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Carl Tobias, *Intentional Infliction of Mental Distress in Nevada*, 2 Nev. L.J. 59 (2002)

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INTENTIONAL INFLICTION OF MENTAL DISTRESS IN NEVADA

Carl Tobias*

The independent cause of action for the intentional infliction of mental distress (IIMD) is the only modern intentional tort for physical injury to persons. State court judges in the United States initially recognized the freestanding cause of action during the mid-twentieth century. Nevertheless, considerable confusion has attended the judicial recognition, articulation, and application of this tort in a substantial number of American jurisdictions. The jurisprudence of IIMD that members of the Nevada Supreme Court as well as attorneys and litigants in Nevada have developed has remained rather clear, although the justices have decided comparatively few cases in which they have assumed the opportunities to explicate and refine enforcement of the cause of action or to elaborate comprehensively on the elements of the mental distress tort. Moreover, several recent determinations that the Nevada Supreme Court has issued have helped to clarify the IIMD cause of action by, for instance, specifically confirming its applicability in the important context of employment termination. Nonetheless, one of those opinions and two other decisions which the justices have resolved since 1995 could create confusion because the cases seemingly require parties who pursue IIMD claims to demonstrate that extremely outrageous behavior caused the litigants to suffer physical impacts or to experience physical injuries or physical illnesses.¹ Furthermore, Nevada lawyers and their clients have increasingly pled and attempted to prove that individuals who participated in extremely outrageous conduct that they intended would inflict severe mental distress on the parties behaved in ways which should expose the perpetrators to intentional tort liability, while invocation of the IIMD cause of action in Nevada promises to expand exponentially in the foreseeable future. All of the ideas above mean that those determinations in which the Nevada Supreme Court has recognized, enunciated, and applied the IIMD tort deserve assessment. This article undertakes that effort.

The first section of the article considers the origins and development of the IIMD cause of action in the United States. Finding that the overwhelming majority of jurisdictions in the country have recognized the independent tort, that California was the initial state in America to acknowledge the mental dis-

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¹ See *Dillard Dep't Stores, Inc. v. Beckwith*, 989 P.2d 882 (Nev. 1999); *Shoen v. Amerco, Inc.*, 896 P.2d 469 (Nev. 1995); see also *Olivero v. Lowe*, 995 P.2d 1023 (Nev. 2000); *Nev. Dep't of Human Res. v. Jiminez*, 935 P.2d 274 (Nev.1997); *infra* notes 39-43 and accompanying text.

stress claim during 1952, and that the California articulation and enforcement appear to have affected rather significantly the Nevada Supreme Court's recognition, enunciation, and application of the cause of action,² the second part explores the jurisprudence of the IIMD tort in Nevada. The examination afforded in section two relies substantially on the recent Nevada Supreme Court opinions which I mentioned in the first paragraph, a number of additional, significant decisions rendered by the justices over the last five years, and several of the most important earlier cases. The evaluation ascertains that the Nevada Supreme Court initially recognized the freestanding cause of action for IIMD during 1981. Moreover, the analysis determines that the jurisdiction's jurisprudence of IIMD is relatively clear, albeit somewhat limited in scope, because there is a dearth of relevant precedent in which the Nevada Supreme Court has thoroughly explained the tort or embellished the elements of this cause of action during the subsequent two-decade period. The third portion of the article, therefore, provides recommendations for future treatment of the IIMD tort in Nevada, primarily by proffering ideas that should clarify significant areas of the law that remain rather unclear.

I. THE ORIGINS AND DEVELOPMENT OF THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CAUSE OF ACTION IN THE UNITED STATES

The rise and development of the independent cause of action for IIMD in the United States warrant comparatively brief examination in this article, as the applicable background has been rather comprehensively assessed elsewhere.³ Nevertheless, considerable exploration of the tort's origins and growth is appropriate, because that type of evaluation should enhance understanding of the cause of action in Nevada and in this nation today.

When the American Law Institute (ALI) promulgated the original Restatement of Torts during 1934, the organization considered the interest in mental and emotional tranquility alone insufficiently consequential that its violation should support recognition of a freestanding tort cause of action.⁴ Nevertheless, fourteen years thereafter, the Institute prescribed a supplement to the initial Restatement of Torts in which the entity decided to recognize an

² See *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952); *infra* note 27 and accompanying text. This article does not analyze Nevada federal court case law because it has rather limited relevance. The article only evaluates the cause of action for negligent infliction of mental distress, insofar as that tort implicates IIMD. For a recent articulation, see *Grotts v. Zahner*, 989 P.2d 415 (Nev. 1999); see also *infra* notes 40-41, 52-53 and accompanying text.

³ See, e.g., Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 140-46 (1992). See generally Martha Chamallas with Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

⁴ See RESTATEMENT OF TORTS § 46 cmt. c (1934); see also *Siliznoff*, 240 P.2d at 285. For the relevant history of the IIMD tort, see Givelber, *supra* note 3, at 43-45; William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

independent cause of action in tort for IIMD.⁵ The American Law Institute essentially reversed the position it had espoused a decade and a half earlier, determining that the "interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it."⁶ The Institute, when adopting the Restatement (Second) of Torts during 1965, maintained liability in tort for intentionally inflicted extreme and outrageous behavior, while the ALI left open the possibility that courts in the United States might further expand the cause of action, a caveat which apparently reflected the somewhat nascent development of the intentional tort in this country at that particular juncture in time.⁷

The California Supreme Court, with its pathbreaking 1952 determination in *State Rubbish Collectors Association v. Siliznoff* (*Siliznoff*), was the first state high court in the nation that recognized the independent cause of action for IIMD.⁸ Judges in numerous jurisdictions rather promptly followed California's lead and many other states acknowledged the tort throughout the remainder of the twentieth century, while a substantial, clear majority of American jurisdictions currently subscribes to the freestanding mental distress cause of action.⁹ Practically all of the states no longer require plaintiffs to prove that some type of physical harm accompanied the mental distress which they incurred, even though a comparatively small, and apparently dwindling, number of jurisdictions have limited the application of the tort to situations in which plaintiffs have been able to demonstrate physical injury¹⁰ and a few additional state courts have evinced greater comfort when physical consequences attended the mental harm suffered.¹¹

The vast majority of jurisdictions have found that the cause of action comprises two principal elements – extremely outrageous conduct and severe mental distress – both of which constituents state court judges have considered to be elevated requirements. A significant number of jurisdictions have defined the first of these elements as behavior that exceeds all bounds that a reasonable society can tolerate. Judges in those states have concomitantly recognized two

⁵ See RESTATEMENT OF TORTS § 46 (Supp. 1948); see also *Siliznoff*, 240 P.2d at 285-86. See generally DAN B. DOBBS, *THE LAW OF TORTS* § 303, at 825 (2000); VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE & SCHWARTZ'S CASES AND MATERIALS ON TORTS* 51 n.6 (10th ed. 2000); Levit, *supra* note 3, at 142-43.

⁶ See RESTATEMENT OF TORTS § 46 cmt. d (Supp. 1948). See generally Givelber, *supra* note 3, at 43, 60-62; William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 41 (1956).

⁷ See RESTATEMENT (SECOND) OF TORTS § 46 (1964); *id.* caveat. See generally DOBBS, *supra* note 5, at 826; Givelber, *supra* note 3, at 62; Levit, *supra* note 3, at 143-44.

⁸ *Siliznoff*, 240 P.2d 282. See generally Comment, *Torts – Emotional Distress – Intentional Infliction of Mental Suffering*, 25 S. CAL. L. REV. 440 (1952); Recent Developments, *Liability for Intentional Infliction of Mental Suffering*, 52 COLUM. L. REV. 939 (1952).

⁹ See *Harris v. Jones*, 380 A.2d 611, 613 & n.1 (Md. 1977); DOBBS, *supra* note 5, at 826; Givelber, *supra* note 3, at 43 & n.9.

¹⁰ See, e.g., *Duty v. Gen. Fin. Co.*, 273 S.W.2d 64, 65 (Tex. 1954); *Carrigan v. Henderson*, 135 P.2d 330 (Okla. 1943); see also *infra* note 39 and accompanying text. See generally SCHWARTZ ET AL., *supra* note 5, at 51 n.4.

¹¹ See, e.g., *Clark v. Associated Retail Credit Men of Washington D.C.*, 105 F.2d 62 (D.C. Cir. 1939); *Kirby v. Jules Chain Stores Corp.*, 188 S.E. 625 (N.C. 1936); see also *infra* notes 39-44 and accompanying text. See generally DOBBS, *supra* note 5, at 832; Chamallas with Kerber, *supra* note 3; Levit, *supra* note 3, at 142.

primary kinds of circumstances that satisfy this definition. One important class of situations involves abuse of some relationship, ordinarily relating to economic or physical power; a large number of these actions are pursued by employees against employers, tenants against landlords, and insured persons against insurance companies.¹² The second major category of circumstances implicates individuals who are peculiarly vulnerable to experiencing severe mental distress and people who are aware of, and capitalize upon, those special susceptibilities to the disadvantage of the persons harmed.¹³

The 1977 determination of the Maryland Court of Appeals in *Harris v. Jones* affords a quintessential example of the two principal classifications.¹⁴ The plaintiff pursuing the intentional tort cause of action was a twenty-six year old individual with a high school education, who had worked on an assembly line in an automobile assembly plant for eight years and who had stuttered throughout his life.¹⁵ Defendants were General Motors and the corporation's supervisor, Jones, who mimicked Harris' stuttering approximately thirty times over less than a half-year period, even though the supervisor understood that his mimicking behavior would worsen the employee's situation. The plaintiff, accordingly, alleged that the supervisor had abused his position of authority in the workplace over the employee and was cognizant of, and had played on, the plaintiff's special susceptibility and, therefore, the supervisor exacerbated the condition of the employee.

Outside these two rather clearly-identifiable categories, judges in a number of jurisdictions have encountered considerable difficulty when attempting to delineate precisely what types of activities should be denominated extremely outrageous conduct. This complication has made the criterion peculiarly general and has meant that members of the bench and juries may diversely apply the standard in individual states and even within specific jurisdictions.

Severe mental distress, which is the second primary element of the intentional infliction of mental distress cause of action, has concomitantly resisted particularly felicitous articulation. The state court judiciaries in nearly all American jurisdictions have characterized the factor as an elevated consideration and have applied formulations that rely on the phrasing in comment j which accompanies Section 46 of the *Restatement (Second) of Torts*. This comment requires, and a substantial number of courts have indicated, that plaintiffs must show they experienced mental distress that was extreme, unusual, or so extraordinary that reasonable individuals could not be expected to

¹² See, e.g., *Harris v. Jones*, 380 A.2d 611 (employee-employer); *Kaufman v. Abramson*, 363 F.2d 865 (4th Cir. 1966) (tenant-landlord); see also RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1964); SCHWARTZ ET AL., *supra* note 5, at 59 n.6; Regina Austin, *Employer Abuse, Worker Resistance and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Prosser, *supra* note 6, at 47-50.

¹³ See, e.g., *Drejza v. Vaccaro*, 650 A.2d 1308 (D.C. 1994); *Alcorn v. Ambro Eng'g, Inc.*, 468 P.2d 216 (Cal. 1970); *Korbin v. Berlin*, 177 So. 2d 551 (Fla. Dist. Ct. App. 1965); see also RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1964); DOBBS, *supra* note 5, at 827; Prosser, *supra* note 6, at 50-51.

¹⁴ 380 A.2d 611 (Md. 1977).

¹⁵ *Id.* at 612. See generally Givelber, *supra* note 3, at 48-49 & n.29.

tolerate the harm.¹⁶ Moreover, comment j to Section 46 of the *Restatement* speaks in terms of a quite broad spectrum of adverse responses, which encompasses "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea," while judges have frequently invoked one of these ideas or some combination of the various concepts.¹⁷ Furthermore, the *Restatement* can be read to suggest, and a comparatively small number of state court judges have mandated, that plaintiffs seeking recovery must suffer severely disabling distress.¹⁸

Finally, concerns that individuals who believed they had experienced intentionally inflicted mental harm would pursue fictitious, fraudulent, or frivolous lawsuits, thereby "opening the floodgates of litigation," as well as concerns about those persons in fact suffering, and being able to prove, tangible injury apparently explain why courts in the United States only subscribed to the independent cause of action for IIMD after the middle of the twentieth century. These phenomena may also indicate why judges, in recognizing, articulating, and applying this tort, have imposed a pair of elevated requirements upon plaintiffs, seeming to mandate proof both that defendants participated in extremely outrageous conduct and that this behavior caused plaintiffs severe mental distress. It is important to understand, however, that judges and juries in numerous jurisdictions have derived the guarantees that claims which plaintiffs asserted were genuine from the extremity of the outrageousness of defendants' conduct, rather than from the severity of the mental distress that this behavior inflicted on plaintiffs.¹⁹ Indeed, Justice Roger Traynor of the California Supreme Court specifically included an analogous proposition as a critical argument for the tort's recognition in the landmark *Siliznoff* decision when he stated: "greater proof of mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom."²⁰ Comment k which attends Section 46 of the *Restatement (Second) of Torts* correspondingly embodies somewhat closely related notions.²¹

¹⁶ See, e.g., *Deitsch v. Tillery*, 833 S.W.2d 760, 762 (Ark. 1992); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 155 (Me. 1979); RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964). See generally DOBBS, *supra* note 5, at 832. But see *infra* notes 19-21 and accompanying text.

¹⁷ See RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 426 (Mont. 1995). See generally DOBBS, *supra* note 5, at 832-33.

¹⁸ See RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964); *Harris*, 380 A.2d at 616; see also *Russo v. White*, 400 S.E.2d 160 (Va. 1991).

¹⁹ See DOBBS, *supra* note 5, at 832; *Givelber*, *supra* note 3, at 46-51; David F. Partlett, *Tort Liability and the American Way: Reflections on Liability for Emotional Distress*, 45 AM. J. COMP. L. 171, 187 (1997); *Prosser*, *supra* note 6, at 53.

²⁰ See *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 286 (Cal. 1952). See generally SCHWARTZ ET AL., *supra* note 5, at 51 n.4.

²¹ The rule stated is not, however, limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous, there may be liability for the emotional distress alone, without such harm. In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has been severe emotion distress, bodily harm is not required.

II. THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CAUSE OF ACTION IN NEVADA

The origins and growth of the freestanding cause of action for IIMD in Nevada deserve relatively abbreviated discussion in this article for several reasons. First and perhaps foremost, the Nevada Supreme Court has issued comparatively few opinions involving the mental distress tort in which the justices have thoroughly examined the independent cause of action or its elements, so that the jurisprudence has received rather limited development.²² Second, many of those cases that the Supreme Court has resolved have generally tracked the national developments considered above, and nearly all of the determinations have relied substantially on earlier Nevada precedent. Two of the recent Nevada Supreme Court opinions mentioned in the introduction to this article illustrate a number of these ideas. For example, the justices who decided the cases clearly reiterated the elements of the freestanding IIMD cause of action and observed that the tort applies in the employment termination context while citing prior precedent for these propositions without elaborating the cause of action or its major elements in very great detail.²³ Finally, the court resolved only a minuscule number of lawsuits in which plaintiffs sought to have the justices recognize the independent tort for IIMD before the court chose to acknowledge the freestanding cause of action twenty years ago.

A. *Origins and Early Development*

The first decision in which the Nevada Supreme Court specifically recognized the independent tort that involves IIMD was *Star v. Rabello*, a 1981 determination.²⁴ Rabello filed suit against Star for assault and battery for herself and, as guardian ad litem for her daughter, who witnessed the attack, for intentionally inflicting emotional distress. The district court judge awarded Rabello special, general, and punitive damages for the injuries which she had suffered and awarded her daughter general damages for the intentional infliction of emotional distress.²⁵

Star appealed the trial court's award of damages to the daughter and contended that the daughter was not entitled to recovery under an IIMD theory. The Nevada Supreme Court expressly remarked that "there are no reported

²² I do not intend these ideas to be criticisms. Many of the fifty opinions that have mentioned mental distress may have warranted minimal elaboration, because they were quite limited. Illustrative are cases in which IIMD was one among multiple causes of action, the Nevada Supreme Court was reviewing a trial judge's evidentiary ruling or weighing of the evidence or the questions that involved mental distress were too inconsequential to deserve very extensive examination.

²³ See *Dillard Dep't Stores, Inc. v. Beckwith*, 989 P.2d 882 (Nev. 1999); *Shoen v. Amerco, Inc.*, 896 P.2d 469 (Nev. 1995).

²⁴ 625 P.2d 90 (Nev. 1981). In earlier cases, plaintiffs had sought recovery of damages for mental distress against common carriers or when plaintiffs proved another intentional tort, such as false imprisonment. See, e.g., *Lerner Shops of Nev. Inc. v. Marin*, 423 P.2d 398, 401 (Nev. 1967); *J.C. Penney Co. v. Gravelle*, 155 P.2d 477, 483 (Nev. 1945); *Summerfield v. Hines*, 197 P. 690, 692 (Nev. 1921); see also *Burrus v. Nev. - Cal. - Or. Ry.*, 145 P. 927, 928-29 (Nev. 1915); *Barnes v. W. Union Tel. Co.*, 76 P. 931 (Nev. 1904). See generally DOBBS, *supra* note 5, at 824-25; Prosser, *supra* note 6, at 59-61.

²⁵ *Star*, 625 P.2d at 91.

cases in this jurisdiction concerning the intentional infliction of emotional distress the tort of 'outrage.'²⁶ The justices then recognized the independent mental distress tort by announcing that the elements of this cause of action generally "are (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation."²⁷ The court elaborated, and particularized, its enunciation by declaring that a third party who observes outrageous behavior can recover, if the individual is a "close relative of the person against whom the outrage was directed" and the "witnessed acts were not only outrageous but unquestionably violent and shocking."²⁸ The justices noted the existence of "very little case law [respecting] the mere observation of outrageous acts aimed at third parties"; ascertained that recovery has been permitted only when the conduct witnessed "has been outrageous in the extreme"; ruled, "as a matter of law, that an assault of the kind presented in this appeal is insufficient to warrant recovery by a witness to such an assault"; and reversed the determination of the district court judge.²⁹

In *Branda v. Sanford*, which the Nevada Supreme Court issued during December 1981, the justices reinforced, and made somewhat more specific, the previous articulation of the freestanding mental distress tort with the statement that the court had "recently explicitly recognized that liability can flow from intentional infliction of emotional distress" and with a citation to the decision in the *Star* case nine months earlier.³⁰ The justices correspondingly endorsed the elements of the independent cause of action for the IIMD which the court had enunciated in *Star* by repeating those criteria, while the justices apparently accorded a measure of substantive content to the extremely outrageous conduct element when they declared that the "jury was entitled to determine, considering prevailing circumstances, contemporary attitudes and [plaintiff's] own susceptibility, whether the conduct in question constituted extreme outrage."³¹ The court may also have been elaborating the severe mental distress element when the justices observed that "severe emotional distress could be manifested through such symptoms as hysteria and nervousness, nightmares, great nervousness, and bodily illness and injury," although the court proffered this enumeration in the context of ascertaining whether the IIMD cause of action "was pled and *prima facie* proof given at trial."³²

²⁶ See *id.*; see also *supra* note 24 (discussing the earlier case law in Nevada).

²⁷ See *Star*, 625 P.2d at 91-92. The court cited *Cervantes (sic) v. J.C. Penney, Inc.*, 595 P.2d 975 (Cal. 1979), for this proposition, while the court in *Cervantez* relied substantially on *Siliznoff*.

²⁸ See *Star*, 625 P.2d at 92. See generally RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1964); DOBBS, *supra* note 5, at 833-35; PROSSER, *supra* note 6, at 56-59.

²⁹ See *Star*, 625 P.2d at 92. Accord *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1145 (Nev. 1983); see also *infra* note 43 and accompanying text.

³⁰ 637 P.2d 1223, 1227 (Nev. 1981).

³¹ See *id.* Plaintiff was a fifteen-year-old busgirl whom the defendant, a well-known male entertainer, "verbally accosted with sexual innuendoes." *Id.* at 1224; see also *Posadas v. City of Reno*, 851 P.2d 438, 442 (Nev. 1993) (affording an articulation similar to the enunciation quoted in the text).

³² *Branda*, 637 P.2d at 1227; see also *infra* note 39.

B. Subsequent Developments

Subsequent determinations rendered by the Nevada Supreme Court have expanded in some detail, and applied in specific factual circumstances, the fundamental elements of the IIMD tort that the justices enunciated in the *Star* decision when initially recognizing the independent cause of action. However, members of the court who have written almost all of the decisions have subscribed to the essential elements that the justices propounded in the *Star* opinion. The cases, accordingly, have required plaintiffs to prove that defendants participated in extreme and outrageous conduct with the intention of, or reckless disregard for, inflicting emotional distress, which behavior actually or proximately caused plaintiffs to suffer severe or extreme emotional distress.

A comparatively small number of those determinations that the Nevada Supreme Court has issued over the last two decades have elaborated in substantial detail the concept of extreme and outrageous conduct, perhaps because the activities which have been at issue in individual lawsuits have clearly constituted extremely outrageous behavior or have ranged across such an enormous spectrum of conduct that extreme and outrageous behavior has resisted particularly clear or thoroughgoing delineation.³³ The 1998 decision in *Maduiké v. Agency Rent-a-Car* afforded one of the more comprehensive explications of what comprises extreme and outrageous conduct by drawing upon the *California Book of Approved Jury Instructions*.³⁴ The Nevada Supreme Court defined the behavior as conduct "which is 'outside all possible bounds of decency' and is regarded as 'utterly intolerable in a civilized community.'"³⁵ The justices concomitantly depended on the California jury instructions to offer additional guidance that "persons must necessarily be expected and required to be hardened . . . to occasional acts that are definitely inconsiderate and unkind."³⁶

The Nevada Supreme Court has also expanded only minimally upon the meaning of severe or extreme emotional distress. Nevertheless, two recent rulings may provide a modicum of insight into how the justices define the notion of severe mental distress and into the proof requirements that the court imposes on plaintiffs.³⁷ In the 1998 opinion of *Miller v. Jones*, the justices determined that the plaintiff's statement in a "deposition that he was depressed for some time [but] did not seek any medical or psychiatric assistance . . . presented no objectively verifiable indicia of the severity of his emotional distress" and, therefore, the court concluded that the plaintiff had failed to "raise a genuine issue of material fact as to whether he suffered severe emotional distress."³⁸ In

³³ Extreme and outrageous conduct may not have been that clear, because a number of the cases affirmed trial court determinations that favored defendants.

³⁴ 953 P.2d 24 (Nev. 1998); see also *supra* notes 12-15 and accompanying text.

³⁵ *Maduiké*, 953 P.2d at 26. See generally RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); DOBBS, *supra* note 5, at 827; Givelber, *supra* note 3, at 51-52.

³⁶ See *Maduiké*, 953 P.2d at 26. See generally Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936); Prosser, *supra* note 4, at 888-89.

³⁷ See *Miller v. Jones*, 970 P.2d 571 (Nev. 1998); *Nev. Dep't of Human Res. v. Jiminez*, 935 P.2d 274 (Nev. 1997).

³⁸ *Miller*, 970 P.2d at 577; see also *Chowdry v. NLVH, Inc.*, 851 P.2d 459, 462 (Nev. 1993); *supra* notes 10-11, 16-18 and accompanying text. See generally DOBBS, *supra* note 5, at 832-33.

the 1997 decision of *Nevada Department of Human Resources v. Jiminez*, the justices observed that “where the damages are for extreme emotional distress, such distress must be manifested by physical injury or illness, something more than just embarrassment,” and found the standard satisfied with the “evidence of physical injury . . . in the form of medical testimony which proved that [the plaintiff] had suffered sexual trauma” as well as with the “nine acts of sexual assault” which the defendant had inflicted on the plaintiff.³⁹

Several cases that involved mental distress claims which the court has issued since 1995 have concomitantly stated that “where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness must be presented.”⁴⁰ The justices who authored the three opinions were specifically addressing negligent, not intentional, infliction of emotional distress, and, therefore, the determinations should have limited, if any, applicability to the *intentional* infliction of mental distress tort, although the court deciding the *Jiminez* case may have derived the “physical injury or illness” notion from the last clause in the sentence immediately above.⁴¹ The justices, in the *Olivero v. Lowe* opinion, the most recent of those three determinations, correspondingly reproduced in a footnote, and perhaps subscribed to, comment k which accompanies the *Restatement (Second) of Torts* Section 46. This comment provides that plaintiffs need not suffer physical harm to recover for IIMD, especially when the outrageousness of defendants’ conduct affords sufficient assurance that the mental damages sustained are genuine.⁴² The 1983 case of *Nelson v. City of Las Vegas* proffered, in the context of a third-party claim, a somewhat similar formulation: the “less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress.”⁴³ In short, these opinions might seem to mandate that plaintiffs, who did not experience physical impacts, must prove severe emotional distress by showing physical injury or physical illness. However, *Jiminez* was the only

³⁹ *Jiminez*, 935 P.2d at 284. The justices stated that they had earlier “intimated that severe emotional distress could be manifested through such symptoms as hysteria and nervousness, nightmares, great nervousness, and bodily illness and injury,” although the *Branda* court so observed in the context of deciding whether IIMD “was pled and *prima facie* proof given at trial” and did not expressly require proof of physical injury or illness. *Id.*; see also *Branda v. Sanford*, 637 P.2d 1223, 1227 (Nev. 1981).

⁴⁰ See *Olivero v. Lowe*, 995 P.2d 1023, 1026 (Nev. 2000); *Barlmetter v. Reno Air, Inc.*, 956 P.2d 1382, 1386-87 (Nev. 1998); *Shoen v. Amerco, Inc.*, 896 P.2d 469, 477 (Nev. 1995); see also *supra* notes 10-11 and accompanying text. See generally Chamallas with Kerber, *supra* note 3.

⁴¹ See *Olivero*, 995 P.2d at 1026; *Barlmetter*, 956 P.2d at 1386-87; *Shoen*, 896 P.2d at 477; see also *supra* notes 39-40 and accompanying text. “Insomnia and general physical or emotional discomfort are insufficient to satisfy the physical impact requirement.” *Chowdry*, 851 P.2d at 462 (citation omitted). See generally DOBBS, *supra* note 5, at 832-33.

⁴² See *Olivero*, 995 P.2d at 1027 n.1; see also *supra* notes 19-21, *infra* notes 48-50, 59-60 and accompanying text.

⁴³ 665 P.2d 1141, 1145 (Nev. 1983) (citing *Star v. Rabello*, 625 P.2d 90 (Nev. 1981); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 62 (4th ed. 1971)). The 1993 opinion in *Chowdry*, 851 P.2d at 462, reproduced the direct quotation in the text. See generally DOBBS, *supra* note 5, at 832-33.

decision which clearly so provided for first-party claims, while that intimation was not necessary to the litigation's resolution and appeared aberrational because the justices imposed an exceptionally high standard, which few other jurisdictions presently apply and which lacks scientific substantiation.

A significant number of Nevada Supreme Court cases have also clarified certain specific dimensions of the freestanding cause of action for IIMD. For instance, one new determination and another relatively recent ruling have expressly observed that the "tort of intentional infliction of emotional distress is recognizable in the employment termination context."⁴⁴ This pronouncement is especially important, because considerable litigation which plaintiffs in Nevada have pursued that alleged IIMD, and numerous IIMD opinions issued by additional jurisdictions, have implicated disputes over employment.⁴⁵

In sum, the Nevada Supreme Court has resolved approximately fifty decisions in which plaintiffs asserted claims involving IIMD over the period since the justices initially recognized the independent cause of action in the *Star* determination nearly two decades ago. Nonetheless, comparatively few of the rulings that have addressed the mental distress tort have comprehensively elaborated the cause of action or its particular elements. The third section of this article, therefore, provides recommendations for future application of the IIMD cause of action in Nevada.

III. SUGGESTIONS FOR THE FUTURE

When the Nevada Supreme Court considers future cases that implicate the freestanding IIMD cause of action, the justices should embellish the tort and its elements and attempt to elucidate specific features of the cause of action that may remain unclear. Obvious aspects of the tort that the Nevada Supreme Court might want to accord more thorough treatment are the two principal elements of the IIMD cause of action: extremely outrageous conduct and severe mental distress.

The justices should expand, and particularize, the definition of extremely outrageous conduct beyond the general notion of behavior that exceeds the limits that a reasonable society tolerates. For example, the court could expressly recognize the two primary situations that satisfy the idea of extremely outrageous conduct – abuse of a relationship and special susceptibility.⁴⁶ The explicit acknowledgement of those circumstances should enhance understanding and application of the tort in Nevada, although this element of the cause of action may necessarily remain rather general. Behavior that is extremely outrageous or that surpasses all bounds tolerated by a reasonable society might simply resist very precise definition, will operate at a high level of generality, will retain a somewhat abstract and situation-specific quality, and could vary signif-

⁴⁴ See *Dillard Dep't Stores, Inc. v. Beckwith*, 989 P.2d 882, 886 (Nev. 1999); *Shoen*, 896 P.2d at 476.

⁴⁵ See SCHWARTZ ET AL., *supra* note 5, at 58 n.4; see also *supra* note 12 and accompanying text.

⁴⁶ See *supra* notes 12-15 and accompanying text. A number of the Nevada cases reviewed above involved the two primary situations. See, e.g., *supra* notes 30-32, 39 and accompanying text.

icantly over time and from place to place. For instance, conduct which today exceeds the limits tolerated in Elko, Ely, or Winnemucca may have been acceptable a half-century ago, and remain so, in Las Vegas and probably in Reno. Given the quite generalized nature of what constitutes extremely outrageous behavior, perhaps all that the Nevada Supreme Court can do is to recognize expressly both major classifications. The justices should apply in a flexible and pragmatic manner the extremely outrageous conduct element, but they must also be alert to the possibility that the general, open-ended character of the definition might facilitate efforts to invoke the tort in situations that may be inappropriate. For example, these attributes of the element can permit plaintiffs to employ the mental distress cause of action in ways that could deter or punish, and even chill, speech or activities that are politically unpopular.⁴⁷

The Nevada Supreme Court should also attempt to elaborate and make as specific as possible the second principal element of the mental distress tort – severe or extreme mental distress. Defining and particularizing the concept of severe mental distress presents numerous complications that resemble the difficulties that attend efforts to define and specify the notion of extremely outrageous conduct. Nevertheless, certain guidance can be afforded.

The justices ought to treat this element as an elevated requirement; however, the court should flexibly and practically employ the severe mental distress concept. For instance, judges in numerous jurisdictions demand less by way of proof that plaintiffs have suffered severe mental distress, if those parties have proven that defendants clearly behaved in an extremely outrageous manner.⁴⁸ The Nevada Supreme Court has acknowledged a somewhat closely related idea in one very recent case when discussing damages for intentional tort causes of action⁴⁹ and in an earlier decision when examining the existence of a physical injury requirement.⁵⁰ The justices should explicitly endorse these notions by expressly stating that plaintiffs will have to prove less vis-à-vis the severity of the mental distress suffered when defendants' intentional conduct is sufficiently extreme and outrageous, because the "enormity of the outrage carries conviction that there has been severe emotional distress."⁵¹

The Nevada Supreme Court should concomitantly clarify whether a showing of physical impact or physical illness or injury is mandated in this situation or in other circumstances. The justices, accordingly, must elucidate whether they intended the "physical impact" requirement articulated in several recent opinions to govern *intentional*, as well as negligent, infliction of mental distress cases.⁵² Although the court has specifically applied the physical impact idea

⁴⁷ See, e.g., Givelber, *supra* note 3, at 51-54; Paul D. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579 (1993).

⁴⁸ See *supra* note 19 and accompanying text. *But see* Harris v. Jones, 380 A.2d 611, 616-17 (Md. 1977). See generally Stanley Ingber, *Rethinking Intangible Injuries*, 73 CAL. L. REV. 772, 788 (1985).

⁴⁹ See *supra* note 42 and accompanying text.

⁵⁰ See *supra* note 43 and accompanying text.

⁵¹ See *Olivero v. Lowe*, 995 P.2d 1023, 1027 n.1 (Nev. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965)); see also *supra* note 21 and accompanying text.

⁵² See *supra* notes 40-41 and accompanying text; see also *supra* notes 43, 50 and accompanying text.

only to instances which involved negligent infliction of mental distress,⁵³ it is arguable that the justices meant the concept also to cover intentional infliction, partly because negligent and intentional infliction can seem analogous in certain situations and because some courts treat them similarly.⁵⁴ Notwithstanding these considerations, the justices must explicitly reject the imposition of a physical impact requirement in IIMD litigation for numerous reasons. This interpretation would be a strained reading of the relevant Nevada precedent and would inappropriately conflate the torts of negligent and IIMD, which are two distinct causes of action that should remain discrete. The construction would also demand proof which contravenes modern legal and scientific understandings of mental harm, while it would require that plaintiffs show a type of injury – physical impact – which simply does not occur in that substantial number of circumstances when the extremely outrageous conduct at issue consists exclusively of words. Moreover, mandating proof of extremely outrageous behavior will achieve the principal purpose of a physical impact command by providing the requisite guarantee in most situations with fewer disadvantages. Insofar as the Nevada jurisprudence and the *Jiminez* determination seem to impose a physical injury or physical illness requirement, the justices must expressly repudiate this idea for several reasons that resemble those propositions immediately above. For example, very little applicable Nevada case law supports the notion, a tiny number of other jurisdictions now demand proof of physical injury or illness, the concept cannot be supported scientifically, and the requirement is overly stringent.⁵⁵

The Nevada Supreme Court should elaborate and clarify the meaning of severe or extreme emotional distress in additional ways. The justices recently suggested that plaintiffs must present “objectively verifiable indicia of the severity of [the] emotional distress,” intimating that the pursuit of medical or psychiatric assistance might have significance.⁵⁶ Plaintiffs can frequently proffer this type of evidence and they often secure professional help, although most courts do not require plaintiffs to introduce medical testimony that demonstrates distress’s severity or its cause⁵⁷ and seeking this aid should rarely be dispositive. Proof that defendants have engaged in outrageous enough conduct will be available and should suffice in the overwhelming majority of circumstances, while some plaintiffs might be unable to afford professional assistance

⁵³ *Olivero*, 995 P.2d at 1026; *Barmetter v. Reno Air, Inc.*, 956 P.2d 1382, 1386-87 (Nev. 1998); and *Shoen v. Amerco, Inc.*, 896 P.2d 469, 477 (Nev. 1995), expressly applied the requirement to situations of negligent infliction, while *Chowdry v. NLVH, Inc.*, 851 P.2d 459, 462 (Nev. 1993), apparently did.

⁵⁴ See, e.g., *Vallinoto v. DiSandro*, 688 A.2d 830 (R.I. 1997); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411 (Mont. 1995); *Shoen*, 896 P.2d at 477. See generally *DOBBS*, *supra* note 5, at 832; *Givelber*, *supra* note 3, at 55-57; *Levit*, *supra* note 3, at 142-46; *Carl Tobias*, *Intentional Infliction of Mental Distress in Montana*, 57 MONT. L. REV. 99, 109-12 (1996).

⁵⁵ See *supra* notes 10-11 and accompanying text.

⁵⁶ See *Miller v. Jones*, 970 P.2d 571, 577 (Nev. 1998); see also *supra* notes 38-39 and accompanying text.

⁵⁷ See, e.g., *Stump v. Ashland, Inc.*, 499 S.E.2d 41 (W. Va. 1997); *Human Rights Comm’n v. La Brie, Inc.*, 688 A.2d 659 (Vt. 1995). See generally *DOBBS*, *supra* note 5, at 832.

and others could be concerned about a social stigma that may attach to the receipt of medical or psychiatric treatment.

The justices might also attempt to choose among the broad spectrum of mental reactions that comment j of the *Restatement (Second)* enumerates and to which the Nevada Supreme Court in *Jiminez* apparently subscribed when the justices declared that extreme emotional distress "must be manifested by physical injury or illness, something more than just embarrassment."⁵⁸ However, the best approach would be the express rejection of a physical injury or physical illness requirement⁵⁹ and the concomitant deployment of a sliding scale. For instance, it is preferable to require that plaintiffs prove less severe mental harm when the outrageousness of defendants' conduct is relatively extreme and more serious mental responses when the defendants' behavior is comparatively innocuous.⁶⁰ Finally, the Nevada Supreme Court may want to repudiate explicitly the notion of severely disabling distress, which the *Restatement* mentions, and a rather small, declining number of jurisdictions apply, because the standard is unnecessarily strict and Nevada judges have never employed the concept.⁶¹

IV. CONCLUSION

The jurisprudence of the IIMD cause of action, which the Nevada Supreme Court as well as counsel and parties in this state have developed over the two-decade period since the justices initially recognized the independent tort during 1981, has remained relatively clear. This attribute can be ascribed partly to the court's resolution of comparatively few cases that thoroughly treat the cause of action. If the justices elaborate and make more specific the IIMD cause of action in the future, the court will additionally clarify the tort's application in Nevada.

⁵⁸ See *supra* notes 18, 39 and accompanying text. The difference between "physical injury" and "just embarrassment" is obviously substantial.

⁵⁹ See *supra* note 55 and accompanying text.

⁶⁰ See *supra* notes 48-51 and accompanying text.

⁶¹ See *supra* notes 17, 37-43 and accompanying text. If the court does choose to apply this test, it should be reserved for situations in which the showing of extremely outrageous conduct is particularly weak.