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NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN ILLINOIS: LIVING IN THE PAST, SUFFERING IN THE PRESENT

James J. Reidy*†

The law always has been, is now, and will ever continue to be, largely vague and variable. And how could this well be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it—more confused than ever, in our kaleidoscopic age.

Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipating all possible legal disputes and settling them in advance. Even in such a social order no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times?

Jerome Frank, *LAW AND
THE MODERN MIND* 6 (1930).

On February 12, 1972, eight-year-old Robert Rickey, his mother, and his younger brother entered a train station in downtown Chicago. After paying their fares, the trio took an escalator down to a lower level to catch their train. Robert and his mother rode the escalator without incident, but the younger brother's dangling scarf caught in the escalator's gears and he was dragged down by the gears' motion. Robert watched his brother, Michael, being choked around the neck and deprived of oxygen while the escalator continued to revolve. Before he was finally freed, Michael was comatose. As a result of observing his brother's plight, young Robert sustained severe mental and emotional distress and psychiatric trauma, manifested by definite functional, emotional, psychiatric and behavioral disorders. In addition, he suffered extreme depression, prolonged mental disturbances, and an inability to attend school or engage in normal activities.

It would be reasonable to assume that Robert Rickey's attorneys, presenting a case based on such compelling circumstances, would encounter little difficulty in winning a verdict for their client. The trial judge held, however, that Robert Rickey had failed to state a cause of action and granted defendant's motion to dismiss.¹ The court's reason for dismissing Rickey's suit was that his injuries were not caused by direct contact with the escalator upon which his younger brother was mangled.

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1. See *Rickey v. Chicago Transit Authority*, No. 79 L 15963 (Cook County Cir. Ct. 1980).
(*Editor's Note*: The Illinois Appellate Court reversed the Circuit Court and recognized the

For nearly a century, the sheer inertia of *stare decisis* has deprived Illinois plaintiffs, such as Robert Rickey, of redress for mental and emotional distress when there is no contemporaneous physical impact. The source of this inertia is the landmark case of *Braun v. Craven*,² where the Illinois Supreme Court denied recovery for negligently inflicted emotional distress in the absence of contemporaneous physical impact. This holding has been followed by Illinois courts for eighty-two years,³ notwithstanding dramatic advances in medical science that have led most American jurisdictions to reject or modify the physical impact rule.⁴ Surprisingly, the Illinois Supreme Court has displayed no willingness to reconsider this issue despite a number of ideal recent opportunities to do so.

This Article urges a change in Illinois law because the physical impact rule is at variance with modern needs and concepts of justice. It is startling that the Illinois Supreme Court has failed to recognize that a physical injury may manifest itself in emotional trauma and, instead, continues to perpetuate a rule so out of tune with contemporary circumstances. To understand this

tort of negligent infliction of emotional distress after this issue went to print. *Rickey v. Chicago Transit Authority*, ___ Ill. App. 3d ___, 428 N.E.2d 596 (1st Dist. 1981).

2. 175 Ill. 401, 51 N.E. 657 (1898).

3. See *Cutright v. City Nat'l Bank*, 88 Ill. App. 3d 742, 410 N.E.2d 1142 (3d Dist. 1980); *Carlville Nat'l Bank v. Rhoads*, 63 Ill. App. 3d 502, 308 N.E.2d 63 (4th Dist. 1978); *Kaiserman v. Bright*, 61 Ill. App. 3d 767, 377 N.E.2d 261 (1st Dist. 1978); *Neuberg v. Michael Reese Hosp. & Medical Center*, 60 Ill. App. 3d 679, 377 N.E.2d 215 (1st Dist. 1978); *Rosenberg v. Packerland Packing Co.*, 55 Ill. App. 3d 959, 370 N.E.2d 1235 (1st Dist. 1977); *Benza v. Shulman Air Freight*, 46 Ill. App. 3d 521, 361 N.E.2d 91 (1st Dist. 1977).

4. *Alabama Fuel & Iron Co. v. Baldoni*, 15 Ala. App. 316, 73 So. 205 (1916); *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163 (1978); *D'Amico v. Alvarez Shipping Co.*, 31 Conn. Sup. 164, 326 A.2d 129 (1973); *Robb v. Pennsylvania R.R.*, 58 Del. 454, 210 A.2d 709 (1965); *Stewart v. Gilliam*, 271 So. 2d 466 (Fla. Dist. Ct. App. 1973); *Usry v. Small*, 103 Ga. App. 144, 118 S.E.2d 719 (1961); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974); *Watson v. Diltz*, 116 Iowa 249, 89 N.W. 1068 (1902); *Whitsell v. Watts*, 98 Kan. 508, 159 P. 401 (1916); *Laird v. Natchitoches Oil Mill, Inc.*, 10 La. App. 191, 120 So. 692 (1929); *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970); *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 73 A. 688 (1909); *Dziokowski v. Babineau*, 380 N.E.2d 1295 (Mass. 1978); *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973); *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892); *First Nat'l Bank v. Langly*, 314 So. 2d 324 (Miss. 1975); *Cashin v. Northern Pac. Ry.*, 96 Mont. 92, 28 P.2d 802 (1934); *Hanford v. Omaha & C.B. St. Ry.*, 113 Neb. 423, 203 N.W. 643 (1925); *Chiuchio v. New England Wholesale Tailors*, 84 N.H. 329, 150 A. 540 (1930); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *Kimberly v. Howland*, 143 N.C. 398, 55 S.E. 778 (1906); *Held v. Red Malcuit, Inc.*, 12 Ohio Misc. 158, 230 N.E.2d 674 (1967); *Salmi v. Columbia & N. R.R.*, 146 P. 819 (Or. 1915); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975); *Mack v. South Bound R.R.*, 52 S.C. 323, 29 S.E. 905 (1898); *Sterngafen v. Kozel*, 40 S.D. 396, 167 N.W. 398 (1918); *Memphis St. Ry. v. Bernstein*, 137 Tenn. 637, 194 S.W. 902 (1917); *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978); *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 234 A.2d 656 (1967); *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973); *Grimsby v. Sampson*, 85 Wash. 2d 52, 530 P.2d 214 (1975); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). States which still follow the impact rule include: *Peay v. Western Union Tel. Co.*, 64 Ark. 538, 43 S.W. 965 (1898); *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898); *Jeffersonville Siglas, Inc. v. Wilson*, 154 Ind. App. 398, 290 N.E.2d 113 (1972); *Kentucky Traction & Terminal Co. v. Roman's Guardian*, 232 Ky. 285, 23

anomaly, this Article deals with three major topics: (1) the historical developments in the area of negligent infliction of emotional distress; (2) the *Braun* decision and Illinois' adherence to its obsolete result; and (3) judicial lawmaking and the courts' duty to reform outmoded precedent. Because of the judicially created impact rule's clear injustice this Article presents an extended analysis of a plaintiff's right to redress when a victim of the tort of negligent infliction of emotional distress.

HISTORICAL DEVELOPMENTS:
A SERIES OF CHANGES AND ABANDONMENTS

The tort of negligent infliction of emotional distress has undergone various postures since its inception in this country. Although courts have been receptive to the somewhat similar tort of intentional infliction of emotional distress, the fear of both fraudulent claims and the extension of liability in proportion to the tortfeasor's fault have resulted in arbitrary rules designed to limit recovery when the tortious conduct was unintentional. Some jurisdictions have recognized that the plaintiff in either case may have a legitimate cause of action and should be able to recover upon sufficient proof to the jury. A number of courts, however, have been reluctant to modify old theories of liability, even though support for these theories has evaporated. Consequently, the ability to recover for injuries incurred as a result of negligently inflicted emotional distress may depend upon the state in which the suit is brought and the ability to offer proof in satisfaction of questionable rules laid down by courts of that state. At present, most jurisdictions require satisfaction of one of three rules of recovery: the physical impact rule, the zone of danger theory, or the *Dillon* foreseeability test.

Physical Impact Rule

In the landmark decision of *Victorian Railways Commissioners v. Coultas*,⁵ an English tribunal in 1888 denied recovery for the physical results of mental anguish absent a contemporaneous impact. The *Coultas* case involved a gatekeeper who negligently allowed Mr. Coultas and his wife to drive their buggy across a railroad crossing while a locomotive bore down on them. Although an actual collision was averted, the plaintiffs allegedly suffered severe shock and subsequent physical manifestations as a result of their narrow escape.⁶ The court contended that the plaintiffs' injuries would not normally be expected to result from the gatekeeper's negligent act and then concluded that an award of damages would extend liability for the negligent act beyond the fault of the tortfeasor.⁷ The *Coultas* court clearly

S.W.2d 272 (1929); *Babcock & Wilcox Co. v. Nolton*, 58 Nev. 133, 71 P.2d 1051 (1937); *Butner v. Western Union Tel. Co.*, 2 Okla. 234, 37 P. 1087 (1894).

5. 13 App. Cas. 222 (Eng. 1888).

6. *Id.* at 223.

7. *Id.* at 225-26.

struggled with the concept of physical injuries occasioned by mental anguish⁸ and its decision was prompted, in part, by the court's anticipation of future dubious claims. Had the plaintiffs in *Coultas* actually been struck by the train, it is reasonably certain that their claim would have been honored. Hence, the gatekeeper and his employer were exempted from liability, not because of the relationship of injuries to culpability, but because the plaintiffs successfully crossed the tracks before a collision could occur.

The reasoning of the *Coultas* court was readily adopted by the first American jurisdictions confronted with similar claims.⁹ As a result, the impact requirement quickly became the majority rule in this country despite its abandonment in England only thirteen years after its recognition.¹⁰ The New York Supreme Court's 1896 decision in *Mitchell v. Rochester Railway*¹¹ is representative of the early American decisions. In *Mitchell*, the defendant's horsecar bore down on the plaintiff as she waited to board a similar horsecar. No impact occurred, but by the time the driver was able to bring the horses under control, the plaintiff stood wedged between the horses' heads.¹² The court denied recovery despite the plaintiff's claims of unconsciousness, miscarriage, and subsequent illness. Echoing the English decision in *Coultas*, the *Mitchell* court spoke of unforeseeable injuries and fraudulent claims and held that no recovery could be maintained for fright-induced injuries, even though the injuries might be "nervous disease, blindness, insanity, or even a miscarriage."¹³ In addition, the court reiterated the fear expressed in

8. Although medical evidence was offered at the trial to show that Mrs. Coultas suffered severe shock, delicate health, impaired memory and eyesight subsequent to the accident, *id.* at 224, the court warned:

Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in cases of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

Id. at 225-26.

9. See *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898); *Cleveland C.C. & St. L. Ry. v. Stewart*, 24 Ind. App. 374, 56 N.E. 917 (1899); *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Ward v. West Jersey & S. R.R.*, 65 N.J.L. 383, 47 A. 561 (1900); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896); *Miller v. Baltimore & O.S.W. R.R.*, 78 Ohio St. 309, 85 N.E. 499 (1908); *Ewing v. Pittsburgh, C.C. & St. L. Ry.*, 147 Pa. 40, 23 A. 340 (1892). *But see Purcell v. St. Paul City R.R.*, 48 Minn. 134, 50 N.W. 1034 (1892); *Mack v. South Bound R.R.*, 52 S.C. 323, 29 S.E. 905 (1898); *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890).

10. *Dulieu v. White & Sons*, [1901] 2 K.B. 669. In *Dulieu*, the plaintiff was tending bar in her husband's public house when the defendant's servant negligently drove a horse-drawn van onto the premises. The pregnant woman sustained severe shock and illness and later gave birth prematurely to a child who was "an idiot." *Id.* at 670. In granting recovery, the court held that if physical injuries are naturally and directly caused by nervous shock, a rule which would bar all claims based on public policy and the prevention of fraudulent lawsuits should not be adopted. *Id.* at 681.

11. 151 N.Y. 107, 45 N.E. 354 (1896).

12. *Id.* at 108, 45 N.E. at 354.

13. *Id.* at 109, 45 N.E. at 354. According to the court, if the plaintiff presented a valid cause of action, recovery would be allowed, "however slight the injury." On the other hand, if no cause of action existed, recovery would be denied, "no matter how grave or serious the consequences." *Id.* at 110, 45 N.E. at 354.

expressed in *Coultas* of a floodgate of false claims grounded on the theory of negligently inflicted mental distress.¹⁴

It is apparent, then, that the four basic arguments emerging from the early cases—the fear of frivolous claims, refusal to recognize the extension of liability theory, the medical sciences' difficulty in proving causation between damages and the alleged fright, and the anxiety that such a rule might precipitate a flood of litigation—were all based on policy rather than on strict logic or legal analysis. Yet careful analysis demonstrates the flaws in these contentions. First, the possibility of fabricated claims exists whether the alleged injuries arise from a physical impact or emotional anguish. Recognizing this, courts and commentators have contended that the requirement of sufficient proof before a jury will weed out fraudulent suits.¹⁵ In addition, many courts have questioned the logic of denying all claims simply because some may be false.¹⁶

The extension of liability argument carries some weight; yet, courts have long recognized that “as between the tortfeasor who started the chain of circumstances resulting in the injury and the entirely innocent plaintiff, the tortfeasor should suffer the consequences.”¹⁷ Indeed, the refusal to extend

14. *Id.* at 110, 45 N.E. at 354-55.

15. See *Stewart v. Gilliam*, 271 So. 2d 466, 474 (Fla. Dist. Ct. App. 1973) (while adherence to impact rule implies judicial system is incapable of weeding out fraudulent claims, the bench, bar, jury, and medical profession are equal to the task); *Niederman v. Brodsky*, 436 Pa. 401, 410-11, 261 A.2d 84, 88-89 (1970) (unlikely that factual, medical, or legal charlatans will emerge from a trial unmasked in modern times); *D'Ambra v. United States*, 114 R.I. 643, 655, 338 A.2d 524, 532 (1975) (courts should weigh the quality and genuineness of proof, contemporary sophistication of the medical profession, and the ability of the court and jury to weed out dishonest claims); *Dulieu v. White & Sons*, [1901] 2 K.B. 669, 681 (jury should have no more trouble in deciding merits of case whether injuries arise with or without impact). See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 12, at 51 (4th ed. 1971) [hereinafter cited as PROSSER, *TORTS*] (careful scrutiny of evidence required to distinguish valid and fabricated claims); Green, “*Fright*” Cases, 27 ILL. L. REV. 761, 886 (1933) (weakness, if any, of plaintiff's case will be determined via use of traditional negligence analysis).

16. See *D'Ambra v. United States*, 114 R.I. 643, 655, 338 A.2d 524, 530 (1975) (reluctant to bar an entire class of claims because of occasional fraudulent suit); *Dulieu v. White & Sons*, [1901] 2 K.B. 669, 681 (adoption of a rigid rule denies redress for meritorious claims); McNiece, *Psychic Injury and Tort Liability In New York*, 24 ST. JOHN'S L. REV. 1, 31 (1949) [hereinafter cited as McNiece] (denial of all claims in order to prevent dishonest ones stretches public policy to the breaking point).

According to an English tribunal, the “[f]ear that unfounded claims may be put forward, and may result in erroneous conclusions of fact, ought not to influence us to impose legal limitations as to the nature of the facts that it is permissible to prove.” *Owens v. Liverpool Corp.*, [1939] 1 K.B. 394, 400. Two years later, the Supreme Court of Connecticut echoed those sentiments in rejecting the physical impact rule. “Certainly it is a very questionable position for a court to take, that because of the possibility of encouraging fictitious claims compensation should be denied those who have actually suffered serious injury through the negligence of another.” *Orlo v. Connecticut Co.*, 128 Conn. 231, 239, 21 A.2d 402, 405 (1941).

17. McNiece, *supra* note 16, at 16. According to Prosser, “the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties.” PROSSER, *TORTS*, *supra* note 15, at 14-15. In most cases, such an adjustment results in a finding of liability. The courts will draw the line, however, where the

liability may prompt arbitrary results. The *Coultas* case illustrates a situation where, but for the plaintiffs' narrow escape, a collision would have occurred and the defendants would have been subject to liability. Ironically, plaintiffs' diligence dictated their failure in court.

Third, the argument that mental injuries are too difficult to substantiate was perhaps valid when *Coultas* and *Mitchell* were decided. Some of the early decisions, however, reflected an insensitivity to mental or emotional injuries by repeatedly referring to "mere words and gestures" and persons of "peculiarly nervous temperament[s]."¹⁸ These jurists, perhaps, felt that such claims were improper rather than unjustified. Courts have subsequently recognized that this position is at odds with a growing body of medical learning¹⁹ that casts serious doubts upon the common assertion that mental and emotional injuries are too tenuous or superficial to be tested or diagnosed.²⁰ Although this may have been true when *Coultas* and *Mitchell* were

consequences of the negligent actor's conduct are so remote as to be "unforeseeable" by the "reasonable man." *E.g.*, *Petition of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968); *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng. Co.*, [1961] A.C. 388. *Cf.* *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964) (if some harm to plaintiff is foreseeable, the unforeseeability of extent of harm no bar to recovery); *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928) (Andrews, J., dissenting) (every person has a duty of care to protect society); *In re Polemis* [1921] 3 K.B. 560 (all damages are recoverable under a theory of direct causation).

18. *Braun v. Craven*, 175 Ill. 401, 406-07, 51 N.E. 657, 659 (1898). One court refused to recognize "so intangible, so untrustworthy, so illusory, and so speculative a cause of action as mere mental disturbance." *Huston v. Freemansberg*, 212 Pa. 540, 550, 61 A. 1022, 1023 (1905). *See also* *Ward v. West Jersey & Seashore R.R.*, 65 N.J.L. 383, 47 A. 561 (1900) (reference to possession of "ordinary physical and mental vigor"); *Spade v. Lynn & Boston R.R.*, 163 Mass. 285, 47 N.E. 88 (1897) (reference to "timid" or "sensitive" plaintiffs); *Renner v. Canfield*, 36 Minn. 90, 30 N.W. 435 (1886) (reference to one's "delicate state of health"). One commentator has even remarked that "[a]gainst a large part of the frictions and irritations and clashing temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be." Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

19. According to a Florida appellate court: "The question of proving or disproving causation between the claimed injuries and damages and the alleged fright or shock may indeed have been a difficult undertaking in 1883 when the impact rule was first announced. Such is not the situation today." *Stewart v. Gilliam*, 271 So. 2d 466, 472 (Fla. Dist. Ct. App. 1972). *Accord*, *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38, (1961) (courts must rely on sophistication of medical profession); *Niederman v. Brodsky*, 436 Pa. 401, 406, 261 A.2d 84, 86 (1970) (new equipment, research, improved education, diagnostic techniques, and better understanding of disease in general allow courts today to deal with mental and emotional injuries); *Alsteen v. Gehl*, 21 Wis. 2d 349, 359, 124 N.W.2d 312, 317-18 (1963) (because psychiatry and clinical psychology can today provide reliable information concerning psychological distress, no reason exists to follow the impact rule). One commentator has remarked that at the time the impact rule was propounded, "medical science was in its infancy" and "insanity and other emotional illnesses were considered to be the result of one's own sins." Liebson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 163-64 (1976-77).

20. *See, e.g.*, *Huston v. Borough of Freemansburg*, 212 Pa. 548, 550, 61 A. 1022, 1023 (1905) (court refused to acknowledge "so intangible, so untrustworthy, so illusory, and so

decided, today the physical and psychological consequences of emotional distress have become the subject of an increasingly large number of medical studies.²¹ More refined methods of measurement²² and documentation²³ of the effects of emotional distress have "moved the methodology from the pseudo-scientific to the scientific, testable area."²⁴ Recent studies have documented the physical effects of emotional distress, citing increases in the

speculative a cause of action as mere mental disturbance"). See also notes 8, 13, & 18 and accompanying text *supra*.

21. One survey of the existing literature indicates that between 1965 and 1975 over 300 publications appeared on the subject. Hull, *Life Circumstances and Physical Illness: A Cross Disciplinary Survey of Research Content and Method for the Decade 1965/75*, 21 J. PSYCHOSOMATIC RESEARCH 115, 115 (1977).

22. See Buell & Sime, *Quantitation of Physiological Response to Emotional Stress*, 75 J.S.C. MED. A. 555 (1979) (elastic modulus, a method used to classify human physiologic responses as dimensional strain patterns, has been found to be useful in quantifying the relationship between emotional stress and human behavior within the area of stress testing); Schiffer, Hartley, Shulman & Abelman, *The Quiz Electrocardiogram: A New Diagnostic and Research Technique for Evaluating the Relation Between Emotional Stress and Ischemic Heart Disease*, 37 AM. J. CARDIOLOGY 41 (1976) (measurement of the heart rate while patient under stress found to be useful in predicting ischemic heart disease).

Successful efforts have also been made to quantify the magnitude of life events. See Holmes & Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RESEARCH 213 (1967). Life events are occurrences in an individual's life which require some degree of adaptation. As stated by one commentator: "A characteristic feature of the life events which predict illness is that they necessitate the termination of customary pursuits and/or social contacts, and sometimes the initiation of new ones." Totman, *What Makes 'Life Events' Stressful? A Retrospective Study of Patients Who Have Suffered a First Myocardial Infarction*, 23 J. PSYCHOSOMATIC RESEARCH 193, 193 (1979). See also Holmes & Masuda, *Life Change and Illness Susceptibility* [hereinafter cited as Holmes & Masuda] in STRESSFUL LIFE EVENTS: THEIR NATURE AND EFFECTS 46 (B. Dohrenwend & B. Dohrenwend eds. 1974) [hereinafter cited as STRESSFUL LIFE EVENTS] ("The emphasis is on change from the existing steady state and not on psychological meaning, emotion, or social desirability"). By means of a written questionnaire within a sample of 394 subjects, an attempt was made to estimate the magnitude of a life event with respect to the intensity and length of time necessary to accommodate the event. Of the 43 life events listed, the death of a spouse ranked first, employee retirement ranked tenth, a mortgage over \$10,000 ranked twentieth, trouble with a person's boss ranked thirtieth, and minor violations of the law ranked last. Holmes & Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RESEARCH 217 (1967). The authors concluded: "The high degree of consensus also suggests a universal agreement between groups and among individuals about the significance of the life events under study that transcends differences in age, sex, marital status, education, social class, generation American, religion, and race." *Id.*

23. See Totman, *What Makes 'Life Events' Stressful? A Retrospective Study of Patients Who Have Suffered a First Myocardial Infarction*, 23 J. PSYCHOSOMATIC RESEARCH 193, 193 (1979) ("A substantial body of evidence from several different disciplines supports the hypothesis that a person's susceptibility to physical illness is influenced by the recent incidence of 'life events' involving social change."). See generally STRESSFUL LIFE EVENTS, *supra* note 22; Rabkin & Struening, *Life Events, Stress, and Illness*, 194 SCIENCE 1013 (1976) [hereinafter cited as Rabkin & Struening].

24. Kuller, *Epidemiology of Stress-Related Cardiovascular Disease*, 75 J.S.C. MED. A. 521, 529 (1979).

incidence of cardiovascular disease,²⁵ cancer,²⁶ diabetes,²⁷ multiple sclerosis,²⁸ hypertension,²⁹ lower back pain,³⁰ various other illnesses³¹ and profound psychiatric disorders,³² and have demonstrated statistically significant correlations between these maladies and emotionally stressful occurrences or life events.³³ In fact, at least one study has found a direct relationship between the magnitude of a life event and the risk of a health change.³⁴ In addition, it has been determined that there is a strong positive relationship between the magnitude of the life crisis and the seriousness of the resulting illness.³⁵ Further, it has been proven that physical symptoms are by no means

25. Buell & Eliot, *Stress and Cardiovascular Disease*, 75 J.S.C. MED. A. 494 (1979) ("The current interest in the relationship between stress and cardiovascular disease stems from a sizable body of evidence implicating psychosocial conflict, emotions and patterns of behavior in the pathogenesis of cardiovascular disease, arrhythmias and sudden death"); Jenkins, *Recent Evidence Supporting Psychologic and Social Risk Factors for Coronary Disease*, 295 NEW ENGLAND J. MED. 987 (1976) ("Recent publications reinforce the hypothesis that life dissatisfactions may serve as a precursor to angina pectoris and perhaps also to myocardial infarction"). Accord, Ahlbom, *Impact of Psychological Stress on Ischemic Heart Disease When Controlling for Conventional Risk Indicators*, 6 J. HUMAN STRESS 7 (1980); Wilhelmsen, *Stress and Coronary Heart Disease*, 10 AUSTRAL. N.S. MED. 135 (1980).

26. Bahnson, *Stress and Cancer: The State of the Art*, 21 PSYCHOSOMATICS 975 (1980) ("there can be little doubt that a subtle relationship exists between loss and depression and the clinical onset or exacerbation of cancer. . .").

27. Bradley, *Life Events and the Control of Diabetes Mellitus*, 23 J. PSYCHOSOMATIC RESEARCH 159 (1979) (experience of stressful life events found to be associated with disturbances of diabetic control).

28. Poser, *Trauma Stress and Multiple Sclerosis*, 7 BULL. AM. ACAD. PSYCH. L. 209 (1979) ("[t]rauma and stress must be considered precipitating factors, not causal ones").

29. Henry & Cassel, *Psychosocial Factors in Essential Hypertension*, 90 AM. J. EPIDEMIOLOGY 171 (1969) (recent experimental studies show link between unfulfilled social needs and development of high blood pressure).

30. Leavitt, Garron, & BiEliaukas, *Stressing Life Events and the Experience of Low Back Pain*, 23 J. PSYCHOSOMATIC RESEARCH 49 (1979) ("There are . . . significant relationships between the occurrence of life events and how pain is experienced within our total low back pain sample").

31. See generally STRESSFUL LIFE EVENTS, *supra* note 22; Murphy, *Life Events, Psychiatric Disturbance and Physical Illness*, 136 BRIT. J. PSYCH. 326 (1980); Rabkin & Struening, *supra* note 23; Racy, *Stress and Human Disease: An Overview and Background*, 37 ARIZ. MED. 352 (1980).

32. See note 23 *supra*.

33. See note 22 *supra*.

34. Holmes & Masuda, *supra* note 22, at 61. This study indicated that for those in the sample who had experienced a "mild" life crisis, 37% had an associated health change within two years; for those who had experienced a "moderate" crisis, 51% had an associated health change within two years; and for those who had experienced a "major" life crisis, 71% had an associated health change within two years.

A "mild" life crisis was defined as an event which had an associated value of between 150 and 199 life-change units, units which represented values to various life events in one year. *Id.* at 58. A life crisis was defined as any clustering of life-change events whose values summed to 150 life-change units or more within the one year period. *Id.* at 59. A "moderate" life crisis was defined as an event which had an associated value of between 200 and 299 life-change units. *Id.* at 58. A "major" life crisis was defined as an event which had an associated value of 300 or more life change units. *Id.*

35. *Id.* at 68. The health changes that are documented include psychiatric as well as medical and surgical diseases. *Id.* Thirty-four varieties of disease were categorized into seven types:

the only element of damage as the victim of a personal catastrophe may remain physically unaffected but suffer profound psychological injury.³⁶

Thus, medical science has demonstrated the effects of mental illness and the psychological injury resulting from emotional distress, and it can no longer be argued that psychological injuries are incapable of being measured or that their effects are inherently speculative. This is not to say that medical science is exacting in the area of detection, measurement, or controlled treatment of emotional illness. Significant advances, however, have been made, and have been one impetus for courts that have abandoned the physical impact rule.

The final argument against recovery, that a floodgate of litigation might result, is employed for cumulative effect rather than analytical support. Decisions following precedent in the face of changes in circumstances have often reverted to the time-worn contention that a flood of lawsuits would result from increased access to the courts.³⁷ In fact, however, states that

infectious and parasitic, allergic, musculoskeletal, psychosomatic, psychiatric, physical trauma, and miscellaneous. Forty-five percent were infectious, 13% were allergic, 11% were musculoskeletal and 7% were psychosomatic. *Id.* at 58.

36. Karas, Kaltreider & Horowitz, *Responses to Catastrophe: A Case Study*, 38 DISEASES NERVOUS Sys. 625 (1977). For instance, a young woman witnessed two consecutive events, the fatal shooting of her fiancé at the hands of her father and the suicide of her father. No significant physiological complications resulted, but the woman encountered significant difficulty in coping with the loss of her fiancé and with her anger toward her father. *Id.* at 626. Following a pattern familiar to psychiatrists, the woman initially denied the experience, avoiding the angry feelings toward her father and speaking idealistically of her fiancé as though he were still alive. The woman then endured intense periods of anger and anxiety over the incident that oscillated with further periods of denial. As a result, she experienced difficulty in all phases of her life, at one point dropping out of school, and only after four months of counselling was the woman able to leave therapy, re-enroll in school, and continue to live a normal life.

A vast body of literature has developed on the nature and treatment of severe psychological injury. See, e.g., Krieger, Rosenfeld, Gordon & Bennett, *Problems in the Psychotherapy of Children with Histories of Incest*, 34 AM. J. PSYCHOTHERAPY 81 (1980) (found that molested children tend to feel physically and morally helpless, defiant, precociously mature, angry, anxious, and ashamed and detailed the "special problems which arise in the individual psychotherapy of children with histories of incest"); Melges & DeMaso, *Grief-Resolution Therapy: Reliving, Revising, and Revisiting*, 35 AM. J. PSYCHOTHERAPY 51 (1970) (grief-resolution therapy indicated for the treatment of unresolved grief reactions "whereby the patient removes obstacles to grieving through reliving, revising and revisiting events of the loss"); Petti & Wells, *Crisis Treatment of a Preadolescent Who Accidentally Killed His Twin*, 34 AM. J. PSYCHOTHERAPY 434 (1980) ("It is anticipated that such intensive treatment can shorten both the duration of institutional care and the morbidity of highly vulnerable children such as the patient described").

37. According to Prosser, "[t]he courts always have stood more or less in dread of a 'flood of litigation' involving problems which they are not prepared to deal with." PROSSER, TORTS, *supra* note 15, at 21 (emphasis added). See also *Dillon v. Legg*, 68 Cal.2d 728, 735, 441 P.2d 912, 917, 69 Cal. Rptr. 72, 77 (1968) (pressing need for legal redress reflected by a multitude of claims); *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969) (a wrong requires a remedy, despite the burden on the courts); *Niederman v. Brodsky*, 436 Pa. 401, 412, 261 A.2d 84, 89 (1970) (fear of increased caseload should not result in limited access to judicial forum).

have allowed liberal recovery for negligently inflicted emotional distress have escaped the dreaded flood.³⁸

Recognizing the harsh consequences of the physical impact rule, most jurisdictions have sought alternative methods to allow limited recovery. The most conservative states have adopted a token impact doctrine allowing recovery as long as some impact, no matter how trivial, can be shown.³⁹ Although states following such a rule are perhaps more sensitive to a plaintiff than the states that still cling to the old impact rule, such a token doctrine also suffers from the same misguided logic. If the pro-recovery arguments regarding foreseeability of injuries, liability of the negligent actor, difficulty of proof, and the possibility of fabricated lawsuits carry any validity at all, then the problems surrounding them are not alleviated by the token impact doctrine.

Zone of Danger

To escape the restrictive consequences of the physical impact rule, several jurisdictions have allowed recovery for physical reactions to mental distress if the plaintiff was directly endangered by the defendant's conduct. The so-called zone of danger theory was first adopted by an English court in the 1925 decision in *Hambrook v. Stokes Brothers*.⁴⁰ In that case, a mother and

38. According to a Florida appellate court:

To perpetuate the old impact rule on the basis that its rejection would precipitate a flood of litigation, is an unsatisfactory and tenuous contention. In those states allowing recovery for psychic injuries without impact, the feared 'floodgate of litigation' has simply not appeared. Nor has it been demonstrated that the amount of litigation in those states with no impact rule is greater than in those states with the impact rule. A fear of expansive litigation should not deter courts from granting relief in meritorious cases. The fundamental concept of justice under the law would reject any rule that measures availability of a forum on a nebulous principle of a floodgate of litigation or a virtual avalanche of cases.

Stewart v. Gilliam, 271 So. 2d 466, 475 (Fla. Dist. Ct. App. 1972). See *Sinn v. Burd*, 486 Pa. 146, 162-63, 404 A.2d 672, 680 (1979) for a discussion of the California experience since the *Dillon* decision.

39. See *Israel v. Ulrich*, 114 Conn. 599, 159 A. 634 (1922) (jostling in an automobile); *Kentucky Traction & Terminal Co. v. Roman's Guardian*, 232 Ky. 285, 23 S.W.2d 272 (1929) (slight burn); *Homans v. Boston Elevated R.R.*, 180 Mass. 456, 62 N.E. 737 (1902) (slight bump against car seat); *Porter v. Delaware, L. & W. R.R.*, 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eyes); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 369 (1930) (inhalation of smoke).

At least one tribunal which pursued such practice has admitted that where "injuries, even though trivial or minor in character" exist, "mental suffering is a legitimate element of damages." *Potere v. City of Philadelphia*, 380 Pa. 581, 589, 112 A.2d 100, 104 (1955). Fifteen years after the *Potere* decision, the same jurisdiction repudiated the trivial impacts doctrine. *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 34 (1970). In *Niederman*, the Supreme Court of Pennsylvania questioned the logic of the *Potere* decision:

[The rule against recovery] has *only* been applied where there is absolutely no impact whatsoever. Once there is even the slightest impact, it has been held that the plaintiff can recover for any damages which resulted from the accompanying fright, even though the impact *had no causal connection* with the fright-induced injuries.

436 Pa. at 406-07, 261 A.2d at 86 (emphasis in original).

40. [1925] 1 K.B. 141.

her child were placed in imminent danger by a cart that allegedly had been negligently secured at the top of a hill. The mother in *Hambrook* managed to escape the onrushing cart, but suffered emotional distress and other consequences at the sight of her child being struck.⁴¹ The court held that the defendant breached a duty of care to the mother and that it was therefore reasonably foreseeable that she would be injured. The fact that her injuries were manifested in an unexpected manner did not bar the plaintiff from recovery.⁴²

Once again American courts took the British lead and, as early as 1925 and as recently as 1972, recognized the zone of danger theory as a viable alternative to the physical impact rule.⁴³ Representative of the American courts' position is *Robb v. Pennsylvania Railroad*,⁴⁴ where the Delaware court, faced with facts similar to those found in *Victorian Railways v. Coultas*, abandoned the impact doctrine in favor of the zone of danger requirement. The *Robb* case arose when plaintiff's automobile stalled at a railroad grade crossing due to a deep rut negligently permitted to form by the defendant. While attempting to move the vehicle, plaintiff saw the defendant's train approaching and fled the vehicle seconds before the train collided with it.⁴⁵ The Delaware court noted the sharp diversity in judicial opinions regarding the right to recover for the physical consequences of fright in the absence of a contemporaneous physical impact,⁴⁶ including the rejection of the requirement by the jurisdiction in which it originated.⁴⁷ In contrast to the early American decisions supporting the impact doctrine, the *Robb* decision recognized the plaintiff's right to be free from emotional disturbance and allowed the plaintiff to recover under the established negligence analysis.⁴⁸ The court thus discarded both the physical impact and token impact doctrines despite the feared increase in volume of cases, the danger of fraudulent suits, and the difficulty of proof.

41. *Id.* at 142.

42. *Id.* at 151, 156-57.

43. States adopting the zone of danger test as an alternative to the impact rule include the following: Colorado: *Towns v. Anderson*, 175 Colo. 517, 579 P.2d 1163 (1978); Delaware: *Robb v. Pennsylvania R.R.*, 58 Del. 454, 210 A.2d 709 (1965); Maryland: *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); Minnesota: *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892); Nebraska: *Manford v. Omaha & C.B. St. Ry.*, 203 N.W. 643 (Neb. 1925); Tennessee: *Memphis Street R.R. v. Bernstein*, 137 Tenn. 637, 194 S.E. 902 (1917); Vermont: *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 234 A.2d 656 (1967); Wisconsin: *Colla v. Mandrella*, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

44. 58 Del. 454, 210 A.2d 709 (1965).

45. *Id.* at 455, 210 A.2d at 710.

46. *Id.* at 458, 210 A.2d at 711.

47. See note 10 *supra* for a discussion of *Dulieu v. White & Sons*.

48. According to the Supreme Court of Delaware:

Where negligence proximately caused fright to a person within the immediate area of physical danger from that negligence, which in turn produced physical consequences such as would be elements of damage if a bodily injury had been suffered, the injured party is entitled to recover under an application of the prevailing principles of law as to negligence and proximate cause.

Robb v. Pennsylvania R.R. Co., 58 Del. 454, 464, 210 A.2d 709, 714-15.

In 1965, the American Law Institute joined the states that had adopted positions similar to the *Robb* decision by recognizing the zone of danger theory.⁴⁹ The Second Restatement of Torts even borrowed the fact pattern of *Mitchell v. Rochester Railway* as a case in which recovery should be allowed.⁵⁰ In settling on the zone of danger requirement, the American Law Institute revised its earlier opinion that "the testimony necessary to establish the causal relation between the actor's negligence and the other's illness or bodily harm" may be unreliable and, thus, insufficient to sustain a cause of action.⁵¹

The zone of danger requirement has been praised by some commentators as a way to ensure genuine claims and to guard against extending the negligent actor's liability to unforeseeable consequences.⁵² In practice, it restricts actions and yet allows recovery when proof is offered of injuries arising from the defendant's breach of duty to the plaintiff. The rule has also been criticized, however, for being as arbitrary as its predecessors. According to the Pennsylvania Supreme Court, the zone of danger requirement "would bar recovery depending upon the position of the plaintiff at the time of the event."⁵³ The contention has also been put forth that, in a case such as

49. The pertinent section of the *Second Restatement* reads as follows:

§ 436. Physical Harm Resulting from Emotional Disturbance

(1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbances does not protect the actor from liability.

(3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.

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

50. RESTATEMENT (SECOND) OF TORTS § 436, Comment c, Illustration 2 (1965). See notes 11-14 and accompanying text *supra* for a discussion of the *Mitchell* case.

51. *Niederman v. Brodsky*, 436 Pa. 401, 406 n.3, 261 A.2d 84, 86 n.3 (1970) (quoting RESTATEMENT OF TORTS (1931)).

52. See *Resavage v. Davies*, 199 Md. 479, 487, 86 A. 879, 883 (1952) (if recovery were granted to plaintiff outside zone of danger, an unjustified extension of liability to world at large would result); *Flynn v. Gordon*, 86 N.H. 198, 201, 165 A. 715, 717 (1933) (zone of danger includes expectable persons and expectable risks); *H.E. Butt Grocery Co. v. Perez*, 408 S.W.2d 576, 581 (Tex. Civ. App. 1966) (physical injuries resulting from fright are reasonably foreseeable where plaintiff was in the zone of danger); *Colla v. Mandrella*, 1 Wis. 2d 594, 599-600, 85 N.W.2d 345, 348 (1957) (injury was not too remote in time or place or sequence of events from defendant's negligent act where plaintiff was in the zone of danger); Comment, *The Common Law Treatment in Wisconsin of the Right to Recover for Emotional Harm*, 1977 Wis. L. Rev. 1089, 1106 (zone of danger test designed to insure genuine claims and set reasonable limits on defendant's liability).

53. *Sinn v. Burd*, 486 Pa. 146, 157, 404 A.2d 672, 679 (1979). In contrast, in *Dillon v. Legg*, the decedent's death was witnessed by his sister who was within the zone of danger, and

Hambrook, the plaintiff's distress would most likely arise from the danger to the loved one rather than to the plaintiff. Indeed, this has been recognized and sanctioned by the Second Restatement.⁵⁴ The zone of danger theory, then, although not a satisfactory resolution represents a step forward from the impact rule.

Dillon Foreseeability

Another viable alternative to the impact doctrine was the extension of duty based upon relationship rather than impact. In the leading decision of *Dillon v. Legg*,⁵⁵ California became the first American jurisdiction to grant recovery to a bystander who witnessed her child's death but was not herself physically struck or within the zone of danger. The California Supreme Court held that the plaintiff should be able to recover if: (1) she was in close proximity to the accident; (2) she was closely related to the victim; and (3) she suffered severe shock and physical consequences as a result of a sensory and contemporaneous observance of the accident.⁵⁶ The court recognized that the law of torts would hold defendants responsible for the reasonably foreseeable injuries they cause.⁵⁷ Accordingly, the court set forth the test that the facts of each case should determine whether the harm to the plaintiff was reasonably foreseeable.

Jurisdictions that have followed the *Dillon* decision⁵⁸ have not advocated legal redress for every plaintiff claiming fright, shock, or distress. Were this the case, the restrictive rationales supporting the physical impact and zone of

by his mother who was not in the zone of danger. Under a strict zone of danger analysis, the sister would have been allowed to recover damages for the emotional distress and physical consequences she suffered, but her mother would have been denied recovery. The *Dillon* court disdained such an arbitrary result and, in allowing recovery for the sister and mother, refused to distinguish between the "zone of danger of physical impact" and the "zone of danger of emotional impact." 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

54. See RESTATEMENT (SECOND) OF TORTS § 436, Comment f (1965) (rule in Subsection (2) applies even though plaintiff's shock is due to fear for safety of spouse or child because defendant has breached duty to plaintiff and fact that injury arises in unexpected or unusual manner is of no consequence).

55. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). See note 53 *supra* for the facts confronting the court in *Dillon*.

56. 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The Supreme Court of New Jersey added a fourth requirement to the *Dillon* test—the victim must suffer death or serious physical danger. In addition, the recovery granted may be reduced by the proportion of the injured party's negligence and any contributory negligence on the part of the plaintiff. *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521, 528 (1980).

57. See generally PROSSER, TORTS, *supra* note 15, at 250-70 for a discussion of foreseeability.

58. Connecticut: *D'Amicol v. Alvarez Shipping Co.*, 31 Conn. Sup. 164, 326 A.2d 129 (1973); Hawaii: *Leong v. Takasaki*, 55 Haw. 390, 520 P.2d 758 (1974); Massachusetts: *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978); Michigan: *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973); New Jersey: *Portee v. Jaffee*, 34 N.J. 88, 417 A.2d 521 (1980); Pennsylvania: *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); Rhode Island: *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975); Texas: *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978); Washington: *Grimsby v. Sampson*, 85 Wash. 2d 52, 530 P.2d 291 (1975).

danger rules would be legitimate and the gates would indeed be opened to a flood of claims, many of them fraudulent. Instead, the test set forth in *Dillon* recognizes the responsibility of the judiciary to deal with cases on their merits, rejecting the notion that the concept of reasonable foreseeability supports adherence to the zone of danger theory or impact rule.⁵⁹

The *Dillon* foreseeability test is an attractive alternative to the impact rule for several reasons: it follows a traditional negligence analysis, incorporating as necessary elements proximate cause and duty;⁶⁰ it affirms the contention of many commentators that concern over fraud is without justification;⁶¹ it recognizes advances in psychology and psychiatry as well as the ability of the judge and jury to determine whether a causal relationship exists and to measure damages;⁶² finally, and perhaps most importantly, it places a duty on the courts to allow a cause of action to honest, sincere claimants. As the Delaware Supreme Court remarked in *Robb v. Pennsylvania Railway*:

Justice is not best served, we think, when compensation is denied to one who has suffered injury through the negligence of another merely because of the possibility of encouraging fictitious claims in other cases. Public

59. Prosser concedes that "the danger of claims without merit is a real one" and that the difficulty lies in distinguishing valid claims from false ones and serious injuries from trivial ones. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939). He contends, however, that valid claimants will be reimbursed if they are able to introduce sufficient proof and that the court will draw the line between serious and trivial injuries via employment of the "'rule of reason,' the 'fair return,' and the standard of conduct of the 'reasonable man' . . ." *Id.* at 877-78. *Dillon* allows courts to draw the line along similar boundaries, although perhaps more circumscribed. Indeed, the tort of negligent infliction of emotional distress is one given to perhaps arbitrary linedrawing by the courts. As Prosser asserts, "the limits to be set are a matter for the practical common sense of the court, and probably incapable of reduction to any definite rule." *Id.* at 892. Nonetheless, the *Dillon* court has fashioned a rule which should prove to be more definite, more logical, and, thus, more valuable than either the physical impact doctrine or the zone of danger theory.

60. The *Dillon* formula represents a logical analysis and should prove to be more reliable than the impact rule. In addition, the foreseeability test, which judges cases on their individual merits, lends itself to the traditional negligence analysis. As one commentator pointed out:

[Such cases] should be dealt with by some variation of the negligence formula appropriate to the particular case, and if the case satisfies the requirements of the formula, recovery should be allowed. If it does not, recovery should not be allowed. There is no reason why the fact that the injury was received through fright [in the absence of a physical impact] should be of any peculiar importance. The inquiry ought to be: Did the defendant owe plaintiff a duty, the violation of which caused plaintiff damage?

Green, "Fright" Cases, 27 ILL. L. REV. 761, 886 (1933).

61. See note 15 *supra* regarding the courts' ability to distinguish fabricated suits from valid ones. See also Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 13 (1976) (modern trend is to reject fraud as grounds for denying relief); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 276 (1920) (desire to avoid fraudulent claims never given weight where plaintiff proves existence of injuries). Note, *Bystander's Recovery for Negligently Inflicted Mental Distress*, 29 ARK. L. REV. 562, 564-65 (1976) (rule which seeks to bar fraud by denying all claims is scarcely in keeping with ideals of the judicial system).

62. See note 15 *supra*.

policy requires the courts with the aid of the legal and medical professions to find ways and means to solve satisfactorily the problems thus presented—not expedient ways to avoid them.⁶³

By extending the concept of duty and developing a rational nexus between negligent conduct and the injury sued upon, the *Dillon* foreseeability test has demonstrated that a reasonable parameter can be drawn to the field of legal liability, thus allowing liability to extend beyond the zone of danger.⁶⁴

It is clear that the physical impact rule is anachronistic and ill-founded. It is equally clear that the zone of danger and foreseeability tests, widely followed throughout the United States, represent the better, more progressive view. Despite this undeniable trend away from the physical impact doctrine, Illinois still clings to the impact rule because the Illinois Supreme Court has refused to consider the problem.

ILLINOIS ADHERENCE TO THE OBSOLESCENT PRECEDENT OF
BRAUN V. CRAVEN

Since 1898, Illinois courts have followed the rule announced in *Braun v. Craven*⁶⁵ that denies recovery for negligently inflicted emotional distress unless such injuries were incurred as a result of, or simultaneously with, physical impact. The several districts of the Illinois Appellate Court have steadfastly refused to abandon or modify this rule, not so much because they approve of it, but because the supreme court has not abrogated it. In *Braun*, the plaintiff was helping her sister move from her apartment when her sister's landlord, Mr. Craven, noticed the moving van. Believing that Braun's sister intended to move in violation of her lease, Craven charged angrily upstairs and confronted the plaintiff. He loosed a tirade of vile and abusive language at Mrs. Braun, causing her great emotional distress and eventually chorea, a nervous disorder attributed to severe shock.⁶⁶

The supreme court, while acknowledging the plaintiff's injuries, held that no recovery would attach for negligent infliction of mental distress absent a contemporaneous physical impact,⁶⁷ relying heavily upon public policy to reach this result. Although a reasonable person in the defendant's position might have realized that such conduct would have caused the plaintiff discomfort, the court decided that under normal circumstances the actual injuries incurred by Mrs. Braun were not likely to result.⁶⁸ The court held that, absent an actual battery, the injuries were unforeseeable.⁶⁹ Thus,

63. 58 Del. 454, 464, 210 A.2d 709, 714 (1965).

64. See notes 59 & 60 and accompanying text *supra*.

65. 175 Ill. 401, 51 N.E. 657 (1898).

66. *Id.* at 401-05, 51 N.E. at 657-59.

67. *Id.* at 420, 51 N.E. at 664.

68. *Id.*

69. *Id.* at 408, 51 N.E. at 660. Here, the *Braun* court relied upon a statement made in *Indianapolis & St. Louis R.R. v. Stables*, 62 Ill. 313, 320-21 (1872):

[W]e cannot readily understand how there can be pain without mental suffering. It is a mental emotion arising from a physical injury. It is the mind that either feels or

Braun failed in her attempt to prove that her injuries were proximately caused by the defendant's negligence.

Similar to other early physical impact decisions, *Braun* reflected the once prevalent notion that mental or emotional injuries deserve less protection than physical injuries, and that people who complain of mental disturbances are merely too sensitive to their environment.⁷⁰ *Braun* also evinced the familiar concern that because mental injuries were not as easily susceptible of proof as physical injuries, juries would improperly reward damages to insincere claimants. The court, therefore, required proof of an antecedent physical impact or injury as a means to stem the anticipated flood of frivolous and fraudulent claims.⁷¹

Recent decisions of the Illinois Appellate Court, however, have openly expressed hostility toward the impact doctrine, acknowledging that the rule is illogical and obsolete.⁷² Further, the appellate court has effectively eroded *Braun* by permitting recovery for mental distress in cases of contemporaneous property damage but no physical injury.⁷³ As discussed below, *Braun* has been followed in Illinois only because the appellate court has determined that the authority to fashion tort law rests exclusively with the Illinois Supreme Court, a court unwilling to repudiate *Braun*.⁷⁴

takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury, unless the mind is overpowered and consciousness is destroyed. The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception, not arising from the physical injury.

See City of Chicago v. McLean, 133 Ill. 148, 153, 24 N.E. 527, 528 (1890) (mental anguish is a product of physical injury). *See also* note 79 and accompanying text *infra*.

70. *See* note 18 and accompanying text *supra*.

71. 175 Ill. at 420, 51 N.E. at 664. The *Braun* court concluded:

The action is purely one of negligence, and if appellee could be held liable under this evidence, then any person who might so speak or act as to cause a stranger of peculiar sensibility passing by to sustain a nervous shock productive of serious injury might be held liable. Thus, one whose very existence was unknown to the party guilty of so speaking and acting would be given a right of recovery. . . . On the ground of public policy alone, having reference to the dangerous use to be made of such cause of action, we hold that a liability cannot exist consequent on mere fright or terror which superinduces nervous shock.

Id. at 420, 51 N.E. at 664. *Accord*, *Horan v. Klein's-Sheridan, Inc.*, 62 Ill. App. 2d 455, 459-60, 211 N.E.2d 116, 118 (3d Dist. 1965) (permitted recovery for mental suffering caused by personal injury); *Budek v. City of Chicago*, 279 Ill. App. 410, 427 (1st Dist. 1935) (recovery permitted for mental pain directly and necessarily caused by physical pain); *Chicago City Ry. v. Canevin*, 72 Ill. App. 81, 90 (1st Dist. 1897) (mental pain not directly caused by physical pain cannot be compensated). *See Pinkley v. C. & E. I. R.R.*, 246 Ill. 370, 380, 92 N.E. 896, 900 (1910) (*Braun* established measure of damages for negligence); *Carlinville Nat'l Bank v. Rhoads*, 63 Ill. App. 3d 502, 503, 380 N.E.2d 63, 65 (4th Dist. 1978) (*Braun* is firmly rooted in Illinois); *Benza v. Schulman Air Freight*, 46 Ill. App. 3d 521, 523, 361 N.E.2d 91, 93 (1st Dist. 1977) (appellate courts are bound by *Braun*).

72. *See* notes 75-78 and accompanying text *infra*.

73. *See* notes 79-85 and accompanying text *infra*.

74. The language used by the appellate court in *Carlinville Nat'l Bank v. Rhoads*, 63 Ill. App. 3d 502, 505, 380 N.E.2d 63, 66 (4th Dist. 1978) is typical:

Despite the appellate court's deferential posture, it has acknowledged that the physical impact rule is difficult to reconcile with the supreme court's recognition of a separate tort action for intentional infliction of emotional distress.⁷⁵ For example, in *Carlinville National Bank v. Rhoads*,⁷⁶ the plaintiff suffered emotional damage after witnessing her husband's death in an automobile accident.⁷⁷ The *Rhoads* court conceded that emotional disturbances caused by negligence can be as severe and as verifiable as those caused by intentional conduct.⁷⁸ The defendant's state of mind therefore seems irrelevant. Hence, there appears to be little, if any, justifiable distinction

While we note that resulting emotional disturbance can be as severe and as certain whether it be caused by an intentional act or by a negligent act, we are bound by decisions of the Illinois Supreme Court. . . . [W]e conclude that any recognition of negligent infliction of mental distress as a separate tort must come from the supreme court of this State.

See also *Corey v. Hiberly*, 346 F.2d 368, 370 (7th Cir. 1965) (widow of fireman denied recovery, applying Illinois law, for mental suffering from defendant who negligently started fire); *Kaiserman v. Bright*, 61 Ill. App. 3d 67, 72, 377 N.E.2d 261, 264 (1st Dist. 1978) (family of boy struck and killed by taxi denied recovery for emotional distress resulting from driver's negligence); *McCullough v. Orcutt*, 14 Ill. App. 2d 513, 522-23, 145 N.E.2d 109, 114 (2d Dist. 1957) (per curiam) (denied recovery for miscarriage caused by shock when husband suffered injuries from driver's negligent collision with truck at highway intersection). The Illinois Supreme Court has recently refused to hear cases dealing with the impact doctrine; plaintiffs who have chosen to take appeals watch as their petitions for leave to appeal are routinely denied by the high court.

75. *Knierim v. Izzo*, 22 Ill. 2d 73, 87, 174 N.E.2d 157, 165 (1961). See note 78 *infra* and notes 109-117 and accompanying text *infra*.

76. 63 Ill. App. 3d 502, 380 N.E.2d 63 (4th Dist. 1978).

77. *Id.* at 502-03, 380 N.E.2d at 64. Plaintiff alleged that, as a result of discovering her husband's dead body hunched over the steering wheel, she sustained "severe mental pain, fright, shock, depression, instability, nervous tension, and experienced physical manifestations of this emotional distress including dizziness, chest discomfort, anxiety attacks, insomnia, and frequent awakenings." *Id.* at 503, 380 N.E.2d at 64.

78. *Id.* at 505, 380 N.E.2d at 66. Other Illinois courts have also noted that emotional injuries can arise independent of bodily harm, and that there exists no just distinction between mental suffering resulting from negligent and intentional conduct. In *Knierim v. Izzo*, 22 Ill. 2d 73, 84-85, 174 N.E.2d 157, 163-64 (1961), where the Supreme Court of Illinois first recognized an action for intentional infliction of emotional distress, the court supported the adoption of such an action by referring to developing medical knowledge in determining whether the claimant actually suffered injuries flowing from fright. In addition, rather than adopting the approach taken by the *Braun* court, the *Knierim* court assumed that mental injuries are inherently separable from bodily harm, and therefore can be compensated for even in the absence of physical injuries. *Id.*

Moreover, medical authorities have generally recognized that severe mental distress causing physical disease frequently results from shock unaccompanied by contemporaneous physical injury. See notes 25-36 and accompanying text *supra*.

Further, the fact that Illinois joins the majority of jurisdictions in recognizing an action for intentional infliction of emotional distress indicates that Illinois courts no longer regard physical and emotional injuries to be inseparable. See *Garris v. Schwartz*, 551 F.2d 156, 157 (7th Cir. 1977) (erroneous advice of attorney calculated to cause mental distress is actionable); *Public Fin. Corp. v. Davis*, 66 Ill. 2d 85, 90, 360 N.E.2d 765, 767 (1976) (intentional conduct warranting action for mental distress must be extreme and outrageous); *Rosenberg v. Packerland Packing Co.*, 55 Ill. App. 3d 959, 963, 370 N.E.2d 1235, 1238 (1st Dist. 1977) (physical impact doctrine irrelevant to actions for intentional infliction of emotional distress).

between negligent and intentional infliction of mental distress because either act can cause severe and lasting injury.

Perhaps in recognition of the artificiality of this distinction, recent appellate court interpretations of the physical impact doctrine have significantly limited the scope of the *Braun* holding. Instead of equating physical impact solely with bodily harm, as the court did in *Braun*, the Illinois Appellate Court has ruled that physical impact contemplates either bodily injury or property damage. In *Benza v. Schulman Air Freight*,⁷⁹ the appellate court denied recovery for mental distress resulting from a near head-on collision.⁸⁰ Rather than decide the case on the absence of bodily injury, the *Benza* court denied relief because there was no impact between the vehicles.⁸¹ Similarly, in *Rosenberg v. Packerland Packing Co.*,⁸² where the defendant tailgated the plaintiff's automobile at speeds of 70 to 80 miles per hour for many miles,⁸³ the court denied recovery for mental distress, not because the plaintiff suffered no bodily harm, but because the cars never touched.⁸⁴ Had there been a collision in either *Benza* or *Rosenberg*, damages for mental distress presumably would have been awarded even if the impact caused the plaintiff no contemporaneous bodily injury. Thus, in future appellate court decisions, adequate proof of contemporaneous property damage might suffice to permit the plaintiff to recover for emotional distress.

In deciding these cases, Illinois courts have generally focused on problems of proximate causation and then summarily concluded that absent a physical impact (or property damage), a claimant's injuries are not reasonably foreseeable.⁸⁵ The concept of reasonable foreseeability is subverted, however, because the courts have failed to consider the duty of care owed by defendants to those persons immediately surrounding them.⁸⁶ If foreseeability was

79. 46 Ill. App. 3d 521, 361 N.E.2d 91 (1st Dist. 1977).

80. *Id.* at 522-23, 361 N.E.2d at 92.

81. *Id.* at 523, 361 N.E.2d at 92. It should be pointed out, however, that the *Benza* court never expressly held that the plaintiff's complaint would have survived a motion to dismiss had there been impact between the vehicles.

Illinois courts have apparently interpreted *Benza* in an ambiguous manner. In *Neuberg v. Michael Reese Hosp. & Medical Center*, 60 Ill. App. 3d 679, 683, 377 N.E.2d 215, 217 (1st Dist. 1978), the court cited *Benza* for the proposition that, to recover for mental distress, a claimant must show that the defendant's negligent conduct "physically injured" him. In *Kaiserman v. Bright*, 61 Ill. App. 3d 67, 71, 377 N.E.2d 261, 264 (1st Dist. 1978), the Illinois Appellate Court cited *Benza* for the proposition that a complaint for negligent infliction of emotional distress must allege "physical impact or contemporaneous physical injury" to survive a motion to dismiss.

82. 55 Ill. App. 3d 959, 370 N.E.2d 1235 (1st Dist. 1977).

83. *Id.* at 961, 370 N.E.2d at 1237.

84. *Id.* at 962, 370 N.E.2d at 1238.

85. See notes 2 & 3 and accompanying text *supra*.

86. Some courts have permitted recovery as long as the plaintiff can show he was within the zone of danger created by negligent conduct or was in fear for his own safety. See *Chiuchiollo v. New England Wholesale Tailors*, 84 N.H. 329, 150 A. 540 (1930); *Flazone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961);

determined by the spacial relationship between the parties, instead of the presence of physical impact, the element of proximate cause could be satisfied even in the absence of such bodily injury.

Notwithstanding the appellate court's reluctance to fully embrace *Braun*, the Illinois Supreme Court has abandoned the impact rule "concept" in its construction of the Illinois Workers' Compensation Act.⁸⁷ In *Pathfinder Co. v. Industrial Commission*,⁸⁸ the claimant suffered mental distress after extricating a co-worker's severed hand from a punch press.⁸⁹ The *Pathfinder* court reversed the lower court's refusal to allow the Commission to award the claimant disability payments for her mental distress and held that an employee who suffers a sudden and severe emotional shock, which produces psychological disability and which is traceable to a definite time, place, and readily perceivable cause, can recover under the Act even though no physical injury was sustained.⁹⁰ In so ruling, the *Pathfinder* court rebutted every argument advanced in support of the impact doctrine.

Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970). See also notes 40-51 and accompanying text *supra*.

Other courts have held that recovery may be awarded for mental distress provided such psychic injuries are a foreseeable consequence of negligent conduct. See *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975); *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973). See notes 55-64 and accompanying text *supra*.

87. ILL. REV. STAT. ch. 48, §§ 138.1-28 (1979) [hereinafter cited as the Illinois Workers' Compensation Act or the Act]. To determine whether the claimant could recover under the Act in *Pathfinder*, the supreme court had to find that (1) the claimant suffered an accidental injury within the meaning of § 138.2 of the Act; (2) the injury was proven by competent evidence, including objective symptoms not within the physical or mental control of the claimant under § 138.8(b)(7) of the Act; (3) the injury was traceable to a definite time and place under *Mattheisen & Hegeler Zinc Co. v. Industrial Bd.*, 284 Ill. 378, 383, 120 N.E. 249, 251 (1918); (4) the injury was in fact the cause of the disability under *Boland v. Industrial Comm'n*, 34 Ill. 2d 422, 423, 216 N.E.2d 152, 153 (1966); and (5) the injury arose out of and in the course of employment under § 138.2 of the Illinois Workers' Compensation Act.

However, the Act has since been amended so that the claimant need not prove the injury or disability by showing objective symptoms which resulted from the trauma. Public Act 79-79, June 17, 1975, deleted § 138.8 (b) (7) of the 1973 Act. According to Mr. David Anderson, the sponsor of the Act, the Act's purpose was to increase the amount of compensation awarded for each injury and to remove the impediment to expanded compensation that § 138(b)(7) presented. Abolishment of the Act's only evidentiary requirement has undoubtedly increased awards for all injuries, including psychological injury. Telephone interview with David Anderson, attorney with the Illinois Legislative Reference Library Service, on October 5, 1976.

The supreme court has also abandoned the physical impact rule in cases of intentional infliction of mental distress. See *Knierim v. Izzo*, 22 Ill. 2d 73, 174, N.E.2d 157 (1961). See generally Note, *Action Maintainable for Intentional Infliction of Severe Emotional Distress Unaccompanied by Physical Injury*, 1961 U. ILL. L.F. 535. See also notes 109-117 and accompanying text *infra*.

88. 62 Ill. 2d 556, 343 N.E.2d 913 (1976).

89. *Id.* at 559, 343 N.E.2d at 915.

90. *Id.* at 563, 343 N.E.2d at 917. Before *Pathfinder*, Illinois courts had granted compensation for psychological disability only if accompanied or preceded by physical injury. See *Spetyla v. Industrial Comm'n*, 59 Ill. 2d 1, 5, 319 N.E.2d 40, 43 (1974) (mental distress preceded by

The *Pathfinder* court first discredited the logic of denying recovery for psychological disability unaccompanied by physical injuries; courts had consistently allowed generous awards to claimants who suffered psychological disability caused by minor physical injury.⁹¹ Second, the supreme court cited contemporary medical evidence to demonstrate that it was "medically unjustifiable"⁹² to maintain a legal gulf between the physical and emotional

claimant's head falling against a steel table warranted temporary total disability compensation); *Hook v. Industrial Comm'n*, 53 Ill. 2d 245, 248, 290 N.E.2d 890, 892 (1972) (compensation for a disability resulting from traumatic neurosis after carpenter fell from scaffold warranted); *Postal Tel. Cable Co. v. Industrial Comm'n*, 345 Ill. 349, 349-50, 178 N.E. 187, 187 (1931) (recovery for traumatic neurosis permitted where claimant sustained severe blow to the face); *Armour Grain Co. v. Industrial Comm'n*, 323 Ill. 80, 86, 153 N.E. 699, 702 (1926) (recovery permitted for claimant's mental condition occasioned by industrial explosion).

Courts in other states are split as to whether their Workers' Compensation Acts permit recovery for psychological injury absent physical impact. For decisions denying recovery for negligent infliction of mental distress, see *Shope v. Industrial Comm'n*, 17 Ariz. App. 23, 495 P.2d 148 (1972); *Brady v. Royal Mfg. Co.*, 117 Ga. App. 312, 160 S.E.2d 424 (1968); *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 412 P.2d 986 (1966); *Bekeleski v. C.F. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). For cases permitting recovery for mental distress without accompanying physical injury, see *Brook v. Industrial Comm'n*, 15 Ariz. App. 95, 486 P.2d 207 (1971); *Baker v. Workmen's Compensation Appeals Bd.*, 18 Cal. App. 3d 852, 96 Cal. Rptr. 279 (1971); *Carter v. General Motors Corp.*, 361 Mich. 328, 10 N.W.2d 903 (1943); *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975); *Bailey v. American Gen. Ins. Co.*, 154 Tex. 430, 279 S.W.2d 315 (1955); *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 13 S.E.2d 291 (1941).

91. 62 Ill.2d at 564, 343 N.E.2d at 917. See *City of Chicago v. Industrial Comm'n*, 59 Ill. 2d 284, 319 N.E.2d 749 (1974) (claimant who suffered muscle pull compensated for resulting disabling "phantom pain" even though medical experts could find no organic explanation for the pain); *Hook v. Industrial Comm'n*, 53 Ill. 2d 245, 290 N.E.2d 890 (1972) (claimant who suffered back injury compensated for disabling traumatic neurosis which may have resulted from the same accident); *Thomas J. Douglass & Co. v. Industrial Comm'n*, 35 Ill. 2d 100, 219 N.E.2d 486 (1966) (claimant who suffered toe injury compensated for traumatic neurosis which may have resulted from the same accident); *United States Fuel Co. v. Industrial Comm'n*, 313 Ill. 590, 145 N.E. 122 (1924) (claimant who suffered fractured vertebrae compensated for a resulting stooped walking posture even though there was no longer any pathological reason for such a posture).

92. 62 Ill.2d at 565, 343 N.E.2d at 917-18. Professor Larson believes that any distinction between physical and nervous injuries cannot be justified:

Against the rather old-fashioned clinging to some shred of the "physical" in these cases must be balanced the fact that, once this shred has been found, awards issue that require recognition of some of the most sophisticated theories of the interaction of the mind and body and of some of the most complex neurotic conditions including "compensation neurosis." As to the category of mental stimulus causing nervous injury, with no "physical" involvement, although the cases are now sharply divided, the strength of the trend toward coverage suggests that the time is perhaps not too far off when compensation law generally will cease to set an artificial and medically unjustifiable gulf between the "physical" and the "nervous." The test of existence of injury can then be greatly simplified. The single question will be whether there was a harmful change in the human organism—not just its bones and muscles, but its brain and nerves as well.

Larson, *Mental & Nervous Injury in Workmen's Compensation*, 23 VAND. L. REV. 1243, 1260 (1970). Accord, Render, *Mental Illness As An Industrial Accident*, 31 TENN. L. REV. 288 (1964); Note, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129 (1961).

realms of human behavior. Further, the *Pathfinder* court determined that recognizing an action for negligent infliction of mental distress under the Workers' Compensation Act would not spur a flood of frivolous or fraudulent claims.⁹³ The tide of claims had not washed out other jurisdictions that permitted compensation for mental distress,⁹⁴ nor had the Illinois Industrial Commission experienced a significant increase in the number of claims filed subsequent to allowance of compensatory awards for psychological damage.⁹⁵ The *Pathfinder* court, moreover, reasoned that the Commission's vigilance would effectively detect fabricated and exaggerated claims before litigation commenced.⁹⁶

It is difficult to reconcile separate rules regarding recovery for mental distress in and out of the workplace. By acknowledging that negligently inflicted emotional injuries fall within the protection afforded by the Illinois Workers' Compensation Act, the *Pathfinder* court cogently dismissed the rationales relied upon in the *Braun* decision.⁹⁷ Moreover, no valid distinction exists between compensation under the Act and compensation under traditional tort theories, and it stands to reason that deserving plaintiffs should be compensated. Finally, the distinctions claimed by the *Pathfinder*

Further, some psychiatrists have concluded that psychological injury is often more disabling than physical injury:

Modern medical science supports the *Pathfinder* court's decision to compensate psychological disability absent physical injury. Psychiatrists agree that psychological injury, or "traumatic neurosis," is an injury to the psyche. In fact, the consensus of medical opinion seems to be that traumatic neurosis is often more disabling than physical injury. To condition compensation on the presence of physical injury would be particularly questionable because clinical experiments have proven that any physical injury reduces to some extent the probability that a traumatic neurosis will develop. The court's decision to grant compensation for psychological injury regardless of physical injury, therefore, is consistent with sound medical theories and practice.

Note, *Workmen's Compensation for Psychological Disability Without an Antecedent Physical Injury*, 1977 U. ILL. L.F. 536, 540. See also R. COHEN, *TRAUMATIC NEUROSES IN PERSONAL INJURY CASES* 81 (1970); Tanay, *Psychic Trauma and the Law*, 15 WAYNE L. REV. 1033, 1034-35 (1969).

93. 62 Ill. 2d at 567, 343 N.E.2d at 919.

94. *Id.* See note 38 and accompanying text *supra*.

95. 62 Ill. 2d at 567, 343 N.E.2d at 919.

96. *Id.* *Pathfinder* has been followed by the following Illinois courts: *Watts v. Industrial Comm'n*, 77 Ill. 2d 30, 33, 394 N.E.2d 1171, 1172 (1979) (psychologically induced injuries are compensable under the Act in certain circumstances); *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 371, 362 N.E.2d 325, 329 (1977) (negligence of employee no bar to recovery under Act).

Many of the reasons for recognizing intentional infliction of emotional distress as a separate tort are parallel to those forwarded by the Illinois Supreme Court in *Pathfinder*. See *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) (landmark decision establishing intentional infliction of mental distress as a separate tort in Illinois). The Illinois Appellate Court, however, has rejected the argument advanced in *Benza v. Schulman Air Freight*, 46 Ill. App. 3d 521, 361 N.E.2d 91 (1st Dist. 1977), that *Knierim* implicitly recognized an action for negligent infliction of mental distress.

97. See notes 67-71 and accompanying text *supra*.

court—that the Act is remedial in nature and the costs of compensation are entirely borne by employers—do not provide persuasive arguments against abandoning the impact rule outside the workplace, for tort law is designed and developed precisely to provide bona fide claimants with adequate remedies.⁹⁸

Thus, logic and fairness require the Illinois Supreme Court to abandon the physical impact rule and recognize a separate tort for negligent infliction of mental distress. The impact rule subverts the concept of proximate cause by failing to adequately assess the defendant's duty of care. The Illinois Appellate Court has not adhered to the impact rule because it considers it correct; it has adhered to the rule merely because the *Braun* decision is firmly rooted as precedent. Finally, in recognizing that the Illinois Workers' Compensation Act permits recovery for the negligent infliction of emotional distress, the Illinois Supreme Court has placed itself in the impossible situation of having to reconcile *Braun* with *Pathfinder*, an indication that perhaps the court no longer considers the *Braun* physical impact rule justified or defensible.

JUDICIAL RESPONSIBILITY AND *BRAUN*: DEVELOPING THE LAW IN THE FACE OF A CONFLICTING PRECEDENT

Illinois' physical impact rule is obviously ready for reform, as the spate of recent appellate decisions on this point demonstrate. The sole problem, of course, is antiquated precedent. Although judicial precedents such as *Braun* have a settling effect on the law,⁹⁹ adherence to them is not always appropri-

98. In essence, the *Pathfinder* court distinguished the Workers' Compensation Act from general tort theory on the following grounds: (1) The Act is remedial in nature in that it is intended to provide financial protection to the injured worker; (2) The costs incurred by the allowance of claims are borne by the employer; (3) The rights and remedies of the employee are statutory rather than common law rights; (4) It has been consistently held that the Act should be liberally construed to accomplish its purposes and objects. 62 Ill. 2d at 563, 343 N.E.2d at 916-17.

At least one commentator believes that the distinctions the *Pathfinder* court drew between the Act and general tort theory are valid:

The social purpose of the Workers' Compensation Act . . . cannot be disregarded when analyzing the applicability of common law tort limitations to workmen's compensation proceedings. The undisputed purpose of the Act is to provide financial protection for employees injured while at work. The underlying philosophy of the Act is that all injuries suffered at work are costs of industry and thus should be borne by industry. Once the determination is made that a psychological injury is an accidental injury within the meaning of the Act, an application of the tort law requirement of concurrent physical injury would defeat the Act's social purpose.

Note, *Workmen's Compensation for Psychological Disability Without an Antecedent Physical Injury*, 1977 U. ILL. L.F. 536, 547 (1977).

99. Judicial concern for the rippling effect of precedent may result in occasional injustice because of the court's fear of unsettling law for the future. J. FRANK, *LAW AND THE MODERN MIND* 154-55 (1930) [hereinafter cited as FRANK]. Judge Frank derides such concern and advises the judiciary to deal with the case at hand. See note 102 *infra*.

ate nor desirable. This is especially so when changing times and changing needs dictate a break from the past and the charting of new legal courses, which is clearly the case with negligent infliction of emotional distress. The ideal balance between established rules and modern notions of public policy, as former Illinois Supreme Court Justice Walter V. Schaefer once observed, would be "a blend which takes into account in due proportion the wisdom of the past and the needs of the present."¹⁰⁰

It was once the belief, and may still be today, of some members of the bar that the law should be circumscribed and unalterable, remaining governed by the wisdom of the past.¹⁰¹ Perhaps this belief arose out of a desire to control the future; or perhaps it was an attempt to avoid the problems of the present.¹⁰² Commentators have long argued, however, that the common law is, in reality, a body of legal principles to be developed by judicial exposition on a case-by-case basis. Despite the urgings of some that precedent be adhered to or that social change be administered by the legislature,¹⁰³ judges do and must make law.¹⁰⁴ This is the result of a combination of the "pragmatism of decision-making," the "demands of economic or social logic

100. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 24 (1966) [hereinafter referred to as Schaefer]. While the phrase, precedent and policy "suggests a sharp antithesis, a relationship of mutual exclusion," Justice Schaefer contends that such is not always the case. *Id.* at 6-7.

101. Blackstone, apparently, viewed the common law as complete in itself to the exclusion of statutory or judicial modification, and one English tribunal claimed in 1875 that they were "bound to take the act of Parliament as they have made it; a *casus omissus* can in no way be supplied by a court of law for that would be to make law." *Id.* at 18. See Landis, *Statutes and Sources of Law*, in HARVARD LEGAL ESSAYS 213, 216-17 (1934).

"Reception" statutes have been adopted by many states, their purpose being to adopt the common law of England:

That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

ILL. REV. STAT. ch. 1, § 801 (1979). See note 124 *infra* for discussion of a decision which construed the aforementioned statute.

102. FRANK, *supra* note 99, at 153-54. Judge Frank contends that the hope of controlling the future is "doomed to futility" because the future brings its own problems and obstacles. An attempt to control the future ultimately results in ignoring the present. Instead of continually chasing the rainbow, the judge urges fellow jurists to concentrate on the case and issues at hand without concern for future ramifications. *Id.* at 154. Judge Schaefer, however, argues that cases are actually decided in the belief that future cases will be directly affected. Schaefer, *supra* note 100, at 3-4.

103. According to one commentator, delay by the courts in anticipation of legislative action may ultimately hinder reform of tort law due to: (1) legislators' indifference to tort law making; (2) lack of experience, time, and wages; (3) failure to hold effective committee and public hearings; and (4) subjection to aggressive lobbies and pressure groups. See generally Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

104. The belief that judges are powerless to make new law "is a direct outgrowth of a subjective need for believing in a stable, approximately unalterable legal world—in effect, a child's world." FRANK, *supra* note 99, at 35.

or fairness," and the reflection by the law of "rules sufficiently acceptable for society to support."¹⁰⁵ According to Cardozo:

[A] rule which in its origin was a creation of the courts themselves, and supposed in the making to express the mores of the day, may be abrogated by the court when the mores have so changed that perpetuation of the rule would do violence to the social conscience. . . . [T]his is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by judges of the past.¹⁰⁶

Without judicial development of the law to meet the needs of society, as in the area of emotional injuries, our legal system could easily stagnate and the role of the judiciary could greatly diminish. When a jurisdiction is faced with an obsolete common law precedent, such as *Braun*, the courts need not persist in error¹⁰⁷ simply because of the presence of law already made. By looking to policy expressions and decisions in other jurisdictions and by extending concepts to reach problems unanticipated by earlier authors of the common law, judicial decision making accomodates gaps in the law to better serve justice. Several cases illustrate the endeavors of the Illinois Supreme Court to develop the common law in response to social demands.¹⁰⁸

In *Knierim v. Izzo*,¹⁰⁹ the issue was whether the plaintiff could maintain an action against the murderer of her husband for intentional infliction of mental anguish that did not result from physical injury. The supreme court embraced intentional infliction of severe emotional distress as a separate tort and allowed recovery for emotional distress as well as any bodily harm resulting therefrom.¹¹⁰ In modifying the common law rule against recovery for mental suffering, the court considered a series of rational propositions and modern developments in the law: (1) the recognition of compensatory damages for pain and suffering;¹¹¹ (2) the advances of psychosomatic medi-

105. Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563, 567 (1976).

106. B. CARDOZO, *THE GROWTH OF THE LAW* 136-37 (1924).

107. While seemingly unjust decisions may appear, in this day and age, to have been made in error, the truth may be simply that they are obsolete. Schaefer, *supra* note 100, at 10-11.

108. See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (damages recoverable by terminable-at-will employee retaliatorily discharged); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965) (hospital held liable in tort for negligence beyond its liability insurance coverage); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (school district held liable in tort for employee's negligence).

109. 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

110. According to the court, "peace of mind is an interest of sufficient importance to receive protection from the law against intentional invasion. . . ." *Id.* at 87, 174 N.E.2d at 165.

111. According to the *Knierim* court, it would be no more difficult to assess pecuniary damages for mental disturbance caused by negligence than for mental disturbance caused by defamation, malicious prosecution, or assault. 22 Ill. 2d at 84, 174 N.E.2d at 163 (citations omitted).

cine in the nature of men's emotions and their bodily effects;¹¹² (3) the fairness in providing a forum for redress of mental disturbances;¹¹³ and (4) the ability of judge and juror to determine whether outrageous conduct could result in severe emotional distress.¹¹⁴ Having established a foundation for change,¹¹⁵ the court relied on the resources of the judiciary to ferret out frivolous claims and support the new judicially created law. The court thus drew back from pre-determined conclusions dictated by the historic fear of the extension of liability, and recognized the necessity to decide each case on its own merits.¹¹⁶ The court gave credence to the theory that an "intense intellectual and emotional life . . . has come with the advance of civilization, [making] it clear that only a part of the pain, pleasure, and profit of life lie in physical things."¹¹⁷ Recognizing the ability of the judicial process to prevent litigation from entering the field of mere trivialities, the Illinois Supreme Court found comfort in the importance of peace of mind being protected by the law against intentional invasion.

112. The court noted that advances in medicine in the thirty year period preceeding the decision cast genuine doubt on the validity of the argument that mental and emotional injuries were too "evanescent, intangible, and peculiar" for the law to remedy. 22 Ill. 2d at 84-85, 174 N.E.2d at 163-64.

113. The court reasoned that tribunals should be able to draw a line between serious injuries and trivial injuries and, thus, weed out fictitious claims. *Id.* at 85, 174 N.E.2d at 104.

114. The court repudiated the subjective methods used to determine whether words or conduct were actionable in character and acquiesced with the decision of the Supreme Court of Florida in *Slocum v. Food Fair Stores of Fla., Inc.*, 100 So.2d 396 (Fla. 1958), that the standard of conduct to be applied was to be an objective standard formulated from common acceptance. Such unwarranted intrusion had to be calculated to cause severe emotional distress to a person of ordinary sensibilities. 22 Ill. 2d at 86, 174 N.E.2d at 164. Once again, the court displayed confidence in "the men of science" in conjunction with the personal experiences of jurors to determine whether a petitioner had suffered severe emotional distress and was entitled to recovery. *Id.* at 85, 174 N.E.2d at 184.

115. The *Knierim* court built its foundation for change by discarding the same reasons that were used to support the impact rule in cases of negligent infliction of mental distress. In fact, the court specifically cited *Braun v. Craven* as an example of two such obsolete reasons: the belief that mental injuries could not be dealt with by the legal system, and the fear that recognition of a cause of action would open the door to fictitious claims. 22 Ill. 2d at 84-86, 174 N.E.2d at 164.

However, Judge House and his colleagues did not take the opportunity to extend their logical analysis to negligence actions. The court in *Knierim* quoted with approval a Florida decision which allowed recovery for the intentional infliction of mental distress, emphasizing that "[t]he unwarranted intrusion must be *calculated* to cause 'severe emotional distress.'" *Slocum v. Food Fair Stores of Florida, Inc.*, 100 So.2d 396, 398 (Fla. 1958) (emphasis added), *quoted at* 22 Ill. 2d 86, 174 N.E.2d 164.

116. According to the court, not "every emotional upset should constitute the basis of an action. . . . [A] line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility." 22 Ill. 2d at 85, 174 N.E.2d at 164.

117. *Id.* at 87, 174 N.E.2d at 165. The theory was originally advanced in Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The authors purport that the protection of society can only be accomplished via the protection of the rights of the individual. *Id.* at 219-20.

Similarly, in *Renslow v. Mennonite Hospital*,¹¹⁸ the Illinois Supreme Court considered whether a child, not conceived at the time negligent acts were committed against its mother, had a cause of action against the tortfeasors for injuries caused by their conduct.¹¹⁹ In a careful and well-reasoned opinion, the court examined the development of medical science¹²⁰ before considering the duty owed to a plaintiff not yet conceived. The court relied on the concept of duty as a means by which to direct the course of the common law and granted relief for an act committed prior to conception. In so deciding, the court recognized a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother.¹²¹ In articulating the extension of duty, the majority's decision was consonant with current perceptions of justice and reaffirmed the court's responsibility for fitting law to necessity by altering the restrictions of precedent. Justice Dooley, in his concurring opinion, quoted Corbin as to the proper response of the court when faced with out-dated decisional law:

It is the function of our courts to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives the judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril.¹²²

Justice Dooley found it essential that courts create law, for if they did not, the common law would remain out of touch with life. In discussing the concept, he stated that "the body of law is not a repository of stagnant problems of society but a vital, moving force which [must] deal with the current problems of society."¹²³ His concurrence indicated that the common law should be regarded as a system of elementary rules and general declara-

118. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

119. 67 Ill. 2d at 349, 367 N.E.2d at 1251. The plaintiff alleged that when her mother was thirteen, the defendant negligently transfused her with RH positive blood. The mother's RH negative blood was incompatible with and sensitized by the RH positive blood. The resulting sensitization of the mother's blood subsequently caused prenatal damage to the plaintiff's hemolytic processes and induced her premature birth. 67 Ill. 2d at 349, 367 N.E.2d at 1251.

120. 67 Ill. 2d at 350-52, 367 N.E.2d at 1251-52. The court reviewed the cases in Illinois and other jurisdictions which first recognized a cause of action for prenatal injuries. These cases represented a reversal of the common law tradition against recovery for prenatal injuries as exemplified by *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884), and *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900). According to the dissent in *Allaire*, the majority's opinion sacrificed "truth to a mere theoretical abstraction to say an injury was not to the child but wholly to the mother." 184 Ill. at 370, 56 N.E. at 641 (Boggs, J., dissenting).

121. 67 Ill. 2d at 357, 367 N.E.2d at 1255.

122. *Id.* at 360-61, 367 N.E.2d at 1256 (quoting Comment, *The Offer of an Act for a Promise*, 29 YALE L.J. 767, 771 (1920)).

123. 67 Ill. 2d at 362, 367 N.E.2d at 1257.

tions of principles continually expanding with the progress of society and adapting to the gradual changes of modern life.¹²⁴

The Illinois Supreme Court recognized the harsh effect that could result from an inflexible application of the judicially created bar to contribution among joint tortfeasors in *Skinner v. Reed-Prentice Division Package Machinery Co.*¹²⁵ Faced with the necessity of performing interpretative and administrative functions, the court considered a report submitted at the 1976 Illinois Judicial Conference by the Study Committee on Indemnity, Third Party Actions, and Equitable Contributions.¹²⁶ The report contained a comprehensive review of the historic development of the law and its application to various types of litigation, and concluded that the rule in Illinois prohibiting contribution among joint tortfeasors was "harsh and inequitable in operation."¹²⁷ The court adopted the study committee's viewpoint and held that when the judiciary created a rule or doctrine which, under present conditions, is considered unsound or unjust, it not only has the power but the duty to modify or abolish the rule.¹²⁸

Even more recently, in *Alvis v. Ribar*,¹²⁹ the supreme court took a further step and abandoned the concept of contributory negligence, replacing it with comparative negligence. Most significantly, the *Alvis* court addressed at length the role of stare decisis in the court's decision-making process:

124. *Id.* See *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 82, 117 N.E.2d 74, 79-80 (1954) (justice requires more than adherence to precedent in order to progress in accordance with a changing world); *Amann v. Faidy*, 415 Ill. 422, 433, 114 N.E.2d 412, 418 (1953) (value of jurisprudence lies in its adaptability and capacity for growth); *Kreitz v. Behrensmeyer*, 149 Ill. 496, 502, 36 N.E. 983, 984 (1894) (common law rules continually expand with progress of society and adapt themselves to changes in society).

In 1841, the Illinois Supreme Court reviewed a state statute, *supra* note 101, which looked to the common law prior to the fourth year of King James I's reign as authority for future decisions. In holding that the common law was to be read in conjunction with modifications by state law, the court warned:

[I]f we are to be restricted to the common law, as it was enacted at fourth James, rejecting all modifications and improvements which have since been made, by practice and statutes . . . we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years behind the age.

Penny v. Little, 3 Ill. 301, 304 (1841).

125. 70 Ill. 2d 1, 374 N.E.2d 437 (1977).

126. *Id.* at 6-7, 374 N.E.2d at 439.

127. *Id.* at 6, 374 N.E.2d at 439. According to the study committee, the rule against contribution among joint tortfeasors "has resulted in a great deal of judicial effort in expanding the concept of indemnity creatively in order to avoid the harsh results inherent in the rule." The committee unanimously recommended the adoption of the principle of contribution, and suggested that liability "be apportioned on the basis of [the tortfeasors'] pure relative fault." *Id.* at 6-7, 374 N.E.2d at 439.

128. 70 Ill. 2d at 13-14, 374 N.E.2d at 442. The court, thus, modified a rule of law that had been accepted by Illinois courts for 122 years. See *Nelson v. Cook*, 17 Ill. 443, 449 (1856) (principle laid down by English court in 1799 still "unquestionable law").

129. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

The tenets of *stare decisis* cannot be so rigid as to incapacitate a court in its duty to develop the law. Clearly, the need for stability in law must not be allowed to obscure the changing needs of society or to veil the injustice resulting from a doctrine in need of reevaluation. This court can no longer ignore the fact that Illinois is currently out of step with the majority of States and with the common law countries of the world. We cannot continue to ignore the plight of plaintiffs, who because of some negligence on their part, are forced to bear the entire burden of their injuries. Neither can we condone the policy of allowing defendants to totally escape liability for injuries arising from their own negligence on the pretext that another party's negligence has contributed to such injuries.¹³⁰

The cogent analysis in *Alvis* is equally applicable to negligent infliction of emotional distress plaintiffs who needlessly suffer through no fault of their own simply because Illinois remains out of step with modern common law decisions that allow recovery under more flexible and more realistic theories.

It appears, from a review of the aforementioned cases, that the Illinois Supreme Court is cognizant of its obligation to keep the common law equal to life's problems. Plaintiffs in Illinois, however, are still bound by the antiquated *Braun* rule against recovery for the negligent infliction of emotional distress.¹³¹ Even when plaintiffs allege compelling facts and changing social policy, the appellate courts, often reluctantly, have persisted in their adherence to the 1898 decision.¹³² This conduct by the courts is seemingly incompatible with their belief in advancing the logical development of the law to reach formerly unanticipated problems.¹³³

The doctrine of *stare decisis* does not require courts to perpetuate outworn rules. While adherence to precedent is important to the law's stability,¹³⁴ it is

130. *Id.* at 24-25, 421 N.E.2d at 896 (citations omitted).

131. *See Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898).

132. *See* note 2 and accompanying text *supra*.

133. In 1959, the Illinois Supreme Court set forth that:

[T]he doctrine of *stare decisis* is not an inflexible rule requiring [Illinois courts] to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present day concepts of right and justice.

Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 26, 163 N.E.2d 89, 96 (1959). The plaintiff in *Molitor* was injured when the school bus in which he was riding left the road due to the driver's negligence, hit a culvert, exploded and burned. *Id.* at 12-13, 163 N.E.2d at 89. Prior to the *Molitor* decision, school districts in Illinois had been immune from liability for tortious conduct by their employees since 1898. *Kinnaire v. City of Chicago*, 171 Ill. 332, 44 N.E. 535 (1898). The Supreme Court of Illinois, however, employed its "inherent power as the highest court of [the] state" to modify the common law rule. 18 Ill. 2d at 28, 163 N.E. 2d at 97. *See also Nudd v. Matsoukas*, 7 Ill. 2d 608, 615, 131 N.E.2d 525, 529 (1956) (*stare decisis* is an important factor, but it is not controlling in all cases); *Bradley v. Fox*, 7 Ill. 2d 106, 111, 129 N.E.2d 699, 702 (1955) (court has power and duty to reexamine legal authorities and concepts under doctrine of *stare decisis*).

134. According to Judge Schaefer, precedents are the "starting point of decision," but not always the "concluding point." Schaefer, *supra* note 100, at 5.

the court's duty to reexamine past decisions when legitimate doubts are raised as to the validity of such decisions.¹³⁵ A persuasive argument may thus be made that when judges of an earlier generation establish a doctrine believed to be a sound instrument of judicial policy that furthers the moral, social, and economic welfare of the state's people, judges of a later generation must be ready to discharge their own judicial responsibilities in conformance with modern day concepts and needs.¹³⁶ When compelling reasons exist for judicial application of a new rule, the doctrine of *stare decisis* must be limited. It is not urged that hundreds of years of jurisprudence be discarded or that courts begin anew when faced with modern litigation. Rather, as Justice Schaefer envisioned, the "wisdom of the past" and the "needs of the present" should co-exist and contribute "in due proportion" to decision making.¹³⁷ Recognition of the necessity to modify or abolish unwise law in response to public policy and social needs in appropriate cases such as *Braun* best serves society and our legal system as well.

CONCLUSION

In negligently inflicted emotional distress cases, Illinois still adheres to an obsolete rule modified or abrogated by the vast majority of states. Even though Illinois' common law physical impact doctrine has no logical support and, in fact, has been rejected by the supreme court in the area of workers' compensation, Illinois plaintiffs continue to suffer needless financial deprivation in addition to their negligently inflicted emotional injuries. This gross injustice can and must be ended by overruling the long-standing *Braun* decision.

The power to abandon *Braun*, however, lies primarily with the Illinois Supreme Court and, thus far, the court has been unwilling to act. Perhaps the court is waiting for the right case to come along, although any of the recent appellate court decisions would surely have sufficed. If and when the court chooses to address this pressing problem, it is hoped that the court will be cognizant of its well-established duty to conform legal principles to modern needs, as it has done in other areas. Until then, Illinois courts will follow 19th century law even though Illinois citizens suffer from 20th century injuries.

135. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 615, 131 N.E.2d 525, 529 (1956). In *Nudd*, the court held that where a minor was injured in an automobile driven by his father, he could recover via suit against his father notwithstanding the traditional public policy of parental immunity. 7 Ill. 2d at 619, 131 N.E.2d at 531. *Foley v. Foley*, 61 Ill. App. 577 (2d Dist. 1895), a decision which stood for 60 years, was thus overruled. The *Nudd* court rejected the notion that a modification of the immunity doctrine must be undertaken only by the legislature. "The doctrine of parental immunity . . . was created by the courts. It is especially for them to interpret and modify that doctrine to correspond with prevalent considerations of public policy and social needs." 7 Ill. 2d at 619, 131 N.E.2d at 531.

136. *Molitor v. Kaneland Community Unit Dist. No. 302*, 13 Ill. 2d at 26, 163 N.E.2d at 96 (1959).

137. See note 100 and accompanying text *supra*.

