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BOLDLY INTO THE FOG: LIMITING RIGHTS OF RECOVERY FOR INFLICTION OF EMOTIONAL DISTRESS

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I. INTRODUCTION

This article examines emotional distress damages and their treatment by Montana courts. To guide future cases, particularly in the burgeoning area of toxic torts and attendant claims for fear of future disease, it is necessary to understand the concerns expressed by courts and commentators regarding emotional distress damages and to develop a consistent approach that will allow fair treatment of emotional distress claims while guarding against unlimited and disproportionate liability.

II. THE TREATMENT OF EMOTIONAL DISTRESS CLAIMS IN MONTANA: AN OVERVIEW

Montana courts have been called upon to consider claims of emotional distress as both an element of damages and as a cause of action.[1] The Montana Supreme Court's treatment of emotional distress claims generally comports with established principles.[2] Because of some missteps, however, and because the Montana Supreme Court has not yet considered certain issues, Montana law is not prepared to address difficult issues that will arise in future cases. This article is intended to provide assistance to trial lawyers and the courts as they confront those issues. We turn first to a consideration of established principles.

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1. Emotional distress in Montana "remains primarily an element of damages rather than a distinct cause of action." Day v. Montana Power Co., 242 Mont. 195, 198, 789 P.2d 1224, 1226 (1990), quoting Frigon v. Morrison-Maierle, Inc., 233 Mont. 113, 123, 760 P.2d 57, 63 (1988). However, the Montana Supreme Court has also recognized and established an independent cause of action for negligent infliction of emotional distress. Versland v. Caron Transp., 206 Mont. 313, 671 P.2d 583 (1983). The Montana Supreme Court has discussed the independent tort of intentional infliction of emotional distress but has yet to rule that a particular case possesses all the necessary elements to satisfy a claim for intentional infliction of emotional distress. Lachenmaier v. First Bank Sys., Inc., 246 Mont. 26, 803 P.2d 614 (1990); *see also* McNeil v. Currie, ___ Mont. ___, 830 P.2d 1241 (1992).

2. *See* Part II, Section C, *infra*.

A. Historical Background

History shows the reluctance of courts to accept emotional distress as an element of damages, much less as an independent cause of action.[3] Courts and legal scholars give various reasons for this reluctance to accept as compensable an interest in one's peace of mind.[4] The primary reasons include the difficulty of proving emotional distress,[5] the potential for fraudulent claims,[6] the imposition of "incalculable and potentially unlimited damages"[7] and a concern that allowing recovery for mere fright or emotional distress would result in a flood of litigation.[8] Each of these concerns point, in one way or another, to the fundamental problems of determining the genuineness of emotional distress claims and the potential for such claims to overwhelm an already overburdened tort system.[9]

Traditionally, emotional distress damages are difficult to prove.[10] Mental distress is regarded as "metaphysical," and "too subtle and speculative to be capable of [measurement] by any standard known to the law."[11] Mental consequences are "evanescent, intangible, and peculiar, and vary to such an extent with the individual concerned, that they cannot be anticipated, and so lie outside the boundaries of any reasonable 'proximate' connection with the act of the defendant."[12]

Additionally, emotional distress is an area wrought with the

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3. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 54-55 (5th ed. 1984) (hereinafter PROSSER).

4. *Id.* at 55. *See also* Francis X. Clinch & Jodie L. Johnson, Note, *Compensation of Emotional Distress in Montana: Distinctions Between Bystanders and Direct Victims*, 47 MONT. L. REV. 479 (1986).

5. STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 16:1, at 937 (1987) (hereinafter SPEISER).

6. PROSSER, *supra* note 3, § 12, at 56; SPEISER, *supra* note 5, at 937; Douglas B. Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based On An Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781, 784 (1988), (hereinafter Marlowe); Payton v. Abbott Labs, 437 N.E.2d 171, 178 (Mass. 1982); Kraus v. Consolidated Rail Corp., 723 F. Supp. 1073, 1090 (E.D. Pa. 1989).

7. *Kraus*, 723 F. Supp. at 1090.

8. Gates v. Richardson, 719 P.2d 193, 197 (Wyo. 1986); *Kraus*, 723 F. Supp. at 1090; Marlowe, *supra* note 6, at 784.

9. *Cf.*, *Payton*, 437 N.E.2d at 179, where the court stated that the "underlying policy in most jurisdictions seems to be that of compensating plaintiffs with clearly recognizable serious injuries, while not burdening either the judicial system or individual defendants with the latter type of claim."

10. *Id.*

11. SPEISER, *supra* note 5, at 937; *see also* PROSSER, *supra* note 3, at 55.

12. SPEISER, *supra* note 5, at 937.

potential for fictitious claims.[13] The courts express concern that if litigants are allowed compensation for emotional distress, the floodgates will open for litigation "in the field of trivialities and mere bad manners."[14]

While these concerns have been, to one degree or another, discredited,[15] they still run through the case law and are often cited as reasons for not expanding defendants' liability for emotional harm.[16] The concerns remain valid and are worth considering in every case. Indeed, the often-stated worries regarding genuineness and the effect of trivial claims have been addressed, though not in detail, in Montana.[17]

This article concentrates primarily on the issue of emotional distress claims in cases of minor physical injury or no physical injury at all. As background, however, it is necessary to provide an overview of Montana law and law in other jurisdictions regarding treatment of claims based on mental suffering, distress and anguish.

B. Montana: Emotional Distress as an Element of Damages

Some definition of the term "emotional distress" is in order. As used in this article, "emotional distress" includes numerous descriptions of psychic injury or ephemeral reactions to unpleasant events. The term emotional distress encompasses mental anguish, discomfort, fear, anxiety, fright, shock, humiliation, embarrassment and shame.[18]

The Montana Supreme Court has addressed emotional distress damages in a variety of circumstances. Where emotional distress damages flow from the negligent act itself and where significant other damages are present, Montana courts accept emotional distress claims as a matter of course.[19] For example, in negligence

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13. *Id.*; *see also Kraus*, 723 F. Supp. at 1090.

14. SPEISER, *supra* note 5, at 937; PROSSER, *supra* note 3, at 56.

15. *See* PROSSER, *supra* note 3, at 56.

16. *Kraus*, 723 F. Supp. at 1090. In that case, plaintiff's alleged emotional harm stemmed from what amounted to stressful working conditions. The federal district court, in a very thorough analysis, rejected the claims under the Federal Employees Liability Act, 45 U.S.C. § 51 (1988).

17. *See* First Bank (N.A.) - Billings v. Clark, 236 Mont. 195, 204-08, 771 P.2d 84, 90-92 (1989). In *Clark*, the Montana court examined the "severe" emotional distress requirement stated in the RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965). *Id.* at 206, 771 P.2d at 91. *See generally* Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) addressing concerns of unlimited liability "out of all proportion to the degree of the defendant's negligence . . . ." *Id.* at 826.

18. *See* Johnson v. Supersave Markets, Inc., 211 Mont. 465, 471, 686 P.2d 209, 212 (1984); Graveley v. Springer, 145 Mont. 486, 402 P.2d 41 (1965).

19. Anderson v. TW Corp., 228 Mont. 1, 7, 741 P.2d 397, 400 (1987). This is a concept

cases involving serious physical injury, juries are routinely allowed to consider evidence of emotional distress and to award compensation.[20] Likewise, the Montana Supreme Court has allowed plaintiffs to recover for their emotional distress as an element of damages in actions for (1) private nuisance,[21] (2) violation of certain constitutional rights,[22] (3) breach of the covenant of good faith and fair dealing,[23] and (4) fraud.[24]

The Montana Supreme Court has also affirmed damage awards for emotional distress in cases of minor physical injury or when the emotional distress is so severe that it results in some physical manifestation.[25] Evidence of sleeplessness, chest pains, worry and damage to a relationship were enough to place the issue of emotional distress before the jury in *Zugg v. Ramage*.[26] In that case, the court noted that "the amount of evidence of emotional distress is close to the line."[27]

Limiting emotional distress damages to cases of physical injury or to cases where serious mental distress leads to physical harm satisfies concerns regarding genuineness, difficulty of proof, fear of fictitious claims and liability disproportionate to the conduct of the defendant. The mental anguish in such cases is easy to see, prove and understand.

Claims for purely emotional injury, however, are difficult for all courts, including Montana's. The clearest Montana example of such difficulties is *Johnson v. Supersave Markets, Inc.*,[28] which set forth a "standard" that has adversely affected Montana jurisprudence. *Johnson* marked the Montana court's willingness to com-

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with deep roots in the law. *See* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936). *See also* Clinch, et al., *supra* note 4, at 480-83.

20. *Graveley*, at 490, 402 P.2d at 43 (1965); *see also* Montana Pattern Instruction No. 25.01.

21. French v. Ralph E. Moore, Inc., 203 Mont. 327, 661 P.2d 844 (1983).

22. Stensvad v. Towe, 232 Mont. 378, 759 P.2d 138 (1988).

23. *See* Day v. Montana Power Co., 242 Mont. 195, 789 P.2d 1224 (1990); Dunfee v. Baskin-Robbins, Inc., 221 Mont. 447, 720 P.2d 1148 (1986); Gibson v. Western Fire Ins. Co., 210 Mont. 267, 682 P.2d 725 (1984); *see also* Montana Pole & Treating Plant v. I.F. Laucks & Co., 775 F. Supp. 1339, 1349 (D. Mont. 1991).

Recoverability of tort damages in breach of covenant of good faith and fair dealing cases outside the insurance area is now seriously in doubt and strictly limited. *See infra* note 32.

24. Zugg v. Ramage, 239 Mont. 292, 779 P.2d 913 (1989).

25. *Id.* at 292, 779 P.2d at 913; Niles v. Big Sky Eyewear, 236 Mont. 455, 771 P.2d 114 (1989); *French*, at 327, 661 P.2d at 844; Harrington v. Holiday Rambler Corp., 176 Mont. 37, 575 P.2d 578 (1978).

26. *Zugg*, at 298, 779 P.2d at 917.

27. *Id.*

28. 211 Mont. 465, 686 P.2d 209 (1984).

pensate tort victims for purely emotional disturbance in cases in which the defendant's "tortious conduct results in a substantial invasion of a legally protected interest," a standard often repeated.[29]

While allowing emotional distress damages in various types of cases without physical injury, Montana purports to disallow emotional distress damages in claims involving only property damage[30] or contract claims.[31] Also, in what was described as a "mid-course correction," the court severely curtailed the recoverability of tort damages in breach of covenant of good faith and fair dealing cases.[32] The Montana Legislature has also eliminated the availability of emotional distress damages in wrongful discharge cases.[33]

The preceding review of Montana cases considers only cases in

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29. *Id.* at 473, 686 P.2d at 213. *See also* Shupak v. New York Life Ins. Co., 780 F. Supp. 1328 (D. Mont. 1991); Montana Pole & Treating Plant v. I.F. Laucks & Co., 775 F. Supp. 1339 (D. Mont. 1991); Semenza v. Leitzke, 232 Mont. 15, 754 P.2d 509 (1988); McGregor v. Mommer, 220 Mont. 98, 714 P.2d 536 (1986).

30. *Day*, at 195, 789 P.2d at 1224. In *Day*, the Montana Power Company negligently ruptured a gas service line resulting in a fire and explosion that destroyed the Day's restaurant. The jury awarded $450,000 in emotional distress damages to the owner of the restaurant. *Id.* at 196-97, 789 P.2d at 1225.

The Montana Supreme Court reversed the emotional distress award and stated that in emotional distress cases absent physical injury the question is "[w]hether tortious conduct results in a *substantial* invasion of a legally protected interest and causes a *significant* impact upon the person of plaintiff." *Id.* at 198-99, 789 P.2d at 1226 (citing Johnson v. Supersave Markets, Inc., 211 Mont. 465, 473, 686 P.2d 209, 213 (1984)) (emphasis in original). The court refused to extend recovery for emotional distress damages to instances where the defendant negligently damages or destroys real property and there is no physical injury, based on the lack of substantial invasion of a legally protected interest. *Day*, at 199-200, 789 P.2d at 1227.

But see French, at 327, 661 P.2d at 844, and *Harrington*, at 37, 575 P.2d at 578, in which emotional distress damages were awarded for property damage claims. However, both cases involved personal injury of varying degrees. Further, while courts generally refuse to allow emotional distress damages in purely property damage cases, private nuisance cases like *French* are a different type of case and emotional distress damages are allowed.

31. Larson v. Undem, 246 Mont. 336, 805 P.2d 1318 (1990). *But see Zugg*, at 292, 779 P.2d at 913; *Dunfee*, at 447, 720 P.2d at 1148; *McGregor*, at 98, 714 P.2d at 536. The court in *Larson* held that the evidence did "not show that in the ordinary course of things, emotional distress damages were likely to result from the defendant's breach of contract." *Larson*, at 342, 805 P.2d at 1322. The court further concluded "that the evidence presented fails to establish that the emotional distress damages were clearly ascertainable in origin." *Id.*

Note, however, that the court in *Zugg* allowed recovery for emotional distress damages for fraud arising out of a contract. *Zugg*, at 292, 779 P.2d at 913.

32. Story v. City of Bozeman, 242 Mont. 436, 791 P.2d 767 (1990). In *Story* the Montana Supreme Court concluded that "in the great majority of ordinary contract cases, a breach of the covenant is only a breach of the contract and only contract damages are due." *Id.* at 450, 791 P.2d at 775. However, the court went on to state that "[t]he tort of bad faith may still apply in exceptional circumstances." *Id.* at 451, 791 P.2d at 776.

33. MONT. CODE ANN. § 39-2-905(3) (1991) states that "[t]here is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, *emotional distress*, compensatory damages, punitive damages, or any other form of damages, except as provided in subsections (1) and (2)." (Emphasis added).

which emotional distress is considered an element of damages. To complete the review of Montana cases, the next section addresses emotional distress as a cause of action; that is, claims of either negligent or intentional infliction of emotional distress.

C. *Emotional Distress as a Cause of Action*

Skepticism of emotional distress claims has deep and powerful roots. In *Lynch v. Knight*,[34] Lord Wensleydale wrote the often-cited phrase: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."[35] Thus, a distinction developed, and remains, between those cases in which mental or emotional distress alone is the subject of the action, and in which the emotional distress is said to be "parasitic," i.e., connected to or a consequence of other injury, particularly physical injury.[36] Because of "the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone."[37] It is only recently that infliction of emotional distress has been recognized as a separate and distinct cause of action, absent the elements of another tort such as assault, battery, trespass or false imprisonment.[38]

Therefore, it is understandable that Montana is reluctant to extend remedies for emotional distress alone, whether for negligent infliction of emotional distress (NIED) or intentional infliction of emotional distress (IIED).[39] The Montana Supreme Court has not rejected the potential validity of a cause of action for IIED, but it has yet to find a case that merits its recognition as a separate cause of action.[40] The Montana Supreme Court has, however, allowed claims for negligent infliction of emotional distress.[41] Both types of claims are discussed below.

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34. 11 Eng. Rep. 854, 863 (H.L. 1861).

35. *Id.*; cited, among many others, by Magruder and Speiser. *See supra*, note 5.

36. SPEISER, *supra* note 5, at 943-44.

37. RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (1965).

38. *Id.*

39. *See Day*, at 199-200, 789 P.2d at 1227 and cases cited therein; *see also* Marazzato v. Burlington N. R.R., 249 Mont. 487, 817 P.2d 672 (1991) (Trieweiler, J., concurring).

40. *See* Doohan v. Bigfork Sch. Dist. No. 38, 247 Mont. 125, 138, 805 P.2d 1354, 1362 (1991).

41. *See Versland*, 206 Mont. 313, 671 P.2d 583 and *Johnson*, 211 Mont. 465, 686 P.2d 209.

1. Negligent Infliction of Emotional Distress

"Early courts denied recovery for damage for emotional trauma if there was no physical impact . . . ."[42] Later, this rule was replaced with one that limited recovery to plaintiffs who suffered distress as a consequence of fear for their own physical safety—plaintiffs located in the 'zone of danger.'[43] In 1968, the California Supreme Court abandoned the "zone of danger" rule and adopted the "zone of psychic-danger" rule.[44] In *Dillon v. Legg*, the California court allowed recovery by a mother for emotional trauma she suffered by witnessing her daughter's death at the hands of a motorist as the daughter crossed a street. The California court found that it was reasonably foreseeable that negligent operation of a motor vehicle that causes injury to a child will cause mental distress to a parent who witnesses the accident.[45] The *Dillon* court required some physical manifestation of the emotional distress, though this requirement was later abandoned.[46]

a. Montana Takes the First Step: Versland v. Caron Transport

The Montana Supreme Court first confronted the issue of emotional distress as a separate cause of action in *Versland v. Caron Transport* in 1983.[47] In *Versland*, the court adopted the California "zone of psychic-danger rule" and found that "in light of today's more advanced state of medical science, technology and testing techniques, the traditional limitation of requiring the existence of physical injury as a condition precedent to recovery for psychic injury is no longer necessary."[48] The court stated that "[w]hile physical manifestations of emotional trauma may be considered by the trier of fact along with other evidence, physical manifestation will not be required to support a *prima facie* case for negligent infliction of emotional distress."[49]

Under the *Versland* rule, still in effect today, three elements

42. *Versland*, at 316, 671 P.2d at 585.

43. "[U]nder this rule, a plaintiff could recover if he were located within the zone of defendant's negligent conduct and feared for his own safety." *Versland*, at 316, 671 P.2d at 585. *See also* Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979).

44. Dillon v. Legg, 441 P.2d 912 (Cal. 1968). This aspect of *Dillon* has been clarified and narrowed. Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989).

45. *Dillon*, at 920-21.

46. Molien v. Kaiser Found. Hosp., 616 P.2d 813 (Cal. 1980).

47. Versland v. Caron Transp., 206 Mont. 313, 671 P.2d 583 (1983).

48. *Id.* at 322, 671 P.2d at 588.

49. *Id.*

are required to establish liability for negligent infliction of emotional distress:

> (1)The shock must result from a direct emotional impact upon the plaintiff from the sensory and contemporaneous perception of the accident, as contrasted with learning of the accident from others after its occurrence.
> (2)The plaintiff and victim must be closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.
> (3)Either death or serious physical injury of the victim must have occurred as a result of the defendant's negligence.[50]

Thus, while recognizing the need to address emotional distress claims cautiously, the Montana court allowed a plaintiff who had suffered no physical injury to recover damages for purely emotional and mental harm, although under carefully limited circumstances. Although not squarely articulated, the cautious approach to pure emotional distress claims was based on underlying concerns about the genuineness of such claims and the effect on the tort system of unlimited liability to anyone remotely affected by the defendant's negligence.

b. The Next Step: Johnson v. Supersave Markets

A year after *Versland*, the Montana Supreme Court took a giant step in the area of emotional distress claims and, for the first time, allowed the direct victim of purely negligent acts to recover for emotional distress alone in the absence of physical harm, thus explicitly creating a cause of action for negligent infliction of emotional distress (NIED). The careful analysis that characterized *Versland* was missing. There was no consideration of the policy concerns that typically restrain courts considering emotional distress claims in the absence of physical injury. The facts and holding of that case deserve critical scrutiny.

Johnson brought an action for intentional unlawful arrest and, alternatively, claims for negligence and punitive damages arising out of his wrongful arrest caused by defendant's failure to properly confirm restitution of a prior non-sufficient funds check.[51] Johnson was held a short time in jail, then released.[52] His divorce lawyer,

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50. *Id.* For a thorough discussion, see Francis X. Clinch and Jodie L. Johnson, Note, *Compensation of Emotional Distress in Montana: Distinctions Between Bystanders and Victims*, 47 MONT. L. REV. 479 (1986). The authors of that article appear to favor an expansion of recovery for emotional distress alone, a conclusion we regard as unsound.

51. *Johnson*, at 467, 686 P.2d at 210 (1984).

52. *Id.* at 469, 686 P.2d at 211.

whom Johnson called for assistance, testified that the plaintiff was very "animated" and nervous while in jail, and was "disoriented" and "on the verge of tears."[53]

At the close of plaintiff's case, the trial court dismissed both the intentional tort claim and the claim for punitive damages.[54] The case went to the jury *solely* as a claim for negligent infliction of emotional distress.[55] The jury awarded $17,000, subject to a fifteen percent reduction for comparative negligence.[56]

In upholding the verdict, the supreme court found support for the award of emotional distress damages from cases that allow such damages when the defendant's conduct is intentional or outrageous.[57] It also, remarkably, found support in an Oregon Court of Appeals decision, *Meyer v. 4-D Insulation Co.*,[58] although that court had *refused* to allow recovery of emotional distress damages resulting from negligent damage to property.[59] The *Meyer* court, noting that most emotional distress damage recoveries are limited to intentional torts, expressed a hesitancy to allow recovery for mental distress claims "absent some indication that they are real and not feigned."[60]

Notwithstanding the limitations expressed in *Meyer*, the *Johnson* court relied on it to "adopt the species of case approach which requires a factual analysis of each case to determine whether the alleged 'emotional distress' merits compensation."[61] As guidance for making that determination, the court established the following "standard": "[W]e will look to whether tortious conduct results in a *substantial* invasion of a legally protected interest and causes a *significant* impact upon the person of the plaintiff."[62] With that brief statement, a new tort—with an unprecedented standard—was born in Montana.

One of the truly amazing things about the creation of the "standard" for negligent infliction cases in Montana in *Johnson* is the court's failure to cite or discuss the standard adopted in the

53. *Id.* at 474, 686 P.2d at 213-14.

54. *Id.* at 476, 686 P.2d at 215 (citing Owens v. Parker Drilling Co., 207 Mont. 446, 676 P.2d 162 (1984)). In *Johnson* the trial court held, and the supreme court agreed, that there was not sufficient evidence of reckless conduct to meet the "implied malice" standard necessary to support a punitive damages claim. *Johnson*, at 476, 686 P.2d at 215.

55. *Johnson*, at 468, 686 P.2d at 210.

56. *Id.*

57. *Id.* at 471-73, 686 P.2d at 212-13.

58. 652 P.2d 852 (Or. App. 1982).

59. *Johnson*, at 472-73, 686 P.2d at 213.

60. *Id.* at 473, 686 P.2d at 213 (quoting *Meyer*, 652 P.2d at 857).

61. *Id.* at 473, 686 P.2d at 213.

62. *Id.* (emphasis in original).

Restatement,[63] nor, indeed, to consider the majority rule in American courts: that emotional distress alone, without physical harm, is left uncompensated.[64] Section 436A of the *Restatement* provides:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.[65]

Johnson, of course, involved no risk of bodily harm and the claims presented were for purely emotional disturbance. Had the court adopted the *Restatement* rule, it would have denied recovery. It is also important to note that the court specifically refused to draw a distinction between intentional and negligent conduct, holding that consideration of a "defendant's culpability" is a subject "more properly considered when addressing the subject of punitive damages."[66]

Finally, the *Johnson* court found that plaintiff's "liberty" interest was invaded when he was arrested, handcuffed, frisked, booked and charged, and that this liberty interest was "legally protected."[67] The emotional impact described by Johnson's lawyer was apparently sufficient to satisfy the "significant impact" requirement.

The *Johnson* case is routinely cited in Montana[68] and its "standard" quoted in nearly all cases of claimed emotional distress. Unfortunately, it is a "standard" under which virtually any facts may be sufficient to establish liability. Yet questions abound. How much of an "invasion" is necessary before it is regarded as "substantial"? What is a "legally protected interest"?[69] How much

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

64. *Id.*

65. *Id.* In comment b to Section 436A, the authors cite the traditional and often-repeated reasons for the rule: (1) emotional disturbance is normally trivial and temporary and compensating emotional distress under these circumstances would constitute a burden on the courts, (2) in the absence of the guarantee of genuineness provided by resulting bodily harm, emotional disturbance can be "too easily feigned," and allowing such recovery would "open too wide a door for false claimants who have suffered no real harm" and, (3) where the defendant has been merely negligent, with no intent to do harm, his fault is not sufficiently great as to require him to pay for purely mental disturbance.

66. *Johnson*, at 472, 686 P.2d at 213.

67. *Id.* at 473, 686 P.2d at 213.

68. *See supra* note 29.

69. In First Bank (N.A.) - Billings v. Clark, 236 Mont. 195, 771 P.2d 84 (1989), the Montana Supreme Court stated that the legally protected interest is the right to be free from emotional distress. *Id.* at 206, 771 P.2d at 91. Thus, the mere allegation of emotional distress satisfies the test and the definition becomes perfectly circular.

of an impact on the "person of the plaintiff" is regarded as "significant," and "significant" to whom? Once an independent interest in freedom from negligently inflicted mental distress is recognized, there is no logical stopping place.[70]

Another major flaw in *Johnson* is the court's refusal to consider the culpability of the defendant's conduct.[71] While appropriately noting that most courts allow emotional distress damages for intentional or outrageous conduct, the court failed to understand the distinction between those cases and claims for emotional distress from negligent conduct. The distinction is based on concerns over imagined or fraudulent claims. When the defendant's conduct is aimed at a specific person and is intentional, it is more likely that it is intended to harm and will have the intended effect. There is, under those circumstances, a more reliable basis for allowing a claim no one can see or measure to go forward than exists in the routine negligence case. As Prosser notes in discussing the development of the cause of action for infliction of emotional distress:

> Its limits are as yet ill defined, but it has been extended to its greatest length in the case of intentional infliction of emotional suffering by conduct of a flagrant character, the enormity of which adds especial weight to the plaintiff's claim, and is in itself an important guarantee that the mental disturbance which follows is serious and not feigned.[72]

The *Johnson* court's casual brushing aside of any of the sound reasons for drawing distinctions between emotional distress claims in an intentional tort case and the same claim in a simple negligence case is in error and is completely contrary to the overwhelming weight of authority.[73] Its "standard" for measuring emotional distress claims is so imprecise as to be useless at best and deliberately result-oriented at worst.[74] It will serve as a useful standard only if modified as recommended in Part IV, *infra*.

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70. *Miller*, *supra* note 43, at 16.

71. 211 Mont. at 472, 686 P.2d at 213.

72. PROSSER, *supra* note 3, at 57; *see also* La Fleur v. Mosher, 325 N.W.2d 314, 317 (Wis. 1982) (noting that in the intentional tort cases, it is the nature of the conduct itself that guarantees genuineness).

73. *See* Payton v. Abbott Labs, 437 N.E.2d 171, 176 (Mass. 1982); Thing v. La Chusa, 771 P.2d 814, 816-17 (Cal. 1989).

74. While the court in *Johnson* failed to appreciate the crucial role of the defendant's conduct in imposing liability for emotional distress, it looked precisely to that conduct as a guarantee of genuineness in Safeco Ins. Co. v. Ellinghouse, 223 Mont. 239, 725 P.2d 217 (1986). In affirming an award of mental distress damages (though reducing it), the court stated that "an award of mental anguish damages is justified by the evidence . . . on the issue of malice . . . ." *Id.* at 254, 725 P.2d at 226.

2. Intentional Infliction of Emotional Distress

In 1986, the Montana Supreme Court first confronted the issue of intentional infliction of emotional distress as a separate cause of action in *Proto v. Elliot*.[75] In that case the court sidestepped explicit recognition of a separate IIED cause of action. The court, in effect, "piggy-backed" IIED onto the existing *Johnson* standard for NIED and added the requirement that the distress be severe in nature.[76] This has, in effect, made recovery more difficult in an intentional infliction case than in a case of negligent infliction,[77] a result contrary to the rationale behind careful scrutiny of emotional distress claims.[78]

Four years later, the Montana Supreme Court again discussed the possibility of an independent cause of action for IIED and quoted the *Restatement* requirement of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."[79] The *Johnson* standard was not mentioned.[80] True to form, however, the court returned to the double standard in 1991 in *Doohan v. Bigfork School District No. 38*.[81] However, it is unclear from the court's statement in *Doohan* whether the standard now is the *Restatement* plus *Johnson*, the *Restatement* alone or *Johnson* alone, because the court found that

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75. 222 Mont. 393, 722 P.2d 625 (1986). The district court had awarded $3,489 in damages for IIED. *Id.* at 395, 722 P.2d at 626. On appeal, the Montana Supreme Court immediately cited *Johnson* and the often reiterated standard of "*substantial* invasion of a legally protected interest . . . ." *Id.* at 396, 722 P.2d at 627 (emphasis in original). The court did this even though the cause of action at issue was intentional infliction of emotional distress, not negligent infliction of emotional distress which was the cause of action in *Johnson*.

76. The court stated that "[i]n addition, to sustain an action for the intentional infliction of emotional distress, the authorities are in accord that the mental or emotional distress must be of a severe nature." *Id.* at 627 (citing W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11 at 51 (3d. ed. 1964)). The court in stressing the term "severe" stated that the district court found "that Proto had intentionally 'inflicted serious emotional distress and anguish upon' Stinger." *Proto*, at 396-97, 722 P.2d at 627. The high court respected that finding, "although the denomination of the emotional distress as 'serious' may not equate with 'severe'." *Id.* at 397, 722 P.2d at 627.

77. The Montana Supreme Court later reiterated the substantial invasion of a legally protected interest plus severe emotional distress "test" of *Proto* in Frigon v. Morrison-Maierle, Inc., 233 Mont. 113, 123-24, 760 P.2d 57, 64 (1988).

78. *See supra* notes 71-74 and accompanying text. The expressed and accepted rationale for more ready acceptance of claims for emotional harm in cases of intentional conduct is that "the defendant's conduct often afforded greater proof of a serious invasion of the victim's mental tranquility than did the presence or absence of resulting physical symptoms." *Thing*, 771 P.2d at 817.

79. Lachenmaier v. First Bank Sys., Inc., 246 Mont. 26, 35, 803 P.2d 614, 619 (1990).

80. *Id.*

81. 247 Mont. 125, 144, 805 P.2d 1354, 1366 (1991).

the claimant failed to present facts satisfying any standard.[82]

3. *Montana Law: A Summary*

The Montana court is finally beginning to analyze emotional distress, whether as an element of damages or as a stand-alone claim, and to recognize limitations. *Day v. Montana Power Co.*, which involved a negligence claim for property damage alone, indicates that a majority of the present court is unwilling to open wide the "floodgates" of litigation that would result if every negligent act of potential defendants carried with it liability for whatever emotional harm may result.[83] The Montana court has set high standards for the not-yet recognized IIED cause of action and claims to have "narrowly construed" NIED.[84] The approach of the court in both areas is sound, in accordance with the majority of courts in the United States, and should be continued. Continued application of *Johnson* however, is inconsistent with this analytical approach. *Johnson* must, therefore, be modified or abandoned.

As noted in more detail in Part III, Section B2, *infra*, the same cautious standards applied by the Montana Supreme Court in IIED cases should also be applied to emotional distress claims resulting from negligent conduct where no physical injury or immediate threat of physical harm exists. Claims for NIED must be subject to at least the same proof standard as the Montana court has applied to claims of IIED.

With the above review of the Montana cases as background, the article now considers the standards that should apply to claims of emotional distress connected with the risk and fear of future disease.

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82. *Id.* Note that Justice Weber dissented in this case, stating that the plaintiff "presented a compelling factual case in support of his claims," and that the "record supports the court's action in submitting the issue of intentional infliction of emotional distress to the jury, because the evidence of the defendants' acts reached the threshold level of 'outrageousness.'" *Id.* at 145, 805 P.2d at 1367 (Weber, J., dissenting). Justice Weber appears to properly apply the single standard from the RESTATEMENT, without the confusing and unnecessary overlay of *Johnson*.

83. Justice Harrison points out in his dissent that the holding in *Day* is contrary to French v. Moore and that the facts easily meet the "substantial invasion" and "significant impact" test of *Johnson*. Actually, *French* is quite different because there was significant personal injury and physical impact involved. In addition, *French* was a "nuisance" case, and the majority of courts recognize nuisance cases as an exception to the general rule requiring physical harm to support an emotional distress claim. *Cf.*, SPEISER, § 16.3, at 959-60. As to Justice Harrison's observation that the facts meet the *Johnson* standard, he is correct, demonstrating the weakness of that vague and imprecise standard.

84. *See* Doohan v. Bigfork Sch. Dist. No. 38, 247 Mont. 125, 138-39, 805 P.2d 1354, 1362-63 (1991); Frigon v. Morrison-Maierle, Inc., 233 Mont. 113, 123-24, 760 P.2d 57, 63-64 (1988).

III. Emotional Distress Claims in the "Phobia" Case

This portion of the article is directed to an area not yet addressed in Montana law: claims for fear of future disease due to past exposures to toxic substances.[85] Although mental and emotional distress over such serious concerns is easily understood, the cases present such a bewildering array of factual circumstances that consistent analysis is often thwarted. The goal of this section is to review those cases and draw from them principles that Montana courts should apply to such claims as they arise here. The authors also propose adjustments to Montana law to address these more difficult issues.

A. The Dichotomy Between Risk Claims and Fear Claims

There is a generally-recognized difference in the case law between those cases in which a plaintiff seeks to recover damages for the increased risk of getting a disease such as cancer in the future (the "risk" claim), and the fear of contracting such a disease in the future (the "fear" claim). The courts treat the cases separately, applying more rigid proof requirements to risk claims than to fear claims. Sometimes, particularly as to the emotional distress damages sought, the two causes of action overlap. Standards of proof for both risk and fear claims are discussed below.

B. Legal Standards for Recovery in the Risk Claim

In many cases, most commonly the asbestos exposure cases, evidence exists that mere exposure to the offending substance creates an increased risk of contracting cancer in the future. Those claims present interesting and difficult problems for litigants and for the courts.[86] When a plaintiff has no clinically diagnosable disease, is that person seeking compensation for something speculative and conjectural or is he or she entitled to present compensation for a reasonably certain future?[87] The answer often depends on the medical or clinical proof available because the underlying policy question is, as stated by the New Jersey Supreme Court in

85. *Cf., infra* notes 102-108 and accompanying text.

86. An interesting example is the case of Evers v. Dollinger, 471 A.2d 405 (N.J. 1984), in which plaintiff developed cancer while her case was on appeal from a summary judgment order dismissing her claim for damages due to the increased risk of contracting cancer in the future.

87. For a complete collection of cases dealing with this precise topic, *see* David C. Minneman, Annotation, *Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery*, 50 A.L.R.4th 13 (1986).

Ayers v. Jackson Township,[88] "at what stage in the evolution of a toxic injury should tort law intercede by requiring the responsible party to pay damages?"[89] The New Jersey Supreme Court in *Mauro v. Raymark Industries, Inc.*,[90] later noted that the concept of compensating an individual for the "significant but unquantified enhanced risk of a future injury, represents a significant departure from traditional, prevailing legal principles."[91]

In considering risk of cancer cases, the following standards have been developed:

1. *Present Physical Injury*

Prior to presenting evidence of enhanced future risk of cancer or other disease, the plaintiff must present proof of a clinically demonstrable physical injury.[92] For example, in the area of asbestos litigation, the mere breathing of asbestos fibers does not necessarily cause harm.[93] On the other hand, many courts hold that changes in lung tissue visible on x-ray represent sufficient evidence of physical damage to satisfy the present physical injury requirement.[94]

2. *Reasonable Certainty of Contracting the Disease*

A long-held maxim of the common law is that there is no cause of action for negligence in the absence of a present injury because the "threat of future harm, not yet realized, is not enough."[95] That principle has been eroded in the toxic tort area to allow recovery of damages for future consequences where those consequences are "reasonably certain" to occur.[96]

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88. 525 A.2d 287 (N.J. 1987).

89. *Id.* at 298.

90. 561 A.2d 257 (N.J. 1989).

91. *Id.* at 260.

92. Adams v. Johns-Manville Sales Corp., 783 F.2d 589, 591-92 (5th Cir. 1986); *see also* Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir. 1985) (subclinical injury not enough to establish a cause of action); Plummer v. Abbott Labs, 568 F. Supp. 920, 922 (D. R.I. 1983) (mere ingestion of DES does not constitute sufficient injury).

93. *See generally* AMA Council on Scientific Affairs, *A Physician's Guide to Asbestos-Related Diseases*, 252 JAMA 2593, 2594 (1984). *See also* Amendola v. Kansas City S. Ry. Co., 699 F. Supp. 1401, 1403 n.3 (W.D. Mo. 1988); *Schweitzer*, 758 F.2d at 942 ("subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law").

94. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79, 85 (3d Cir. 1986); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1137 (5th Cir. 1985).

95. W. PAGE KEETON. ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984).

96. *See* Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120 (D.C. Cir. 1982)

The reasonable certainty requirement has been nearly uniformly applied, both in asbestos litigation and in claims based on exposure to toxic chemicals. In such cases, the plaintiff must prove that the prospective disease is at least reasonably probable to occur.[97] That standard of proof is consistent with existing Montana law regarding future damages.[98]

3. *Relationship of Physical Injury to Risk of Disease*

A third rule or standard in the risk case is the requirement that the increased risk of disease stem from the same disease process as the present illness.[99] In other words, the disease expected to develop in the future must be related to the physical injury or physical damage presently clinically detectable.

In summary, where plaintiff seeks to recover damages for the increased future risk of contracting a serious disease, he or she must demonstrate a present injury in the form of physical trauma or the present existence of the disease itself and prove that the risk of that future disease is greater than fifty percent. Given existing Montana case law and the near unanimity of the cases in other jurisdictions, it is reasonable to expect that the Montana courts would hold the same way.

4. *Recovery for Emotional Distress Damages in the Risk Case*

Where a plaintiff faces the prospect that he or she will "more likely than not" develop a serious and debilitating or possibly fatal disease in the future, the accompanying mental and emotional distress is easy to understand and appreciate. Thus, in many respects, allowing recovery for emotional distress in the case where the future disease is more likely than not to occur is much the same as awarding emotional distress damages with an existing physical injury.[100] Where there is proof of existing physical injury and proof

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(plaintiff's cancer claim not barred by statute of limitations because when asbestosis was discovered he could not show an increased risk of future development of cancer); Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369, 1376 (Ill. App. 1979) (possibility of developing cancer because of prenatal exposure to DES not a present injury unless cancer is reasonably certain to occur). *See also Amendola*, *supra* note 93, for a list of courts that have adopted the "reasonable probability" standard in claims for increased risk of future disease.

97. *See* discussion in Mauro v. Raymark Indus., Inc., *supra* note 90, at 264-66, and cases cited therein.

98. MONT. CODE ANN. § 27-1-203 (1991); Graham v. Clarks Fork Nat'l Bank, 204 Mont. 141, 631 P.2d 718, 721 (1981).

99. *See* Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1225 (D. Mass. 1986).

100. An example is found in the asbestos cases. A presence of asbestosis, or even of parenchymal changes in the lung visible on x-ray, allows a finding of physical injury. *See*

that future disease is likely to occur, an accompanying emotional distress claim for the fear of that future disease should find no impediments in Montana law.[101]

C. *Recovery in the Fear Claim*

Where there is only exposure to a harmful substance, and neither proof of physical injury nor the likelihood of future disease, may the plaintiff recover damages for emotional distress or for fear of what may happen in the future? That question is far more difficult. The case law varies from jurisdiction to jurisdiction and fact pattern to fact pattern. This section discusses the more appropriate proof requirements and fits them to what Montana law appears to be or should be when the questions arise here.

As previously noted, there is little question regarding the right of a plaintiff who has sustained actual physical injury from exposure to toxic substances to recover damages for emotional distress, including the reasonable distress over enhanced risk of disease in the future.[102] Where there is mere exposure, however, and no specific physical injury, there is no clear rule on whether the plaintiff may recover damages for the emotional distress of worrying about the consequences of that particular exposure.[103] The available proof often determines whether the case is treated the same as a physical injury claim with an emotional distress component (emotional distress as an element of damage) or as an independent cause of action (negligent infliction of emotional distress). It is essential to treat the two separately.[104]

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supra note 93. That becomes the basis for recovery for mental and emotional distress brought about by the fear of cancer in the future, a known risk of asbestos exposure. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 414 (5th Cir. 1986) (applying Mississippi law).

101. *See* Gurnsey v. Conklin Co., Inc., 230 Mont. 42, 53, 751 P.2d 151, 157 (1988), (holding that the *Johnson v. Supersave* instruction is required as a prerequisite for recovery of emotional distress damages where there "has been no proof of physical or mental injury to the plaintiff") The corollary is that where there is proof of physical injury, the separate requirements of *Johnson* need not be satisfied and damages for mental distress are simply part of the damages appropriately recoverable.

102. *See* Mauro v. Raymark Indus., Inc., *supra* note 90, at 263, citing Devlin v. Johns-Manville Corp., 495 A.2d 495 (N.J. Super. 1985).

103. An interesting example is *Devlin*, 495 A.2d at 500 "in which the proof was insufficient to allow a claim for increased risk of cancer" but *was* sufficient to support a claim for fear of cancer. The general consensus, however, appears to be that absent actual physical harm, resulting emotional distress due to worries about the future is not compensable. *Cf.*, Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986); Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1371 (S.D. W. Va. 1990), *aff'd*, 940 F.2d 651 (4th Cir. 1991); DeStories v. City of Phoenix, 744 P.2d 705, 709 (Ariz. App. 1987).

104. The authors believe that this distinction should remain in Montana law but must

Because of the underlying concerns militating against simply allowing any and all claims for emotional distress arising from any tortious act,[105] many courts have tried to impose requirements on emotional distress claims to insure that only genuine claims reach the jury. One of the leading cases is *Payton v. Abbott Labs*, a case involving DES, in which the court denied recovery for fear of cancer absent physical harm.[106] That case, and the policy reasons articulated therein, continues to influence other court decisions in this area, and appropriately so. The primary means for insuring genuineness is to require an underlying physical injury. People are more apt to accept the existence of emotional harm when there is a visible sign of physical injury.[107] Unfortunately, once courts eliminate the requirement for present physical injury, a consistent standard for damages cannot be found.[108]

In Montana, however, there are cases in which plaintiffs suffered no physical injuries but, for policy reasons, the court deemed it appropriate to award damages for emotional distress. The clearest Montana example is *Versland v. Caron Transport*.[109] In *Versland*, the court laid down specific requirements for recovery of damages for emotional distress suffered as a result of witnessing serious injury or death to a family member.[110] The Montana Supreme Court has consistently refused to expand that type of bystander liability.[111] Yet the court has, since *Johnson v. Supersave Markets, Inc.*,[112] allowed recovery for emotional distress absent

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go forward with something other than the standard of *Johnson*. The *Johnson* standard does nothing to screen out the types of emotional distress claims that give rise to often-expressed concerns of fraudulent claims, overburdened courts and unlimited liability.

105. I.e., legitimacy of claims, opening floodgates of litigation, unlimited liability, and the tendency to believe that mental distress is not as "real" as physical injuries. *See generally* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965); Stuart M. Speiser, 4 THE AMERICAN LAW OF TORTS § 16:1 at 937 (1987). *See* Kraus v. Consolidated Rail Corp., 723 F. Supp. 1073, 1090 (E.D. Pa. 1989); Thing v. La Chusa, 771 P.2d 814, 828-29 (Cal. 1989).

106. 437 N.E.2d 171 (Mass. 1982).

107. Major Keith J. Klein, *Fear of Cancer - A Legitimate Claim in Toxic Tort Cases?* 33 A.F.L. REV. 193, 200 (1990) (citing Willmore, *In Fear of Cancerphobia*, 2 TOXICS L. REP. (BNA) 559 (Sept. 29, 1988)).

108. Albert H. Parnell et al., *Medical Monitoring: A Dangerous Trend*, FOR THE DEFENSE, April, 1992, at 11.

109. 206 Mont. 313, 671 P.2d 583 (1983).

110. *Id.* at 319-20; 671 P.2d at 586-87.

111. *Cf.*, Day v. Montana Power Co., 242 Mont. 195, 198, 789 P.2d 1224, 1226 (1990), (in which the court stated that it has "narrowly construed the tort of negligent infliction of emotional distress"); Marazzato v. Burlington Northern R.R. Co., 249 Mont. 487, 493, 817 P.2d 672, 676 (1991) (Trieweiler, J., concurring, noting that the court has been "reluctant to extend" the negligent infliction of emotional distress cause of action beyond the limited circumstances of *Versland*).

112. 211 Mont. 465, 473, 686 P.2d 209, 213 (1984).

physical or mental injury where there is "evidence of substantial invasion of a legally protected interest which causes a significant impact upon the person of the plaintiff . . . ."[113]

The *Johnson* standard lacks sufficient clarity to screen cases of emotional distress arising from exposure to toxic substances when there is no evidence of physical injury. Guarantees of genuineness beyond the superficial, circular definitions of *Johnson* are required. By way of illustration, one only need ask whether any exposure to a toxic or potentially toxic substance constitutes a "substantial" invasion of a "legally protected interest" sufficient to meet the *Johnson* test.[114] It is hard to imagine that it would not be. Any standard automatically satisfied is no standard at all.

The appropriate focus should be the "significant impact" requirement. If that standard is defined as one resulting in "severe emotional distress," as required for recovery in the intentional infliction of emotional distress cases,[115] then *Johnson* need only be modified, not discarded.

Rather than continue application of the vague and unhelpful *Johnson* standard, however, it is better to discard *Johnson* and follow more rigorous standards. In a case of no physical injury, the threshold question is whether any recovery for emotional distress is possible. Even if recovery is allowed, traditional standards of foreseeability and the requirement of "severe emotional distress" must be imposed. The article considers, first, the question of whether physical injury is a prerequisite to recovery.

1. Physical Injury as a Prerequisite

Courts across the nation that have considered the recoverability of damages for emotional distress have struggled with the question of whether physical injury is a prerequisite to such recovery. A significant majority of those cases require either physical injury or physical "impact," i.e., some personal contact between the plaintiff and defendant or between the plaintiff and some force set in motion by the defendant. One of the best examples is *Payton v. Abbott Labs*,[116] in which the Massachusetts court chose to

113. Niles v. Big Sky Eyewear, 236 Mont. 455, 465, 771 P.2d 114, 119 (1989).

114. *Johnson*, at 473, 686 P.2d at 213. This is particularly so if one accepts the Montana Supreme Court's later statement that the "legally protected interest" is the right to be free from emotional distress. *See* First Bank (N.A.) - Billings v. Clark, 236 Mont. 195, 206, 771 P.2d 84, 91 (1989).

115. *Clark*, 236 Mont. at 206, 771 P.2d at 91. *See also* McNeil v. Currie, ___ Mont. ___, 830 P.2d 1241 (1992).

116. 437 N.E.2d 171 (Mass. 1982).

follow the *Restatement* rule[117] denying recovery for emotional injury alone, in the absence of physical injury.[118] After reviewing the major policy reasons for and against such claims, the court stated:

> [W]hen recovery is sought for negligent, rather than intentional or reckless, infliction of emotional distress, evidence must be introduced that the plaintiff has suffered physical harm. This requirement, like those set forth in *Agis*, will serve to limit frivolous suits and those in which only bad manners or mere hurt feelings are involved, and will provide a reasonable safeguard against false claims.[119]

One of the most thoroughly-developed areas of the law regarding emotional distress absent physical injury is claims under the Federal Employers Liability Act (hereinafter FELA).[120] In those cases, the general rule is that there is no right of recovery absent physical injury or threat of physical harm.[121] The courts in FELA cases are particularly concerned, partially due to FELA's featherweight liability standards,[122] about opening the floodgates of litigation, encouraging fraudulent claims and allowing claims with incalculable and potentially unlimited damages.[123] Thus, the general rule is that absent physical injury or the threat of physical harm, there can be no recovery for emotional distress damages under FELA.[124]

Montana cases have not discussed or confronted the explicit policy choice discussed so thoroughly in cases such as *Payton v.*

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

118. *Payton*, 437 N.E.2d at 174.

119. *Id.* at 180.

120. 45 U.S.C. §§ 51-60 (1988).

121. Marazzato v. Burlington N. R.R., 249 Mont. 487, 817 P.2d 672 (1991) (Trieweiler, J., concurring). Justice Trieweiler, who had extensive FELA experience prior to coming to the bench, noted that this is the majority rule. Justice Trieweiler also noted that there has been no federal decisional law since the Ninth Circuit decision of Buell v. Atchison, Topeka & Santa Fe Ry. Co., 771 F.2d 1320 (9th Cir. 1985), later reversed in Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557 (1987), which "clearly allows recovery for the negligent infliction of emotional distress absent infliction of physical harm to the plaintiff." *Marazzato*, 249 Mont. at 493, 817 P.2d at 676 (Trieweiler, J., concurring).

122. A defendant is liable under FELA for all of plaintiff's damages when the defendant's negligence caused, in whole or in part, the injury. 45 U.S.C. § 51 (1988).

123. *See, e.g.*, Outten v. National R.R. Passenger Corp., 928 F.2d 74, 77 (3d Cir. 1991); Kraus v. Consolidated Rail Corp., 723 F. Supp. 1073, 1090 (E.D. Pa. 1989).

124. *See* Ray v. Consolidated Rail Corp., 938 F.2d 704 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 914 (1992); *Outten*, 928 F.2d 74; *Kraus*, 723 F. Supp. 1073. One Montana district court has refused to allow a FELA claim seeking damages for emotional distress. Polich v. Burlington N. R.R., No. ADV-88-1319 (Mont. Dist. Ct., Cascade County, July 31, 1990) (opinion on file with the authors). *But see* Plaisance v. Texaco, Inc., 937 F.2d 1004, 1009 (5th Cir. 1991), *rehearing en banc granted*, 954 F.2d 266 (5th Cir. 1992).

Abbott Labs.[125] Instead, once the Montana Supreme Court crossed the threshold in *Versland*,[126] it abandoned the physical injury requirement without discussion in *Johnson* and has followed *Johnson* since.[127] The court would be on more solid analytical ground had it recognized *Versland* as an exception, well supported in the law, and adhered to a physical injury requirement in emotional distress cases. Perhaps the case will come along where the court will be required to consider the policy ramifications of its apparent rejection of the physical injury requirement in emotional distress claims.

It seems unlikely that the Montana Supreme Court will now reject its earlier decisions and adopt the rule of section 436A of the *Restatement* or the rules so thoroughly developed in FELA cases. That is unfortunate. The concerns regarding emotional distress claims, particularly in the area of exposure to substances that may cause harm in the future and which are not likely to cause injury, are still very real. Because of these concerns, and absent a physical injury requirement, there must be significant limitations placed upon such cases. If not, anyone who has ever sprayed weeds with 2,4-D, worked around asbestos, smoked cigarettes or lived near powerlines would have a potential claim for fear of contracting cancer in the future. The remaining sections of this article discuss appropriate limitations that will guard against these problems yet still allow compensation for legitimate claims of serious emotional distress when physical injury is absent or trivial.

2. *Limitations in Cases Not Involving Physical Injury*

The courts struggle with this issue each time they consider a claim for emotional distress absent physical injury. The only deserving claims are those that are "genuine." Yet, how is genuineness to be determined? The question cannot be turned over to a jury in each instance with the simple direction to "be fair." "In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, . . . the right to recover for negligently caused emotional distress must be limited."[128] The following guidelines, applied in other cases, should be applied in Montana law as well.

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125. 437 N.E.2d at 178-80.

126. *Versland*, 206 Mont. 313, 671 P.2d 583.

127. *See Niles*, at 465, 771 P.2d at 119; Stensvad v. Towe, 232 Mont. 378, 386, 759 P.2d 138, 143 (1988); Noonan v. First Bank Butte, 227 Mont. 329, 335, 740 P.2d 631, 635 (1987); Tynes v. Bankers Life Co., 224 Mont. 350, 369, 730 P.2d 1115, 1127 (1986).

128. *Thing*, at 826-27.

a. Serious Emotional Distress Must Be Foreseeable

Courts and commentators have focused on foreseeability as a means of limiting liability. Simply put, the standard requires that serious distress to a normal individual be foreseeable as a matter of proximate cause.[129] Use of that test accomplishes two purposes. First, it is an objective test focusing on the "normal" person, thereby eliminating the "thin skull" rule in the area of emotional distress claims. Second, it brings an end point to unlimited liability by giving a traditional tort law tool to judges that can be used to weed out claims in which consequences are too remote to be regarded as foreseeable.[130]

b. Proof Must Go Beyond the Trivial

Proof must go beyond the ordinary worries about the future course of one's life. Many courts have held that emotional distress due to fear of the future must be serious, medically diagnosable and medically significant, or manifested by objective symptomatology.[131] When a plaintiff seeks to recover for fear of cancer, he or she must present specific evidence of fear of that condition.[132]

c. The Emotional Distress Must Be Reasonable

It is not enough for a plaintiff to simply state that he or she fears future harm. It must be "reasonable" that he or she has such fears. The reasonableness of the distress is judged by an objective standard.[133] This makes sense, for it may not be reasonable that a plaintiff, even though having demonstrably severe or even clinically diagnosable emotional distress, has such a reaction to a risk of cancer increased from, for example, 1 in 1,000,000 to 1 in 500,000. The risk is remote in either case. A trial judge should have the ability to rule that the fears in such a case are not objectively "reasonable," and put an end to a frivolous case.

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129. Garcia v. Williams, 704 F. Supp. 984, 1004 (N:D. Cal. 1988); Leong v. Takasaki, 520 P.2d 758, 765 (Haw. 1974); Douglas B. Marlowe, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781, 824 (1988).

130. In re Hawaii Federal Asbestos Cases, 734 F. Supp. 1563, 1568 (D. Haw. 1990); Marlowe, *supra* note 129, at 824-29. The Montana Supreme Court has upheld summary judgment granted on foreseeability grounds. *Cf.*, *Marazzato*, at 487, 817 P.2d at 672.

131. Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 866-67 (Mo. App. 1985), *cert. denied*, 476 U.S. 1176 (1986); *Payton*, 437 N.E.2d at 181.

132. Smith v. A.C. & S., Inc., 843 F.2d 854, 859 (5th Cir. 1988); *Hawaii Federal Asbestos Cases*, 734 F. Supp. at 1569.

133. *See, e.g.*, Farrall v. A.C. & S. Co., 558 A.2d 1078, 1081 (Del. Super. 1989).

d. The Emotional Distress Must Be "Severe"

The most important limitation, one with roots in Montana law, limits recovery to cases of "severe emotional distress."[134] Some courts require that the distress be medically significant or, at least, manifested by objective symptoms.[135] As demonstrated by *Johnson v. Supersave, Inc.*, there has been no such requirement in Montana.[136]

The problems that arise from a lack of a higher standard of proof for pure emotional distress claims are demonstrated by *Zugg v. Ramage*,[137] where the court affirmed an award that included damages for emotional distress based on one plaintiff's testimony that he had been to a doctor for chest pains, was worried over financial problems, and suffered many sleepless nights.[138] A second plaintiff testified that he had been forced to borrow money, was cranky and had lost sleep.[139] The court noted that the "amount of evidence of emotional distress is close to the line in this case," but sufficient to support the award.[140] Unfortunately, the court did not describe where the line was, only that the evidence was "close" to it. Thus, trial courts and practitioners were left by *Zugg* with no measuring stick by which to determine whether the emotional distress was of a significantly serious nature to obtain protection under the law. The line not articulated in *Zugg* must be drawn to control the proliferation of trivial emotional distress cases.

The appropriate line has already been drawn in the intentional infliction of emotional distress cases, and should simply be applied to cases of negligent infliction of emotional distress. The standard originates in the *Restatement (Second) of Torts* § 46 comment j (1965), adopted by the court in *First Bank (N.A.) - Billings v. Clark*.[141] In that case, the court considered the *Johnson* standard and held that the requirement of a "significant impact indicates that the emotional distress suffered by the victim must be severe."[142] The *Restatement* comment adopted by the court

134. First Bank (N.A.) - Billings v. Clark at 206, 771 P.2d at 91.

135. *Bennett*, 698 S.W.2d at 867.

136. 211 Mont. at 473-74, 686 P.2d at 213-14. Johnson's lawyer, who saw him in jail, described him as "agitated," "disoriented," not understanding why he was there, "more animated," and he had a "lot more hand movement, expressions, pacing and nervousness" which was "very apparent." Time spent in jail was very short. *Id.* at 469, 686 P.2d at 211.

137. 239 Mont. 292, 779 P.2d 913 (1989).

138. *Id.* at 298, 779 P.2d at 917.

139. *Id.*

140. *Id.*

141. 236 Mont. at 206, 771 P.2d at 91.

142. *Id.*

states that only "extreme" emotional distress is compensable and that the "law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it."[143]

It is an aberration, and reflective of a lack of analysis, that the standard for proof of harm in Montana in an intentional infliction case is more demanding than in a negligent infliction case. There is no rational reason for the difference. If anything, the standard of proof should be more strict in a negligence case than in a case of intentional harm because of the historical distrust of emotional distress claims and concern over genuineness. Where deliberate conduct is directed at a particular individual, it is more likely that the conduct will have its intended result, i.e., emotional anguish on the part of the victim,[144] and it is sound public policy to require the intentional tortfeasor to pay damages for all harm inflicted. Concerns regarding foreseeability of harm are diminished in the intentional tort case.[145]

When the emotional distress requirements in both intentional and negligent infliction cases are held to the same standard, litigants, lawyers and judges are better served. When the threshold requirement is "severe emotional distress" as defined in *First Bank (N.A.) - Billings v. Clark*,[146] the "floodgates of litigation" will remain closed, or at least in check, and we will not have taken another step to the "eggshell society" referred to by the court in cases from *Johnson* to *Doohan*.

IV. Modifications in Montana Law

As discussed earlier, the *Johnson v. Supersave, Inc.* standard of liability for emotional harm is too vague, circular and amorphous to be of any value. The Montana Supreme Court should follow the *Restatement* rule and impose a physical injury requirement. Absent that step, the court should reject the *Johnson* standard and replace it with the *Restatement* standard adopted in *Clark*. The third, though least desirable, alternative is to modify *Johnson* by grafting on the *Restatement* standard so as to define the term "substantial impact." This would make it clear to trial judges and juries that only emotional distress "so severe no reasonable person could be expected to endure it," can be compensated

143. *Id.*

144. *See supra* notes 71-73 and accompanying text.

145. *See* Thing v. La Chusa, 771 P.2d at 818-21 (regarding foreseeability and the limitations of that rule).

146. 236 Mont. at 206, 771 P.2d at 91.

in a claim for purely emotional injuries.[147] That standard is the one applied in many cases, and is a rational and logical approach.[148] A severe emotional distress requirement adheres to a consistent legal standard of recovery and avoids the dilemma of either denying recovery for all forms of mental distress or compensating any and all trivial injuries. The standard is objective, involving the "reasonable man, normally constituted."[149]

The standard applied can then be given to the jury by way of the following jury instruction:

> Plaintiff claims damages from emotional distress suffered as a consequence of the alleged negligence of the defendant. Damages may be awarded by you only if the defendant's conduct has caused a significant impact upon the plaintiff and has resulted in emotional distress that is so severe that a reasonable person, normally constituted, could not be expected to endure it.

This instruction should be given in cases of both intentional and negligent infliction of emotional distress. It retains the only useful portion of the *Johnson* standard, and applies a consistent objective test designed to eliminate trivial claims.

Adoption of the severe emotional distress standard avoids the commonly expressed concern that allowing any and all manner of such claims will open the floodgates of litigation and prevent the courts from weeding out fraudulent claims.

V. CONCLUSION

The business of compensating for injuries to the psyche is difficult and has resulted in uneven and unpredictable awards. The Montana decisions reflect these difficulties. Yet the way to a rational, consistent approach was paved in *First Bank (N.A.) Billings v. Clark*, and the Montana Supreme Court's adoption of a "severe emotional distress" requirement in intentional infliction cases. Extending that requirement to negligent infliction cases and discarding *Johnson* will serve Montana law well and prepare it for the oncoming wave of such claims in toxic tort and chemical exposure cases.

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147. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

148. *See* Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 HAW. L. REV. 1, 33-36 (1979); Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970).

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