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Recovery for Negligent Infliction of Emotional Distress: Changing the Impact Rule in Indiana

In *Kroger Co. v. Beck*,[1] the Indiana Court of Appeals held that the fact that plaintiff's throat had been pricked by a hypodermic needle hidden in a piece of meat satisfied the contemporaneous physical impact requirement necessary to recover for emotional distress. The court, however, noted in dictum that this requirement of impact may not be the soundest possible rule.[2] From this it appears that, given the right fact situation, at least one Indiana court would be willing to abandon the impact rule in favor of a sounder approach. Accordingly, this note analyzes other jurisdictions' solutions to the problem of liability for emotional distress and suggests an approach which would avoid their deficiencies.

THE IMPACT RULE

The impact rule provides that there can be no recovery for emotional distress when there has been no immediate physical impact to the plaintiff.[3] The earliest courts considering emotional distress claims had typically denied recovery because of lack of precedent.[4] The impact rule provided the needed transition from traditional physical injury cases to emotional injury claims by keeping the new action for emotional distress damages within the framework of the old action for physical damages. By allowing recovery for emotional distress which accompanied physical injury, the traditional concept of real physical injury was broadened to include such distress. Indiana adopted the impact rule in 1897[5] and, with one exception,[6] has retained the impact rule to the present day.[7]

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[1] __ Ind. App. __, 375 N.E.2d 640 (1978).

[2] *Id.* at __, 375 N.E.2d at 645 n.5.

[3] *See* W. PROSSER, LAW OF TORTS § 54, at 328-30 (4th ed. 1971).

[4] *E.g.*, Lehman v. Brooklyn City R.R., 47 N.Y. Sup. Ct. 355, 356 (1888).

[5] Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E. 694 (1897).

[6] Indiana courts do not require a contemporaneous physical impact in tort actions where the defendant's conduct is intentional and likely to provoke an emotional disturbance. Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928) (kidnap of plaintiff's child); Harness v. Steele, 159 Ind. 286, 64 N.E. 875 (1902) (false imprisonment); Kline v. Kline, 158 Ind. 602, 64 N.E. 9 (1902) (assault); Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N.E.2d 360 (1938) (unauthorized autopsy on plaintiff's deceased husband).

[7] Boston v. Chesapeake & O. Ry., 223 Ind. 425, 61 N.E.2d 326 (1945); Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N.E. 860 (1933); Lake Erie & W.R.R. v. Johnson, 191 Ind. 479, 133 N.E. 732 (1922); Indianapolis St. Ry. v. Ray, 167 Ind. 236, 78 N.E. 978 (1906); Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N.E. 674 (1901); Kroger Co. v. Beck, __ Ind. App. __, 375 N.E.2d 640 (1978); Charlie Stuart Oldsmobile, Inc. v. Smith, __ Ind. App. __, 357 N.E.2d 247 (1976); Jeffersonville Silgas, Inc. v. Wilson, 154 Ind. App. 398, 290 N.E.2d 113 (1972); Earle v. Porter, 112 Ind. App. 71, 40 N.E.2d 381 (1942); Gaskins v. Runkle, 25 Ind. App. 584, 58 N.E. 740 (1900); Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900).

Although many reasons have been stated for the adoption of the impact rule, five reasons have been espoused most frequently. The first rationale for the rule is a fear of fraudulent claims.[8] The general feeling is that a physical impact provides assurance that emotional distress has actually occurred.[9] This reasoning has several flaws. First, the problem of feigning injuries can be solved simply by testing the adequacy of the proof of emotional injury in each case and denying recovery where the proof of the genuineness of the injury is inadequate.[10] Second, today's state of medical science makes accurate proof of emotional distress possible.[11] Moreover, although the fear of fraudulent claims is well founded, the impact rule does nothing to separate the legitimate from the illegitimate claims: a contemporaneous physical impact does not assure that the emotional distress claim is genuine, nor does absence of a physical impact assure that the claim is fraudulent.[12]

A second reason given for the adoption of the impact rule is the fear that, without this restriction, courts will be drowned in a flood of emotional distress litigation.[13] William Prosser eloquently answers this argument when he writes:

> It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation"; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.[14]

It also appears that the feared litigation deluge has not materialized in jurisdictions not using the impact rule,[15] and that the emotional distress case load has been greater in the states that have followed the rule than in those that have rejected it.[16] Moreover, if halting a potential flood of

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[8]Spade v. Lynn & B.R.R, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896); Huston v. Freemansburg Borough, 212 Pa. 548, 550-51, 61 A. 1022, 1023 (1905); Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 382-86, 56 N.E. 917, 920-21 (1900); Kalen v. Terre Haute & I. R.R., 18 Ind. App. 202, 213, 47 N.E. 694, 698 (1897).

[9]Charlie Stuart Oldsmobile, Inc. v. Smith, __ Ind. App. __, __, 357 N.E.2d 247, 253 (1976).

[10]W. PROSSER, *supra* note 3, at 328.

[11]Leong v. Takasaki, 55 Haw. 398, 411-13, 520 P.2d 758, 766-67 (1975); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort,* 59 GEO. L.J. 1237, 1258-63 (1971).

[12]Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 334, 150 A. 540, 543 (1930); Niederman v. Brodsky, 436 Pa. 401 409-11, 261 A.2d 84, 87-89 (1970); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 409-10, 234 A.2d 656, 659 (1967).

[13]Spade v. Lynn & B.R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896); Charlie Stuart Oldsmobile, Inc. v. Smith, __ Ind. App. __, __, 357 N.E.2d 247, 253 (1976); Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 382, 56 N.E. 917, 920-21 (1900); Kalen v. Terre Haute & I. R.R., 18 Ind. App. 202, 213, 47 N.E. 694, 698 (1897).

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

[15]*E.g.,* Okrina v. Midwestern Corp. 282 Minn. 400, 405, 165 N.W.2d 259, 263 (1969).

[16]Niederman v. Brodsky, 436 Pa. 401, 411-12, 261 A.2d 84, 89 (1970); Lambert, *Tort Liability for Psychic Injuries,* 41 B.U.L. REV. 584, 592 (1961).

litigation should predominate over plaintiffs' rights to recover for emotional distress, then all recovery for emotional distress should be denied, even where there is a contemporaneous physical impact. Emotional distress is no more real simply because there was an impact.

The third reason given for using the impact rule is the belief that, absent impact, cause in fact of the emotional distress cannot be shown.[17] This argument can be answered simply by noting that an impact does not show cause in fact of even the impact itself, but only the fact of the impact; cause must be shown by other evidence and the inferences drawn therefrom.

A fourth reason for the impact rule is that without it measurement of the extent of emotional distress damages is uncertain and largely left to speculation and conjecture.[18] This argument fails on several counts. First, the presence of emotional distress is capable of clear medical proof.[19] Second, the courts allow recovery for physical pain, and for emotional distress when accompanied by a physical injury, in spite of the degree of speculation and conjecture involved,[20] making impact significant in law rather than in fact. Furthermore, there is no reason to believe that requiring impact will lessen the degree of speculation and conjecture involved in measuring emotional distress.

The fifth argument concerns proximate cause. One court adopting the impact rule wrote: "The logical vindication of this rule, is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright . . . ."[21] The weakness of this position is well illustrated by the fact situation of *Mitchell v. Rochester Railway,*[22] one of the leading cases adopting the impact rule. In *Mitchell,* a team of runaway horses was halted so close to the pregnant plaintiff that she stood between their heads; as a result of severe fright she subsequently miscarried. The court denied recovery because of the absence of impact. It is difficult to understand why fright, in such a situation, is neither a natural result nor to be expected. Furthermore, had one of defendant's horses knocked the plaintiff over, such impact would not necessarily have shown more clearly defendant's anticipa-

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[17]Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896); Bosley v. Andrews, 393 Pa. 161, 169, 142 A.2d 263, 267 (1958); Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 389, 56 N.E. 917, 922 (1900).

[18]Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896); Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 66, 60 N.E. 674, 675 (1901); Charlie Stuart Oldsmobile, Inc. v. Smith, __ Ind. App. __, __, 357 N.E. 247, 255 (1976); Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 382-86, 56 N.E. 917, 920-21 (1900); Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 213, 47 N.E. 694, 698 (1897).

[19]Goodrich, *Emotional Disturbances as Legal Damage,* 20 MICH. L. REV. 497, 498-506 (1922).

[20]Rushing v. Seaboard Air Line Ry., 149 N.C. 158, 163, 62 S.E. 890, 892 (1908); Kavanagh v. Butorac, 140 Ind. App. 139, 144, 221 N.E.2d 824, 828 (1966); Dallas & Mavis Forwarding Co. v. Liddell, 126 Ind. App. 113, 117, 126 N.E.2d 18, 20 (1955).

[21]Spade v. Lynn & B.R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897).

[22]151 N.Y. 107, 45 N.E. 354 (1896).

tion of fright. Under such circumstances, it is illogical to condition plaintiff's recovery on an actual impact: if it is truly unreasonable to require defendants to anticipate and guard against fright, there should be no recovery for emotional distress at all. In adopting the impact rule the courts are trying to avoid subjecting defendants to unlimited liability for emotional distress damages;[23] however, there is no logical reason for limiting liability at the point of impact.

These five reasons for requiring impact represent legitimate fears. Fraudulent claims, a flood of litigation, speculation and conjecture, absence of cause in fact, and absence of proximate causation are all problems which must be met and dealt with; however, as has been shown, requiring an impact does not guarantee the genuineness of claims, close the floodgates of litigation, lessen speculation and conjecture, show cause in fact of emotional distress, or provide proximate causation. Consequently, only a few states have retained the impact rule.[24]

THE ZONE OF DANGER RULE

A standard which many jurisdictions have adopted is the zone of danger rule.[25] This rule provides that, as a minimum prerequisite to recovery, plaintiff must have been within the range of ordinary physical

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[23]*E.g.*, Spade v. Lynn & B.R.R., 168 Mass. 285, 288-89, 47 N.E. 88, 89 (1897).

[24]Butchikas v. Travelers Indem. Co., 343 So. 2d 816, 819 (Fla. 1977); Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974); Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Benza v. Shulman Air Freight, 46 Ill. App. 3d 521, 361 N.E.2d 91 (1977); Louisville & N.R.R. v. Roberts, 207 Ky. 310, 269 S.W. 333 (1925); Kentucky Traction & Terminal Co. v. Bain, 161 Ky. 44, 170 S.W. 499 (1914); Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897) (Although *Spade* has not been overruled it has been questioned. *See* George v. Jordan Marsh Co., 359 Mass. 244, 246-48, 268 N.E.2d 915, 916-17 (1971)); Howard v. Bloodworth, 137 Ga. App. 478, 224 S.E.2d 122 (1976); Charlie Stuart Oldsmobile, Inc. v. Smith, __ Ind. App. __, 357 N.E.2d 247 (1976); Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E. 694 (1897); McCardle v. George B. Peck Dry Goods Co., 191 Mo. App. 263, 177 S.W. 1095 (1915).

[25]Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); McGovern v. Piccolo, 33 Conn. Supp. 225, 372 A.2d 989 (1976); Rob v. Pennsylvania R.R, 58 Del. 454, 210 A.2d 709 (1965); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Orkina v. Midwestern Corp., 282 Minn. 400, 165 N.W. 2d 259 (1965); (*Okrina* recognizes that Purcell v. St. Paul City Ry.; 48 Minn. 134, 50 N.W. 1034 (1892), in adopting a zone of danger requirement, is now the law of Minnesota. 282 Minn. 400, 403-05, 165 N.W.2d 259, 262-63 (1965). The *Okrina* case makes clear that a physical injury resulting from a fear for one's own safety is necessary to recover for emotional distress in Minnesota. *Id.* at 404, 165 N.W.2d at 262.) Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

Rhode Island has chosen to maintain the zone of danger rule, in general, and carve out exceptions to the rule where necessary. *See* D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975).

The law in Louisiana regarding the negligent infliction of emotional distress is in a somewhat confused state. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1961), uses a duty approach to determine liability; however, subsequent cases distinguish *Holland* by limiting it to its narrow fact situation. *See, e.g.*, Hickman v. Parish of E. Baton Rouge, 314 So. 2d 486 (La. App. 1975). It appears from Bourque v. American Mut. Liab.

peril.[26] In the leading case upholding the zone of danger rule, *Tobin v. Grossman*,[27] the court admits that the fears of fraudulent claims, a flood of litigation, speculation and conjecture, and an absence of proximate cause[28] are no longer cogent reasons for requiring impact in emotional distress cases. However, because of the fear of unlimited liability, the New York court limits recovery to situations where plaintiff is in the zone of physical danger.[29]

The *Tobin* court recognizes that the zone of danger requirement is an arbitrary limitation, but justifies this limitation as the only way to prevent unlimited liability.[30] The court is saying that unlimited liability outweighs the value of compensating plaintiffs for legitimate emotional distress claims. To prevent unlimited liability the *Tobin* court extends liability from its complete denial, past the admittedly arbitrary point of impact, to the equally arbitrary zone of danger, beyond which the court chops it off. But one wonders why the impact-rule-courts think plaintiffs who sustain a contemporaneous impact are more deserving of recovery than plaintiffs who are merely in the zone of danger, and why the *Tobin* court thinks that plaintiffs within the zone of danger are more deserving of recovery than plaintiffs who are outside the zone.

The fact situation in *Dillon v. Legg*[31] illustrates what the California court called the "hopeless artificiality" of the zone of danger rule.[32] In *Dillon*, Erin Dillon was killed by a negligent motorist while her mother and sister watched. The sister was arguably within the zone of danger while the mother was not. The zone of danger rule would require granting the sister relief for emotional distress sustained as a result of witnessing the death, but deny the mother the same recovery simply because she stood a few yards away.

Ins. Co., 345 So. 2d 237 (La. App. 1977) that Louisiana is now using at least a form of the zone of danger rule.

[26]Tobin v. Grossman, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559 (1969); Waube v. Warrington, 216 Wis. 603, 612-13, 258 N.W. 497, 500-01 (1935); Resavage v. Davies, 199 Md. App. 479, 487, 86 A.2d 879, 883 (1952).

[27]24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). The *Tobin* court does not explicitly call New York's rule the zone of danger rule, but, in essence, this is precisely what it is. Since Battalla v. New York, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) held that physical impact was no longer necessary to recover for emotional distress, the role of the *Tobin* court was to determine how far recovery might go. In drawing the line the *Tobin* court held that one could not recover for unintentional harm resulting solely from injuries inflicted upon another. 24 N.Y.2d 609, 611, 249 N.E.2d 419, 419-20, 301 N.Y.S.2d 554, 555 (1969). The court concluded, "It is enough that the law establishes liability in favor of those directly or intentionally harmed." *Id.* at 619, 176 N.E.2d at 424, 301 N.Y.S.2d at 562. Without requiring impact and without allowing bystander recovery, those directly harmed could only be those who feared for their own personal safety. This is in fact the zone of danger rule.

[28]These fears are four of the five reasons that courts have most frequently given for adopting the impact rule. *See supra* note 8-23 and accompanying text.

[29]24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

[30]*Id.* at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

[31]68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[32]*Id.* at 733. 441 P.2d at 915, 69 Cal. Rptr. at 75.

If the danger of unlimited liability outweighs the value of compensating plaintiffs for legitimate claims, then the more logical approach would be to deny recovery *in toto*, and not allow it to turn on such arbitrary distinctions as an impact or presence within a zone of danger. In *Dillon v. Legg*, Justice Tobriner wrote: "In substance, [the zone of danger proponents] say, definition of liability being impossible, denial of liability is the only realistic alternative."[33] Although Justice Tobriner's conclusion is the logical one, it is not the one adopted by the zone of danger proponents: they would not deny all emotional distress liability, but rather let liability turn on the arbitrary distinction of whether or not plaintiff is in the zone of peril.[34] The zone of danger rule has been considered to be a mere extension of the impact rule because the requirement of being within the zone of peril merely assures that one fears the danger of impact. Consequently, the zone of danger rule carries with it all of the shortcomings of the impact rule.[35]

THE FORESEEABILITY TEST

The English case of *Victorian Railways Commissioners v. Coultas*,[36] decided in 1888, has generally been recognized as inspiring the impact rule in the United States[37] and was explicitly considered in Indiana's initial adoption of the impact rule,[38] although the validity of so citing *Coultas* is questionable.[39] The King's Bench declined to require an impact thirteen years later in *Dulieu v. White & Sons*[40] and adopted instead a zone of danger rule.[41] The zone of danger rule, however, had a short life as well in English law and was abandoned in 1925 in *Hambrook v. Stokes Brothers*[42] which adopted a duty approach to liability for negligently in-

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[33]*Id.* at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.

[34]*Id.*; Toms v. McConnell, 45 Mich. App. 647, 653-54, 207 N.W.2d 140, 144 (1973).

[35]Dillon v. Legg, 68 Cal. 2d 728, 733, 441 P.2d 912, 915, 69 Cal. Rptr. 72, 75 (1968). *See generally, supra* notes 8-24 and accompanying text.

[36]13 App. Cas. 222 (1888).

[37]46 MISS. L.J. 871, 872 (1975); Note, *Mental Distress—The Impact Rule*, 42 U.M.K.C.L. REV. 234 (1973).

[38]Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E. 694 (1897).

[39]The Privy Council had held only,

> [Their Lordships] are of the opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that "impact" is necessary, that the judgment should have been for the defendants.

Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222, 226 (1888).

[40][1901] 2 K.B. 669. Directly on point, Justice Kennedy asks,

> [i]f impact be not necessary, and if . . . the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for these damages lie just as well as it lies where there has been an actual impact?

Id. at 675.

[41]*Id.*

[42][1925] 1 K.B. 141.

flicted emotional distress. Today, breach of duty remains the test of emotional distress liability in England.[43]

The word "duty," however, may be a misnomer for this test, for, when the English courts refer to "duty" in emotional distress cases, they contemplate "foreseeability." This point is aptly illustrated by noting that, in *Hambrook*, both Lord Bankes[44] and Lord Sargent[45] said they were using a duty analysis but ended up using a foreseeability test to decide the case. Eighteen years later the English courts were still substituting foreseeability for duty as all five of the Lords in *Bourhill v. Young*,[46] a noted progeny of *Hambrook*, used foreseeability as the test of liability for emotional distress.

As might be expected, some United States courts have adopted the English foreseeability approach in much the same way as others picked up the impact and zone of danger rules.[47] The leading American case on foreseeability of emotional distress is *Dillon v. Legg*.[48] The *Dillon* court rejected both the impact and zone of danger rules and adopted the zone of emotional danger rule which allows recovery where defendant should have foreseen "fright or shock severe enough to cause substantial injury in a person normally constituted."[49] But, as the *Tobin* court pointed out in adopting the zone of danger rule, "foreseeability, once recognized, is not so easily limited."[50]

Recognizing the need to limit liability,[51] the *Dillon* court introduced three factors to consider in determining foreseeability: nearness of the plaintiff to the accident, whether plaintiff witnessed the accident, and closeness of the relationship between the plaintiff and the victim.[52] However well these guidelines serve to limit liability, they also provide distinctions which are as arbitrary and artificial as those provided by the impact and zone of danger rules.[53] A mother's distress is likely to be just

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[43]*See* R. PERCY, CHARLESWORTH ON NEGLIGENCE 95-103 (6th ed. 1977).

[44][1925] 1 K.B. 141, 148-51.

[45]*Id.* at 162-63.

[46][1943] A.C. 92, 98, 101-02, 104-05, 111, 116-17. For another English case using foreseeability as the test of duty, see Boardman v. Sanderson [1964] 1 W.L.R. 1317 (C.A.).

[47]St. Louis I.M. & S. Ry. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901); Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Rodrigues v. State, 52 Haw. 156, 169-74, 472 P.2d 509, 518-21 (1970) (*Rodrigues* closely follows the duty approach, although subsequent cases decided by the Hawaii Supreme Court limit *Rodrigues* to its facts and use a foreseeability test. *See, e.g.*, Kelly v. Kokua Sales & Supply, Inc., 56 Haw. 204, 208-09, 532 P.2d 673, 676 (1975)); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970); Gulf, C. & S.F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900), Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923 (Tex. App. 1974); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

[48]68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). For a discussion of the fact situation in *Dillon*, see *supra* notes 31-32 and accompanying text.

[49]*Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[50]24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969).

[51]Dillon v. Legg, 68 Cal. 2d 728, 739, 741-46, 441 P.2d 912, 919, 921-24, 69 Cal. Rptr. 72, 79, 81-84 (1968).

[52]*Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[53]*See id.* at 749-50, 441 P.2d at 926, 69 Cal. Rptr. at 86 (Burke, J. dissenting).

as real when she hears the screech of tires and looks out the kitchen window to see her child lying mangled on the curb, or when she sees the injured child brought home from an accident, as it is when she witnesses the accident from the curb.

Both the *Dillon* court[54] and the English courts[55] base defendant's duty to plaintiff on foreseeability standards. In the standard conception of duty this is wholly improper. Leon Green writes:

> [H]owever valuable the foreseeability formula may be in aiding a jury or judge to reach a decision on the negligence issue, it is altogether inadequate for use by the judge as a basis of determining the duty issue and its scope.
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> . . . It is [the judges] and they only who can say whether the risk that has brought injury to the victim shall be borne by the defendant, if the other issues are found favorably to the plaintiff. This is the law-making or law-declaring function of the courts and its range extends far beyond the range of the reasonable man's foresight, or the foresight of anyone. Here it is always *hindsight* that must be relied on for judgment—hindsight that may call into play far-flung considerations affecting the welfare of persons not parties to the litigation, for "we the people" have a stake in every litigation and our interests cannot be ignored.[56]

DUTY

Since Chief Justice Cardozo's announcement of the *Palsgraf v. Long Island Railroad*[57] decision in 1928, it has become firmly established in American law that, "before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining . . . ."[58] There are no artificial cutoff points or mechanical tests in this concept of duty. Duty, in its purest form, is "the sum total of those

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[54]*Id.* at 739-40, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[55]*See supra* notes 42-46 and accompanying text.

[56]Green, *Foreseeability in Negligence Law*, 61 COL. L. REV. 1401, 1417-18 (1961). *See also* Linden, *Down with Foreseeability! Of Thin Skulls and Rescuers*, 47 CAN. BAR REV. 545, 548 (1969); Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law* (pt. 2), 9 COL. L. REV. 136, 138-45 (1909). And lest this conception of duty be thought to be solely a product of academia, it should be noted that this view of duty has support in courts as well as the law journals. *E.g.*, Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 354-57, 367 N.E.2d 1250, 1253-57 (1977); Laird v. Travelers Ins. Co., 263 La. 199, 210-14, 267 So. 2d 714, 718-19 (1972); Samson v. Saginaw Professional Bldg., 393 Mich. 393, 418-21, 224 N.W.2d 843, 854-56 (1975) (Levin, J. dissenting); Mayer v. Housing Auth. of Jersey City, 44 N.J. 567, 210 A.2d 617 (1965); D'Ambra v. United States, 114 R.I. 643, 650-51, 338 A.2d 524, 528 (1975); Frericks v. General Motors Corp., 20 Md. App. 518, 530-31, 317 A.2d 494, 501 (1974).

[57]248 N.Y. 339, 162 N.E. 99 (1928).

[58]*Id.* at 342, 162 N.E at 99-100 (Quoting McSherry, C.J., in West Virginia Cent. & P. Ry. v. State, 96 Md. 652, 666, 54 A. 669, 671 (1903)).

considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[59]

In determining whether the defendant had a duty to the plaintiff, the court must weigh all of the policy considerations favoring compensating the plaintiff for his injury against those favoring limiting the defendant's liability,[60] and then consider the effect on society of allowing or disallowing recovery.[61] This societal view is what Green calls the "third phase of the judicial process"[62] because it extends beyond the interests of the immediate parties to the litigation and takes into consideration the interests of "we the people," society at large.

In weighing the competing interests, there will be a different set of variables to balance in each significantly different case; consequently, this duty analysis does not admit of any formula.[63] Such arbitrary, mechanical barriers to recovery as the impact rule, the zone of danger rule, and the foreseeability test[64] can not suffice. Leon Green writes:

> Despite the intricacies involved, despite our incapacity to deal appreciatingly with all the conflicting interests even in the easiest case, can we rationally escape the attempt? The fact remains that whatever judgment is passed some interest is favored and some other disfavored. The risk is made to fall one way or the other as certainly as judgment is rendered. But shutting our eyes, stopping our ears, resorting to doubtful formulas or other device of chance, does not mean that judgment is escaped nor that it is an intelligent and acceptable judgment. It merely means that we have been saved the painful process of rational judging. . . .
>
> Does not the problem shake down to one of weighing the interests involved and apportioning the risks according to the dictates of that "will-of-the-wisp" justice we think so much of?[65]

It is important to remember that the reason the courts are using such formulas as the impact rule, the zone of danger rule, and the foreseeability test is to limit the otherwise potentially infinite liability of an admittedly negligent defendant.[66] But in answering the question of whether it is fair to hold the defendant responsible for the harm to the plaintiff, a

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[59]W. PROSSER, *supra* note 3, at 325-26.

[60]Rodrigues v. State, 52 Haw. 156, 170, 472 P.2d 509, 518-19 (1970).

[61]Green, *supra* note 56, at 1417-18.

[62]Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 2 (1959).

[63]Green writes, "The process which leaves the problem a wide open one in every case, requiring the consideration of economic and social interests on the broadest scales, offers a variable rule where only variableness obtains." L. GREEN, RATIONALE OF PROXIMATE CAUSE. 70-71 (1927).

[64]*See* Leong v. Takasaki, 55 Haw. 398, 402-04, 410, 520 P.2d 758, 761-63, 765-66 (1974).

[65]L. GREEN, *supra* note 63, at 198.

[66]*See supra* nn. 23, 30, & 51 and accompanying text.

catchword formula cannot be expected to be a very useful tool. What is needed is a detailed analysis of the policy considerations that the case presents.[67] Such an approach is embodied in the duty analysis.

To say "duty" is one thing; to use "duty" is quite another. The intricacies and the number of competing interests involved are enormous. Consequently, courts often say that they are using the duty approach, but slip off this analysis and turn the case on the mechanical foreseeability test.[68] Such has been the case with the English courts,[69] however, within the last ten years, in general tort cases not involving emotional distress, the courts of England have finally begun to discuss and weigh the policy considerations involved in each case, no longer choosing to hide behind the facile foreseeability test.[70] Although the English courts have not yet used this new duty approach in emotional distress cases, the growing use of the doctrine in other areas suggests that English implementation of the duty analysis in the emotional distress area is inevitable.

Many advocates of the duty approach leave their audience with little idea of exactly what this approach is;[71] therefore, it is necessary here to take an in-depth look at what a duty analysis really involves. Although the policy considerations which will lead the courts to impose a duty will vary from case to case, several considerations will arise frequently, and flexibility must be the rule. One consideration, articulated by courts since the inception of the emotional distress tort,[72] is the possibility of

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[67]Linden, *supra* note 56, at 548.

[68]For example, the *Dillon* court writes, "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." Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). But the *Dillon* court goes on to equate foreseeability with duty and turns the case on the lack of foreseeability. *Id.* at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

[69]*See supra* notes 43-46 and accompanying text.

[70]Symmons, *The Duty of Care in Negligence: Recently Expressed Policy Elements*, 34 MODERN L. REV. 394 (1971). Symmons' article presents a frank recognition and analysis of the English courts' rectification of the problem that faces the American courts in their use of foreseeability as the test of liability for negligent infliction of emotional distress. Compare this brief quotation of Symmons to the state of the American law in the courts using the foreseeability test (*supra* note 47):

> In retrospect, until as recently as the 1960's, . . . reasonable foreseeability has been used by the courts [of England] as a convenient facade behind which they could extend, or restrict extension of, the existing categories of negligence . . . . Consequently, in creating "notional" duties of care in novel "situation-patterns" in the past, the courts have been accused of concealing the true judicial process by their reticence in articulating underlying policy considerations and their almost inevitable resort to the vague and facile test of reasonable foreseeability to determine this highly important issue.
>
> Within the last ten years, however, almost dramatically, English courts seem to have taken the cue from their Commonwealth counterparts and begun openly to analyze and discuss policy elements in such cases.

Symmons, *supra* at 394.

[71]*See, e.g.*, Comment, *A New Boundary for Zone of Peril*, 1969 U. ILL. L.F. 125, 129-30.

[72]Spade v. Lynn & B.R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897); Mitchell v.

fraudulent claims.[73] In each case the court must consider the strength of the assurances that the claim involves a "genuine and serious" mental distress.[74] One standard available to test the authenticity of plaintiff's claim is how a reasonable person in his situation would have reacted.[75] Using this standard would relieve the courts of the felt need to put up artificial barriers to recovery, such as the requirement of resulting physical injuries.[76] Emotional distress can be just as real whether it manifests itself in physical injuries or not, and the reasonable person standard takes this into account.

Evidence of resulting physical injuries is acceptable as an indication of the degree of emotional distress plaintiff suffered.[77] The seriousness of an injury is a very important consideration; however, the impact of this injury on the plaintiff must be balanced against the impact on the defendant resulting from the imposition of unduly burdensome liability.[78] In balancing these impacts of injury and liability, the Hawaii Supreme Court in the case of *Rodrigues v. State*[79] presents four reasons for limiting recovery only to claims of serious mental distress. First, minor emotional shocks are inevitable consequences of everyday living. Second, social controls may provide a more effective means for dealing with the infliction of small degrees of emotional distress than do legal controls. Third, some kinds of emotional anguish may be beneficial. Fourth, the law should not countenance the neurotic patterns in society.[80] Similarly, the Rhode Island Supreme Court concludes that where the plaintiff's emotional injury is extremely severe, the courts should be much more willing to impose liability on the defendant than where plaintiff's injury is merely a "minor psychic shock."[81]

A further policy consideration, it has been suggested,[82] is who, between the two parties, can best bear the loss. "While society has no interest, of course, in the mere shifting of a loss, it does benefit from the wide and regular distribution of losses."[83] Often the question tacitly turns upon

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Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896); Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 213, 47 N.E. 694, 698 (1897).

[73]Rodrigues v. State, 52 Haw. 156, 170, 472 P.2d 509, 519 (1970); Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969); D'Ambra v. United States, 114 R.I. 643, 654-55, 338 A.2d 524, 530 (1975).

[74]Rodrigues v. State, 52 Haw. 156, 170, 472 P.2d 509, 519 (1970).

[75]*Id.* at 173, 472 P.2d at 520.

[76]Leong v. Takaski, 55 Haw. 398, 403, 520 P.2d 758, 762 (1974).

[77]*Id.*

[78]Rodrigues v. State, 52 Haw. 156, 172-73, 472 P.2d 509, 520 (1970); D'Ambra v. United States, 114 R.I. 643, 653, 338 A.2d 524, 529 (1975); *See generally* Dillon v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968); Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969).

[79]52 Haw. 156, 472 P.2d 509 (1970).

[80]*Id.* at 172-73, 472 P.2d at 520.

[81]D'Ambra v. United States, 114 R.I. 643, 653, 338 A.2d 524, 529 (1975).

[82]Green, *The Duty Problem in Negligence Cases* (pt. 2), 29 COL. L. REV. 255, 256 (1929).

[83]Heuston, *The Law of Torts in 1960,* 6 J. SOC'Y PUB. TCHRS. L. 26, 30-31 (1961).

whether defendant is likely to have insurance,[84] thus enabling the loss to be broadly spread across society via the insurance company.

The courts should also look at the utility of defendant's conduct:

> Another policy factor which is gaining increasing attention from the courts is whether the imposition of a duty of care will cause the class of persons on whom it would potentially fall to be so circumspect in their work that, on balance, the public at large would suffer to an unreasonable degree. This factor . . . has particular relevance to the professions which render public services . . . .[85]

This policy factor breaks down into simple economic theory. Any defendant which is a business has a cost of doing business, and if a court imposes tort liability on the defendant requiring payment of damages, then his cost of doing business increases. At the point where this increase makes defendant's costs higher than his income, the business will be operating at a loss, and if operation at a loss continues for any appreciable length of time, the defendant will be forced out of business. Both losing the value of defendant's services and allowing the injured plaintiff to go uncompensated will have costs to society. The result which causes society the greatest loss should be the outcome that the court's decision seeks to prevent.

Deterrence of future tortious conduct is another policy factor. Although compensation is the primary function of the tort law, a subsidiary function is prevention of future losses.[86] This latter goal is balanced by the feasibility and costs of conduct avoidance. If defendant cannot avoid this type of conduct in the future, imposing liability on him will not deter him or others similiarly situated. Likewise, using the same economic analysis as above, if the costs to defendant, and thus to society, of avoiding the conduct in the future are greater than the costs to society of allowing plaintiff to go uncompensated, then society benefits economically by not imposing a duty on the defendant.

A further policy consideration is the ease of administering the decision. As Green has stated,

> there is nothing so weighty with court-room government as the *workability* of a rule or process . . . . A Court will not knowingly enter upon a course of dealing which it cannot finish, or that may bring down upon it an increase in business or a mass of problems which it is not prepared to handle.[87]

These are simply practical considerations which acknowledge that there

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[84]D'Ambra v. United States, 114 R.I. 643, 654, 338 A.2d 524, 530 (1975); Symmons, *The Duty of Care in Negligence: Recently Expressed Policy Elements* (pt. 2), 34 MODERN L. REV. 528, 539 (1971).

[85]Symmons, *supra* note 84, at 528.

[86]Hueston, *supra* note 83, at 30.

[87]Green, *The Duty Problem in Negligence Cases,* 28 COL. L. REV. 1014, 1035 (1928).

are limitations on how much judges can do. However, as indicated earlier,[88] these considerations should not be afforded a great deal of weight.

Even foreseeability is a policy consideration which must be taken into account in evaluating liability. But this is foreseeability in the narrow sense, not the broad sense in which it was used in *Dillon* and the English cases.[89] Perhaps the term foreseeability has such a well recognized meaning in the broader sense that foreseeability in the narrow sense should be called "moral culpability" in order to distinguish it:

> [F]oreseeability is responsive only to the moral aspects of the issue; it tracks the moral postulate that one must be in a position to be aware of what one is doing before one should be held responsible for it. This is not to say that foreseeability fails as a functional concept in tort law, but only that it should not be pushed beyond its inherent limitations as a conclusion to the question of whether there exists sufficient moral culpability for legal liability to be imposed.[90]

This discussion necessarily does not cover every possible consideration, since these will vary with the fact patterns, and many more may emerge. As Green has pointed out, this duty analysis "offers a variable rule where only variableness obtains."[91] Nonetheless, the discussion is indicative of the direction a duty analysis should take.

The concept of duty has not been a stranger to the Indiana courts, which have held, in areas other than emotional distress, that duty, breach, and injury resulting therefrom, constitute actionable negligence.[92] They have also noted that the existence of a duty is a pure question of law for the courts to decide.[93] Regrettably, a recent Indiana court turned the question of duty, in a case not involving emotional distress, on the test of foreseeability[94] as did the *Dillon* and English courts in emotional distress cases.[95] As already discussed,[96] this is wholly improper: an extension of the foreseeability test, by the Indiana courts, into the emotional distress area should be guarded against.

CONCLUSION

The paths to ascertaining emotional distress liability are many. The impact rule, the zone of danger rule, and the foreseeability test have all

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[88]*See supra* note 14 and accompanying text.
[89]*See supra* notes 43-55 and accompanying text.
[90]D'Ambra v. United States, 114 R.I. 643, 650-51, 338 A.2d 524, 528 (1975).
[91]L. GREEN, *supra* note 63, at 70-71.
[92]Miller v. Griesel, 261 Ind. 604, 610-11, 308 N.E.2d 701, 706 (1974); Harris v. Indiana Gen. Serv. Co., 206 Ind. 351, 356, 189 N.E. 410, 412 (1934).
[93]Miller v. Griesel, 261 Ind. 604, 610-11, 308 N.E.2d 701, 706 (1974); Union Traction Co. v. Berry, 188 Ind. 514, 520-21, 121 N.E. 655, 657 (1919).
[94]Geyer v. City of Logansport, __ Ind. App. __,__, 346 N.E.2d 634, 639 (1976).
[95]*See supra* notes 43-55 and accompanying text.
[96]*Supra* notes 54-70 and accompanying text.

been brought to America from English roots.[97] Now the innovative English courts are moving away from the foreseeability test of duty and using the policy analysis approach in an increasing number of cases.[98] It seems likely that the courts of England will eventually apply this new duty approach to the emotional distress area. But American courts need not wait to follow English initiative in adopting rules in the emotional distress area. They should consider shifting the test of emotional distress claims from inadequate mechanical rules to the flexible duty analysis.

There are only two rational alternatives regarding tort liability for negligently inflicted emotional distress: denial of recovery because the plaintiff's interests in not being subjected to emotional distress are not legally protected, or allowance of recovery where plaintiff can show duty, negligence and causation. Any rule that rests on an intermediate ground is an arbitrary, illogical barrier to recovery. "Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion."[99] With the Indiana court evidencing a willingness to change its old rule,[100] adoption of the duty analysis would be a timely, laudable advance in Indiana law.

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[97]*See supra* notes 36-47 and accompanying text.
[98]*See supra* note 70 and accompanying text.
[99]Dillon v. Legg, 68 Cal. 2d 728, 747, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968).
[100]*See supra* notes 1-3 and accompanying text.