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Young v. Stensrude: Fishing through Bass for the Boundaries of Negligent Infliction of Mental Distress

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YOUNG V. STENSRUDE: FISHING THROUGH BASS FOR THE BOUNDARIES OF NEGLIGENT INFLICTION OF MENTAL DISTRESS

I. INTRODUCTION

The Missouri Supreme Court's decision in *Bass v. Nooney Co.*[1] expanded liability by recognizing negligent infliction of emotional distress[2] as a new and independent tort.[3] In so doing, it resolved the controversy that arose from the historical notion that emotional tranquility in itself received little protection against negligent invasions.[4] The resolution, however, has given rise to a new controversy: is this new tort capable of being applied reasonably?[5] Do the standards enunicated in *Bass* provide a sufficient boundary within which deserving plaintiffs can recover while shielding defendants from potentially excessive or unlimited liability?

This casenote will review the traditional limitations on recovery for emotional distress. It will then examine the boundaries of liability that exist under present law as set forth in *Bass* and, more recently, *Young v. Stensrude*.[6]

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1. 646 S.W.2d 765 (Mo. 1983) (en banc).

2. "Emotional distress" has no precise legal or medical definition. Different courts use different terms to denote the same idea such as emotional harm, emotional distress, emotional disturance, mental harm, mental distress, and mental disturbance. For instance, the *Bass* court used the term "emotional distress" when stating the new rule while the court in Young v. Stensrude, 664 S.W.2d 263 (Mo. Ct. App. 1984), used the term "emotional harm." In this casenote the terms are used interchangeably. *See* Note, *Negligent Infliction of Emotional Distress Absent Physical Impact or Subsequent Physical Injury*, 47 MO. L. REV. 124, 124 n.5 (1982); RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965) [hereinafter cited as RESTATEMENT].

3. 646 S.W.2d at 772.

4. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 361 (5th ed. 1984).

5. 646 S.W.2d at 779, 781 (Welliver, J., & Donnelly, J., dissenting); *see also* Note, *Duty, Foreseeability, and the Negligent Infliction of Mental Distress*, 33 ME. L. REV. 303, 303 (1981) ("The recognition of the negligent infliction of mental distress as a seperate basis of liability has produced disagreement over when a plaintiff may recover.").

6. 664 S.W.2d 263 (Mo. Ct. App. 1984). This casenote will not discuss the bystander recovery rule. *Bass* explicitly did not extend to bystanders, 646 S.W.2d at 770 n.3, and *Young* was not a bystander case.

II. Development of Negligently Inflicted Mental Distress: A Summary of Other Recovery Boundaries

Traditionally, the common law did not recognize negligent infliction of emotional distress as an independent tort.[7] Thus, if no independently protected right had been violated, a plaintiff could not recover for negligently inflicted emotional harm no matter how foreseeable the risk of such harm.[8] This nonrecognition rule was based on judicial apprehension and restraint.[9] Traditional tort principles were not used to grant legal redress for emotional injuries, the dominant policy being that the courts were ill equipped to handle such claims because the genuineness of mental distress was incapable of adequate and objective legal proof.[10]

As society became more complex and the social utility associated with emotional tranquility became more pronounced,[11] arbitrary rules began to be formulated.[12] These arbitrary rules attempted to fill the void in the law which

7. Fischer, *Tort Law: Expanding the Scope of Recovery Without Loss of Jury Control*, 11 Hofstra L. Rev. 937, 942 (1983); *see also* Green, *Foreseeability in Negligence Law*, 61 Colum. L. Rev. 1401, 1417 (1961) ("Negligence law is designed primarily to protect people against physical hurts to persons and property unintentionally inflicted by the dangerous activities of other people."); Note, *The Death of the Ensuing Physical Injury Rule: Validating Claims for Negligent Infliction of Emotional Harm*, 10 Hofstra L. Rev. 213, 216 (1981) ("From its beginnings, negligence law has been concerned primarily with physical injury.").

8. Recovery for mental distress is allowed as parasitic damages if an independently protected right has been violated. Note, *Negligent Infliction of Emotional Distress as an Independent Cause of Action in California: Do Defendants Face Unlimited Liability?*, 22 Santa Clara L. Rev. 181, 184-85 (1982); *see also* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d. 917, 122 Cal. Rptr. 470 (1975) (breach of implied covenant of good faith and fair dealing resulted in recovery for emotional distress); Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1970) (negligent breach of bailor-bailee relationship gives rise to recovery for emotional injury); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973) (invasion of privacy constitutes a legal injury for which mental suffering is recoverable).

9. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 Geo. L.J. 1237, 1237 (1971).

10. "[T]o hold persons who are merely negligent bound to anticipate and guard against fright and the consequenses of fright . . . would open a wide door for unjust claims which could not successfully be met." Spade v. Lynn & B.R.R., 168 Mass. 258, 290, 47 N.E. 88, 89 (1897).

11. "[A] sound mind within a disabled body can accomplish much, while a disabled mind in the soundest of bodies is rarely capable of making any sustantial contribution to society." Comment, *supra* note 9, at 1237; *see* J. Coleman, Abnormal Psychology and Modern Life 192 (3d ed. 1964).

12. *See* Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 485, 488, 510 (1982). "A rule may be considered . . . arbitrary when measured against a single policy, because it is supported by a number of competing and inconsistent policies and represents a compromise among them." *Id.* at 481-82.

had formally barred recovery for emotional distress. The rules were considered arbitrary because recovery for emotional distress was only allowed if a plaintiff's claim fell within the boundaries of special qualifying factors.[13] These qualifying factors were not designed to recognize emotional tranquility as a complete protectable interest.[14] Rather, they were designed as a compromise seeking to expand liability on the one hand, while limiting this expansion to certain circumstances likely to minimize the risk of trivial or feigned claims on the other.[15]

A. The Impact Rule

One set of qualifying factors, previously followed in Missouri,[16] which permitted a plaintiff to recover for emotional harm was called the impact rule.[17] The impact rule allowed recovery for mental distress only when the physical impact itself of defendant's negligence inflicted direct physical injury.[18] [19] With an underlying cause of action based on direct physical injury, emotional distress damages were deemed "parasitic" and compensation for such damages was allowed.[20] Sufficient assurances that the emotional injuries

13. "Special qualifying factors" means the specific requirements under the various rules which allow recovery for emotional distress recovery.

14. Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 925, 616 P.2d 813, 817, 167 Cal. Rptr. 831, 835 (1980).

15. W. PROSSER, *supra* note 4.

16. Although Missouri cases have not referred to the impact rule by name, a general statement of the prior Missouri rule can be found in Crutcher v. Cleveland, C., C. & St. L. R.R., 132 Mo. App. 311, 111 S.W. 891 (1908):

> We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and, if this rule is to stand we think it should be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without.

Id. at 318, 111 S.W. at 893 (quoting from Spade v. Lynn & B.R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897)); *see generally* Note, *Mental Distress - the Impact Rule*, 42 UMKC L. REV. 235, 237-40 (1973) (discussing history of impact rule in Missouri).

17. *See generally* Note, *supra* note 16 (discussing history of impact rule).

18. *E.g.*, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896) (recovery for fright and consequential miscarriage denied because no immediate personal injury); Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897) (recovery for mental distress and other injuries resulting from the distress denied because no injury to person from without); *see generally* Note, *Redefining the Limits to Recovery for Negligently Inflicted Mental Distress*, 11 TULSA L.J. 587, 589-92 (1976).

19. *See* Fischer, *supra* note 7, at 943.

20. W. PROSSER, *supra* note 4, at 363. The thin skull rule is applicable to parasitic psychological injuries. That is, a plaintiff who is particularly susceptible to psychological disorders may recover for idiosyncratic emotional harm provided such harm results from the physical injuries. *Id.; see* Martinez v. Teague, 96 N.M. 446, 631 P.2d 1314 (1981).

were genuine was viewed to be guaranteed by the establishment of direct physical harm.[21]

The impact rule was rationalized on various policy grounds including: (1) fear of fraudulent claims;[22] (2) fear of excessive litigation;[23] (3) difficulty of proof;[24] (4) lack of precedent;[25] and (5) potential for unlimited liability.[26] Many of these policy considerations have lost their force either because experience has proved that the policy has no basis in fact[27] or because other more important social policies have overshadowed the original reasons behind the impact rule.[28]

If viewed as a rule protecting emotional tranquility, the main criticism of the impact rule is that it sets arbitrary boundaries within which a plaintiff's claim must fall to allow an emotional distress recovery.[29] Under the impact rule, a successful plaintiff must show: (1) a foreseeable risk of physical injury disregarded by the defendant; (2) impact on the plaintiff; (3) physical injury caused by such impact; and (4) emotional distress.[30] These boundaries may be considered arbitrary because they do not truly embody a policy protecting emotional tranquility.[31] A defendant has no duty to protect a foreseeable plaintiff from unreasonable risks of causing mental distress.[32] This is because

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21. W. PROSSER, *supra* note 4, at 363; *Bass*, 646 S.W.2d at 769.

22. Charlie Stuart Oldsmobile v. Smith, 171 Ind. App. 315, 357 N.E.2d 247 (1978); Morse v. Chesapeake & O. Ry., 117 Ky. 11, 77 S.W. 361 (1903); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

23. Ward v. West Jersey & S.R., 65 N.J.L. 383, 47 A. 561 (1900); Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899).

24. Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902); Nelson v. Crawford, 122 Mich. 466, 81 N.E.2d 335 (1899); Hickey v. Welch, 91 Mo. App. 4 (1901); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

25. Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Haas v. Metz, 78 Ill. App. 46 (1898).

26. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Miller v. Baltimore & O.S.W.R., 78 Ohio 309, 85 N.E. 489 (1908); Hickey v. Welch, 91 Mo. App. 4 (1901).

27. *See generally Bass*, 646 S.W.2d at 769 (claiming difficulty of proof, fear of fraudulent claims, and fear of excessive litigation are no longer relevant policy considerations).

28. *See generally* Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922) (arguing that emotional tranquility is an important interest that should override the impact rule).

29. Pearson, *supra* note 12, at 488; Note, *supra* note 5, at 308.

30. Annot., 64 A.L.R.2d 100, 134 (1959).

31. Pearson, *supra* note 12, at 488.

32. *Id.* at 489. Under the impact rule, the defendant's only duty is to avoid causing unreasonable risks which may inflict physical injury to foreseeable plaintiffs.

the boundaries of a defendant's duty are not expanded by the impact rule since recovery for emotional harm represents "parasitic" damages.[33] If there is no impact or direct physical injury, any emotional distress claim would not reach the jury.[34] Moreover, if a jury were to consider such a claim, its analysis would only probe the defendant's creation of an unreasonable risk of causing physical injury - not mental distress.[35] Thus, recovery for mental distress was dependent on the judge or jury deciding threshold questions which, at most, were only indirectly related to whether the plaintiff was actually emotionally harmed.

Some jurisdictions, having recognized the inequity of the traditional impact rule, have adopted a "liberalized" impact rule.[36] In these jurisdictions, recovery is allowed for emotional harm even if the impact is trivial and produces no direct physical harm.[37] This liberalized impact rule merely redefines two of the traditional rule's arbitrary barriers. First, any impact, no matter how slight, satisfies the impact requirement.[38] Second, although "direct" physical harm is no longer required, the liberalized impact rule requires that physical harm result from the mental distress.[39]

Although the liberalized impact rule allows more plaintiffs to reach the jury,[40] the rule is nonetheless arbitrary if, again, it is measured against a policy seeking to protect emotional serenity.[41] Once a plaintiff falls within

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33. *See* Note, *supra* note 7, at 219 (dealing with parasitic harm in general but applicable to the impact rule).

34. *See* Fischer, *supra* note 7; Prosser, *Palsgraf Revisited*, 52 MICH L. REV. 1 (1953). A proximate cause analysis, as opposed to a duty analysis, could also be used. Annot., 64 A.L.R.2d 100, 110 (1959).

35. *Supra* notes 29-32 and accompanying text.

36. *See* Note, *The Expanding Definition of Liability - Dziokonski v. Babineau*, 1 W. NEW ENGLAND L. REV. 795, 797 (1979); *cf.* Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902); Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929).

37. *See, e.g.*, Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902) (a slight blow); Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (trifling burn); Zelinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961) (trivial jolt or jar); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (reduced rule to absurdity where impact found when horse "evacuated his bowels" in plaintiff's lap).

38. W. PROSSER, *supra* note 4, at 363 and *supra* cases cited in note 37.

39. Fischer, *supra* note 7, at 944.

40. Potentially more plaintiffs would have jury questions under the liberalized impact rule since any type of impact satisfies the requirement.

41. The Pennsylvania Supreme Court rejected the liberalized impact rule stating:

> It appears completely inconsistent to argue that the medical profession is absolutely unable to establish a causal connection in the case where there is no impact at all, but that the slightest impact . . . suddenly bestows upon our medical colleagues the knowledge and facility to diagnose the causal

the "magic" boundary of impact, "the door opens to the full joy of complete recovery."[42] As far as substantial justice is concerned, it seems that a plaintiff is equally likely to suffer genuine mental distress when he escapes impact by an inch as compared to when the impact is only slight.[43]

B. The Zone of Danger Rule

Most jurisdictions have rejected the impact rule.[44] The move away from the rule has led some jurisdictions to allow recovery to plaintiffs who fall within a "zone of danger." Under this rule, a plaintiff may recover for emotional harm when he was subject to the risk of impact and fear of this impact caused mental distress which produced ensuing physical harm.[45] The zone of danger rule eliminates the threshold requirement of impact and substantively expands liability by recognizing that emotional distress can be caused through mediums other than actual physical contact.[46]

The transition from the impact rule to the zone of danger rule suggests an increased judicial willingness to protect emotional tranquility.[47] However, like the impact rule, the main criticism of the zone of danger rule is that it does not fully coincide with the policy that defendants should be liable for the foreseeable harm which they caused.[48] As stated above, a defendant has no legal duty to guard against unreasonably inflicted mental distress.[49] Although the impact requirement has been eliminated, a plaintiff still must show that a defendant disregarded a foreseeable risk of physical harm.[50] This risk of physical harm is manifested by the plaintiff being within the zone of

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connection between emotional states and physical injury.
Niederman v. Brodsky, 436 Pa. 401, 403, 261 A.2d 84, 87 (1970).

42. Goodrich, *supra* note 28, at 504.

43. W. PROSSER, *supra* note 4, at 364. Dean Prosser has suggested that the true value in the impact requirement is that it provides the defendant with the opportunity to testify that there was in fact no impact. Realistically, a defendant cannot be sure whether he frightened another; however, he may be able to swear that during the statute of limitation period he has struck no one. If a jury believes testimony such as this, a plaintiff will be unable to recover in an impact rule jurisdiction. *Id.*

44. *E.g.,* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

45. *See* Note, *supra* note 33, at 220; *see also* Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970) (pedestrian allowed to recover despite absence of impact provided he could prove fear of impact); Annot., 29 A.L.R.3d 1337 (1970).

46. Comment, *supra* note 5, at 313.

47. *See supra* notes 44-47 and accompanying text.

48. Pearson, *supra* note 12, at 485; *see* Dziokonski v. Babineau, 375 Mass. 555, 564, 380 N.E.2d 1295, 1302 (1978).

49. Pearson, *supra* note 12, at 489.

50. *Id.*

danger. Thus, if a plaintiff is deemed to be outside the zone of danger[51] or if no zone of danger exists,[52] recovery for mental distress is not allowed.

A "zone of danger" is merely a court-created fiction. It is analagous to the impact rule in that it seeks to establish a relationship between the defendant's conduct creating a risk of physical injury and the emotional consequences which flow from that risk.[53] This relationship may be flawed since all persons subject to the defendant's "physical risk conduct"[54] will not inevitably suffer distress. Further, this relationship does not extend to persons actually suffering distress from conduct not involving a risk of impact, such as abusive language. It must be remembered, however, that the zone of danger rule, like the impact rule, represents a compromise between conflicting policies.[55] Neither rule purports to cover all foreseeable emotional injuries. If the law should protect emotional tranquility to the exclusion of other policies, then the failure of these rules to do so is arbitrary.[56]

C. *The Restatement Rules*

The *Restatement (Second) of Torts* [hereinafter "*Restatement*"] recognizes liability where a defendant unreasonably subjects another to an emotional disturbance so great as to threaten bodily harm.[57] That is, a defendant may be liable if he creates a risk likely to cause such severe emotional distress that as a secondary consequence illness or other bodily harm results.[58] This secondary consequence is considered a physical injury. It is this physical

51. Questions can arise as to whether a plaintiff should be considered within the zone of danger. That is, how near must a plaintiff be to the risk of direct physical injury? Normally this would be a question of fact for the jury unless reasonable minds cannot differ.

52. If no zone of danger exists or the plaintiff is considered outside the zone of danger, he cannot recover for mental distress. He would be considered an unforeseeable plaintiff and the case dismissed under a "no duty" analysis. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E.99 (1928).

53. Pearson, *supra* note 12, at 486.

54. Physical risk conduct is conduct which subjects another to direct physical injury. Comment, *Molien v. Kaiser Foundation. Hospitals: California Expands Liability for Negligently Inflicted Emotional Distress*, 33 HASTINGS L.J. 291, 293 (1981)

55. *See supra* notes 13-15 and accompanying text.

56. Pearson, *supra* note 12, at 480.

57. RESTATEMENT, *supra* note 2, §§ 306, 312, 313(1), 436(1); *see* McDonough v. Whalen, 365 Mass. 506, 516, 313 N.E.2d 435, 441-42 (1974); Corso v. Merrill, 119 N.H. 647, 659, 406 A.2d 300, 308 (1979); Chisum v. Behrens, 283 N.W.2d 235, 240 (S.D. 1979). For a good discussion on the Restatement's view of liability for emotional distress, see Fischer, *supra* note 7, at 948-50.

58. RESTATEMENT, *supra* note 2, § 306 commend d.

injury which a defendant has a duty of care to avoid.[59] Further, a defendant can only be found liable if his conduct actually causes the physical harm created by his risk.[60]

The *Restatement* rules do not protect mere "peace of mind,"[61] but they do represent a noteworthy change from the prior rules discussed above. Under the *Restatement*, the defendant's conduct does not have to create any risk involving direct physical injury.[62] Thus recovery for abusive language which foreseeably causes emotional distress and resulting physical injury is possible. Further, emotional disturbance is only important to the extent that its existence involves the risk of resulting physical harm.[63] If, however, recovery is allowed for resulting physical harm, the primary emotional disturbance can also be recovered.[64] For example,[65] suppose a hospital delivers the wrong baby to a mother after delivery. The mother took the infant home and cared for it until the hospital realized its mistake and informed the mother that the offspring was not hers. Upon hearing this news, the mother suffered emotional distress resulting in repeated hysterical attacks and mental aberration. Under the *Restatement* rules, the mother may be able to recover for the repeated hysterical attacks and mental aberration (a physical injury) and also any original emotional distress (an element of damages). If, however, physical injury did not result, but rather the mother merely had emotional injuries resulting in one or two sleepless nights, the *Restatement* would not allow recovery.[66]

The *Restatement* rules have been criticized because of the difficulty in defining "physical injury."[67] Where emotional distress ends and resulting

59. *Id.* §§ 306, 313(1), 436(1). A defendant must be able to reasonably foresee the resulting physical harm. It is not necessary that a defendant foresee the initial mental distress. Thus, a defendant can negligently inflict mental distress on another and not assume the risk of any exceptional physical susceptibilities to emotions which the other may have unless these susceptibilities are themself foreseeable. *Id.* § 306 comment b.

60. *Id.* § 313(1).

61. *Id.* § 306 comment b.

62. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 53 (1956).

63. RESTATEMENT, *supra* note 2, § 306 comment b.

64. *Id.*

65. This example is based on Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 249 P.2d 843 (1952). In this case the Restatement rationale was followed but recovery was denied, the court stating, "definite nervous distrubance or disorders caused by mental shock and excitement are classified as physical injuries and will support an action for damages for negligence where they are the proximate result of negligence on the part of the defendants." *Id.* at 234, 249 P.2d at 844. The only evidence of injury was testimony that Mrs. Espinosa suffered severe back and stomach pain and ached all over. *Id.*, 249 P.2d at 844-45. The jury, evidently, did not credit these complaints to nervous shock. *Id.*, 249 P.2d at 845.

66. One or two sleepless nights would not be considered a physical injury. *See id.* at 235-36, 249 P.2d at 845; RESTATEMENT, *supra* note 2, § 436A comment c.

67. *E.g.*, Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 926-27, 616 P.2d

physical injury begins may indeed be a difficult line to draw.[68] In *Molien v. Kaiser Foundation*,[69] the California Supreme Court stated that a physical injury requirement "encourages extravagant pleadings and distorted testimony" and "with a little ingenuity" physical consequences can be made to exist in most all cases involving mental distress.[70] If the harm that concerns the law is emotional, it can also be considered arbitrary to require the plaintiff to suffer anything other than emotional harm.[71]

III. THE BASS BOUNDARY

The evolution of the law did not stop with the rules set forth in the *Restatement*.[72] Since the physical injury requirement could be viewed as ar-

813, 818, 167 Cal. Rptr. 831, 836 (1980); Bass v. Nooney Co., 646 S.W.2d 765, 772 (Mo. 1983) (en banc) (attempts to distinguish physical from mental injuries merely creates a definitional problem and distracts from the essential question of proof of injuries).

68. Comment c of the RESTATEMENT § 436A does not appear to make the line any eaiser to draw:

> The rule stated in this Section applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem, rather than one of law.

RESTATEMENT § 436A comment c. *See* Toms v. McConnell, 45 Mich. App. 647, 657, 207 N.W.2d 140, 145 (1973) (physical injury requirement was satisfied by proof that plaintiff had "withdrawn from normal forms of socialization, was for a period of nine months following the accident unable to function as she did previously, and continues in a state of depression"); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) (majority characterized "severe depression" and "acute nervous condition" as physical and mental injuries while dissent stated complaint only involves emotional injuries).

69. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

70. *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838; *see also* Annot., 64 A.L.R.2d 100, 115 n.16 (1959) which stated in footnote 16: "To refer to 'mental distress alone' . . . is undoubtedly somewhat inaccurate, since . . . mental disturbances . . . is [sic] always characterized by a complex of physical reactions, and frequently it is only an accident of pleading that the adverse consequenses complained of are charaterized as 'mental' rather than physical."

71. Pearson, *supra* note 12, at 510. The Missouri Supreme Court refused to follow the Restatement rules when it recognized negligent infliction of mental distress as an independent tort. The court stated "the requirement of physical injury . . . merely meant the replacement of one arbitrary artifical rule with another . . . somewhat less restrictive." *Bass,* 646 S.W.2d at 771.

72. Bass v. Nooney Co., 646 S.W.2d at 771.

bitrary and artificial,[73] a number of jurisdictions rejected the idea that physical injury must flow from the mental distress.[74] While courts recognized the necessity of avoiding the imposition of liability for inconsequential emotional injuries, some courts nonetheless felt that a screening device based on a consequential physical injury requirement was too harsh in that it barred many honest claims from ever reaching the jury.[75] Thus courts began to announce a more liberalized rule emphasizing the requirements that a plaintiff's injury must be foreseeable and serious.[76]

The Missouri Supreme Court accepted this liberalized rule in *Bass v. Nooney Co.*[77] In *Bass*, the plaintiff sought damages for emotional distress allegedly caused by the defendant's negligence which resulted in the plaintiff being trapped in an elevator for about thirty minutes.[78] The court set forth a two-pronged rule in determining liability for negligently inflicted mental distress. Under this rule, a plaintiff may recover for emotional distress if "(1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury [is] medically diagnosable and . . . medically significant."[79] Impact, direct physical injury, or ensuing physical injury are not prerequisites to recover damages for emotional distress. Rather, it is the boundaries of foreseeability and severity which determine whether a plaintiff can recover for emotional injuries.

A. Bass in Troubled Waters

The Missouri Court of Appeals for the Eastern District tried to articulate the *Bass* boundaries in *Young v. Stensrude.*[80] In *Young*, the plaintiff, Olivia Young, attended a business meeting at her employer's office.[81] Her employer,

73. *Id.*

74. Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (Ala. 1981); Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (en banc); Shultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

75. *Supra* note 74.

76. *Supra* note 74.

77. 646 S.W.2d at 772.

78. *Id.* at 766. The plaintiff alleged that while trapped in the elevator she got "warm" and began "feeling strange." *Id.* After the incident the plaintiff was placed in a hospital under heavy sedation. *Id.* at 767. At trial a psychiatrist testified the plaintiff suffered a severe anxiety reaction. *Id.* The psychiatrist also expressed the opinion that the plaintiff would not suffer any permanent disability from the incident. *Id.*

79. *Id.* at 772-73.

80. 664 S.W.2d 263 (Mo. Ct. App. 1984).

81. *Id.* at 265.

Richard Stensrude, the defendant in this action, along with four other men, also attended this meeting. During the gathering the defendant suggested that they all view an "educational" film entitled *Deep Throat*.[82] This film ran for a brief period before the plaintiff realized the film was pornographic rather than educational. During the film's projection, the defendant was "uttering sexual obscenities" at the plaintiff.[83] The plaintiff fled from the meeting.

The plaintiff alleged that as a result of the defendant's conduct she suffered "emotional shock and mental distress, incurred expenses for medical care, and sustained other damage."[84] She asserted that the defendant's actions gave rise to a claim for either intentional or negligent infliction of mental distress.

The trial court dismissed both counts for failure to state a claim for which relief can be granted.[85] The court of appeals reversed and remanded the trial court's decision.[86] The court properly recognized negligent infliction of mental distress to be an independent tort under Missouri law. The court viewed the dispositive question to be whether the "acts of showing a pornographic movie to an unsuspecting female in a room with five men while making obscene remarks could ever . . . create an unreasonable risk of inflicting the requisite harm."[87] Based on this question the court held that the defendant's conduct could constitute an actionable wrong.[88]

The court's question merely restated the *Bass* boundary.[89] Although the decision may have been proper, little judicial analysis was offered to support the holding. This is because the *Bass* standard creates a new problem. The boundaries of liability under the *Bass* rule are vague. *Bass* itself offers little guidance for determining whether a potential defendant should be held liable. Although some vagueness in a rule is perhaps inevitable, a rule should not be so vague as to provide insufficient guidance to judges and juries who are

82. Plaintiff apparently believed the film was educational and thought the title was a "literary pun." Brief for Appellant at ii, Young v. Stenstrude, 664 S.W.2d 263 (Mo. Ct. App. 1984).

83. 664 S.W.2d at 265.

84. Specifically, plaintiff claimed that because of defendant's conduct she was unable to accompany her husband to their wedding anniversary plans scheduled the night of the incident, was unable to resume sexual contact with her husband for several months, had to seek professional counseling, and was unable to perform her employment duties or function in a business environment. Brief, *supra* note 82, at iii.

85. 664 S.W.2d at 264.

86. *Id.*

87. *Id.* at 265.

88. *Id.*

89. *See supra* note 79 and accompanying text.

required to apply the rule.[90] In this sense, the *Bass* boundaries are arbitrary, not because they represent a compromise between conflicting social policies, but rather because the rule offers no uniform standard for determining liability.

B. Foreseeability and Unreasonable Risk Boundary

Liability for negligently inflicted mental distress must rest on a finding of: (1) the existence of a duty owed by the defendant to the plaintiff; (2) violation of this duty; and (3) damages, i.e., mental distress, which were proximately caused by the defendant's negligence.[91]

Although the above formula appears mechanical, an analysis of a tort by each of these elements can create confusion. This is because courts use foreseeability both to determine if a defendant is under an initial duty and also as a measuring rod in determining how far a defendant's liability should extend.[92] Foreseeability is therefore important in determining the boundaries of liability under the *Bass* standard. *Bass'* first prong involves the creation of an "unreasonable risk" that the defendant "should have realized" could cause "the distress."[93] This prong necessarily involves foreseeability because negligence cannot be found unless a defendant is capable of reasonably foreseeing at least some injury resulting from his conduct.[94] *Bass* leaves vague exactly how foreseeability can serve to limit liability in emotional distress cases. This is important for two reasons. First, foreseeability as a limitation on liability, may determine whether a judge decides the case in the first instance or throws the foreseeability issue to a jury. Second, if a jury does decide the case, liability can only be limited if the jury is capable of determining the foreseeable issue with respect to the specific factual setting.

1. Foreseeability: The Duty Boundary

Bass created a duty in defendants to foresee "an unreasonable risk of causing . . . distress."[95] This expanded liability under prior law where a defendant had no duty to foresee unreasonable risks of inflicting mental

90. Pearson, *supra* note 12, at 483. When rules are vague, decisions are made based on what seems important to the decision maker. Decisions are therefore arbitrary because they do not depend on any generally agreed upon principles. *Id.*

91. Note, *supra* note 5, at 317; *see also* Boyle v. City of Phoenix, 115 Ariz. 106, 563 P.2d 905 (1977). *See generally* Prosser, *supra* note 34.

92. W. Prosser, *supra* note 4, at 297-98, 358.

93. *Supra* note 79 and accompanying text.

94. Jurisdictions differ as to exactly what they require a defendant to foresee. *See generally* Prosser, *supra* note 34 (good discussion of how different jurisdictions view foreseeability, duty, and proximate cause).

95. 646 S.W.2d at 772.

distress.[96] As a limitation on liability, the duty question can become important. Duty is a legal issue decided by the judge.[97] Therefore, a judge can maintain control over a lawsuit and limit liability by withholding the case from the jury.[98]

The problem with using duty to limit liability is that it is neither capable of precise definition nor firm application. Dean Prosser stated that duty, in a negligence case, is "an obligation to which the law will give recognition and effect, to conform to [a particular] standard of conduct. . . ."[99] Beyond this, Dean Prosser stated that duty arises from some "relation" between the parties, but exactly what this relation consists of is yet undefined.[100] Thus, without the firm criteria essential to answer the duty question, the term is reduced to a "legal symbol" and is often a substitute for analysis.[101]

Some courts use foreseeability to create a "relation" between a plaintiff and a defendant and therefore entitle a plaintiff to protection.[102] That is, foreseeability may be used as an outer boundary beyond which duty cannot extend.[103] Thus, if no risk is foreseeable, a judge may dismiss a case in the first instance since a defendant is under no duty to conform to a particular standard of conduct.

Using foreseeability of the risk to aid in determining whether the defendant had an initial duty is not very helpful in analysis. All conduct is risk creating.[104] Some type of distress can occur in almost any situation. For example, suppose X, on one occasion, solicits Y for the purpose of illicit intercourse. Recovery has normally been denied, in these types of cases, on the general theory "that there is no harm in asking."[105] However, is it nec-

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96. Fischer, *supra* note 7, at 942.

97. Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury,* 1977 UTAH L. REV. 1, 13 (1977).

98. *See* Fischer, *supra* note 7, at 942.

99. Prosser, *supra* note 34, at 12.

100. *Id.* at 13.

101. W. PROSSER, *supra* note 4, at 357-58.

> The statement that there is or is not a duty begs the essential question - whether the plaintiff's interests are entitled to legal protection against the defendant's conduct . . . . [T]he problem of duty is as broad as the law of negligence . . . no universal test of [duty] has been formulated. It is a shorthand statement for a conclusion, rather than an aid to analysis in itself. . . . '[D]uty' is . . . only an expression of the sum total of those considerations of policy which lead the law to say that [a particular] plaintiff is entitled to protection. *Id.*

102. Note, *supra* note 5, at 317.

103. Prosser, *supra* note 34, at 16.

104. Thode, *supra* note 97, at 8. Risk creating conduct is not only important to the duty question but also when the jury decides the foreseeability issue.

105. *E.g.,* Reed v. Maley, 115 Ky. 816, 74 S.W. 1079 (1903); Prince v. Ridge, 32 Misc. 666, 66 N.Y.S. 454 (N.Y. Sup. Ct. 1900); Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033, 1055 (1936).

essarily true that there is no harm (or risk) in asking? Is there not a conceivable risk, foreseeable to X, that Y will suffer some sort of emotional distress? Carrying this example further, suppose X makes the proposal twice or three times or in conjuction with the proposals sends Y obscene photographs of himself?[106] At some point there is a harm in asking, but when is this risk sufficiently foreseeable for a judge to impose an initial duty on a defendant?

The *Bass* standard makes it conceptually more difficult to dismiss a case under a "no duty" rationale since this standard recognizes that a person's mental well-being is entitled to protection. Almost every case involving the possibility of personal injury also involves the possibility of mental suffering.[107] Further, almost every practical joke or abusive language case also contains the risk of emotional upset.[108] Perhaps it is impossible to reduce the duty question to a definite rule; however, foreseeability should not serve as the only boundary.[109] Foreseeability, without proper limitation, is too uncertain a foundation.[110] Since without a legal duty, the case cannot go to the jury and liability cannot be imposed, a judge is confronted with an initial issue which only he can answer.[111] Nonetheless, in the overwhelming number of tort cases, the courts assume that there is a duty without discussion.[112] It is useful, therefore, to articulate some rational bases upon which considered judgement can be made.

First, the duty question should only be addressed in conjunction with the interest this new tort seeks to protect.[113] The interest is emotional; after all, the tort's name is negligent infliction of emotional distress.[114] Looking at any interest other than protection of emotional tranquility as a criteria to establish a duty is arbitrary in the same way the impact rule or the zone of danger rule arbitrarily protected a person's emotional interests through a

106. *See* Mitran v. Williamson, 21 Misc. 2d 106, 197 N.Y.S.2d 689 (N.Y. Sup. Ct. 1960). It should be noted that as the offense becomes more morally outrageous a court is more apt to view the case as one of intentional infliction of mental distress. *See* RESTATEMENT, *supra* note 2, § 312; Prosser, *supra* note 62 (discussing intentional infliction of mental distress).

107. Williams, *The Risk Principle*, 77 L.Q. REV. 179, 193 (1961).

108. *See* Prosser, *supra* note 62.

109. Note, *supra* note 5, at 322.

110. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1025 (1928).

111. *Id.* at 1029-30. In a close case a judge cannot bypass his function and let the jury decide whether the defendant's conduct created a foreseeable risk. The very passing of the case automatically means he has determined a duty exists, otherwise the case would be dismissed.

112. Thode, *supra* note 97.

113. Green, *supra* note 110. As has been noted, almost any tort conceivable can result in emotional upset. My point, however, in emphasizing a protectible emotional interest is simply that it serves to narrow the analysis.

114. Pearson, *supra* note 12, at 510.

defendant's duty to foresee unreasonable risks of direct injury. For example, suppose X bought his dream car from Y dealership. Y dealership negligently inspected this car and it broke down when X drove it home immediately after the sale. X became emotionally upset and sued the dealership for negligent infliction of mental distress. In this example, a court should center its analysis on X's emotional interest, i.e., was there a foreseeable risk that a purchaser of a new automobile which immediately malfunctions would suffer the requisite distress? It would be arbitrary to allow this emotional distress claim based on the proposition that a malfunctioning car is more likely to result in an automobile accident and the defendant should have foreseen this risk of physical injury. If analyzed in this latter way the interest primarily protected is freedom from direct physical injury. The possibilities of liability would thus greatly be expanded beyond mere recognition of negligently inflicted mental distress. The *Bass* court used language which seems to accept this arbitrary analysis. The court stated that a jury question would be generated if a defendant disregards a "foreseeable likelihood that either physical or psychic harm might be caused. . . ."[115] Thus, arguably under *Bass* a defendant may have an initial duty to guard against inflicting mental distress caused by the creation of an unreasonable risk of physical harm, even if physical harm does not in fact occur.

Second, a judge should examine how much protection should be given this emotional interest.[116] For example, suppose X tells Y, "Your shirt doesn't match your pants." Further, suppose Y actually suffers severe distress from this comment. Under *Bass*, can X be found liable for negligently inflicting mental distress? It has already been noted that all conduct is risk creating. Therefore, some distress is foreseeable in almost any situation. Negligence, however, only compensates for unreasonable risks, that is risks which, because of there nature, give rise to a duty in the defendant to conform to a reasonable standard of care.[117]

In *Bass*, a duty only arises from conduct creating "an unreasonable risk of causing *the distress*."[118] Thus, the answer to the above hypothetical may depend on the *Bass* standard of distress.[119] In other words, how much distress can a potential defendant make another endure before the risk becomes

115. 646 S.W.2d at 774. It could be argued that the *Bass* court used the term physical injury to refer to bodily harm which results from mental distress. *Supra* notes 57-60 and accompanying text. However, when discussing what risk the defendant should foresee, the court viewed as important the physical hazard the plaintiff was exposed to. *Bass*, 646 S.W.2d at 773-74 n.6. For instance, the court discussed the physical hazards the plaintiff would be exposed to if an emergency rescue from the elevator had taken place. *Id.*

116. Green, *supra* note 110, at 1025.

117. Prosser, *supra* note 34, at 6.

118. 646 S.W.2d at 772; *supra* text accompanying note 79.

119. 646 S.W.2d at 772; *supra* text accompanying note 79.

foreseeable that "the distress" which *Bass* contemplates will be caused?

Initially, it should be noted that when the *Bass* court set forth the two-pronged test, the word "severe" was applied to the degree of required mental distress, not to the degree of risk created by the defendant.[120] However, in applying the foreseeability prong the court stated that the defendant must foresee "serious emotional distress."[121] Clearly, policy considerations dictate that a seriousness requirement should be read into the foreseeability prong. *Bass* did not contemplate protecting trivial emotional claims or peace of mind. People must be expected "to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."[122] Further, trivial claims lack the guarantee that the emotional distress is serious or that, if serious, the emotional distress suffered is reasonable.[123] Thus, going back to the hypothetical, it seems X should be free to express an unflattering opinion, even if severe distress results, since the risk of such distress was not unreasonable.

Other factors, besides foreseeability of a sufficiently severe risk, should also be considered by a judge in determining if a duty exists. A protectable interest should more readily be found if there is sufficient moral blame attached to a defendant's conduct.[124] For example, practical jokes, where a defendant wants to get a laugh out of a plaintiff's embarrassment, may fall into this category. In fact, *Young* could be viewed as being an unreasonable practical joke. The defendant's conduct had little social value. When this conduct is measured against a foreseeable risk of serious mental distress,[125] it is not very difficult to establish duty.

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120. 646 S.W.2d at 772; *supra* text accompanying note 79.

121. 646 S.W.2d at 773. If seriousness should be read into the foreseeability test, it becomes somewhat analagous to the Restatement rules where a defendant must foresee the resulting physical harm. *See* RESTATEMENT, *supra* note 2, § 306. This is because of the definitional problems inherent in distinguishing serious mental distress from mental distress which results in physical injuries.

122. Prosser, *supra* note 62, at 44. In response to the proposition that the law should protect peace of mind, Professor Magruder stated:

> Adoption of the suggested principle would open up a wide vista of litigation in the field of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than the law. Quite apart from the question how far peace of mind is a good thing in itself, it would be quixotic indeed for the law to attempt a general securing of it. Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.

Magruder, *supra* note 105, at 1035.

123. Prosser, *supra* note 62, at 44.

124. *See* Rockhill v. Pollard, 259 Or. 54, 485 P.2d 28 (1971) (doctor rude to injured mother and child). *See generally* Note, *supra* note 7, at 230-32.

125. *Supra* notes 116-23 and accompanying text.

Further, an unreasonable risk of causing "the distress" may exist if the defendant's action is directed at a plaintiff and the defendant knows or should know that any error is likely to cause mental distress.[126] This situation often arises in cases involving particularly sensitive information,[127] which, if wrongly transmitted, is practically certain to cause emotional upset. In these cases, the risk of harm clearly creates a duty upon the defendant to correctly transmit the information.[128]

Also, an unreasonable risk of causing "the distress" may be created where the risk is one involving an object deemed worthy of emotional attachment.[129] For example, if a defendant tells X that her husband died after the defendant was told by X's friends that they wanted to break the news to her gently, the defendant may be liable for ensuing distress.

The difficulty in determining if a duty exists stems from the flexibility of this new tort. Duty can only be judged on a case by case basis.[130] In a sense, any standard has to be arbitrary because a rule must be flexible enough to be able to be applied to varying factual situations. One must keep mind, however, that "we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."[131]

2. Foreseeability: The Proximate Cause Boundary

Duty and proximate cause both address the same question: whether legal protection will be available to a plaintiff.[132] Usually, where cases are decided under a proximate cause rationale, they might just as easily have been decided by using a duty analysis.[133] This is because both analytical methods focus on foreseeability.[134] Ordinarily, however, duty has been confined to establish "the existence of some relation between the defendant and the plaintiff which gives rise to the obligation of conduct in the first instance."[135] Proximate

126. *See* Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (spouse wrongly diagnosed with syphilis); Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (notice that mother died).

127. Note, *supra* note 7, at 230-31.

128. *See supra* notes 65-66 and accompanying text.

129. *See* Muniz v. United Hosps. Medical Center Presbyterian Hosps., 153 N.J. Super. 79, 379 A.2d 57 (1977) (hospital could not locate baby's body or confirm death for three weeks). For a case which stretches emotional attachment to the limit, see Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970) (emotional attachment based on damages to home).

130. Comment, *supra* note 9, at 588.

131. Prosser, *supra* note 34, at 15.

132. *See* W. PROSSER, *supra* note 4, at 298.

133. *See* Gregory, *Proximate Cause in Negligence - A Retreat from Rationalization*, 6 U. CHI. L. REV. 36 (1938).

134. *Id.*

135. W. PROSSER, *supra* note 4, at 275.

cause, on the other hand, has dealt with the consequences which have followed once this obligation has arisen.[136]

Thus, proximate cause is more concerned with finding an ending boundary to liability.[137] This is particularly important in emotional distress cases because different people have differing susceptibilities to emotional harm. For example, suppose X, a male, dresses up like a female and enters a girl's locker room. Y, a female, discovers X and becomes so embarrassed she suffers emotional distress resulting in a miscarriage. Assuming a court is willing to find a duty to use reasonable care, should X be liable for all the damage? Clearly, X's conduct created some risk, but it is unlikely a reasonable person would have foreseen a miscarriage.

The issue addressed in the above example is the limitation on liability for unforeseeable damage. Initially, it must be remembered that in order to impose liability, the defendant must be able to foresee some risk.[138] In fact, we already noted that *Bass'* first prong implicitly requires the defendant to be able to foresee "serious" mental distress.[139] Thus our inquiry can be narrowly stated to be: given the foreseeability of serious distress, does this necessarily mean that a defendant is liable for all subsequent emotional harm?

According to the "thin skull rule," a defendant takes a plaintiff as he finds him and once foreseeability of the general risk is established a defendant would be liable for all injuries to an emotionally sensitive plaintiff provided the defendant's conduct aggravated this susceptibility.[140] The thin skull rule can be supported by the policy that as between a negligent defendant and an innocent but emotionally sensitive plaintiff, the loss should fall upon the wrongdoing defendant.[141] However, given that emotional susceptibility varies among people, there would seem to be an equally strong policy argument for a defendant. That is, there is an inherent inequity in imposing what could be "ruinous liability which no private fortune could meet," for unintentional conduct, and "which is out of all proportion to the defendant's fault."[142]

Proximate cause may be used to limit liability in these "thin skull" cases where the injuries caused exceed the foreseeable risk.[143] This is because proximate cause is a question of law and can give a judge control to rule on the

136. *Id.*
137. Prosser, *supra* note 34, at 24.
138. *Supra* note 92 and accompanying text.
139. *Supra* notes 120-23 and accompanying text.
140. *See* W. PROSSER, *supra* note 4, at 292.
141. *Id.* at 293.
142. *Id.*
143. *Id.* § 43, at 280-81. Note the Dean Prosser states a duty analysis could also be used: "[I]s the defendant under a legally responsible to protect the plaintiff against such unforeseeable consequenses of the defendant's own negligent act?" *Id.* at 281. Traditionally, however, courts have used a proximate cause analysis to answer that question. *Supra* notes 134-35 and accompanying text.

case.[144] Proximate cause, however, is based on broad policy considerations.[145] It focuses on foreseeability and also on "our [fundamental] feelings about fair and just limits to legal responsibility."[146] Thus, like duty, proximate cause is vague and conclusory.[147] It "carries only an illusion of certainty in defining the consequences for which the defendant will be liable. . . . what happened should not be 'too cockeyed and far-fetched.'"[148]

C. *Medically Diagnosable and Sufficient Severity*

Besides a defendant disregarding an unreasonable risk of causing distress, *Bass* requires actual distress to occur and be of such a nature as to be classified as both medically diagnosable and severe.[149] Thus, under *Bass* a defendant could be extremely unreasonable and not be liable if the emotional injuries caused do not meet the *Bass* severity standard.[150]

The problem with mental distress in relation to damages is one of definition and application. Mental distress presents a legal issue surrounded by medical considerations.[151] The *Bass* court seemed to accept the definition of mental distress as "any traumatically induced reaction which is medically detrimental to the individual."[152] Courts will have to translate this medical definition into a legal standard to be applied in specific cases.[153]

Conceptually, it is difficult to imagine how a legal standard could be applied on a case by case basis to differentiate severe from nonsevere mental

144. Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471 (1950).

145. W. PROSSER, *supra* note 4, at 281. The policy considerations discussed under the duty section would be equally applicable.

146. F. HARPER & F. JAMES, LAW OF TORTS § 20.5, at 1135 (1956).

147. Prosser, *supra* note 34, at 24.

148. *Id.* at 19.

149. *Supra* note 77 and accompanying text. There are at least three concerns which justify that some limitation be placed on the definition of mental distress: (1) the problem of permitting legal redress for emotional injuries that are often trivial and temporary; (2) the problem that the emotional injuries will be imagined or falsified; (3) the perceived unfairness of imposing heavy financial burdens on a negligent defendant where the consequenses appear remote from the wrongful act. W. PROSSER, *supra* note 4, at 360-61; *see* Payton v. Abbott Labs., 386 Mass. 540, 437 N.E.2d 171 (1982); RESTATEMENT § 436A comment b.

150. For other cases requiring serious distress, see Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); Leong v. Takasaki, 55 Hawaii 398,, 520 P.2d 758 (1974); Culbert v. Sampson's Supermarket Inc., 444 A.2d 433 (Me. 1982); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980).

151. *See* Cantor, *Psychosomatic Injury, Traumatic Psychoneuroses and Law*, 6 CLEV.-MAR. L. REV. 428, 428-29 (1957).

152. 646 S.W.2d at 773 n.4.

153. *Id.*; Comment, *supra* note 9, at 1254. *Bass* apparently leaves for the judge the threshold question of whether the mental distress is medically diagnosable. The jury they decides whether the distress is sufficiently severe as to be worthy of compensation.

distress.[154] Severity is a matter of degree and not an either/or proposition.[155] Thus, any standard will either be so high as to not include many justifiable claims or so low as to extend liability further than policy suggests. A middle ground could be viewed as arbitrary because it is doomed to inconsistent application.[156] The dissenting opinion in *Bass* objected to this inherent vagueness in the severity requirement and asked, "What does 'medically significant' mean in a courtroom."[157]

In reality, the severity requirement is not much different than the Restatement's resulting physical harm requirement.[158] Both rules are vague, allowing judges and juries to "play games" in determining who shall recover. The problem, however, is how to limit liability. If a plaintiff pleads "serious emotional injuries" and presents an expert at trial, *Bass* implied the threshold burden of medically diagnosable distress is met.[159] Thus, most plaintiffs could expect to reach the jury. This is not a true limit on liability, and when both parties present experts, the jury will have little guidance to enable it to choose rationally between conflicting expert testimony.[160]

IV. CONCLUSION

The law has developed a strong policy of freedom from emotional distress. *Bass* merely provides an approach to further this policy via a vague general statement of the law. Vague as the standard is, it does provide that the elements of negligence must be established before liability is imposed. However, the basis of negligence beyond mere foreseeability is difficult to describe, and the concept of foreseeability is susceptible to overbroad for-

154. Pearson, *supra* note 12, at 511.

155. *Id.*

156. *Id.* One commentator examined what harm is necessary to support a claim for negligent infliction of mental distress and suggested that the emotional harm must be serious enough to require medical attention. Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 517 (1968). The *Bass* court did not explicitly state that a plaintiff had to seek medical attention to support a claim for negligent infliction of mental distress; however, the court insinuated that such treatment may be necessary by citing with approval the above-mentioned comment. *Bass*, 646 S.W.2d at 773 n.4.

157. 646 S.W.2d at 781 (Donnelly, J., dissenting). Judge Welliver was of the opinion that "any damage verdict rendered under the evidence would be unjust because of the metaphysical character of plaintiff's suffering and would constitute an award of punitive damages . . . ." *Id.* at 780-81 (Welliver, J., dissenting).

158. *See supra* notes 57-71 and accompanying text.

159. 646 S.W.2d at 773 n.4.

160. *See* Robin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981). Given the difficulties of proof in mental distress cases, the nuisance value of a lawsuit should be taken into consideration. That is, cases involving negligent infliction of mental distress could very well have a settlement value so great even the trivial claim is worth something.

mulations. Although flexibility is important in civil law, the *Bass* rule is too flexible a concept in that no one knows how to apply the general rule. True, negligent infliction of emotional distress is a noteworthy concept, but it is doomed to inconsistent applications.

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