for many years: how to deal with claims for damages for emotional dis-

DES, J.C.A.M. (July, 1980).

10. 386 Mass. 540, 543, 437 N.E.2d 171, 173 (1982).

11. She sought six remedies on behalf of the class:

- 1) a declaratory judgment that the acts of the defendants in producing DES for use by pregnant women to prevent miscarriages were wrongful and unlawful;
- 2) an injunction ordering the defendants to notify girls, women, and doctors of facts about DES;
- 3) an injunction ordering the defendants to establish free clinics for examining plaintiff class members;
- 4) an injunction forbidding "mass-market testing" of drugs by the defendants;
- 5) monetary judgments for compensatory and punitive damages; and
- 6) an injunction ordering the defendants to establish an insurance fund, or to pay a sufficiently large sum, to compensate class members who might suffer later from any cancer that DES has induced.

Payton v. Abbott Labs, 83 F.R.D. 382, 389 n.3 (D. Mass. 1979).

12. The other defendants were Eli Lilly & Co., Merck & Co., Rexall Drug Co., E.R. Squibb & Sons, Inc., and Upjohn Co. 386 Mass. 540, 540 n.2, 437 N.E.2d 171, 171 n.2 (1982).

13. The other three certified questions were: 2) "If the trier of fact concludes that a plaintiff would probably not have been born except for the mother's ingestion of DES, is that plaintiff barred from recovery because of physical or emotional damage suffered as a result of the mother's ingestion of DES?" The court answered yes. *Id.* at 557-60, 437 N.E.2d at 181-2. 3) "Does Massachusetts recognize a right of action for injury to a plaintiff *in utero* resulting from ingestion of a drug by her mother?" And if so, is such right of action to be applied retroactively? The court answered yes. *Id.* at 564-70, 437 N.E.2d at 182-88.

- 4) Assuming that the evidence does not warrant a conclusion that the defendants conspired together, or engaged in concerted action, or established safety standards through a trade association, may the defendant manufacturers, who probably supplied some of the DES ingested by the mothers of the plaintiff class, be held liable to members of the plaintiff class when neither the plaintiffs nor the defendants can identify which manufacturer's DES was ingested by which mothers?

The court failed to give a definitive answer. *Id.* at 570-74, 437 N.E.2d at 188-90.

tress.¹⁴ The courts "have recognized that mental or emotional distress can be both real and serious in some instances, while trivial, evanescent, feigned, or imagined in others."¹⁵ The various methods of treating these claims represent judicial attempts to separate genuine claims from those that are fictitious.

II. THE IMPACT RULE

The impact rule¹⁶ was the first attempt at making the desired distinction. Under this rule, there could be no recovery for negligently inflicted emotional distress¹⁷ unless a qualifying physical injury or physical impact accompanied the distress.¹⁸

14. As early as 1348, courts struggled to recognize mental tranquility as an interest worthy of legal protection. *I de S et Ux v. W de S*, 22 Edw. III, f. 99 pl. 60 (1348). Historically, mental distress was considered too intangible or speculative to be the basis of an independent cause of action. See, e.g., *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916) (mental suffering is too "metaphysical" to be capable of measurement); *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900) (mental distress alone is too remote); see also Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1033 (1936). However, these same courts would generally recognize mental anguish as an element of damages when the plaintiff alleged an independent intentional tort. See Prosser, *supra* note 1, at 880. Courts have also awarded damages in negligence actions in which worry, humiliation or mental disturbances resulted from a bodily injury. See F.V. HARPER & F. JAMES, JR., *THE LAW OF TORTS* 1321-23 (1956). In these cases, recovery for emotional distress was allowed as a claim "parasitic" to the independent "host" claim. The intentional nature of the defendant's conduct or evidence of a contemporaneously inflicted physical injury provided a basis for the assumption that the claim for mental distress was genuine. See C. GREGORY & H. KALVEN JR., *CASES AND MATERIALS ON TORTS* 789-92 (1959) for a review of the classic cases in which parasitic claims for emotional harm were allowed. See generally 1 STREET, *FOUNDATIONS OF LEGAL LIABILITY* (1906).

15. 386 Mass. at 553, 437 N.E.2d at 179.

16. The doctrine was first announced in England in *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222 (1888). Curiously, the rule was abandoned only thirteen years later in *Dulieu v. White & Sons*, [1901] 2 K.B. 669; not in time, however, to block the spawning of the doctrine in this country.

17. Traditionally, courts have shown more willingness to grant recovery where the mental suffering is intentionally inflicted than where it is the result of mere negligence. One reason is the tendency of the courts to expand tort liability as the moral guilt of the defendant increases. See Bauer, *The Degree of Defendant's Fault as Affecting the Administration of the Law of Excessive Compensatory Damages*, 82 U. PA. L. REV. 583 (1934); Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 *id.* at 586 (1933). But probably more important is the belief that in such intentional misconduct there is an element of outrage, which guarantees that the resulting mental disturbance is serious and not feigned. "It is the character of such conduct itself which provides the necessary assurance that genuine harm has been done, and that it is so important as to be entitled to redress." Prosser, *supra* note 1, at 879. But see *infra* Part V (discussion of third public policy argument against recovery).

18. Although the general rule was that no action would lie for the negligent infliction of emotional distress in the absence of physical impact, there were exceptions. These exceptions involved cases where it was apparent from the particular circumstances that the harm

The leading cases on the impact rule demonstrate its mechanical nature. For example, in *Spade v. Lynn & Boston Railroad Co.*¹⁹ a train conductor threatened to throw a drunken passenger off a crowded commuter car. Even though the plaintiff, after watching the fight, suffered serious bodily harm as a result of her nervous shock, the court refused to grant recovery without a contemporaneously inflicted "injury to the person from without."²⁰ An equally harsh result was reached in *Mitchell v. Rochester Railway.*²¹ There, the plaintiff was waiting to board the defendant's horse-drawn trolley. As the trolley approached, the driver negligently turned so close to the plaintiff that she was trapped between the horses' heads when the team stopped. Although she was not touched, the plaintiff was so frightened that she fainted and suffered a miscarriage. The court denied relief.²²

To overcome the harsh results of cases such as *Spade* and *Mitchell*, the courts were sometimes willing to stretch the boundaries of the term "impact" to include even the most trivial forms of

was genuine and serious. In one group of cases involving telegraph companies, emotional distress resulting from the negligent transmission of a message (such as one announcing death) was compensated even absent impact, because the message itself revealed the likelihood of the emotional harm. *Cf. Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80 (1910); *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N.W. 1 (1895); *Nitka v. Western Union Tel. Co.*, 149 Wis. 106, 135 N.W. 492 (1912). A second group of cases involved the negligent mishandling of corpses. *See Carey v. Lima, Salmon & Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1959); *Torres v. State*, 34 Misc. 2d 488, 228 N.Y.S.2d 1005 (1962); *Lott v. State*, 32 Misc. 2d 296, 225 N.Y.S.2d 434 (1962). Courts recognized an independent right of recovery because the emotional harm to close friends and relatives of the deceased was clearly foreseeable. Thus, when there was some external assurance that the claim was worthy of redress, recovery was allowed.

19. 168 Mass. 285, 47 N.E. 88 (1897).

20. *Id.* at 290, 47 N.E. at 89. The court admitted that the rule rested on considerations of administrative convenience.

The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and, to a greater or less extent disqualify one for the time being from doing the duties of life. . . .

. . . .

. . . [T]he real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules.

Id. at 288, 47 N.E. at 88-89.

21. 151 N.Y. 107, 45 N.E. 354 (1896).

22. "[N]o recovery can be had for mere fright, but also . . . none can be had for injuries which are the direct consequences of it." *Id.* at 110, 45 N.E. at 354.

contact.²³ In *Zelinski v. Chimics*²⁴ the plaintiff was involved in a minor automobile accident. Although there was no bodily harm, the court held that the "jostling" of the plaintiff in the automobile was a "physical impact" and allowed recovery for the emotional distress. Similarly, in *Kenney v. Wong Len*²⁵ the plaintiff, a customer at defendant's restaurant, ate some roast chicken dressing that contained a dead mouse. Discovery of the mouse made the plaintiff ill and a nervous shock resulted. The court granted recovery; a mouse hair had touched the roof of the plaintiff's mouth.

Decisions under the impact rule were arbitrary and produced harsh and often anomalous results. While courts sometimes granted an overly generous award based on the most trivial contact, serious emotional distress and the resulting physical harm frequently went uncompensated because the negligent act that caused the emotional distress failed to produce any impact. For example, in *Bosley v. Andrews*²⁶ the plaintiff became physically incapacitated after her neighbor's 1500-pound Hereford bull chased her around her yard. Fortunately, she "was saved from a leaden-footed toreador's end"²⁷ when her dog diverted the bull. Nevertheless, the plaintiff was terrified and collapsed, suffering a heart attack. The court refused to grant relief since there was no physical contact. Similarly, in *Sullivan v. H.P. Hood & Sons, Inc.*²⁸ the court denied recovery for severe emotional shock suffered after drinking milk from a container in which the plaintiff discovered a dead mouse. The court reasoned that the plaintiff was not harmed physically by ingesting the milk containing the "fecal matter of the mouse;" she was harmed solely as a result of her mental disturbance at seeing the mouse in her milk. Although the plaintiff's mental distress was arguably real and serious, this court, unlike the court in *Kenney v. Wong Len*, did not strain to find impact.

23. See, e.g., *Cameron v. New England Tel. & Tel. Co.*, 182 Mass. 310, 65 N.E. 385 (1902) (impact found when a negligent blast frightened plaintiff, causing her to fall out of her rocking chair); *Porter v. Delaware, L. & W. R.R.*, 73 N.J.L. 405, 63 A. 860 (Sup. Ct. 1906) (dust in eyes found to be impact); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (smoke inhaled by a child constituted impact). The Georgia Court of Appeals, however, reduced the whole matter to a complete absurdity by finding impact in *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928) (horse "evacuated his bowels" into the plaintiff's lap).

24. 196 Pa. Super. 312, 175 A.2d 351 (1961).

25. 81 N.H. 427, 128 A. 343 (1925).

26. 393 Pa. 161, 142 A.2d 263 (1958). This case was noted in 13 U. MIAMI L. REV. 370 (1959).

27. 393 Pa. at 171, 142 A.2d at 268 (Musmanno, J., dissenting).

28. 341 Mass. 216, 168 N.E.2d 80 (1960).

Inconsistent results such as *Sullivan* and *Kenney* led to general dissatisfaction with the impact rule. Even courts that had staunchly supported the impact rule eventually abandoned it.²⁹ Today, only Florida maintains a tenuous hold on this outdated doctrine.³⁰ In place of the impact rule, courts have adopted more liberal theories of recovery. Some courts embraced the "zone of danger" test; others applied general negligence concepts, requiring only that the foreseeable plaintiff suffer physical harm as a result of the negligently inflicted emotional distress.

III. ZONE OF DANGER RULE

The zone of danger test is now the majority viewpoint.³¹ This rule disregards the requirement of physical impact and instead demands that the plaintiff be within the physical zone of danger created by the defendant's negligent act. A plaintiff who has been subjected to the risk of bodily injury and who, as a direct result, suffers emotional distress has a cause of action.

29. See *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978) (overruling *Spade v. Lynn & B. R.R.*); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (overruling *Mitchell v. Rochester Ry.*); see also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 332 (4th ed. 1971); Note, *Negligently Caused Mental Distress: Should Recovery be Allowed?*, 13 S.D.L. Rev. 402, 403 (1968).

30. The Florida authority is *Gillian v. Stewart*, 291 So. 2d 593 (Fla. 1974), noted in 28 U. MIAMI L. REV. 705 (1974). *Gillian* was recently followed in *Champion v. Gray*, 420 So. 2d 348 (Fla. 5th DCA 1982) where the Fifth District Court of Appeals held that the plaintiff's complaint alleging emotional distress but no impact was properly dismissed because "[o]nly the Florida Supreme Court can overrule the 'impact rule' and we shall respect the rule until our supreme court sees fit to change it." *Id.* at 349. The court expressed the view, however, "that Florida should now align itself with the overwhelming majority of jurisdictions which have abandoned the rule and condemn it as unjust and illogical." *Id.* at 350. The court, therefore, certified the following question of law to the Florida Supreme Court: "Should Florida abrogate the 'impact rule' and allow recovery for the physical consequences resulting from mental or emotional stress caused by the defendant's negligence in the absence of physical impact upon the plaintiff?" *Id.* at 354.

Although urging abandonment of the impact rule, the wording of the certified question suggests that the court advocates retaining a physical harm requirement, and is not necessarily urging recovery for purely emotional distress suffered by a bystander. In *Champion*, the plaintiff sued for the wrongful death of his wife, who allegedly collapsed and died after discovering her dead daughter's body by the side of the road.

31. 26 PERS. INJ. NEWSLETTER 15 (1982). This position was adopted by the American Law Institute in the Second Restatement of Torts:

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

RESTATEMENT (SECOND) OF TORTS § 436 (1965).

Two cases illustrate the parameters of this rule.³² In *Whetham v. Bismarck Hospital*³³ the plaintiff sought recovery for severe emotional distress after witnessing a hospital employee negligently drop her newborn baby. The court denied relief, holding that the plaintiff was never physically threatened by the defendant's negligent act. The court reasoned that the defendant owed no duty to those outside the range of physical peril.³⁴ A contrary result was reached in *Niederman v. Brodsky*.³⁵ In that case, the plaintiff suffered a heart attack after narrowly escaping the destructive path cut by the defendant's negligently driven car.³⁶ Because he alleged that he was within the zone of danger and feared for his own safety, the court held that the plaintiff had stated a prima facie cause of action for the nervous shock and resulting harm he suffered. Courts following the zone of danger rule explain that it produces reasonable results while still providing an additional element of proof that the claim for mental distress is real. The imposition of liability is regarded as justifiable because the defendant created a foreseeable risk of bodily injury to those within the zone of danger.³⁷ That the plaintiff's bodily harm results from mental distress,

32. *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970) (overruling *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958)); see also *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (mother, not in position to fear for her own safety, denied recovery after witnessing injury to her child); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935) (no wrongful death action available for mother who looked out of the window and saw her child negligently killed on the highway).

33. 197 N.W.2d 678 (N.D. 1972).

34. The court seemed to follow the majority view of *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), in recognizing that negligence is a relative term. It was not enough that the defendant's conduct was negligent toward Mrs. Whetham's child; the defendant's conduct would also have to have been negligent with respect to the legally protected interests of Mrs. Whetham. To impose liability in *Whetham*, it would have been necessary to predicate a duty of care to carry an infant so as to avoid an unreasonable risk of emotional distress to others outside the zone of physical danger. The court decided that such predication would unreasonably enlarge the extent of the duty of care. See Note, *The Negligent Infliction of Mental Distress: The Scope of Duty and Foreseeability of Injury*, 57 N.D.L. Rev. 577 (1981).

35. 436 Pa. 401, 261 A.2d 84 (1970) (overruling *Bosley v. Andrews*). Accord *Mitnick v. Whalen Bros., Inc.*, 115 Conn. 650, 163 A. 414 (1932) (plaintiff frightened by oncoming automobile).

36. According to the plaintiff's complaint, the defendant's car "skidded onto the sidewalk and destroyed or struck down a fire hydrant, a litter pole and basket, a newsstand, and [plaintiff's] son, who at that time was standing next to [plaintiff]." 436 Pa. at 401, 261 A.2d at 84.

37. This rationale was clarified in *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141, both by *Bankes, L.J.*, *id.* at 151, and by *Atkin, L.J.*, *id.* at 156-59. See also *Magruder, supra* note 14, at 1035-39.

and not from impact, does not preclude liability. Some courts, however, view the rule as inadequate because a strict application of the doctrine would prevent recovery in cases when recovery should not be denied.³⁸ These courts would extend the rule to allow recovery regardless of whether the plaintiff was in the zone of danger.

IV. NEITHER PHYSICAL IMPACT NOR ZONE OF DANGER

The first American court to allow another basis for recovery was the Texas Supreme Court in *Hill v. Kimball*.³⁹ There, the court repudiated the requirement of impact and regarded the physical consequences of the mental distress as a sufficient guarantee that the claim was real.⁴⁰ In *Hill* the plaintiff alleged that she sustained emotional distress leading to a miscarriage after she witnessed her landlord violently assault two men in her yard. The court stated: "It may be [very] difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had."⁴¹

This approach treats the claim of negligent infliction of mental distress from an ordinary negligence standpoint without the zone of danger limitation. It recognizes a duty to avoid a foreseeable, unreasonable risk of emotional harm to another. If breach of this duty proximately causes bodily harm, the defendant is liable. Courts adhering to this rule do not require a plaintiff to prove direct physical impact, nor do they require that the plaintiff be within the physical zone of danger.⁴² Instead, these courts hold that a plaintiff states a cause of action when he alleges that the negligently inflicted mental distress was foreseeable and that it resulted in bodily harm.

Massachusetts was one of the first jurisdictions to reject the

38. See *supra* notes 32-34 and accompanying text.

39. 76 Tex. 210, 13 S.W. 59 (1890). *Accord* *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892) (fright causing nervous convulsions and illness compensable); *Colla v. Mandella*, 1 Wis. 2d 594, 85 N.W.2d 345 (1957) (physical injury resulting directly from extreme fright compensable). *Contra* *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 249 P.2d 843 (1952) (loss of sleep and severe emotional distress from receiving wrong baby not compensable).

40. The court noted: "Probably an action will not lie when there is no injury except the suffering of the fright itself; but such is not the present case." 76 Tex. at 215, 13 S.W. at 59.

41. *Id.*

42. In *Hill v. Kimball* the plaintiff would not have recovered had the court applied the zone of danger test because she was never physically threatened by the landlord's negligent conduct.

zone of danger rule in favor of this more liberal approach.⁴³ In *Dziokonski v. Babineau*⁴⁴ the plaintiff suffered severe emotional distress after she witnessed her daughter lying injured on a street.⁴⁵ The Massachusetts Supreme Judicial Court overruled the impact doctrine and held that the plaintiff stated a compensable claim for the negligent infliction of emotional distress even though she was not within the zone of danger. The court stated that although the zone of danger rule produces more reasonable results than does the impact rule, it is nonetheless inadequate because it does not recognize the reasonable foreseeability of an injury to those outside the physical zone of danger.⁴⁶ Reasonable foreseeability, explained the court, is the proper starting point in deciding whether a negligent act leads to liability.

Thus, *Dziokonski* expanded the notion of duty beyond the zone of danger of direct harm to the zone of foreseeable risk of harm. Unlike the zone of danger rule, which limits liability to an absolute physical area, the zone of risk rule is based on the traditional negligence concept of foreseeability. A growing minority of courts view this approach as the better one.⁴⁷

43. Three states had previously rejected the zone of danger rule. *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975).

44. 375 Mass. 555, 380 N.E.2d 1295 (1978).

45. The facts of this case are particularly tragic. An automobile hit the plaintiff's child as she was crossing a street. The plaintiff went to the scene of the accident and saw her daughter lying injured on the ground. The mother suffered emotional shock after seeing the child's injury and died while riding in the ambulance that was taking her daughter to the hospital. The complaint also alleged that the father suffered emotional distress as a result of the injury to his daughter and the death of his wife, and he also died. *Id.* at 557, 380 N.E.2d at 1296.

46. In *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1965), the California Supreme Court held that a mother, outside the zone of danger, stated a prima facie cause of action for the negligent infliction of emotional distress. The mother had allegedly suffered severe emotional distress and resulting bodily harm after watching a negligently driven car "roll over" her daughter Erin.

Erin's sister also witnessed the collision. Although the mother and sister were within a few yards of each other, only the sister happened to be within the zone of danger. The court noted:

The case thus illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other. . . . [W]e can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule.

Id. at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

47. See cases cited *supra* note 43. Additional state courts applying the foreseeability test include: *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Culbert v. Sampson's Super-*

The courts have been inconsistent in attempting to resolve the public policy problems inherent in mental distress cases. The impact rule has been universally condemned as unfair and illogical. The zone of danger rule, while still the majority viewpoint, is the subject of much criticism. The emergence of the zone of foreseeable risk test indicates that some courts are now willing to abandon the earlier, more restrictive tests in determining liability. The *Dziokonski* approach abrogated one of the arbitrary limitations on recovery,⁴⁸ but retained another — the bodily harm requirement.⁴⁹ Fear of fraudulent claims and a desire to limit the scope of liability may have produced this compromise. Regardless of the reasons for the requirement,⁵⁰ the *Dziokonski* court distinguished emotional distress manifested by physical injury and emotional distress absent physical manifestations. This distinction prevented recovery in *Payton v. Abbott Labs*.

V. PAYTON v. ABBOTT LABS

Payton held that no cause of action exists for the negligent infliction of emotional distress absent any evidence of physical harm.⁵¹ The majority's opinion focused on three public policy con-

markets Inc., 444 A.2d 433 (Me. 1982); *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973); *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979); *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); and *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978).

48. See 30 MERCER L. REV. 735, 744 (1979).

49. "The only real requirement, however, which policy and justice dictate, is stringent evidence of causation and of actual injury to deter those who would use a sound and just rule as a cover for spurious claims." *Tobin v. Grossman*, 24 N.Y.2d 609, 620-21, 249 N.E.2d 419, 425, 301 N.Y.S.2d 554, 563 (1969) (Keating, J., dissenting).

50. The courts are now divided regarding the requirement of physical harm, or at least physical symptoms, accompanying the mental distress. No physical harm was required in *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (where tortious conduct directed toward plaintiff, no physical injury from emotional distress required), in *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982) (bystander may recover damages for serious mental distress without physical manifestations), or in *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982) (parents allowed emotional distress damages for "wrongful birth" of their child). *Contra* *Plummer v. Abbott Labs*, No. 80-0556 (D.R.I. July 1, 1983), DES Litigation Rep. 3402 (July 26, 1983) (psychic injury which is neither caused by some physical impact nor results in physical harm is not compensable); *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981) (no liability for conduct resulting in emotional disturbance absent bodily harm); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979) (parents who witness serious injury to their child may recover if their mental and emotional harm is accompanied by objective physical symptoms).

51. Alternatively, if bodily harm results directly from the mother's ingestion of the DES, parasitic damages for the mental distress would be recoverable. See *supra* note 14.

cepts which courts have traditionally weighed against recovery in mental distress cases: (1) fear of a flood of litigation; (2) fear of fictitious claims; and (3) reluctance to subject a defendant to liability for mental distress when he was merely negligent.⁵²

The fear of a flood of litigation is based on an expected increase in actions of a trivial nature coupled with an increase in fraudulent claims. The court explained: "It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating . . . that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress."⁵³

Previously, the fear that a flood of litigation would ensue had been advanced in support of the impact requirement.⁵⁴ This argument has two weaknesses. First, those courts that have relaxed the impact rule have not experienced any substantial increase in litigation.⁵⁵ Second, courts should not refuse to adjudicate a particular type of case simply because their docket may increase.⁵⁶ A court's duty is to remedy legal wrongs "even at the expense of a 'flood of litigation;' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do."⁵⁷

The second public policy concept — fear of fraudulent claims — also should not limit recovery. This fear has always troubled the

52. See 386 Mass. at 552-53, 437 N.E.2d at 178-79.

53. *Id.* at 547, 437 N.E.2d at 175.

54. Impact, it was thought, would guarantee that the plaintiff's mental distress was real. See, e.g., Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 233-34 (1962); cf. Herrick v. Evening Express Publishing Co., 120 Me. 138, 140, 113 A. 16, 17 (1921) ("[I]f no bodily injury is alleged or proved, there can be no premise upon which to base a conclusion of mental suffering."); Huston v. Borough of Freemansburg, 212 Pa. 548, 550, 61 A. 1022, 1023 (1905) (mental distress unaccompanied by impact is "so intangible, so untrustworthy, so illusory, and so speculative a cause of action" that it would be disastrous to grant recovery).

55. See, e.g., Okrina v. Midwestern Corp., 282 Minn. 400, 405, 165 N.W.2d 259, 263 (1969) (no indication of a flood of litigation or rash of fraudulent claims); Lambert, *Tort Liability for Psychic Injuries*, 41 B.U.L. REV. 584, 592 (1961) ("The truth of the matter is that the feared flood tide of litigation has simply not appeared . . .").

56. See Hopper v. United States, 244 F. Supp. 314, 315 (D. Colo. 1965); Green v. Shoemaker & Co., 111 Md. 69, 81, 73 A. 688, 692 (1909); Battalla v. State, 10 N.Y.2d 237, 241-42, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 38 (1961). The California Supreme Court in *Dillon v. Legg* stated, "Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of 'administrative convenience' to sweep away a class of claims a number of which are admittedly meritorious." 68 Cal. 2d at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78.

57. Prosser, *supra* note 1, at 877.

judiciary,⁵⁸ but now, because of the recent advances in psychiatric and psychological knowledge, there is no longer any justification for denying recovery for purely emotional injuries.⁵⁹ Therefore, courts can no longer legitimately deny recovery on the strength of precedent that points to the difficulty of distinguishing between serious and fraudulent mental distress.

In fact, the argument that a jury may be unable to distinguish between a legitimate claim and a fictitious claim is a spurious one which can be advanced in any situation. The Massachusetts Supreme Judicial Court recognized this, and seven years before *Payton* the court dismissed the notion that tort liability in particular classes of cases should be denied because of the threat of fraud. In *Sorenson v. Sorenson*⁶⁰ the court stated that it would be a sad expression of incompetence "if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted then all causes of action should be abolished."⁶¹

In *Agis v. Howard Johnson Co.*,⁶² a 1976 case mentioned only briefly in *Payton*,⁶³ the court rejected this same argument:

That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the

58. See *supra* text accompanying notes 14-16.

59. In *Niederman v. Brodsky*, 436 Pa. 401, 405-06, 261 A.2d 84, 86 (1970), the court noted, "New equipment and research, improved education and diagnostic techniques, and an increased professional understanding of disease in general require us now to give greater credit to medical evidence." No longer are the effects of hyperemotional states of the human body shrouded in mystery or myth.

60. 369 Mass. 350, 339 N.E.2d 907 (1975).

61. *Id.* at 365 n.19, 339 N.E.2d at 915-16 n.19 (quoting *Gibson v. Gibson*, 3 Cal. 3d 914, 920, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971), quoting *Klein v. Klein*, 58 Cal. 2d 692, 696, 376 P.2d 70, 73, 26 Cal. Rptr. 102, 105 (1962)).

Perhaps the most stinging attack on the position is found in Judge Musmanno's forceful dissent to a decision based on the impact requirement.

But are our courts so naive, are they so gullible, are they so devoid of worldly knowledge, are they so childlike in their approach to realities that they can be deceived and hoodwinked by claims that have no factual, medical, or legalistic basis? If they are, then all our proud boasts of the worthiness of our judicial system are empty and vapid indeed.

Bosley v. Andrews, 393 Pa. 161, 175, 142 A.2d 263, 270 (1958) (Musmanno, J., dissenting).

62. 370 Mass. 140, 355 N.E.2d 315 (1976).

63. 386 Mass. at 550, 554-56, 437 N.E.2d at 177, 179-80.

task may be difficult to perform.⁶⁴

For reasons not specified, the *Payton* court ignored its own reasoning in *Agis* and *Sorenson* and resurrected the "fear of fictitious claims" argument.

The third public policy concept the court discussed is that where the defendant's conduct is negligent, not intentional, he should not be held liable for a purely mental disturbance. This concept is rooted in the misguided belief that the reckless or intentional nature of a defendant's conduct permits a jury to infer that the plaintiff suffered genuine emotional distress. But the degree of the defendant's fault bears no relation to the genuineness of a claim for damages for emotional distress. In a well-reasoned dissent, Judge Wilkins pointed out that the defendant's extreme behavior should be the basis for recovery rather than the basis for inferring genuine emotional distress.⁶⁵

Yet, it was for these three rather unpersuasive policy reasons that the court in *Payton* upheld the *Dziokonski* distinction between emotional distress manifested by physical injury and emotional distress absent physical manifestations.⁶⁶ This distinction suffers from two serious flaws. First, it assumes that emotional distress without physical manifestations is likely to be trivial.⁶⁷ This assumption is incorrect. Because of the subjective nature of anxiety reactions, precise levels of suffering and disability cannot be objectively determined.⁶⁸ Relatively mild emotional distress may result in bodily harm to one person, while extremely severe mental trauma may not produce any physical manifestations in another. There is no legal justification based on medical knowledge for prohibiting all plaintiffs from attempting to prove that their inju-

64. 370 Mass. at 143-44, 355 N.E.2d at 318 (quoting *Samms v. Eccles*, 11 Utah 2d 290, 293, 358 P.2d 344, 347 (1961)). Accord *George v. Jordan Marsh Co.*, 359 Mass. 244, 268 N.E.2d 915 (1971) (the soundness of this argument should not prevail against logic and justice); *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926 (1967) (courts can face the possibility of fraudulent claims as in other types of cases).

65. 386 Mass. at 578, 437 N.E.2d at 193 (Wilkins, J., dissenting). Judges Liacos and Abrams joined Judge Wilkins in dissenting to the answer to certified question one.

66. See *supra* text accompanying notes 48-51.

67. 386 Mass. at 552, 437 N.E.2d at 178 ("emotional disturbance which is not so severe or serious as to have physical consequences is likely to be so temporary, so evanescent and so relatively harmless").

68. See generally Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944). "Our purpose . . . has been to show the scientific error in assuming that psychic stimuli cannot cause injury. The reader must realize, on the other hand, that we do not say that injury is an invariable or even a frequent consequence." *Id.* at 225.

ries are real.

The second drawback to the *Dziokonski* distinction is that it actually clouds the real issue. The essential question in any mental distress case is one of proof: whether on the facts presented, the plaintiff has suffered a serious and compensable injury. This is a question of fact for the jury. Jurors, by referring to their own experiences, are best able to determine whether the defendant's conduct has resulted in emotional distress and whether the plaintiff is entitled to compensation.⁶⁹ When the judge reads the complaint to determine whether there was a resulting physical injury, he is invading the province of the jury.⁷⁰

The physical harm requirement is simultaneously overinclusive and underinclusive. It is overinclusive because it permits recovery for mental distress when the physical harm is trivial. It is underinclusive because it prevents the litigation of valid claims. In addition to these faults, the physical harm requirement fails to serve its intended purpose — it does not prevent the litigation of fraudulent claims. This shortcoming is illustrated by the simple suggestion that those capable of perjuring evidence in the first instance will not hesitate to fabricate a slight injury to insure recovery. In short, the physical harm requirement is arbitrary and unreliable.⁷¹

Courts have long feared that compensating the loss of mental tranquility would too often result in undeserved liability.⁷² The *Payton* court hoped to lessen this fear by distinguishing between serious and trivial mental distress based upon the presence or absence of physical harm. However, the majority was so anxious to uphold its convenient distinction that they did not bother to examine what effect their decision would have on the 4,000 plaintiffs. It is questionable whether Judge Lynch, writing for the court, ever studied the factual circumstances that led to the certified question. The court summarily dismissed an entire class of claims as trivial

69. See *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952).

70. See *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 927, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

71. See *Ver Hagen v. Gibbons*, 47 Wis. 2d 220, 177 N.W.2d 83 (1970).

72. This is not necessarily true. See *Reaves, Fear Not Enough: Noncancer DES Case Fails*, 69 A.B.A. J. 725 (1983) (discussing *Mink v. University of Chicago*). *Mink* was one of the first noncancer cases to go to trial. In *Mink*, the plaintiff claimed no physical harm as a result of her exposure to DES but tried to convince the jury that she was entitled to damages because she has had to endure extreme mental suffering and fear over the possibility that she will some day be a cancer victim. The defendants contended that nothing was wrong with the plaintiff and that her fear of cancer should not be grounds for awarding damages. The jury agreed.

when the claims could have easily been viewed as legitimate.⁷³ Surely, the facts warranted a jury determination of the reasonableness of the plaintiffs' claims for emotional distress. A rule that would dismiss as trivial emotional distress without resulting physical injury before there is a jury determination is not a fair one.

In dissent, Judge Wilkins argued that emotional distress is not always trivial. He remarked that emotional distress may result from any number of circumstances.

It may be the product of a reasonable concern about one's increased prospect of contracting a fatal disease, which may be treatable only by radical surgery or radiation. It may be the result of concern over the expenses, reasonably to be incurred, in submitting to medical examinations. While, on the facts given to us, I cannot declare with certainty that each plaintiff considered in question one may recover for the consequences of her emotional distress, it appears that at least some of the plaintiffs may be able to demonstrate emotional distress of more than a trivial nature.⁷⁴

The fact that most jurisdictions would not have granted relief absent physical harm does not condone adherence to an illogical and oftentimes unjust rule of law.⁷⁵ As Judge Wilkins noted, "The inertia which results from reliance on a 'majority view' guarantees a glacial development of the law."⁷⁶ Even earlier, Judge Musmanno stated, "A precedent can not, and should not, control, if its strength depends alone on the fact that it is old, but may crumble at the slightest probing touch of instinctive reason and natural justice."⁷⁷

The arguments in support of the physical injury requirement are old and have crumbled in other jurisdictions.⁷⁸ Yet the *Payton* court upheld its former rule of law. The dissent, however, had the better argument; in this case the plaintiffs' claims should have been submitted to a jury, although there was no allegation of physical harm. Because the plaintiffs were exposed to DES, "good medical practice requires interference with the[ir] normal lives."⁷⁹ The

73. See *infra* text accompanying notes 79-82.

74. 386 Mass. at 579-80, 437 N.E.2d at 193 (Wilkins, J., dissenting).

75. *Id.* at 546, 437 N.E.2d at 175 (collecting cases).

76. *Id.* at 581, 437 N.E.2d at 194 (Wilkins, J., dissenting).

77. *Bosley v. Andrews*, 393 Pa. 161, 183, 142 A.2d 263, 274 (1958) (Musmanno, J., dissenting).

78. See *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982).

79. 386 Mass. at 581, 437 N.E.2d at 194 (Wilkins, J., dissenting).

dissent recognized that "[t]he time devoted to medical tests affects the plaintiffs' earning power, and the expense of the testing affects their pocketbooks."⁸⁰ The plaintiffs' concerns are not trivial, evanescent, or feigned. It is apparent from the factual circumstances that the alleged emotional harm is genuine and serious.⁸¹ "These circumstances present, in the words of the majority, although they do not perceive it, an 'objective corroboration of the emotional distress alleged.'"⁸²

Admittedly, the court was very concerned with "objective corroboration" and the traditional fears of granting recovery for emotional distress.⁸³ It would seem, however, that the real reason for denying relief rested on some other ground, not articulated by the court. This ground was probably the fear that, once the rigid lines drawn by the artificial restrictions are erased, a defendant might be susceptible to unlimited liability.⁸⁴ This fear is one of the motivating forces behind the various limiting doctrines in other jurisdictions.⁸⁵

VI. CONCLUSION

The possibility of unlimited liability is a legitimate concern,⁸⁶

80. *Id.*

81. *See supra* note 18.

82. 386 Mass. at 579, 437 N.E.2d at 192 (Wilkins, J., dissenting).

83. *See supra* text accompanying notes 14-16.

84. As Judge Breitel noted, "Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

"Practically, not every loss can be made compensable in money damages, and legal causation must terminate somewhere. In delineating the extent of a tortfeasor's responsibility for damages . . . the courts must locate the line between liability and non-liability at some point, a decision which is essentially political." *Suter v. Leonard*, 45 Cal. App. 3d 744, 746, 120 Cal. Rptr. 110, 111-12 (1975).

85. *See, e.g., Cosgrove v. Beymer*, 244 F. Supp. 824 (D. Del. 1965) (compensating mental distress would burden the courts and the defendants); *Arnett v. Dow Chem. Co.*, SF Master File No. 729586 (Cal. Super. Ct. filed Mar. 21, 1983) (memorandum decision in support of orders regarding fear of cancer and risk of cancer) ("[T]he spectre of unlimited liability from an army of plaintiffs parading their tumescent fears into the courtroom supported by a corps of psychiatrists has resulted in proper judicial restraint in this area." *Id.* at 19).

The French philosopher Montaigne seemed to predict this widespread concern in his essay on fear. He wrote: "There is no passion so contagious as fear." M. DE MONTAIGNE, *Of Fear* in *THE ESSAYS OF MICHEL DE MONTAIGNE* 62 (C. Cotton trans. 1892).

86. Unlimited liability could bankrupt an entire industry. Large judgments could reduce funds needed for research and development, prohibiting new and possibly effective products from being developed. An overly cautious company might elect not to distribute an extremely effective product because it fears that the product might not be completely safe.

but even this possibility must be balanced against the interest of the injured plaintiff. The law should not seek to provide a remedy every time a plaintiff's feelings are hurt.⁸⁷ Conversely, the honest plaintiff should not be denied relief for a foreseeable injury that was negligently caused by another.⁸⁸

The evolution in the area of negligently inflicted mental distress indicates a growing willingness to abandon unnecessarily restrictive tests in assessing liability.⁸⁹ Courts that have abandoned these arbitrary rules have found that traditional principles of duty, foreseeability, and proximate cause are sufficient to resolve the judicial fears inherent in mental distress cases.⁹⁰ Although there are difficult problems of proof involved, these are neither insurmountable nor unique to mental distress cases and should not prevent a plaintiff from presenting her case in court.

It therefore seems likely that the liberal trend will continue and that even Massachusetts will one day abandon the physical harm requirement. But until that day, it is unfortunate that the courts continue to deny women like Brenda Payton the opportunity to litigate their claims.

GARY S. GLICKMAN

87. See *supra* note 1 and accompanying text.

88. See *supra* text accompanying notes 39-47. The rationale for imposing liability on the negligent manufacturer is multifaceted. The public has the right to expect a manufacturer to stand behind the safety of its product. This right is a consequence of the manufacturer's superior knowledge of its product's qualities and capabilities. Due to the complexity of products, consumers are no longer able to protect themselves. Sellers are often in a better position than injured consumers to internalize the cost of insuring the public's safety through production efficiency and higher prices. In short, the manufacturer can treat the burdens of product liability law as a cost of doing business. See Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 684-85 (1980).

89. See *supra* text accompanying notes 47-50.

90. See *supra* notes 42-48 and accompanying text.