Western New England Law Review

Volume 4 4 (1981-1982)
Issue 2

Article 4

1-1-1982

TORT LAW—ABATEMENT & REVIVAL—PROPRIETY OF EXPANDING MASSACHUSETTS SURVIVAL STATUTE TO EMBRACE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS—Harrison v. Loyal Protective Life Insurance Co., 1979 Mass. Adv. Sh. 2477, 396 N.E.2d 987

Franklin H. Caplan

TORT LAW—SURVIVAL OF ACTION—PROPRIETY OF EXPANDING MASSACHUSETTS SURVIVAL STATUTE TO EMBRACE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS—*Harrison v. Loyal Protective Life Insurance Co.*, 1979 Mass. Adv. Sh. 2477, 396 N.E.2d 987.

I. INTRODUCTION

Harrison v. Loyal Protective Life Insurance Co.[1] probed the question whether an action in tort for the intentional infliction of emotional distress survives the victim's death. Marie Harrison, administratrix of her husband's estate, brought this action in January 1978 in the Suffolk County Superior Court following her husband's death from cancer.[2] Defendants included her husband's former employer, Loyal Protective Life Insurance Company (Loyal), Loyal's Board Chairman, Victor Sayyah, and Edward Fitzwilliam, an officer of the company.[3] Plaintiff alleged that Fitzwilliam knew Harrison had terminal cancer. Because of his illness, Harrison was precluded from working and was required to submit a claim for physical disability benefits. Fitzwilliam allegedly threatened Harrison, declaring that if he sought the benefits to which he was entitled, Harrison's position with Loyal would be terminated.[4]

Mrs. Harrison apparently felt that her husband's condition was exacerbated by the dilemma over whether to apply for benefits. She submitted that as a result of this dilemma, her husband suffered mental distress and severe anguish.[5] Implicit in the complaint was the contention that because of defendants' conduct, the quality of Harrison's remaining life was greatly diminished. Plaintiff averred that Fitzwilliam's action constituted a deliberate infliction of mental harm and, as a direct result, Harrison lost all hope of living. His

---

1. 1979 Mass. Adv. Sh. 2477, 396 N.E.2d 987 (1979).

2. *Id.* at 2477, 396 N.E.2d at 988. Sayyah was Chairman of the Board of Directors and leading shareholder in the Holding Corporation of America, which controlled Loyal Protective Life Insurance Company. Fitzwilliam was alleged to actually have committed the tort. *Id.*

3. Brief for Appellant, app. at 3, Harrison v. Loyal Protective Life Ins. Co., 1979 Mass. Adv. Sh. 2477, 396 N.E.2d 987 [hereinafter cited as Brief for Appellant].

4. 1979 Mass. Adv. Sh. at 2478, 396 N.E.2d at 988. Because the trial court dismissed the action without making findings of fact, the supreme judicial court summarized the facts from plaintiff's complaint. *See id.* at 2484, 396 N.E.2d at 991-92.

5. *Id.* at 2478, 396 N.E.2d at 988.

state of mind may well have led to his physical deterioration and ultimate death from cancer.[6]

Mrs. Harrison's prayer for judgment was dismissed in the superior court for failure to state a claim upon which relief could be granted.[7] The court held that the cause of action did not survive Mr. Harrison's death.[8] Plaintiff later sought review in the appeals court; and the Massachusetts Supreme Judicial Court, on its own initiative, ordered direct appellate review.[9] Chief Justice Hennessey authored a reversal of the superior court's determination and held that the tort of intentional infliction of emotional distress, whether accompanied by physical injury or not, survives the death of both the victim and the tortfeasor.[10]

The Commonwealth's survival statute[11] permits survival of tort actions for "assault, battery, imprisonment or other damage to the person."[12] *Harrison* rejected a longstanding policy in Massachusetts that had constrained the survival statute's operation to include only those actions resulting in physical harm to a victim.[13] The basis for this policy has not been articulated clearly but seems to be a vestige of the common-law rule wherein tort actions abated at the death of a party.[14] This common-law mandate has been modified by statute;[15] but, according to the traditional construction of "damage to the person," damage of a physical character was required.[16] Prior to *Harrison*, mental or emotional injuries, such as those sustained by plaintiff's husband, would not have triggered the statute and the right of action would have been extinguished at death. Such a restrictive reading of "damage to the person" would deny redress in a

---

6. Brief for Appellant, app. at 9, *supra* note 3. Mrs. Harrison sought to recover one million dollars in damages against Fitzwilliam and against Loyal and Sayyah under a theory of *respondeat superior*. *Id.* at 5-6.

7. 1979 Mass. Adv. Sh. at 2478, 396 N.E.2d at 988.

8. *Id.* at 2477-78, 396 N.E.2d at 988.

9. *Id.* at 2478, 396 N.E.2d at 988.

10. *Id.* at 2482, 396 N.E.2d at 991.

11. MASS. GEN. LAWS ANN. ch. 228, § 1 (West 1958 & Cum. Supp. 1981). The survival statute provides that "[i]n addition to the actions which survive by the common law, the following shall survive . . . (2) Actions of tort (a) for assault, battery imprisonment or other damage to the person; . . . ." *Id.*

12. *Id.*

13. *See* cases cited notes 57 & 76 *infra*.

14. *See* Putnam v. Savage, 244 Mass. 83, 84-85, 138 N.E. 808, 809 (1923). This common-law rule was expressed in the maxim, *actio personalis moritur cum persona*. Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 214, 338 P.2d 702, 707 (1959).

15. MASS. GEN. LAWS ANN. ch. 228, § 1 (West 1958 & Cum. Supp. 1981).

16. Putnam v. Savage, 244 Mass. 83, 86, 138 N.E. 808, 809-10 (1923).

case that, at minimum, warrants jury consideration.[17]

William Shakespeare once advised, "Things without . . . remedy should be without regard; what's done is done."[18] This suggestion of resignation, however, is at odds with the maxim of the law that for every wrong there is a remedy.[19] *Harrison* resolved this conflict in two steps. First, it affirmed earlier decisions establishing that the right to mental tranquility is a protected interest and that damages are appropriate for an intentional disruption of peace of mind.[20] Second, in sustaining the validity of an action based on this disruption, the supreme judicial court considered the nature of the tort. The court held that the intentional infliction of emotional distress constitutes "damage to the person" and thereby survives the victim's death.[21] In the final analysis, *Harrison* embraced the belief that "the business of the law [is] to remedy wrongs that deserve it . . . ."[22]

This note will examine the survival statute and the changing judicial conceptions of the statute's scope. An analysis of how the statutory language is construed will demonstrate that an expansive reading of "damage to the person" is warranted. Additionally, a discussion of policy considerations attending actions for emotional distress will underscore the propriety of allowing Mr. Harrison's cause of action to survive his death.

II. BACKGROUND

A. *The Common-Law Nonsurvival Rule*

Mrs. Harrison's action based on her husband's injury survived his death because the supreme judicial court placed intentional infliction of emotional distress within the phrase "damage to the person." The survival statute thus operated to defeat defendants' claim

17. "Because reasonable men could differ on these issues, . . . 'it is for the jury, subject to the control of the court,' to determine whether there should be liability. . . ." Agis v. Howard Johnson Co., 371 Mass. 140, 145, 355 N.E.2d 315, 319 (1976) (quoting RESTATEMENT (SECOND) OF TORTS § 46, comment h (1965)).

18. W. SHAKESPEARE, MACBETH, III, ii, 11.

19. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 265 (1921).

20. In George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 915 (1971), the Massachusetts Supreme Judicial Court imposed liability for intentionally causing severe emotional distress with resulting bodily harm. *Id.* at 255, 268 N.E.2d at 921. This ruling was extended in Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976), in which the court held "that one who, by extreme and outrageous conduct and without privilege, causes severe emotional distress to another is subject to liability for such emotional distress even though no bodily harm may result." *Id.* at 144, 355 N.E.2d at 318.

21. 1979 Mass. Adv. Sh. at 2482, 396 N.E.2d at 991.

22. W. PROSSER, LAW OF TORTS § 12, at 51 (4th ed. 1971).

that the cause of action abated at the death of plaintiff's husband.[23] Part of the significance of *Harrison* lies in its juxtaposing emotional trauma with the concept of damage to the person. This expansive view deviates from the supreme judicial court's traditional reading of the survival statute, which has been more typical of the stringent, common-law nonsurvival rule.[24] Generally, new legal theories may be analyzed and supported by viewing older approaches from an updated perspective. Tracing the development of the common-law rule, which terminated tort actions at the party's death, highlights the haphazard evolution of nonsurvival and vindicates Chief Justice Hennessey's judicious construction.

At early common law, tort actions did not survive the death of either the person injured or the wrongdoer: As the actor died, so died the action.[25] "This [abatement] was expressed in the maxim *actio personalis moritur cum persona*."[26] Although this is a familiar maxim of English law, its origin and significance are obscure.[27] It has been speculated that the nonsurvival rule developed because, historically, tort remedies were associated with criminal law and were vindictive in nature.[28] Early civil actions were closely allied with criminal appeals of felony, thus damage awards originally were "regarded as a matter of personal vengeance and punishment."[29] A party's death, therefore, erased the purpose of a civil action.

The alliance between embryonic tort law and criminal law[30] fostered the reasoning that "[s]ince the defendant could not be punished when he was dead, it was natural to regard his demise as terminating the criminal action, and tort liability with it."[31] The

---

23. 1979 Mass. Adv. Sh. at 2480, 396 N.E.2d at 990.

24. *See generally* cases cited notes 57 & 76 *infra*.

25. Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 67 (1913). The common-law prohibition against survival did not apply to contract actions, but did apply to tort actions "founded on malfeasance or misfeasance to the person or property of another. . . ." Hooper v. Gorham, 45 Me. 209, 213 (1858).

26. Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 214, 338 P.2d 702, 707 (1959). *See also* Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929).

27. Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 214, 338 P.2d 702, 707 (1959).

28. W. PROSSER, *supra* note 22, § 126, at 898 (nonsurvival rule was result of development of tort remedy as "an adjunct and incident to criminal punishment"); Winfield, *supra* note 26, at 242 (civil remedy had strong quasi-criminal character).

29. Smedley, *Wrongful Death-Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 608 (1960).

30. Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 214, 338 P.2d 702, 708 (1959).

31. W. PROSSER, *supra* note 22, § 126, at 898.

association between tort and criminal matters, however, became more tenuous as the function of damages shifted from punitive to compensatory purposes.[32] The principle of monetary compensation was furthered; and the civil action was extricated from its roots in criminal law.[33]

Although the genesis of *actio personalis moritur cum persona* largely is speculative, its justification is apparent. Because of the perceived affinity between the tort of trespass and criminal law, the abatement of the punitive action logically might have been extended to the newer civil proceeding. "If one has the habit of looking upon a wrong as something very like a crime, it is a natural inference that none ought to be liable for it except the man who committed it."[34]

This justification no longer is valid. Civil remedies no longer are perceived as appendages of criminal law; the nonsurvival rule therefore is archaic. *Actio personalis moritur cum persona* has been subjected to universal criticism condemning it as unfounded and unjust.[35] Assuming as its basis the vindictive character of suits for civil injuries, "once the notion of vengeance has been put aside and that of compensation substituted, the rule. . . seems to be without plausible ground."[36] Accordingly, the nonsurvival mandate has been described as one of the least rational concepts of our law.[37] Its roots are found in "archaic conceptions of remedy which have long since lost their validity. The reason having ceased the rule is out of place and ought not to be perpetrated."[38]

Applications of the rule have been perceived as arbitrary. For example, while personal tort actions always have died with the person, contract actions, which are equally personal, have survived.[39]

---

32. Smedley, *supra* note 29, at 607 (footnotes omitted).

33. *Id.*

34. Winfield, *supra* note 26, at 242.

35. *See, e.g.*, Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 216, 338 P.2d 702, 708 (1959) ("non-survival rule is a vestige of the ancient concept of violent torts, and owes its existence to historical accident and blind adherence to precedent"); Rodgers v. Ferguson, 89 N.M. 688, 691, 556 P.2d 844, 847 (Ct. App.) (no valid justification for common-law nonsurvival rule), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976); Moyer v. Philips, 462 Pa. 395, 399, 341 A.2d 441, 442-43 (1975) (survival statutes enacted to modify harsh and unjust rule of common law); Note, *Inadequacies of English and State Survival Legislation*, 48 HARV. L. REV. 1008, 1012 (1935) (limited scope of survival rule attributable to conservatism of legislatures).

36. Moyer v. Phillips, 462 Pa. 395, 398, 341 A.2d 441, 442 (1975) (quoting F. POLLACK, LAW OF TORTS 62 (12th ed. 1923)).

37. *Id.*

38. McDaniel v. Bullard, 34 Ill. 2d 487, 494, 216 N.E.2d 140, 144 (1966).

39. W. PROSSER, *supra* note 22, § 126, at 898.

"Neither the distinction between tort and contract nor that between injuries to personalty and those to property has been consistently followed in determining survival."[40] The criticism against the nonsurvival doctrine has weighed overwhelmingly in favor of its abrogation.[41]

B. *Statutory Alteration of the Common-Law Rule*

This obloquy prompted statutory alteration to such a degree that, at present, little remains of the nonsurvival rule in its original form. The stringent effects of nonsurvival have been ameliorated over the years. The first inroad on the ancient rule, albeit a small one, was made by the Statute of Marlborough in 1267, which allowed survival of actions commenced by abbotts for the recovery of stolen church goods.[42] In 1327, Parliament enacted the Statute of Westminster, which provided executors of the estates of those slain in a recently concluded civil war with an action for replevin of their testators' personalty.[43] Three years later, a more significant alteration was provided by an act allowing survival in favor of executors who sought recovery of their testators' goods and chattels from trespassers.[44] "And there for nearly five centuries the law stood almost still."[45]

The impact of these enactments on the nonsurvival rule was minimal. "These statutes did not cover torts against land, and made no provision for survival of the death of the defendant. . . ."[46] Parliament, however, took bolder action with legislation in 1833.[47] The 1833 Act allowed suits in trespass or case for wrongs to the real or personal property of the victim against the executor or administrator of the wrongdoer's estate.[48] This series of revisions culminated, in

---

40. Note, *supra* note 35, at 1008-09.

41. "We have nothing positive to say in defence [*sic*] of the maxim [the nonsurvival rule]. If it were elided from our legal literature, nothing would be lost." Winfield, *supra* note 26, at 253. The rule "has no champion at this date, nor has any judge or law writer risen to defend it for 200 years past." Harris v. Nashville Trust Co., 128 Tenn. 573, 581, 162 S.W. 584, 586 (1914).

42. 52 Hen. III, c. 28 (1267).

43. 1 Edw. III, c. 3 (1327).

44. Statute of Westminster, 1330, 4 Edw. III, c. 7. "The Act of 1330 did not cover injuries to a man's person, freehold, or personal reputation. . . ." Winfield, *supra* note 26, at 243.

45. Winfield, *supra* note 26, at 243.

46. W. PROSSER, *supra* note 22, § 126, at 899.

47. Civil Procedure Act, 1833, 3 & 4 Wm. IV, c. 42, § 2.

48. *Id.* "[E]ven here, the suit was limited to injuries inflicted by the wrongdoer within six months of his death. Futhermore, courts continued to insist on an enrichment

England, with the Law Reform Act of 1934, which markedly circumvented the nonsurvival rule.[49] Under the provisions of this Act, all causes of action survived, whether for or against the estate of the decedent. Causes of action for defamation, alienation of affections in the marital relationship, and seduction specifically were excluded.[50]

American courts paralleled the British evolution, which favored survival of tort actions upon the death of a party.[51] Statutes have modified the common-law rule in all American jurisdictions.[52] The passage of the Massachusetts survival statute testifies to the antiquation of the common-law doctrine.

C. *The Massachusetts Survival Statute*

In Massachusetts survival is "wholly the creature of statute."[53] Survival or abatement under the survival statute depends on the nature of the wrong sustained, not on the form of the action.[54] Any case falling within the ambit of the statute will survive if the action is based on one of the enumerated torts or if the character of the alleged injury fits the rubric of "damage to the person."[55] The policy behind the statute seems confused because of a contradictory posture

---

of the wrongdoers' assets in order for the suit to survive against his representative." Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1047 (1965).

49. *See id.*

50. Note, *supra* note 35, at 1010.

51. W. PROSSER, *supra* note 22, § 126, at 899. "In a variety of cases, in order to extend the remedy *against* the representatives of a party deceased, the form of the action [had] been changed so as to evade the application of strict technical rules." Stebbins v. Palmer, 18 Mass. (1 Pick.) 71, 75 (1822) (emphasis in original).

52. " '[T]he rule has been the subject of legislative modification both in England and America.' " Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 220, 338 P.2d 702, 710 (1959) (quoting Kelley v. Union Pac. R.R., 16 Colo. 455, 457, 27 P. 1058, 1059 (1891)); *see* Evans, *A Comparative Study of the Statutory Survival of Tort Claims for and Against Executors and Administrators*, 29 MICH. L. REV. 969 (1931).

> There is a distinction between survival statutes and wrongful death statutes: Acts designed to alter the common-law restriction on the transmission of tort claims or tort liability at death are commonly known as survival statutes, while legislation aimed at establishing a separate cause of action for the benefit of designated members of the family of a person whose life was wrongfully taken are usually referred to as wrongful death statutes.

Malone, *supra* note 48, at 1044.

53. Putnam v. Savage, 244 Mass. 83, 85, 138 N.E. 808, 809 (1923) (citing Duggan v. Bay St. Ry., 230 Mass. 370, 376, 119 N.E. 757, 759 (1918)).

54. *Id.* at 88, 138 N.E. at 810; Hey v. Prime, 197 Mass. 474, 476, 84 N.E. 141, 142 (1908); Cutter v. Hamlen, 147 Mass. 471, 473, 18 N.E. 397, 398 (1888).

55. *See, e.g.*, Stebbins v. Palmer, 18 Mass. (1 Pick.) 71, 74 (1822); Note, *supra* note 35, at 1008.

assumed by the Massachusetts courts. The nonsurvival rule has been denigrated,[56] yet, prior to *Harrison*, the courts narrowly construed "damage to the person" and imposed stringent restraints on the operation of the survival statute.[57] An analysis of Massachusetts cases spotlights the bifurcated approach taken by the courts.

An 1822 case, *Stebbins v. Palmer*,[58] illustrates the dichotomy that the supreme judicial court tried to resolve in *Harrison*.[59] *Stebbins* involved an action for breach of promise to marry, a cause held to abate at the jilted party's death. The opinion emphasized the nature of the injury and focused on the substance of the action rather than on its form or name.[60] Breach of promise to marry, an action based on disappointed hope and violated faith, was said to be "merely personal," distinguishing it from a cause of action that would survive a party's death.[61] "Merely personal" actions, according to the court's reasoning, died with the person.[62] Dicta in *Stebbins* suggested the threshold of survival under the statute: If a cause of action was based on a personal right of the deceased, something to which an administrator could be neither party nor privy, the action abated. Conversely, an injury that depleted the victim's estate, or enriched that of the perpetrator, was held to trigger the statute and

---

56. MASS. GEN. LAWS ANN. ch. 228, § 1 (West 1958 & Cum. Supp. 1981).

57. *See* Dixon v. Amerman, 181 Mass. 430, 63 N.E. 1057 (1902) (action for criminal conversation and consequent loss of consortium not within survival statute); Cutter v. Hamlen, 147 Mass. 471, 18 N.E. 397 (1888) (survival of action depends on nature of damage sued for); Cummings v. Bird, 115 Mass. 346 (1874) (despite allegation of damage to estate resulting from alleged libel, action abated at plaintiff's death); Norton v. Sewall, 106 Mass. 143 (1870) ("damage to the person" extends only to harm resulting from bodily injury); Nettleton v. Dinehart, 59 Mass. (5 Cush.) 543 (1850) (survival statute does not embrace action such as malicious prosecution, which ordinarily involves personal character of deceased); Smith v. Sherman, 58 Mass. (1 Cush.) 408 (1849) (survival statute, which allows action for damage to the person to survive, extends only to injuries of a physical character); Stebbins v. Palmer, 18 Mass. (1 Pick.) 71 (1822) (nonsurvival rule necessitates abatement of action for breach of promise to marry).

58. 18 Mass. (1 Pick.) 71 (1822).

59. The *Stebbins* court read the survival statute very narrowly and yet critized the nonsurvival rule:

> That there are cases where the maxim. . . applies cannot now be contested; but it is a rule, arbitrary in its commencement, supported only by artificial reasoning, and often most unjust in its consequences. The Court certainly will not feel disposed to extend it to cases not clearly coming within its application.

Id. at 74.

60. *Id.* at 76.

61. *Id.*

62. "The maxim, *actio personalis [moritur cum persona]* applies to all personal wrongs, whether they arise *ex contractu* or *ex dilecto*. . . ." *Id.* at 75.

inure to the administrator.[63]

This careful distinction seems contraposed with the court's reluctance to adhere to the common-law nonsurvival mandate. On the one hand, *Stebbins* strictly limited the operation of the survival statute; on the other, it denigrated the nonsurvival rule that frustrated the statute's intent. Later cases embodied this apparent duality of purpose. For example, *Stebbins* was a precedent to *Smith v. Sherman*,[64] a subsequent action for breach of promise to marry. Chief Justice Shaw interpreted the 1842 version of the survival statute and opined that "damage to the person" was to be read narrowly. "This manifestly extends only to damage of a physical character. . . . If the term 'person' were used in a broader sense, it would extend to slander and every other possible case of tort, which could not be intended."[65]

Chief Justice Shaw circumscribed the survival statute's operation by limiting it to actions based on purely physical injuries. This concept of "damage to the person" defined the prevailing interpretation, which required actual physical damage. Subsequent causes of action were lost in cases of malicious prosecution,[66] libel,[67] and criminal conversation[68] because the respective injuries were not construed as within *Smith*'s concept of "damage to the person." In 1870, the same construction was employed in a negligence action that survived the victim's death. *Norton v. Sewall*[69] permitted an administratrix to maintain an action for personal injuries to her testator, who negligently was given a fatal dose of poison.[70] Justice Gray postulated that "[t]he words damage to the person. . .do not. . .extend to torts not directly affecting the person, but only the feelings or reputation, such as breach of promise, slander, or malicious prosecution. . . . But. . .they do include every action, the substantial cause of which is a bodily injury. . . ."[71]

Eighteen years after *Norton*, Justice Holmes provided an interesting extension to the statute in *Cutter v. Hamlen*.[72] In *Cutter*, the

63. Survival was allowed in cases in which wrongs affected the personal estate. *Id.* at 75-76.

64. 58 Mass. (4 Cush.) 408 (1849).

65. *Id.* at 413.

66. *See, e.g.*, Nettleton v. Dinehart, 59 Mass. (5 Cush.) 543 (1850).

67. *See, e.g.*, Cummings v. Bird, 115 Mass. 346 (1874).

68. *See, e.g.*, Dixon v. Amerman, 181 Mass. 430, 63 N.E. 1057 (1902).

69. 106 Mass. 143 (1870).

70. *Id.* at 143.

71. *Id.* at 145 (citations omitted).

72. 147 Mass. 471, 18 N.E. 397 (1888).

court denied a motion to dismiss on an allegation that a testator contracted diphtheria due to his lessor's deceit in renting him an infected house. The victim became sick, unable to work, and helpless for life as a result of the lessor's action.[73] Justice Holmes looked beyond the form of the action for deceit and focused on the resulting injury to plaintiff. Survival was enabled because the injury sustained was seen as "damage to the person" as contemplated by the statute. "In such cases the action is not for the deceit alone. . . but for the damage caused by the deceit. The nature of the damage sued for, not the nature of its cause, determines whether the action survives."[74]

By allowing the action to survive in *Cutter*, Justice Holmes demonstrated an approach consonant with the view that statutes dealing with remedies should be construed liberally.[75] Injuries to the person resulting from fraud, as well as from direct force, could invoke the survival statute. Later courts, however, continued to read the statute restrictively and required damages from a bodily injury, or damages of a physical character, as distinguished from those that are suffered only in the feelings or reputation.[76] The fundamental consideration in these cases was the nature of the wrong sustained by the victim. In each instance, the supreme judicial court adhered to Chief Justice Shaw's theory, posited in *Smith*, that "damage to the person" was intended solely to encompass damage of a physical character. This principle was echoed in every pertinent supreme ju-

---

73. *Id.* at 472, 18 N.E. at 397.

74. *Id.* at 473, 18 N.E. at 398.

75. Survival statutes have been described as remedial and interpreted liberally. *See generally* McDaniel v. Bullard, 34 Ill. 2d 487, 492, 216 N.E.2d 140, 143 (1966); Wynn v. Board of Assessors, 281 Mass. 245, 249, 183 N.E.2d 528, 530 (1932); Moyer v. Phillips, 462 Pa. 395, 401, 341 A.2d 441, 444 (1975).

76. *E.g.*, Keating v. Boston Elevated Ry. Co., 209 Mass. 278, 95 N.E. 840 (1911) (action for damages to father resulting from injury to minor son did not survive father's death); Hey v. Prime, 197 Mass. 474, 84 N.E. 141 (1908) (consequential injuries to husband arising from injury to wife not viewed as "damage to the person," which included only damages resulting from direct bodily injury); Wilkins v. Wainwright, 173 Mass. 212, 53 N.E. 397 (1899) (action for injury to plaintiff resulting from assault by defendant's dogs considered to be of a physical character and, as such, survived defendant's death); Cummings v. Bird, 115 Mass. 346 (1874) (action abated at plaintiff's death despite allegation of damage to estate resulting from alleged libel); Norton v. Sewall, 106 Mass. 143, (1870) (damage to the person extends only to harm resulting from bodily injury); Walters v. Nettleton, 59 Mass. (5 Cush.) 544 (1850) (action for libel did not survive defendant's death); Nettleton v. Dinehart, 59 Mass. (5 Cush.) 543 (1850) (survival statute did not embrace action such as malicious prosecution, which ordinarily involves personal character of deceased).

dicial court disposition following *Smith*.[77]

The constraints on survival imposed by *Smith* and its progeny apparently stemmed from a blind adherence to the archaic, common-law rule wherein tort actions abated at death. This line of cases was derived from the strict reading given to the survival statute. Such a limited application of the statute impeded its purpose in curtailing the anachronistic, common-law rule.[78] *Harrison* rejected the precedent that required damage of a physical character. This rejection conforms to the state of the law regarding the tort of intentional infliction of emotional distress, which does not require physical damage to a plaintiff before he is entitled to maintain an action.[79] Harrison incorporated a fair and justifiable interpretation of "damage to the person" and thereby furthered the purpose of abrogating the nonsurvival rule.[80]

In *Harrison*, the supreme judicial court, for the first time, confronted the specific issue whether emotional distress is an injury contemplated by the phrase "damage to the person."[81] The opinion was based on the court's belief that emotional injury, absent any physical manifestation, is properly embraced by the statutory phrase.[82] Regarding intangible, emotional suffering as "damage to the person" is somewhat aberrant in light of the longstanding precedent requiring physical injury. *Harrison*'s expansion of the survival statute contravened the previously accepted construction and may have stemmed from the court's recent countenance of claims for emotional distress. A review of the evolution of judicial decisions toward affording redress for this type of injury underscores the propriety of *Harrison*.

D. *Intentional Infliction of Emotional Distress*

In 1971, the tort of intentional infliction of emotional distress first was recognized by Massachusetts courts in *George v. Jordan Marsh Co*.[83] The hesitancy of the supreme judicial court to grant full protection to an individual's peace of mind is not unique to the Commonwealth. Professor William Prosser concluded, "Notwith-

77. *See* notes 57 & 76 *supra*.

78. *See* notes 42-52 *supra* and accompanying text.

79. Agis v. Howard Johnson Co., 371 Mass. 140, 144, 355 N.E.2d 315, 318 (1976).

80. 1979 Mass. Adv. Sh. at 2481, 396 N.E.2d at 990. *See also* Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 224-25, 338 P.2d 702, 712 (1959); Rodgers v. Ferguson, 89 N.M. 688, 691, 556 P.2d 844, 847 (Ct. App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).

81. 1979 Mass. Adv. Sh. at 2477, 396 N.E.2d at 988.

82. *Id.* at 2482, 396 N.E.2d at 991.

83. 359 Mass. 244, 268 N.E.2d 915 (1971).

standing its early recognition in the assault cases, the law has been slow to accept the interest in peace of mind as entitled to independent protection even as against intentional invasions."[84] Yet, the evolution toward protecting peace of mind testifies to the validity of the maxim that mandates a remedy for every wrong.[85]

Early judicial approaches toward emotional injury, however, were incompatible with this maxim. In 1888, for example, courts in England and the United States simultaneously denied recovery for injuries from nervous shock.[86] Damages would not be awarded for injuries due to fright without physical impact. Compensation, however, was allowed in cases wherein mental distress was caused by a tortiously inflicted physical injury,[87] or where an action for emotional injury could be couched in terms of a recognized tort.[88] In this sense, damages for mental injury were seen as parasitic to the independent tort.[89] Thus, in cases such as assault, damages for mental suffering could be assessed as a recoverable item.[90] The early courts,

---

84. W. PROSSER, *supra* note 22, § 126, at 49.

85. "If the rule against recovery is not based on reason, it may be expected to yield to that which is more in conformity with the maxim of the law that for every wrong there is a remedy." Throckmorton, *supra* note 19, at 265.

86. An early English case, Victorian Rys. Comm'rs v. Coultas, 13 A.C. 222 (1888), denied plaintiff recovery for nervous shock caused by defendant's negligence absent proof of actual impact. The court explained that a "mere nervous shock caused by fright of an impending event which never happens results from the constitution and circumstances of the individual, and does not give a cause of action, to support which there must be physical injury. . . ." *Id.* at 222. A similar holding was obtained contemporaneously in the United States, where plaintiff was denied damages for physical injuries due to fright without physical impact. Lehman v. Brooklyn City R.R., 47 Hun. 355 (N.Y. Sup. Ct. 1888).

87. Spade v. Lynn & Boston R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897); Note, *The Right to Mental Security*, 16 U. FLA. L. REV. 540, 541 (1964).

88. It may well be . . . that the practice of including [mental suffering] in recoverable damages arose at a time when courts were not able to force their conceptions of legal injuries on juries, that one reason for continuing to recognize it is that the jury always will include it, whether they should do so or not. . . . Other instances where "mental suffering" is a recoverable item of damages in connection with a cause of action already recognized at law are frequent and well known. . . .

Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 509 (1922) (footnote omitted).

89. W. PROSSER, *supra* note 22, § 12, at 52. The parasitic nature of damages for emotional distress foreshadowed their future recognition as an independent tort. " 'The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will. . . . tomorrow be recognized as an independent basis of liability.' " Goodrich, *supra* note 88, at 510-11 (quoting T. STREET, FOUNDATION OF LEGAL LIABILITY 470 (1906)).

90. W. PROSSER, *supra* note 22, § 12, at 52. The question arises as to why assault actions were permitted as independent torts while actions for mental suffering were not. Mental suffering may result from words "which were more insulting, unendurable and

in barring recovery for injury resulting from mere mental disturbance, were oblivious to the paradox that parasitic damages were freely recoverable while independent torts of intentional infliction of emotional distress were denied.[91] The leading case of *Spade v. Lynn & Boston R.R.*[92] alluded to the policy considerations that prompted Massachusetts courts to embrace this rule.

In *Spade*, Justice Allen established the "impact requirement," which held that bodily injury could cause mental suffering. Recovery for mental distress was proper if it was preceded by physical injury.[93] *Spade* recognized that mental suffering constitutes an actual personal injury that can proximately flow from a defendant's action and produce physical consequences. Justice Allen questioned the rationality of allowing damages for physical injury but not for mental suffering absent perceptible physical manifestations.[94] The *Spade* court, however, sidestepped this inconsistency and focused on administrative problems that would attend damage awards for mental distress.[95] The impact requirement rule, which implied that certain injuries were noncompensable, derived from anxiety over the possibility of fabricated claims.[96]

This anxiety led to a puzzling result: *Spade* depicted mental injury as a serious intrusion on a person's privacy. Compensation for this injury, however, was relegated to the status of a parasitic element of damages.[97] Chief Justice Holmes commented on this inconsistency: "The point decided in *Spade v. Lynn*. . .is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles upon purely practical grounds."[98]

The grounds noted by Chief Justice Holmes are rooted in public

---

generally provocative than blows. . . . [T]he result was a rule which permitted recovery for a gesture that might frighten the plaintiff for a moment, and denied it for menacing words which kept him in terror of his life for a month." *Id.*

91. *Id.* at 51-52.

92. 168 Mass. 285, 47 N.E. 88 (1897).

93. *Id.* at 290, 47 N.E. at 89; *see* Note, *supra* note 87, at 542.

94. "[F]right, terror, alarm or anxiety. . .constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one. . .from doing the duties of life." 168 Mass. at 288, 47 N.E. at 88.

95. "[T]he real reason for refusing damages sustained from mere fright. . .rests on the ground that in practice it is impossible satisfactorily to administer any other rule. . . ." *Id.* at 288, 47 N.E. at 89.

96. Note, *supra* note 87, at 544. Implicit in this requirement is a notion that emotional distress is "an intangible, evanescent something too elusive for the. . .common law to handle." Goodrich, *supra* note 88, at 497.

97. 168 Mass. at 290, 47 N.E. at 90.

98. Smith v. Postal Tel. Cable Co., 174 Mass. 576, 577-78, 55 N.E. 380, 380 (1899).

policy considerations.[99] *Spade* presupposed that emotional distress, because it may be ephemeral, is not foreseeable. Thus, it would not be an appropriate injury to sustain an independent cause of action.[100] This supposition apparently addressed itself to the fear of fraudulent claims. If an independent tort claim required proof of physical injury, the possibility of fraud was thought to be minimized because physical injury ostensibly is easier to ascertain than mere emotional distress. Other public policy considerations invoked to justify the impact requirement rule included: The lack of precedent for actions based solely on emotional distress; the trepidation that allowance of recovery would increase fraudulent litigation; and the fear of imprecision in proving and measuring damages from mental trauma.[101]

Counterarguments, however, have effectively assuaged the anxieties attending actions for emotional distress. The lack of precedent, for example, is not a valid reason for denying redress. The fundamental nature of Anglo-American law, which permits progress through judicial decision, contradicts such reasoning. No one would argue that the law is eternally constrained so that it cannot evolve in accordance with changing times and attitudes.[102]

Public policy does not forbid increased litigation to redress wrongs. This premise obviates concern about the potential flood of lawsuits over emotional distress actions.[103] There is no evidence that judicial flexibility in allowing compensation for mental distress has markedly increased litigation.[104] If the volume of litigation does increase, it has been suggested that the proper solution is an increase in the number of courts, "not a decrease in the availability of

---

99. *See generally* 168 Mass. at 290, 47 N.E. at 89.

100. But *Spade* distinguished actions based on negligence from ones "where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution or arrest. . . ." *Id.*

> Although willing to utilize [the impact requirement] when the wrongdoer was guilty of simple negligence, the courts balked at protecting him when the quality of the wrong was more reprehensible. Thus, the courts unanimously have held that no impact is required to recover for mentally induced injury when the culpability of the wrongdoer is great. . . .

Note, *supra* note 87, at 544-45 (footnote omitted).

101. Throckmorton, *supra* note 19, at 273-74.

102. *See id.* at 274. "[T]he common law has been and still is a living and growing thing." Note, *supra* note 87, at 555 (citing Cason v. Baskin, 155 Fla. 198, 215, 20 So. 2d 243, 251 (1944)).

103. Throckmorton, *supra* note 19, at 275.

104. *See id.*; Note, *supra* note 87, at 558-59.

justice."[105]

There is a valid interest in discouraging vexatious litigation, but not at the expense of denying recovery for meritorious claims. It is the business of the courts to distinguish between fraudulent and valid claims on a case-by-case basis. "Denying all recovery merely in anticipation of unjust claims would erode the courts' adjudicatory function."[106] Courts are empowered to scrutinize "injuries under appropriate standards of proof, rejecting those claims which fail to measure up to the standards."[107] One such standard requires sufficient evidence to show a factual, causative nexus between the defendant's conduct and the alleged injury.[108] In addition, proximate cause must be demonstrated.[109]

The difficulty in determining damages should not bar recovery in an action for emotional distress. A plaintiff should not be precluded from bringing an action simply because there is an element of uncertainty in assessing damages.[110] Where nonpecuniary loss results, judgment for a monetary award may be an inartful device. The difficulty in measuring attributable dollar amounts, however, has not prevented these awards from being granted to satisfy physical or mental injuries. It is incumbent upon the jury, under judicial supervision, to make this determination.[111] In short, public policy justifications "are not so insuperable that they warrant denial of relief altogether."[112] Basic tort doctrine requiring evidence of causation and injury helps ameliorate the fears surrounding actions for emotional distress. An allegation of intentional infliction of emotional distress must contain adequate proof of both the act that was intended to cause the distress and the subsequent injury. This minimizes the potential for fraudulent litigation.[113]

The interest in protecting emotional tranquility has been advo-

---

105. Note, *supra* note 87, at 559. "[E]ven if liberal rules of recovery in this area do create more litigation, the price is not too high. When wrongful acts cause serious injury, there should be adequate forums to adjudge compensation." *Id.*

106. Note, *Negligent Infliction of Emotional Distress in Accident Cases—The Expanding Definition of Liability*—Dziokonski v. Babineau, 1978 Mass. Adv. Sh. 1759, 380 N.E.2d 1295, 1 W. NEW. ENG. L. REV. 795, 797-98 (1979).

107. Note, *supra* note 87, at 556-57.

108. *Id.* at 563.

109. *Id.* at 564.

110. National Merchandising Corp. v. Leyden, 370 Mass. 425, 430, 348 N.E.2d 771, 774 (1976).

111. Throckmorton, *supra* note 19, at 277.

112. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338-39, 240 P.2d 282, 286 (1952).

113. *See* Throckmorton, *supra* note 19, at 273.

cated forcefully.[114] In 1936, Professor Calvert Magruder wrote, "[n]o longer is it even approximately true that the law does not pretend to redress mental pain and anguish 'when the unlawful act complained of causes that alone.' "[115] Although Professor Magruder argued that mental anguish deserved legal protection, he cautioned against extending this protection to trivial matters. "No pressing social need requires that every abusive outburst be converted into a tort. . . ."[116] This caveat is embodied within the *Restatement (Second) of Torts*, which strictly limits tort liability to cases wherein the intentional conduct of the perpetrator is extreme and outrageous and results in severe emotional distress.[117] Massachusetts case law is in accord with this standard.[118]

Shortly after *Spade*, Chief Justice Holmes hinted that intentionally caused emotional distress may render a defendant liable but that the question would remain open until it specifically arose.[119] In *Cohen v. Lion Products Co.*,[120] Judge Wyzanski of the United States District Court for the District of Massachusetts echoed Justice Holmes and assumed that Massachusetts would impose tort liability on a perpetrator of mental trauma.[121] This assumption was validated in 1971, when the supreme judicial court decided *George*. Justice Francis Quirico authored this opinion which recognized a new basis of liability for the intentional infliction of emotional distress.[122]

---

114. *See, e.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 337, 240 P.2d 282, 285 (1952); Goodrich, *supra* note 88, at 506-08.

115. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936).

116. *Id.* at 1053.

117. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

118. Harrison v. Loyal Protective Life Ins. Co., 1979 Mass. Adv. Sh. 2477, 396 N.E.2d 987; Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976); George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 915 (1971).

119. Smith v. Postal Tel. Cable Co., 174 Mass. 576, 578, 55 N.E. 380, 381 (1899).

120. 177 F. Supp. 486 (D. Mass. 1959).

121. *Id.* at 489.

122. 359 Mass. at 255, 268 N.E.2d at 921. The *George* court reviewed the policy justifications advanced in *Spade* that resulted in the "impact requirement": That any other rule would be impossible to administer and that expanded recovery would not encourage unjust claims. *Id.* at 247-48, 268 N.E.2d at 916-17. Justice Quirico allayed these fears by postulating that these justifications would apply to any claim for emotional distress, whether parasitic to a tort recognized at common law or independent of any such tort. *Id.* at 250, 268 N.E.2d at 919. This, however, did not persuade the court to abandon its proclivity toward protecting emotional tranquility. *George* evinced a confidence in factfinding tribunals to discriminate between fraudulent and just claims. "The element of speculation is not present to any greater extent than in the usual tort claim where medical evidence is offered and the issue of causation must be weighed with great care." *Id.* at 251, 268 N.E.2d at 919.

The court favored justice and logic by imposing liability for intentionally caused severe emotional distress with resulting bodily harm.[123]

A significant limitation can be gleaned from this holding in that liability hinged on, among other things, proof of resulting bodily harm. In 1976, five years after *George*, the supreme judicial court expunged this limitation in *Agis v. Howard Johnson Co*.[124] *Agis* involved an action against the owner and manager of a restaurant who threatened to fire his waitresses in alphabetical order until the identity of the one who had been stealing from the restaurant became known. Plaintiff Agis was the first to be summarily dismissed.[125] She alleged that as a result of this action she sustained emotional distress, mental anguish, and loss of wages.[126]

Justice Quirico, in reviewing the facts, reiterated the analysis contained in *George* and enlarged the scope of that holding by allowing Agis to recover for severe emotional distress without proving resultant bodily harm.[127] *Agis* employed a test that is defined sufficiently to obviate fears regarding fraud or outbreaks of litigation.[128]

Agis minimized the distinction between the factfinding problems juries may encounter in cases with resulting physical injury and in those alleging only mental injury. Justice Quirico deemed the difficulties inherent in both tasks to be approximately equal. He suggested that the jurors' own experiences could provide cues to aid them in determining whether the alleged outrageous conduct would cause mental distress.[129] He noted the jurors' awareness of the extent and character of the disagreeable emotions that may result from

---

123. *Id.* at 255, 268 N.E.2d at 921.

124. 371 Mass. 140, 355 N.E.2d 315 (1976).

125. *Id.* at 141, 355 N.E.2d at 317.

126. *Id.*

127. *Id.* at 144, 355 N.E.2d at 318.

128. According to the court in *Agis*, a plaintiff must satisfy four elements to prevail in a case for the intentional infliction of emotional distress where no bodily harm has resulted:

> It must be shown (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was "extreme and outrageous," was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community";. . . . (3) that the actions of the defendant were the cause of the plaintiff's distress;. . .and (4) that the emotional distress sustained by the plaintiff was "severe" and of a nature "that no reasonable man could be expected to endure it."

Id. at 144-45, 355 N.E.2d at 318-19 (citations omitted).

129. *Id.* at 144, 355 N.E.2d at 318; *see* State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952).

the defendant's conduct.[130] This suggests that jurors' empathy may be more valid in weighing a claim for mental distress than their detached, objective judgment would be when the difficult medical question of resulting physical injury arises.

The supreme judicial court's elimination of the physical impact requirement in *Agis* highlights its determination that problems inherent in allowing an action for emotional distress are "outweighed by the unfair and illogical consequences of the denial of recognition of such an independent tort."[131] *Agis*' viability was affirmed in *Harrison*, in which the requirement of physical damage was unnecessary both in the context of triggering the survival statute's "damage to the person" clause and in maintaining a cause of action for the intentional infliction of emotional distress.[132] *Harrison*'s expansion of the survival statute is a logical consequence of the elevation of emotional distress to the status of a personal injury capable of sustaining an independent tort action.

III. ANALYSIS OF *HARRISON*

Survival of the emotional distress action in *Harrison* was predicated upon the divorce of the physical impact requirement from the concept of "damage to the person."[133] This holding aligned the *Agis* standard, which accepts pure emotional distress as an actionable injury,[134] with the survival statute. The *Harrison* court reviewed the history regarding nonsurvival of actions and rejected previous, restrictive readings of the survival statute.[135] As a result, the supreme judicial court reversed the superior court's dismissal of Mrs. Harrison's complaint.[136]

Chief Justice Hennessey first rejected the common-law dogma

---

130. 371 Mass. at 144, 355 N.E.2d at 318 (citing State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952)).

131. *Id.* at 142, 355 N.E.2d at 317.

132. 1979 Mass. Adv. Sh. at 2479-80, 396 N.E.2d at 989.

133. *Id.*

134. *See generally* Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954) (in accord with trend in the law, recovery allowed for intentionally caused severe emotional distress absent resulting physical harm); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E. 2d 315 (1976) (recovery allowed for emotional distress absent showing of physical injury); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961) (best considered view recognizes an action for severe emotional distress without physical injury provided standards safeguarding against false claims are met); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974) (cause of action may lie for severe emotional distress with or without showing of accompanying bodily impact).

135. 1979 Mass. Adv. Sh. at 2478-79, 396 N.E.2d at 989.

136. *Id.* at 2477, 396 N.E.2d at 988.

precluding survival of tort actions after a party's death.[137] The Massachusetts survival statute abrogated this common-law rule and rendered untenable appellees' reliance on it.[138] After noting that early statutory interpretations of "damage to the person" evinced the narrow view that damage of a physical character was required, the court found these interpretations not germane to *Harrison*.[139] Chief Justice Hennessey argued that, as Massachusetts courts only recently have countenanced claims for the intentional infliction of emotional distress, judicial constructions of the survival statute predating recognition of this independent tort cannot be controlling.[140] Explicit in the statute is the legislature's intent that the list of surviving torts supplements, rather than limits, those actions that survived at common law. Under the traditional common-law rule no tort actions survived.[141] The legislature, therefore, must have contemplated a dynamic common law evolving in the courts subsequent to the enactment of the survival statute.[142]

The nonsurvival rule was spawned in an era of purely violent torts and therefore is inapplicable today.[143] This distinction between violent and nonviolent torts is not dispositive in any case because the survival statute explicitly encompasses both violent torts, such as battery, and those involving injuries deemed to cause "other damage to the person."[144] The expansiveness of this phrase allowed Chief Justice Hennessey to presume that the legislature's intent was to afford courts latitude to determine which unenumerated torts result in "damage to the person." *Harrison* imputed a flexibility to the survival statute by construing the intent to allow for changing judicial conceptions of those injuries that would constitute legally

---

137. *Id.* at 2478-79, 396 N.E.2d at 989.

138. *Id.*

139. *Id.*

140. *Id.* at 2479-80, 396 N.E.2d at 989.

141. *Id.* at 2479, 396 N.E.2d at 989.

142. *Id.*

> It would indeed be unfortunate, and perhaps disastrous, if we were required to conclude that at some unknown point in the dim and distant past the law solidified in a manner and to an extent which makes it impossible now to anwser a question which had not arisen and been answered prior to that point. The courts must, and do, have the continuing power and competence to answer novel questions of law arising under ever changing conditions of the society which the law is intended to serve.

George v. Jordan Marsh Co. 359 Mass. 244, 249, 268 N.E.2d 915, 918 (1971).

143. *See* notes 28-41 *supra* and accompanying text.

144. MASS. GEN. LAWS ANN. ch. 228, § 1 (West 1958 & Cum. Supp. 1981).

redressable damage.[145]

Massachusetts cases typifying the statute's traditional, narrow construction requiring physical impact[146] were distinguished by Chief Justice Hennessey because they "were decided at a time when the general attitude of the court toward mental or emotional distress as a legally redressable harm was more restrictive than it is today."[147] Judicial recognition of the right to mental security has increased because of medical knowledge concerning mental processes.[148] "As the potential for harm inherent in mental stress has become better understood, the courts have become increasingly willing to protect mental security."[149] A serious and prolonged invasion of mental security can upset psychological balance, impair bodily functions, and result in severe emotional and physical injury.[150] " 'The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation, in an action at law. . . .' "[151]

After departing from the impact requirement rule,[152] Massachusetts courts settled in the judicial mainstream by recognizing the reality of injuries induced through the invasion of mental security.[153] *Harrison* summarized the two comparatively recent cases through which the supreme judicial court liberalized its treatment of claims based on emotional distress: *George*, in which the court first countenanced a cause of action for the intentional infliction of emotional distress with resulting physical injury; and *Agis*, in which the physical injury limitation was abandoned.[154] Thus, the current philosophy of the Massachusetts judiciary regarding emotional injury has

---

145. 1979 Mass. Adv. Sh. at 2479, 396 N.E.2d at 989.

146. *See* cases cited notes 57 & 76 *supra*.

147. 1979 Mass. Adv. Sh. at 2479, 396 N.E.2d at 989.

148. Note, *supra* note 87, at 540.

149. *Id.* "A merely transitory or mild psychosomatic state caused by mental stress should not be considered legally compensable. But if the invasion of mental security is serious and prolonged, to the extent that the mind and emotions become distracted, and dysfunctionally oriented, then a different conclusion is compelled." *Id.* at 555.

150. *Id.* at 554-55.

151. *Id.* at 551 (quoting Hill v. Kimball, 76 Tex. 210, 215, 12 S.W. 59 (1890)).

152. *See* Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976); George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 915 (1971). Massachusetts expressly abandoned the impact rule of *Spade* in Dziokonski v. Babineau, 375 Mass. 555, 556, 380 N.E.2d 1295, 1296 (1978).

153. Note, *supra* note 87, at 554; *see* Womack v. Eldridge, 215 Va. 338, 341, 210 S.E.2d 145, 147 (1974).

154. 1979 Mass. Adv. Sh. at 2479-80, 396 N.E.2d at 989.

crystallized only in the last few years. This suggested to the court that the attitude toward emotional distress, which fostered narrow constructions of "damage to the person," no longer was viable. Chief Justice Hennessey believed that it was time to reexamine the survival statute and ascertain its bearing on the tort of intentional infliction of emotional distress.[155]

A. *Evaluation of the Language of the Survival Statute*

An historical perspective reveals that *Harrison* contrasts the stringent constructions requiring physical damage.[156] Judicial conceptions of legally redressable "damage to the person," as evidenced by *Harrison* and *Agis*, have expanded to include emotional harm. Chief Justice Hennessey asserted that the survival statute is sufficiently flexible to allow for a change in the courts' attitude.[157] The operative phrase in the survival statute only refers to "damage to the person."[158] This phrase is not limited or altered by any descriptive clause. An adjective such as "physical" does not qualify either of the words "damage" or "person." Rather, the phrase stands alone and should be read as ordinary meaning dictates without any modifying clause.[159]

The court was satisfied that common understanding mandates that the statutory language should not be constrained solely to damage of a physical character.[160] Under this analysis, a reasonable definition of "damage to the person" includes mental injury. The kind of the injury, not the form of the action, must control in deciding whether to invoke the survival statute.[161] Contemporary judicial treatment of emotional injury, as exemplified by *Agis*, is supported by the medical profession's view that this kind of injury can be tangi-

---

155. *Id.* at 2480, 396 N.E.2d at 989-90.

156. *See* cases cited notes 57 & 76 *supra*.

157. 1979 Mass. Adv. Sh. at 2479, 396 N.E.2d at 989. This view of statutory intent requires a focus upon the literal meaning of the words in the survival statute *Id.* at 2480, 396 N.E.2d at 990. There is precedent for this literalist approach in Putnam v. Savage, 244 Mass. 83, 138 N.E. 808 (1923): "This statute is general in terms and manifestly is designed to include all classes of cases within its scope. It comprehends all such cases whether then existing or thereafter created. . . ." *Id.* at 85, 138 N.E. at 809.

158. MASS. GEN. LAWS ANN. ch. 228, § 1(2)(a) (West 1958).

159. "Person" is defined as "[a] being characterized by conscious apprehension, rationality, and a moral sense. . .a being possessing or forming the subject of personality." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1686 (1971).

160. 1979 Mass. Adv. Sh. at 2480, 396 N.E.2d at 990.

161. Hey v. Prime, 197 Mass. 474, 476, 84 N.E. 141, 142 (1908); Cutter v. Hamlen, 147 Mass. 471, 473, 18 N.E. 397, 398 (1888).

ble and of serious consequence to the victim.[162] Such an attitude belies the arbitrary dichotomy between corporal "body" and ephemeral "feelings"; between the physical and the metaphysical, that earlier supreme judicial court decisions imposed.

Harrison failed to consider personal, intangible torts other than intentional infliction of emotional distress. By imputing flexibility to the survival statute, however, and interpreting "damage to the person" broadly, the court may have expanded the statute's purview to encompass any significant injury to the mind or body.[163] Clearly, the court disfavored abatement of a valid tort action solely because of a party's death.[164] Because "damage to the person" now contemplates emotional injury, it may be inferred that the court would allow survival in cases alleging defamation, malicious prosecution, and invasion of privacy.[165]

As the concept of "damage to the person" now markedly has increased in scope, it appears that survival or abatement no longer hinges on the character of the alleged injury. Rather, survival would be allowed in cases alleging sufficiently severe mental as well as physical harm. Such a construction of "damage to the person" would comport with the broader concept of personal injury, which "may be intangible or mental rather than tactile and physical."[166]

---

162. *See* notes 149-52 *supra* and accompanying text.

163. In *Harrison*, plaintiff alleged facts and circumstances that reasonably could have led the trier of fact to conclude that Harrison suffered severe emotional distress because of defendants' actions. Because the allegations were sufficient to warrant jury consideration, it follows that the survival statute's operation to enable this consideration was appropriate. *See* 1979 Mass. Adv. Sh. at 2484, 396 N.E.2d at 992.

164. *See* notes 35-41 *supra* and accompanying text. A recent case decided by the supreme judicial court reinforces this conclusion. In DuMont v. Godbey, 1981 Mass. Adv. Sh. 51, 415 N.E.2d 188, an action by plaintiff wife against her former husband for alimony and assignment of property was held to survive the husband's death. In making this determination, the court cited *Harrison*, explaining, "[w]e have recently had occasion to consider rules as to survival of actions and we have found the reasons for non-survival lacking in current force." *Id.* at 56, 415 N.E.2d at 191.

165. This inference was first drawn by Chief Justice Shaw, who wrote that if "damages to the person" were to be taken to include non-physical torts, it would also be extended "to slander and every other possible case of tort." Smith v. Sherman, 58 Mass. (4 Cush.) 408, 413 (1849). More recent courts have agreed with Chief Justice Shaw. *See generally* Cohen v. Lion Prods. Co., 177 F. Supp. 486, 489 (D. Mass. 1959); Moyer v. Phillips, 462 Pa. 395, 341 A.2d 441 (1975).

The analogy has been explained aptly by a commentator in the following fashion: "Since the modern theory of torts is essentially compensatory, [t]here seems to be no valid reason why even purely personal actions such as defamation and malicious prosecution should [not survive the death of the tortfeasor]." Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386, 421 (1942).

166. *In re* Madden, 222 Mass. 487, 492, 111 N.E. 379, 381 (1916).

Harrison repudiated the distinction between "personal injury" and "damage to the person" by envisioning mental trauma as being within the ambit of the survival statute.

B. *Policy Considerations*

Apart from drawing conclusions from statutory language, Chief Justice Hennessey considered whether, as a matter of policy, intentional infliction of emotional distress actions should survive. A specific fear attending these actions is that the difficulty in proving emotional injury might increase the potential for fraud. The potential for fraud supposedly is reduced if both the victim and the tortfeasor are alive at the time of the suit. The *Harrison* court followed *Agis* in rejecting this argument.[167]

The statutory provision allowing assault actions to survive evinces the legislature's opinion that courts are competent to decide, after the death of a party, questions involving mental and emotional harm. Assault actions, which expressly survive, may involve only slight harm or even a mere apprehension of bodily contact.[168] Conversely, in order for there to be recovery, injury resulting from intentional infliction of emotional distress must be severe.[169] An allegation of tortious invasion of mental tranquility by assault would survive. The same rule should apply if the allegation is based on the tort of intentional infliction of emotional distress. Abatement of the latter action, in light of the survival of assault actions, would be illogical. Chief Justice Hennessey was disdainful of the anomaly that would result if this were to occur.[170] The statute does not compel such a result and it is dubious that the legislature would have intended such an illogical consequence.

Harrison countered defendants' claim that the difficulty in proof and the danger of fraud necessitated the court's nonrecognition of actions for intentionally caused emotional distress. Chief Justice Hennessey was mindful of these inherent threats but was not convinced that they compelled denial of relief for serious invasions of peace of mind. The Chief Justice echoed *Agis* by recognizing that

---

167. 1979 Mass. Adv. Sh. at 2482, 396 N.E.2d at 990-91.

168. *Id.* at 2481, 396 N.E.2d at 990.

169. *Id.* at 2482, 396 N.E.2d at 990.

170. *Id.* at 2481, 396 N.E.2d at 990. In Cohen v. Lion Prods. Co., 177 F. Supp. 486 (D. Mass. 1959), the court stated that assault required proof of physical contact which marked the essential difference between that tort and intentional infliction of emotional distress. *Id.* at 489. Because *Harrison* obviates the physical injury requirement, this difference is no longer relevant.

courts and juries are charged with determining the validity or invalidity of claims. That the task may be difficult does not excuse them of their duty to perform it.[171] Indeed, the nature of intentional infliction of emotional distress mitigates the potential for excessive fraud. Under *Agis*, the plaintiff must demonstrate what the defendant did or said that led to the complaint. The trier of fact then must decide whether those actions or words would have caused severe emotional distress in a reasonable person.[172] As in the surviving actions of battery and contract, intentional infliction of emotional distress actions carry standard of proof requirements.[173] Chief Justice Hennessey therefore predicted that the confusion resulting from a party's death would not be extraordinary.[174]

In giving credence to the jury's competence, Chief Justice Hennessey defused the impact of a problem presented by an exception to the hearsay rule.[175] In civil cases, a decedent's declarations can be introduced into evidence as long as the statement was made in good faith and upon the personal knowledge of the declarant.[176] Thus, a plaintiff may introduce prior, good faith statements of a deceased victim about his susceptibility and resulting distress, while contemporaneously avoiding the possibility of cross-examination. The court, however, concluded that the legislative decision to create this exception to the hearsay rule applied in all civil cases. Also, the plaintiff's benefit in avoiding cross-examination counterbalanced the burden of not being able to elicit testimony directly from the victim. The hearsay exception does not require abatement of the cause of action by inordinately favoring the plaintiff.[177]

IV. CONCLUSION

Early cases interpreting the survival statute required the victim to endure physical injury in order to prevent abatement of the action

---

171. 1979 Mass. Adv. Sh. at 2482, 396 N.E.2d at 990-91 (quoting *Agis*, 371 Mass. at 144, 355 N.E.2d at 318).

172. 371 Mass. at 144-45, 355 N.E.2d at 318-19.

173. *Id.*

174. 1979 Mass. Adv. Sh. at 2483, 396 N.E.2d at 991.

175. *Id.*

176. MASS. GEN. LAWS ANN. ch. 233, § 65 (West 1959) provides:

> Admissibility of declaration of decedent. In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.

177. 1979 Mass. Adv. Sh. at 2483, 396 N.E.2d at 991.

at the death of a party. This constraint on survivorship stemmed from blind adherence to the archaic, common-law nonsurvival rule. The Massachusetts survival statute, however, was designed to abrogate this anachronistic rule.

Harrison v. Loyal Protective Life Insurance Co.,[178] focused on intentional infliction of emotional distress actions. A cause of action based on emotional distress traditionally would have fallen outside the ambit of the survival statute if evidence of physical injury were lacking. The action would have abated at the death of a party. Nothing in the survival statute, however, requires such a restrictive construction.

Statutory language enabling survival of actions merely requires "damage to the person" that is not qualified by the imposition of a physical injury requirement. The expansiveness of this phrase, and the statute's purpose in abrogating the nonsurvival rule, indicate that causes of action based on emotional harm, as well as physical damage, should survive. The statute's explicit provision for the survival of assault actions, which do not necessarily involve physical damage, supports this interpretation.

Harrison adopted the current standard regarding intentional infliction of emotional distress actions. This standard, as expressed in *Agis v. Howard Johnson Co.*,[179] is that outrageous conduct must result in severe emotional distress for there to be an actionable tort. *Harrison* was based on a complaint alleging this degree of emotional distress. The Massachusetts Supreme Judicial Court applied the *Agis* standard, which obviates a showing of ensuing physical harm. By allowing survival of this action, *Harrison* juxtaposed the survival statute's phrase "damage to the person" with the standard requiring severe emotional distress absent some perceptible physical injury. In doing so, *Harrison* incorporated a fair and justifiable interpretaton of "damage to the person" and thereby furthered the purpose of abrogating the antiquated nonsurvival rule.

Franklin H. Caplan

178. *Id.* at 2477, 396 N.E.2d at 987.
179. 371 Mass. at 140, 355 N.E.2d at 315.