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An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying It Does Not Exist

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ESSAY

AN ESSAY ON THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN TEXAS: STOP SAYING IT DOES NOT EXIST

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During the short period of time that marked the completion of this Essay and its publication, we in the law school community endured the tragic loss of our friend, student, and fellow classmate, Eric Riester. Eric exemplified all that is good of the non-traditional student: slightly older, hard working, athletic, intelligent, friendly and most of all, he showed great promise. We can only wonder as to what he would have accomplished had he been given more time. For example, we know he had accepted three of the four clerkships offered to him this summer and was looking forward to establishing himself in the legal profession.

To those he leaves behind—his wife, daughter, sister, and mother—we can only say that we know not why God chose to take him so soon. And while we do not question His judgment, we do express our appreciation for the opportunity of sharing a small part of his too short life. To paraphrase the poet Gibran when speaking of the traveler about to embark on a journey: there is a staying in his going and a going in his staying. We know that part of Eric will stay with us forever, and only hope that he has taken part of us with him. On this his final voyage, we say: God speed! And to Eric, God bless!

I. INTRODUCTION

The injury of emotional distress is an interesting tort, which has long perplexed the Anglo-American system of jurisprudence. Originally, allegations of this kind did not constitute a cause of action. The courts routinely dismissed plaintiffs' lawsuits, reasoning that such claims were too speculative in that they were extremely difficult to prove. The judiciary's goal was to stem what it most feared: false claims resulting in a flood of litigation.[1] An interesting phenomenon occurred, however, when the medical profession developed the capacity to establish beyond doubt that the injury was real.[2] When this occurred, the law was quick to change. It was as if the legal profession followed in the tremendous progress made in the field of medicine, and as a result, the rules governing recovery evolved during the last century. Today, there is no question that an injured plaintiff may recover for the infliction of emotional distress. The majority and minority positions differ only on what must be alleged and proved.[3]

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1. *See* City of Tyler v. Likes, 962 S.W.2d 489, 495 (Tex. 1997) (stating that fear of the false claim previously led courts to award damages for mental anguish only when objective bodily symptoms were present); Parkway Co. v. Woodruff, 901 S.W.2d 434, 442 (Tex. 1995) (noting that historically, mental anguish claims were distrusted, and courts did not award damages); Bassham v. Evans, 216 S.W. 446, 451 (Tex. Civ. App.—Amarillo 1919, no writ) (holding that mental anguish damages are not recoverable because suffering is not seen by the courts as resulting from an act, but rather as a remote contingency).

2. *See* St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 653 (Tex. 1987) (stating that "medical research has provided modern mankind with a much more detailed and useful understanding of the interaction between mind and body"); Leong v. Takasaki, 520 P.2d 758, 766-67 (Haw. 1974) (noting that a psychiatrist cannot necessarily establish negligence as the only cause of mental injury, but he or she can give an estimate of the likely impact of the defendant's actions on the plaintiff, and whether the trauma caused the mental anguish); Nicholas M. Whittington, Note, *Against the Grain: An Interdisciplinary Examination of the 1996 Federal Statutory Changes to the Taxability of Personal Injury Awards*, 37 WASHBURN L.J. 153, 185 (1997) (arguing that emotional distress is real, and does not require any objective physical manifestation).

3. *Compare* Twyman v. Twyman, 855 S.W.2d 619, 621-22 (Tex. 1993) (adopting the tort of intentional infliction of emotional distress, the elements of which are: "1) the defendant acted intentionally or recklessly, 2) the conduct was extreme and outrageous, 3) the actions of the defendant caused the plaintiff emotional distress, and 4) the emotional

In fact, mental anguish is one of the few torts wherein the basis of liability may be either the intentional behavior of the defendant, or in the alternative, the negligent conduct of the defendant. This Essay—as noted in the title—is concerned only with the latter. The Texas Supreme Court in *Twyman v. Twyman*[4] made it quite clear that Texas was joining the majority of jurisdictions in recognizing the tort of intentional infliction of emotional distress.[5] As an interesting footnote to the history of our common law, the court in its decision did not mention *Duty v. General Finance Co.*,[6] which recognized the tort in 1954.[7] Nevertheless, *Twyman* is the definitive case on intentional infliction of emotional distress in Texas.[8]

II. DEFINITION

Before proceeding, the term mental anguish should be defined. This is an endeavor that has perplexed the judiciary.[9] The courts

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distress suffered by the plaintiff was severe"), *and id.* at 622 (distinguishing the "rigorous legal standards of the Restatement formulation of intentional infliction of emotional distress," with that of negligent infliction of emotional distress), *with* Boyles v. Kerr, 855 S.W.2d 593, 595 (Tex. 1993) (citing *Garrard*, 730 S.W.2d 649, as holding that conclusive proof of physical injury as a result of mental anguish is not required to sustain an action at common law for negligent infliction of emotional distress), *and Boyles*, 855 S.W.2d at 595 (stating that *Garrard* stood for the proposition that only severe emotional distress is actionable, and that jurors are the best mechanism of ascertaining whether the defendant's actions are actionable).

4. 855 S.W.2d 619 (Tex. 1993).

5. *See* Twyman v. Twyman, 855 S.W.2d 619, 621-22 (Tex. 1993) (holding that Texas was "the forty-seventh state to adopt the tort of intentional infliction of emotional distress").

6. 154 Tex. 16, 273 S.W.2d 64 (1954).

7. *See* Duty v. Gen. Fin. Co., 154 Tex. 16, 20, 273 S.W.2d 64, 66 (1954). The court stated:

> [B]ut we do hold that resort to every cruel device which his cunning can invent in order to enforce collection when that course of conduct has the intended effect of causing great mental anguish to the debtor, resulting in physical injury and causing his loss of employment, renders the creditor liable to respond in damages.

Id.

8. *See* Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993) (stating that the court recognized intentional infliction of emotional distress in *Twyman*, and adopted the elements of the tort as stated in the Restatement (Second) of Torts § 46 (1965)); Motsenbocker v. Potts, 863 S.W.2d 126, 131 (Tex. App.—Dallas 1993, no writ) (noting the Texas Supreme Court formally recognized intentional infliction of emotional distress in *Twyman*).

9. *See Woodruff*, 901 S.W.2d at 444 (opining that the definition of mental anguish proffered in *Trevino v. Southwestern Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. Civ. App.—Corpus Christi 1979, no writ) requires a jury to make difficult distinctions and gives rise to situations when courts and juries find the current definition troublesome in application).

seem to have a very difficult time determining what interest this tort is supposed to protect. The most widely used definition is one wherein we speak, not in terms of what the cause of action is intended to encompass, but more in terms of what the injury is not. For example:

> The term 'mental anguish' implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment, or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation.[10]

Instead of this approach, the following is offered. Why not take cognizance of the fact that, as a tort, we are dealing with a physical injury? After all, a tort is defined as an injury to the property or *person* of another. Mental anguish, however, is not a physical injury in the normal sense of the term because it is not an injury to the body of the plaintiff. Instead, it is one limited to the mind.[11] Mental anguish is an injury to the mind that precludes the individual from performing those tasks of daily life—such as eating, sleeping, working, concentrating—which up to the time of the alleged mishap, they could perform with ease. This proposed definition should incorporate the fact that the plaintiff is dealing with a high degree of mental pain and distress, and would also acknowledge that the plaintiff suffers more than mere disappointment, anger, resentment, or embarrassment. Mental anguish would also result from painful emotions such "as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation."[12] More importantly, establishing mental anguish should require the plaintiff to furnish the proof that has always been sought by the courts to prevent the onslaught of the false claim.

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10. Trevino v. Southwestern Bell Tel. Co., 582 S.W.2d 582, 584 (Tex. Civ. App.—Corpus Christi 1979, no writ).

11. *See* Larrumbide v. Doctors Health Facilities, 734 S.W.2d 685, 690 (Tex. App.—Dallas 1987, writ denied) (defining mental anguish as "a heightened emotional injury beyond ordinary grief; it encompasses keen and poignant mental suffering, a high degree of mental suffering, or an intense pain of mind or body"); Roberts v. U.S. Home Corp., 694 S.W.2d 129, 136 (Tex. App.—San Antonio 1985, no writ) (noting that the term "mental anguish" implies a significant degree of mental and emotional pain (quoting *Trevino*, 582 S.W.2d at 584)).

12. *Trevino*, 582 S.W.2d at 584.

Finally, this definition speaks not in terms of what the injury does not include, but more in terms of what it encompasses. By emphasizing this standard, the courts and their juries have a more objective and easier rule to apply.

III. BACKGROUND

Historically, it should be noted that Texas was the first jurisdiction in the United States to allow recovery for mental anguish. In 1890, the Texas Supreme Court, in a drastic departure from the prevailing rule of that time, allowed an injured plaintiff compensation.[13] Texas continued to keep abreast of the national trend until 1993. In that year, the Texas Supreme Court appeared to take a position contrary to the majority view. In *Boyles v. Kerr*,[14] the court decided that negligent infliction of emotional distress *alone* was not compensable.[15] As a result, some practitioners, and indeed some courts, state that the tort is no longer recognized.[16] This is in

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13. *See* Hill v. Kimball, 76 Tex. 210, 215, 13 S.W. 59, 59 (1890). The court recognized for the first time an award for mental anguish, stating:

> We have found no exact precedent for such an action, but that is no sufficient reason why an action should not be sustained. That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation, in an action at law, when the injury is intentionally or negligently inflicted. It may be more 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.

Id.

14. 855 S.W.2d 593 (Tex. 1993).

15. *See* Boyles v. Kerr, 855 S.W.2d 593, 597 (Tex. 1993) (stating "[b]y overruling the language of *Garrard*, we hold only that there is no general duty not to negligently inflict emotional distress"). The court added that "[o]ur decision does not affect a claimant's right to recover mental anguish damages caused by defendant's breach of some other legal duty." *Id.*

16. *See* Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993) (noting that in *Boyles*, decided on the same day as *Twyman*, the court decided a cause of action for negligent infliction of emotional distress does not exist in Texas); Valenzuela v. Aquino, 853 S.W.2d 512, 513 (Tex. 1993) (citing *Boyles* for the proposition that Texas has no cause of action for negligent infliction of emotional distress); Burnap v. Linnartz, 38 S.W.3d 612, 619 (Tex. App.—San Antonio 2000, no pet.) (noting that appellant conceded summary judgment was correctly granted for the negligent infliction of emotional distress claim because Texas does not recognize such a cause of action); Rios v. Tex. Commerce Bancshares, Inc., 930 S.W.2d 809, 816 (Tex. App.—Corpus Christi 1996, writ denied) (stating "[a]ppellant alleged negligent infliction of emotional distress arising from [appellee's] . . . breach of an employment

fact not true, and it is the object of this Essay to resolve that mystery.

IV. HISTORICAL DEVELOPMENT

A. *Impact Rule*

In the area of actionable negligence, the early cases allowed recovery only in instances where there had been some pre-existing physical injury.[17] In an attempt to stall the aforementioned avalanche of false claims, the courts insisted on a safety measure. This was accomplished by requiring the injured plaintiff to show that the alleged mental anguish resulted from an actual injury to their body.[18] This rule served as a safety net for the courts, and satisfied the concern that the alleged mental injury was real. Thus, develop-

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contract"). The court stated that "Texas does not recognize a cause of action for negligent infliction of emotional distress." *Rios*, 930 S.W.2d at 816; Noriega v. Mireles, 925 S.W.2d 261, 268 (Tex. App.—Corpus Christi 1996, writ denied) (stating that in addition to not recognizing a claim for lost chance of survival, Texas also does not recognize negligent infliction of emotional distress as a cause of action due to the Texas Supreme Court's decision in *Boyles*); Hector v. Thaler, 927 S.W.2d 95, 97 n.1 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (noting that appellees moved for summary judgment, in part, on the grounds that negligent infliction of emotional distress is not recognized in Texas); Barker v. City of Galveston, 907 S.W.2d 879, 889 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (stating that summary judgment was proper in a cause of action where plaintiffs conceded that negligent infliction of emotional distress does not exist as a tort in Texas); Farrington v. Sysco Food Servs., Inc., 865 S.W.2d 247, 254 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (stating "the Texas Supreme Court eliminated negligent infliction of emotional distress as a cause of action"); Wackenhut Corp. v. Perez, 865 S.W.2d 86, 88 (Tex. App.—Corpus Christi 1993, writ denied) (relating that although the jury found the defendant negligent and awarded money damages, the court of appeals reversed because Texas does not recognize negligent infliction of emotional distress).

17. *See* St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 652 (Tex. 1987) (citing *Hill*, 76 Tex. 210, 13 S.W. 59, for the proposition that while mental anguish was first recognized under conventional tort concepts, recovery was not allowed where the plaintiff's distress failed to manifest itself physically); Cont'l Cas. Co. v. Garrett, 161 So. 753, 755 (Miss. 1935) (noting courts recognize that emotional distress may produce a physical injury).

18. *See* R.J. v. Humana of Fla., Inc., 652 So. 2d 360, 362 (Fla. 1995) (asserting the proposition that "the impact rule requires that 'before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact'") (quoting Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So. 2d 1294, 1296 (Fla. 4th DCA 1992), *review denied*, 623 So. 2d 494 (Fla. 1993)); Connell v. W. Union Tel. Co., 22 S.W. 345, 349 (1893) (justifying a claim for mental anguish because the body and mind are so inter-connected that a bodily injury can result in an injury to the mind).

ing the so-called "impact rule."[19] As long as the allegations stemmed from a pre-existing injury or contact to the plaintiff's body, the courts were willing to offer compensation for the resulting mental anguish. The standard was in effect for many years, and appeared to be an effective compromise. Injured plaintiffs were allowed to recover, while providing a restrictive measure precluding false claims.

Interestingly, three exceptions to this rule soon evolved. The first dealt with the negligent mis-handling of dead bodies;[20] the second covered negligently delayed messages concerning death;[21] and the third involved what soon became known as cases wherein the plaintiff was not injured but was deemed to be within the "zone of danger."[22]

The first two exceptions are easy to accept. Obviously, the early common law was entranced with the aura that surrounds the death of a loved one. If their body is mis-handled (and there are some grotesque cases involving this type of scenario),[23] the courts could

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19. *See* Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 547 (1994) (stating that the impact rule allows damages for mental anguish only when there has been a physical impact to the plaintiff's body resulting from the conduct of the defendant); Parkway Co. v. Woodruff, 901 S.W.2d 434, 442-43 (Tex. 1995) (tracing the history of the impact rule in Texas).

20. Clark v. Smith, 494 S.W.2d 192, 198 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) (finding that an award of $6,000 to the children of deceased was not excessive when testimony showed the victims to be emotionally distressed and revolted by the appearance of the body, even though there was no evidence of permanent physical or emotional damage); Pat H. Foley & Co. v. Wyatt, 442 S.W.2d 904, 907 (Tex. Civ. App.—Houston 1969, writ ref'd n.r.e.) (stating that when a funeral home contracts to prepare the body of a deceased loved one, they contract to do so in a workmanlike manner and know that the family of the deceased will likely suffer emotional distress if they fail).

21. *See* W. Union Tel. Co. v. Junker, 153 S.W.2d 210, 210 (Tex. Civ. App.—San Antonio 1941, writ ref'd w.o.m) (addressing an appeal from the District Court of Cameron County which awarded plaintiff $500 in damages for delay in delivery of an "unrepeated" telegram, which subsequently caused plaintiff to miss her mother's funeral); Stuart v. W. Union Tel. Co., 66 Tex. 580, 584-85, 18 S.W. 351, 353 (1885) (noting that in a claim for emotional distress, the person negligently handling a message knows that withholding such a message concerning a mortal illness inflicts an injury to the mind).

22. *See* Houston Elec. Co. v. Dorsett, 194 S.W.2d 546, 548 (Tex. 1946) (stating the case at bar did not concern an action regarding only fright, unaccompanied by bodily injury, and showing that the plaintiff was outside of the zone of danger).

23. *See* Lions Eye Bank v. Perry, 56 S.W.3d 872, 874 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (relating that deceased's eyes were harvested for organ donation without the consent of next of kin); Heikkila v. Harris County, 973 S.W.2d 333, 334-35 (Tex. App.—Tyler 1998, pet. denied) (discussing a case in which the misidentification of a mother's deceased child resulted in the subsequent release of the child's body to the wrong mother).

easily accept the concept of resulting mental anguish. The same could be said of the second exception. When one misses the burial and attending ceremony of a loved one, there is little doubt that emotional distress results.[24] In both of these instances, the courts were satisfied that the allegations concerning mental anguish were real. This was also true in suits involving the so-called "zone of danger." Although there was no required pre-existing injury as noted above, the plaintiff was apparently so close to being injured that the courts were again satisfied as to the legitimacy of their claim.[25]

When Texas abandoned the impact rule, the position involving this last scenario also changed. California led the way in *Dillon v. Legg*,[26] holding that the plaintiff could recover for their alleged mental anguish for injury inflicted upon a third person only when such emotional distress was foreseeable.[27] It was deemed foreseeable if three criteria were established:

> (1) Whether [the] plaintiff was located near the scene of the accident *as contrasted with one who was a distance away from it.* (2) Whether the shock resulted from a direct emotional impact upon [the] plaintiff from the sensory and contemporaneous observance of the accident, *as contrasted with learning of the accident from others after its occurrence.* (3) Whether [the] plaintiff and the victim were closely

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24. *See* Loper v. W. Union Tel. Co., 70 Tex. 689, 691-92, 8 S.W. 600, 601-02 (1888) (discussing a case in which parents of deceased child failed to get his urgent message concerning his rapidly failing health and were not present for his death or burial); W. Union Tel. Co. v. McGaughey, 198 S.W. 1084, 1085 (Tex. Civ. App.—Beaumont 1917, writ ref'd) (relating a case in which a negligently handled telegram caused a mother to be unable to view her son's remains and attend his funeral).

25. *See* Bedgood v. Madalin, 600 S.W.2d 773, 774 (Tex. 1980) (stating that in a case where parents of the deceased sought damages for mental anguish, petitioners argued that there was no evidence that respondents merited damages for mental anguish because parents were not located in the zone of danger); Sanchez v. Schindler, 626 S.W.2d 871, 874 (Tex. App.—Corpus Christi 1981, writ granted) (stating that the court was sympathetic to a more liberal test, but could not apply one in the case because the plaintiff was not present at the scene and did not observe the event), *rev'd in part*, 651 S.W.2d 249 (Tex. 1983).

26. 441 P.2d 912 (Cal. 1968).

27. Dillon v. Legg, 441 P.2d 912, 919-21 (Cal. 1968).

> Under general principles recovery should be had in such a case if defendant should foresee fright or shock severe enough to cause substantial injury in a person normally constituted . . . . Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case.

Id. at 920.

related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[28]

The impact rule and its three exceptions operated in an efficient and satisfactory manner. All was well. The medical profession, however, advanced yet again, and was able to establish beyond doubt that it was possible to sustain mental anguish even in cases where no pre-existing physical injury existed.[29]

B. *Physical Manifestations*

The evolved position no longer required a pre-existing impact to the body of the plaintiff. However, the legal profession, still fearful of false claims, was adamant about requiring a safety measure.[30] The legal profession insisted that injured plaintiffs establish by a preponderance of the evidence that the alleged mental anguish was real. The solution soon became apparent. The law required plaintiffs to exhibit physical proof of the alleged emotional distress.[31] To do so, the plaintiffs showed that their bodies were outwardly manifesting the mental pain they were enduring. This was accomplished by evidence which included, but was not limited to, the fact that a plaintiff could no longer sleep, concentrate, eat, or work. A plaintiff might also exhibit symptoms such as crying, nightmares,

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28. Freeman v. City of Pasadena, 744 S.W.2d 923, 923-24 (Tex. 1988) (adopting the criteria stated in *Dillon*).

29. *See* Moore v. Lillebo, 722 S.W.2d 683, 684 (Tex. 1986) (noting that decisions allowing recovery for emotional distress, without any proof of physical manifestation, acknowledge that emotional distress is inseparable from certain torts, and as a result, no physical injury is required); Midkiff v. Shaver, 788 S.W.2d 399, 402 (Tex. App.—Amarillo 1990, no writ) (noting that "mental anguish is the emotional distress that typically accompanies the tortious act, and it may, though it need not, result in physical injury or physical manifestations" (citations omitted)).

30. *See* Parkway Co. v. Woodruff, 901 S.W.2d 434, 443 (Tex. 1995) (citing *Moore*, 722 S.W.2d at 688-92, for the proposition that as claims for mental anguish become more commonplace, the court has expressed concern regarding the potential for abuse and overcompensation); Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 368-69 (Tex. 1987) (noting an award for "shock and emotional trauma" is the same as, and duplicative of, damages for mental anguish).

31. *See Woodruff*, 901 S.W.2d at 442 (stating that once the physical impact requirement for negligent infliction of emotional distress was diminished, recovery for mental anguish was allowed only when the anguish was physically apparent); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 652 (Tex. 1987) (stating that the sole purpose of the requirement of a physical manifestation was to ensure that claims were genuine); Gulf, C. & S. F. Ry. Co. v. Hayter, 93 Tex. 239, 241, 54 S.W. 944, 945 (1900) (holding there can be no recovery for mere fright without an accompanying physical injury).

and other similar showings of grief. In other words, the body must physically manifest the emotional suffering[32] and there was objective proof of the alleged mental anguish. Again, two goals were satisfied: plaintiffs were allowed to recover for their emotional distress, and a safety measure was in place to guard against the dreaded false claim. This position proved to be very successful until the medical profession progressed yet again and convinced society that not all individuals suffer in the same manner. Namely, not all injured plaintiffs wear their emotions externally; some are much more stoic than others.[33] In some cases, the plaintiff may manifest nothing, yet their mental anguish is no less real.

C. *Jury Question*

To compensate this type of individual, the common law was required to change yet again. A rule evolved recognizing the role played by the jury system. In retrospect, the solution was simple: let the ultimate issue of mental anguish lie within the province of the jury who would be presented with a question of fact as to whether the plaintiff's allegations were real.[34] The jury system, which has long been a hallmark of our system of jurisprudence,

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32. *See* Brown & Root, Inc. v. City of Cities Mun. Util. Dist., 721 S.W.2d 881, 884 (Tex. App.—Houston [1st Dist.] 1986, no writ) (discussing the position taken by a majority of states whereby proof of a physical injury or a physical manifestation is required before a claim for emotional distress can be successful); *see also Moore*, 722 S.W.2d at 684 (noting that a majority of jurisdictions require a physical manifestation to prevail on a mental anguish claim).

33. *See* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 826 (Tex. 1997) (stating that although mental injuries can manifest in a physical manner, it is not automatically necessary to conclude that claims brought for emotional injuries imply or validate a claim for overt physical manifestations); Tex. Dep't of Human Servs. v. Hinds, 860 S.W.2d 893, 899 (Tex. App.—El Paso 1993, writ granted) (noting that courts have construed mental anguish to justify recovery where a plaintiff's emotional distress results "from a myriad of negative emotions"), *rev'd*, 904 S.W.2d 629 (Tex. 1995); Worsham Steel Co. v. Arias, 831 S.W.2d 81, 88 (Tex. App.—El Paso 1992, no writ) (Larsen, J., dissenting) (stating "[a] glib and well-practiced plaintiff is not necessarily more entitled to mental anguish damages than is a stoic or guileless one").

34. *See* Gant v. Dumas Glass & Mirror, Inc., 935 S.W.2d 202, 210 (Tex. App.—Amarillo 1996, no writ) (opining that a jury's negative answer to the question of mental anguish was not "against the great weight and preponderance of the evidence" when such evidence required them to speculate regarding the existence of mental anguish); *Arias*, 831 S.W.2d at 85 (stating that mental anguish is a non-pecuniary loss, the amount of which is within the discretion of the jury, and carries "the risks of passion, prejudice, speculation and bias").

assumed a position of importance. They, and they alone, would determine the validity and extent of the plaintiff's claim.[35] This position, which was probably the most advanced and enlightened, solved many problems. It took into account what the medical profession was so adept in proving, that not all individuals suffer the same way.[36] The legal profession could now take this fact into consideration and protect against what lawyers have always feared—false claims. The jury would be in the best position to determine whether the plaintiff was lying or, in fact, telling the truth.

This rule was in place for some time. It seemed as if the courts found an effective means of achieving justice. However, as mentioned above, the Texas Supreme Court retreated in *Boyles v. Kerr*.[37]

D. Boyles v. Kerr

The Texas Supreme Court's decision in *Boyles* received much attention, and many may recall its salacious facts. A young man invited his lady friend to the family home, and with concealed friends watching, video-taped the two while engaging in sexual intercourse.[38] When the truth emerged, the young lady understandably sued for the negligent infliction of emotional distress.[39] This was her only cause of action, and what is important to this discussion is the manner in which the court addressed the issue.[40]

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35. *See Garrard*, 730 S.W.2d at 654 (stating "[j]urors are best suited to determine whether and to what extent the defendant's conduct caused compensable mental anguish by referring to their own experience"); *see also* Boyles v. Kerr, 855 S.W.2d 593, 595 (Tex. 1993) (quoting *Garrard*, 730 S.W.2d at 654, and not overruling the proposition that juries are the most appropriate forum to determine the applicability of damages for mental anguish).

36. *See* Star Houston, Inc. v. Shevack, 886 S.W.2d 414, 418 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (citing Coates v. Whittington, 758 S.W.2d 749, 752-53 (Tex. 1988), for the proposition that even with mental anguish injuries, a tortfeasor who causes mental anguish "takes his plaintiff as he finds him" and regardless of pre-injury susceptibility on the part of the plaintiff, the injured party can recover for mental anguish).

37. Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993).

38. *See* Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993) (indicating Boyles pre-arranged the video taping).

39. *See id.* (reporting that Kerr became stigmatized as "porno queen," which affected her academic performance and future relationships).

40. *See id.* at 594-95 (narrowing the court's focus on whether Texas recognizes the tort of negligent infliction of emotional distress).

At the beginning of its opinion, the court stated emphatically: "Initially, we must determine whether negligent infliction of emotional distress constitutes an *independent* cause of action."[41] The court discussed the previous position enunciated in *St. Elizabeth Hospital v. Garrard*,[42] which in effect held that jurors were in the best position to determine whether and to what extend the defendant's conduct caused compensable mental anguish, and determined that the case would be overruled;[43] but not completely overruled. The court articulated definite limitations to its new position by stating: "Therefore, we overrule the language of *Garrard* to the extent that it recognizes *an independent right* to recover for negligently inflicted emotional distress. Instead, mental anguish damages should be compensated only in connection with [the] defendant's breach of some other duty imposed by law."[44]

Subsequently in their decision, the court added: "By overruling the language of *Garrard,* we hold *only* that there is no general duty not to negligently inflict emotional distress. Our decision does not affect a claimant's right to recover mental anguish damages caused by defendant's breach of some other legal duty."[45]

The holding is very clear. Whether couched in terms of a parasitic recovery in the area of substantive law, or in terms of a requirement in pleading with regard to procedure, the result is the same—there is no independent recovery for the negligent infliction of emotional distress in Texas.[46] However, and this is the point being emphasized, this is not the same as holding that the tort no longer exists. It is recognized, but is compensable only when attached to the breach of some other legal duty.[47] It was not the

41. *Id.* at 595 (emphasis added).

42. 730 S.W.2d 649 (Tex. 1987).

43. *See* St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (Tex. 1987) (holding that jurors can best determine whether the defendant's conduct was the cause of emotional distress).

44. *Boyles*, 855 S.W.2d at 595-96 (emphasis added).

45. *Id.* at 597 (emphasis added).

46. City of Tyler v. Likes, 962 S.W.2d 489, 494 (Tex. 1997); *Boyles*, 855 S.W.2d at 597; Seminole Pipeline Co. v. Broad Leaf Partners, Inc., 979 S.W.2d 730, 754 (Tex. App.—Houston [14th Dist.] 1998, no pet.); Farrington v. Sysco Food Servs., Inc., 865 S.W.2d 247, 254 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

47. *Boyles*, 855 S.W.2d at 594; Motor Express, Inc. v. Rodriguez, 925 S.W.2d 638, 639 (Tex. 1996); Verinakis v. Med. Profiles, Inc., 987 S.W.2d 90, 94-95 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

intention of the court to completely abandon the idea of recovery for negligently inflicted mental anguish.[48] This is made clear when the decision goes on to state: "We . . . are not imposing a requirement that emotional distress manifest itself physically to be compensable."[49] In other words, Texas was not retreating to the position which followed the impact rule, and was not going to require a physical manifestation of the plaintiff's alleged mental anguish. Instead, the presence or absence of this injury would continue as a question of fact for the jury.[50]

Furthermore, the court added that "our holding does not affect the right of bystanders to recover emotional distress damages suffered as a result of witnessing a serious or fatal accident. Texas has adopted the bystander rules originally promulgated by the California Supreme Court in *Dillon v. Legg*."[51] Again, *Boyles* should not be considered as a general retreat with regard to the law governing recovery in the area of negligently inflicted emotional distress. The court made it quite clear that damages for mental anguish resulting from the negligent infliction of injury to a third person are still compensable.[52] Recovery in these instances has been recognized since the early development of this particular cause of action, and remains a recognized concept of our common law.[53]

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48. *Boyles*, 855 S.W.2d at 598.

49. *Id.*

50. *See* St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (Tex. 1987) (stating that juries are in the best position to determine compensable mental anguish damages); *see also* Parkway Co. v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995) (stating a jury finding for mental anguish damages survives when plaintiffs provide "direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiff's daily routine"). The court went on to say that "[s]uch evidence . . . is more likely to provide the fact finder with adequate details to assess mental anguish claims." *Woodruff*, 901 S.W.2d at 444.

51. *Boyles*, 855 S.W.2d at 597-98.

52. *See id.* (stating the *Dillon v. Legg* criteria for bystander liability, and further noting that a bystander must first establish that the primary victim incurred injuries before being eligible for recovery).

53. *See generally Woodruff*, 901 S.W.2d at 442-44 (tracing the history of negligent infliction of emotional distress); *Boyles*, 855 S.W.2d at 595-600 (evaluating the existence of an independent cause of action for negligent infliction of emotional distress in Texas); *Garrard*, 730 S.W.2d at 652 (tracing the history of negligent infliction of emotional distress as supporting justification for elimination of the physical manifestation requirement).

Boyles is clearly not a complete rejection of *Garrard.* Instead, it is a limitation as to the rule enunciated therein.[54] An injured plaintiff may not recover for the negligent infliction of emotional distress *alone*, but clearly may recover damages for this injury when it is *accompanied by the breach of some other legal duty.*[55] From this discussion, it appears that when plaintiffs sustain injury as a result of some breach of duty, they may attach a claim for mental anguish.[56] This is analogous to the above mentioned "impact rule." Today, however, there is no longer a need for a pre-existing injury. Instead, all that need be established is a breach of some other legal duty.

V. CONCLUSION

Boyles has caused far too much confusion. It is time to recognize that the tort of negligently inflicted emotional distress is alive and well in Texas. It is clear that the Texas Supreme Court never intended to completely eradicate the cause of action. To recover for this injury, plaintiffs must only show that they have endured the breach of some other duty owed to them. As stated above, whether we think of this in terms of a parasitic recovery in the area of substantive law, or in terms of a requirement in pleading with regard to procedure, the result is the same.

54. *See Boyles*, 855 S.W.2d at 597 (asserting that the court's decision does not limit the right to recover under mental anguish claims, rather recovery is contingent on bringing the claim along with a breach of another legal duty).

55. *Id.*

56. *Id.* at 600. "We agree that certain relationships may give rise to a duty which, if breached, would support an emotional distress award. However, there must be some specific duty of care that, under the law, arises from the relationship." *Id.* (citations omitted).