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Torts: *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*— The Oklahoma Supreme Court Recognizes the Tort of Intentional Infliction of Severe Emotional Distress in a New Context

Matthew B. Free

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NOTE

Torts: *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.* — The Oklahoma Supreme Court Recognizes the Tort of Intentional Infliction of Severe Emotional Distress in a New Context

I. Introduction

The Supreme Court of Oklahoma, prior to *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*,¹ had explicitly adopted *Restatement (Second) of Torts* section 46.² This section of the *Restatement*³ recognizes the need to protect an individual's mental and emotional well being from intentional invasions.⁴ The section is divided into two subsections: section 46(1) concerns conduct directed at a primary victim, while section 46(2) concerns conduct directed at a third person.⁵ Section 46 clearly contemplates a distinction between direct infliction of severe emotional distress and infliction of emotional distress on a third party.

1. 916 P.2d 241 (Okla. 1996).

2. See *Breeden v. League Servs. Corp.*, 575 P.2d 1374, 1377 (Okla. 1978); see also *Williams v. Lee Way Motor Freight, Inc.*, 688 P.2d 1294, 1297 n.4 (Okla. 1984) (noting the court has "virtually adopted" the RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

3. RESTATEMENT (SECOND) OF TORTS § 46 (1965). The section is as follows:

Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.

Id.

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

5. For analytical clarity throughout this note, the distinction between the "primary victim" and the "third party" will be illustrated in the following example: A is sitting on her front porch watching her husband B, who is standing on the sidewalk. C, who hates B and is friendly to A, whose presence is known to him, stabs B, killing him. The "primary victim" in this scenario is B, whereas the "third party" is A. In "bystander"-type cases, the plaintiff is always a "third party." This illustration was utilized in *Taylor v. Vallelunga*, 339 P.2d 910 (Cal. Ct. App. 1959), which is more fully discussed *infra* notes 125-29 and accompanying text. See also RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1, illus. 21 (1965) (suggesting, in a similar fact scenario, that C would be subject to liability to A for intentional infliction of severe emotional distress).

The Oklahoma Supreme Court, however, fails to recognize this distinction. In *Breeden v. League Services Corp.*,⁶ the court recognized the first subsection and applied it in a case in which the primary victim sued a defendant for intentional infliction of severe emotional distress.⁷ On its face, the *Kraszewski* case appears to implicate the second subsection. *Kraszewski*, a third party, sued Defendant for intentional infliction of severe emotional distress arising when *Kraszewski* viewed Defendant injuring his wife. Otherwise there is no reference to what Defendant has to do with the wife being injured. However, the court declined to follow section 46(2) and instead created a new and confusing mutation of the subsection.

In place of the *Restatement's* version of intentional infliction of severe emotional distress on third parties, the Oklahoma Supreme Court, in *Kraszewski*, adopted a cause of action that both mirrors other jurisdiction's tort of negligent infliction of emotional distress and burdens plaintiffs with excessive pleading requirements. Indeed, the court provided a means by which a plaintiff can recover more easily under a negligence cause of action than a plaintiff asserting intentional infliction of severe emotional distress. This anomalous result occurs because the court ignored the most important aspect of the tort of intentional infliction of emotional distress — the intentional or reckless nature of the defendant's conduct. In a somewhat knee-jerk reaction, the court integrated the elements of the negligence action into the requirements for the intentional action, requiring the plaintiff to prove actual physical involvement in the incident giving rise to the alleged injury. Absent a change in position by the court, the *Kraszewski* decision will guide future litigation in which a plaintiff alleges intentional infliction of severe emotional distress in a bystander-type situation.

According to the *Kraszewski* court, in order for a plaintiff to establish a cause of action for intentional infliction of severe emotional distress, he must allege three criteria: (1) the plaintiff must be directly physically involved in the accident; (2) the plaintiff must be damaged from actually viewing the injury to another rather than from learning of the accident later; and (3) a familial or other close relationship must exist between the plaintiff and the primary victim.⁸

While the Oklahoma Supreme Court explicitly rejected the "bystander" theory, which allows a third party to claim damages from viewing the harm inflicted on another,⁹ the court nevertheless adopted criteria for the tort that closely resemble bystander cases and section 46(2) of the *Restatement*.¹⁰ However, by emphasizing the necessity of physical harm directed to the plaintiff-third party, the court appears to have ignored *Restatement* section 46(2). Rather, the court's rationale seems to focus on the harm directed specifically at the plaintiff separate and apart from the harm inflicted on the primary victim.¹¹ When viewed in this light, the case seems

6. 575 P.2d 1374 (Okla. 1978).

7. See *id.* at 1377.

8. See *Kraszewski*, 916 P.2d at 243.

9. See KEETON, *supra* note 4, § 54, at 365-67.

10. See discussion *infra* part VI.C.

11. See *infra* notes 50-58 and accompanying text (discussing the distinction between "direct victims" and "bystanders").

to be controlled either by *Restatement* section 46(1) or by concepts pulled from the tort of negligent infliction of emotional distress. By failing to discuss the distinction between negligent infliction of emotional distress and intentional infliction of emotional distress, the court falls prey to the elusive concepts involved in recovery for emotional distress.

This note first outlines the history of mental or emotional damages in Oklahoma and the court's reluctance to compensate emotional harm without some physical manifestation. Second, the *Kraszewski* case itself is discussed. Third, this note analyzes the holding of the *Kraszewski* case, how this decision was reached, and problems with its interpretation of this area of tort law. Fourth, in light of the court's explicit adoption of section 46 of the *Restatement (Second) of Torts*, this note urges the adoption of section 46(2) as the more flexible and meaningful rule. Finally, the basis of liability issue is discussed, noting the Oklahoma Supreme Court's failure to discuss the issue in *Kraszewski* and emphasizing the importance of the issue when analyzing the tort.

II. Historical Development of Emotional Damages in Oklahoma

A. The Physical Manifestation Requirement

The Oklahoma Supreme Court has been extremely reluctant to compensate mental anxiety or emotional disturbance in the absence of some physical injury or physical suffering unless the emotional disturbance was attached to some other liability theory. Many of the early cases in which damages for emotional or mental injury were claimed involved the alleged negligent actions of common carriers,¹² telegraph companies,¹³ or beverage-bottling companies.¹⁴

The Oklahoma Supreme Court based its denial of damages for mental suffering on at least three concerns: (1) the court's proper role in the governmental structure,¹⁵ (2) the validity of mental injury in the absence of physical manifestation,¹⁶ and (3) *stare decisis*.¹⁷ The court, adhering to a formalist interpretation, held that if the right to mental damages cannot be found in the common law, then the court is powerless to place it there in the absence of legislative authorization.¹⁸ Further, the court was concerned that mental distress claims for such things as anguish and anxiety were too remote and too intangible to form a basis for recovery of damages.¹⁹ Finally, the

12. See, e.g., *St. Louis & S.F. Ry. v. Keiffer*, 150 P. 1026 (Okla. 1915).

13. See, e.g., *Western Union Tel. Co. v. Choteau*, 115 P. 879 (Okla. 1911).

14. See, e.g., *Van Hoy v. Oklahoma Coca-Cola Bottling Co.*, 235 P.2d 948 (Okla. 1951); see also *Nail v. McCullough & Lee*, 212 P. 981 (Okla. 1923) (mutilation of corpse).

15. See *Choteau*, 115 P. at 881.

16. See *Keiffer*, 150 P. at 1028.

17. See *Choteau*, 115 P. at 880; see also *Miller v. Miller*, No. 87615, 1998 WL 128795, at *8 (Okla. 1998) (noting primary objections to recognition of tort of intentional infliction of emotional distress include difficulty proving causation, danger of fraudulent claims, and the fear of a flood of litigation).

18. See *id.*

19. See *id.* at 881 (quoting *Rowan v. Western Union Telegraph Co.*, 149 F. 550, 552 (C.C.N.D. Iowa 1907)). See also generally KEETON, *supra* note 4, § 12, at 55.

court was committed to the doctrine of stare decisis; while disclaiming agreement with the rule denying recovery for mental damages, the court nevertheless strictly applied it in cases where no physical injury was shown.²⁰

However, the outcomes of mental suffering cases were magically transformed when the plaintiff showed some physical injury or suffering relating to the mental distress. In the formative years of mental distress damages, recovery was allowed when physical injury produced mental distress²¹ but denied when the mental distress produced physical injury.²² In modern cases, physical injury or physical manifestation of injury was required irrespective of when the mental distress occurred.²³ These decisions were all made interpreting the following oft-quoted passage: "No recovery can be had for mental pain and anguish, which is not produced by, connected with, or the result of, some physical suffering or injury, to the person enduring the mental anguish."²⁴

Cases that required physical injury to precede mental suffering seized on the language "produced by" and "result of," holding that physical suffering must be a cause of the mental suffering.²⁵ The court wished to be certain that the defendant's "wrong" was the cause of the plaintiff's damages. That is, the court viewed the mental damages as inseparable from the physical suffering and, therefore, part of the plaintiff's compensable injury. In that same vein, the court did not wish to compensate mere mental injury which caused physical suffering.²⁶ The mental injury was evidently not part of the original wrong committed against the plaintiff, and the subsequent physical suffering could not properly be attributed to the defendant's conduct.²⁷

20. See *Keiffer*, 150 P. at 1028 ("Whether we personally agree with the rule or not, nevertheless it is the law of Oklahoma . . .").

21. See, e.g., *Thompson v. Minnis*, 202 P.2d 981 (Okla. 1949). To illustrate the transparent nature of the physical suffering requirement, *Thompson* involved a situation where the mental suffering arose out of the claimed physical injury of "hunger." *Id.* at 986. Of course, absence of physical injury was itself sufficient to deny a cause of action. See, e.g., *Seidenbach's, Inc. v. Williams*, 361 P.2d 185, 187 (Okla. 1961) (disallowing a cause of action for mental anguish, humiliation and embarrassment which allegedly resulted from breach of contract but did not result in physical injury).

22. See, e.g., *Cushing Coca-Cola Bottling Co. v. Francis*, 245 P.2d 84, 86 (Okla. 1952) (denying plaintiff relief because his nausea at seeing dead mouse "stemmed exclusively from his mental reaction" and noting a different result if plaintiff had become nauseated and vomited as result of the taste and had a subsequent mental condition).

23. See, e.g., *Obieli v. Campbell Soup Co.*, 623 F.2d 668 (10th Cir. 1980) (Oklahoma law); *Ellington v. Coca-Cola Bottling Co. of Tulsa*, 717 P.2d 109 (Okla. 1986).

24. See, e.g., *Ellington*, 717 P.2d at 111; *Jines v. City of Norman*, 351 P.2d 1048, 1052 (Okla. 1960); *Thompson*, 202 P.2d at 985; *Keiffer*, 150 P. at 1028; see also KEETON, *supra* note 4, § 54, at 362 ("[C]ases will obviously be infrequent in which 'mental disturbance,' not so severe as to cause physical harm, will clearly be a serious wrong worthy of redress and sufficiently attested by the circumstances of the case.").

25. See, e.g., *Francis*, 245 P.2d at 86.

26. See *id.*

27. See KEETON, *supra* note 4, § 54, at 362-63 ("With a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned.") (footnote omitted).

Later, the court decided that recovery for mental damages should not depend on whether mental suffering preceded or succeeded the physical suffering.²⁸ The court cited the above-quoted passage, but this time invoked the word "connected" to conclude that temporal placement of the physical injury is immaterial; the only important issue is whether there was in fact a physical injury.²⁹

B. Willful or Wanton Conduct: Physical Impact Not Required

The Oklahoma Supreme Court discarded the physical injury requirement in other cases. In circumstances where the defendant's conduct was particularly unreasonable, the court held that an independent action for mental pain and suffering could be brought.³⁰ More specifically, the defendant's conduct had to be characterized as "willful" in order for the independent cause of action to lie.³¹ According to the court, the plaintiff had to show a "willful wrong of such a character that the mental suffering is recognized as an ordinary, natural and proximate result of such a wrong."³²

The allowance of an independent claim of damages for mental suffering was a precursor to formal recognition of the tort of intentional infliction of severe emotional distress.³³ According to the court, the interests in emotional and mental security were sufficiently important to warrant protection even in the absence of physical suffering.³⁴ In recognizing this change in nomenclature, the court expressly cited section 46 of the *Restatement (Second) of Torts* and stated that the Oklahoma Supreme Court follows the *Restatement's* guidelines.³⁵

28. See, e.g., *Ellington*, 717 P.2d at 111; *Obieli*, 623 F.2d at 670; *Belt v. St. Louis-San Francisco Ry.*, 195 F.2d 241, 243 (10th Cir. 1952) (Oklahoma law) (recognizing the majority rule that the right to recover is not dependent on the nature of results but rather on the nature of tortious conduct, but nevertheless recognizing that "shock" was a compensable physical injury).

29. See, e.g., *Ellington*, 717 P.2d at 111.

30. E.g., *Dean v. Chapman*, 556 P.2d 257 (Okla. 1976) (holding that an autopsy performed at an open and public site was not of sufficient character to be considered willful wrong); *Mashunkashey v. Mashunkashey*, 113 P.2d 190 (Okla. 1941).

31. See, e.g., *Dean*, 556 P.2d at 261; *Mashunkashey*, 113 P.2d at 191.

32. *Dean*, 556 P.2d at 261. In *Mashunkashey*, 113 P.2d at 191, the court held that to "fraudulently induce one to enter into a bigamous marriage contract would constitute such a wrong." See also KEETON, *supra* note 4, § 34, at 212-14 (describing degrees of care and noting that willful, wanton, and reckless conduct mean the same thing or come out the "same legal exit"). The Oklahoma Supreme Court's recognition of the independent action based on "willful" conduct can be seen as a precursor to either the intentional cause of action for severe emotional distress, or (more likely) the reckless cause of action for severe emotional distress, both of which are subsumed under RESTATEMENT (SECOND) OF TORTS § 46 (1965). For a discussion of the recognition of an action for reckless infliction of severe emotional distress, see KEETON, *supra* note 4, § 12, at 64, and *infra* notes 130-42 and accompanying text.

33. See *Williams v. Lee Way Motor Freight, Inc.*, 688 P.2d 1294, 1296 (Okla. 1984) (stating that Oklahoma follows section 46 of the *Restatement (Second) of Torts*) ("The right to recover damages for emotional distress is not dependent on physical injury."); see also *Chandler v. Denton*, 741 P.2d 855, 866 (Okla. 1987) (recognizing that physical injury is not required).

34. See *Williams*, 688 P.2d at 1296.

35. See *id.* But once again, the question of whether the court adopted section 46(2) is still debatable and the *Kraszewski* case does not provide much use in resolving the debate. If anything, the *Kraszewski* case can be seen as an implicit rejection of section 46(2). See discussion *infra* part VI.C.

C. Third Parties Claiming Mental or Emotional Damages

It is thus clear that the Oklahoma Supreme Court does not require physical injury in cases where the defendant's conduct is willfully or intentionally directed at the plaintiff.³⁶ What remains unclear, even in the light of the *Kraszewski* case, are the requirements for a cause of action predicated on the conduct of the defendant and his actions relative to a third party.

The earliest cases in which a third party claimed mental suffering damages from the alleged negligence of the defendant toward the primary victim were the common carrier, telegraph, and bottling cases mentioned above.³⁷ For example, in *St. Louis & San Francisco Railway v. Keiffer*,³⁸ the plaintiff claimed mental damages because he had to watch the suffering and worry of his brother immediately prior to death. According to the plaintiff, this suffering was a result of the defendant's failure to get a train to its destination on time and, as a result, the plaintiff's decedent "abandoned all hope for life."³⁹

In deciding such third party cases, the Oklahoma Supreme Court did not focus on the nature of the defendant's conduct or on the effect of liability in the context of such third party damages. Rather, the focus was on the noncompensable nature of mental distress damages when unaccompanied by some physical manifestation.⁴⁰ Further, these early cases all involved the alleged negligence of the defendant. The plaintiff claimed damages from the alleged negligence of the defendant in the defendant's dealings with the plaintiff's decedent. In all of these cases, recovery was denied when the mental suffering was unaccompanied by physical symptoms.⁴¹

The Oklahoma Supreme Court has never decided a case where the defendant was regarded as intentionally causing emotional distress to a third party. Therefore, the case law was ripe for a clear and concise decision outlining the cause of action for emotional distress, whether negligent or intentional. The need for such a decision was reinforced by the court's explicit adoption of section 46 of the *Restatement* but silence regarding section 46(2).

36. See *supra* notes 30-35 and accompanying text.

37. See *supra* notes 12-14 and accompanying text.

38. 150 P. 1026 (Okla. 1915).

39. *Id.* at 1028. The facts of *Keiffer* are similar to other cases decided by the court. See, e.g., *Choteau*, 115 P. at 379; *Thompson*, 202 P.2d at 983.

40. See, e.g., *Keiffer*, 150 P. at 1028.

41. The *Restatement* recognizes this "physical impact" theory in its discussion of negligent infliction of emotional distress. A defendant is liable for emotional distress if he should have realized that his conduct involved a reasonable risk of causing emotional distress and, from the facts, should have realized that the distress might result in "illness or bodily harm." RESTATEMENT (SECOND) OF TORTS § 313 (1965); see also *id.* § 313 cmt. a ("The rule stated in this section does not give protection to mental and emotional tranquility in itself. In general . . . there is no liability where the actor's negligent conduct inflicts only emotional distress, without resulting bodily harm or any other invasion of the other's interests.").

III. Statement of the Case

A. Facts and Questions Presented

The facts of the *Kraszewski* case are startling. Kraszewski and his wife were walking across the parking lot of a grocery store. Defendant had spent the entire afternoon in a local bar and was legally intoxicated.⁴² Defendant sat in his pickup truck in the parking lot near the grocery store entrance immediately prior to the incident. As the Kraszewski couple made their way across the lot, Defendant accelerated rapidly toward the couple, as evidenced by twenty feet of skid marks on the parking lot surface. The vehicle struck Kraszewski in the knee, chest and shoulder and knocked Kraszewski back from the truck. Kraszewski's wife was pinned underneath the vehicle and dragged sixty feet through the parking lot.⁴³ The driver only stopped the vehicle because he was forced to by backed-up traffic. After the driver backed off Mrs. Kraszewski's body, Mr. Kraszewski held her and comforted her until the paramedics arrived. She died later that evening.⁴⁴

Kraszewski filed a wrongful death action and a claim for intentional infliction of severe emotional distress.⁴⁵ The parties privately settled the wrongful death action.⁴⁶ Therefore, the sole issue on appeal to the Oklahoma Supreme Court was whether the trial court erred in granting summary judgment against Kraszewski on the claim for

42. Defendant's blood alcohol content was .14, which is .04 above the legal limit. See 47 OKLA. STAT. § 11-902 (1991) ("Persons under the influence of alcohol or other intoxicating substance or combination thereof. A. It is unlawful and punishable as provided in this section for any person to drive, operate, or be in actual physical control of a motor vehicle within this state who: 1. Has a blood or breath alcohol concentration . . . of ten-hundredths (0.10) or more at the time of a test of such person's blood or breath administered within two (2) hours after the arrest of such person . . .").

43. Mr. Kraszewski testified as follows:

[I] parked in this area here and Mary and I got out of the car. We walked this way, which is west. And we got to this point when we angled northwest. We were about eight to ten feet away from the truck. I took another step. Mary was to my left. I was holding her hand. And the truck lurched from a standing stop, brushed me back, knocked me back. I pounded the truck as it went by knocking down Mary and dragged her more than 50 feet. . . . [W]e were about eight to ten feet away. I took another step, Mary and I took another step and the truck lurched at us. In that step, my knee was struck, my right knee was struck, and I felt the impact of my chest and shoulder. And it continued faster and faster and I hit with my hands on the side of the truck. I yelled, stop, stop . . .

Kraszewski, 916 P.2d at 244 n.5.

44. See *id.* The driver of the truck pleaded guilty to driving under the influence and manslaughter in the first degree. He was sentenced to 38 years in prison, 24 of which were suspended.

45. Kraszewski's original action was for reckless infliction of emotional distress. This claim was dismissed without prejudice when faced with a summary judgment motion. See *Kraszewski*, 916 P.2d at 244. Kraszewski refiled the action claiming negligent infliction of emotional distress. When again faced with a summary judgment motion, the court allowed the plaintiff to amend to include the claim for intentional infliction of severe emotional distress. The court, however, sustained a summary judgment motion for both claims. See *id.* at 245.

46. See *id.* The husband's complaint named the driver, the hospital where his wife was treated, and the doctors charged with her care. The driver's insurance company intervened. See *id.* at 244.

intentional infliction of severe emotional distress caused from viewing the injuries and suffering of his wife.

The Oklahoma Supreme Court reversed the decision of the lower court. According to the court, Kraszewski could state a cause of action for intentional infliction of emotional distress because: (1) he was directly physically involved in the incident, (2) his damages arose from actually viewing the injury to the primary victim rather than from learning of the accident later, and (3) there existed a familial or other close personal relationship between him and the primary victim.⁴⁷

The court limited the damages under this theory to those Kraszewski suffered as a result of watching his wife's injuries and her suffering up to the time of death as opposed to emotional damages from the death itself.⁴⁸ Defendant claimed that allowing recovery for Kraszewski's emotional suffering would allow for double recovery — recovery in both the wrongful death action and the emotional distress action.⁴⁹ However, the court, in a chronological parsing out of mental damages, distinguished Kraszewski's emotional damages arising from the death of the wife, which are properly within the wrongful death action, and Kraszewski's emotional damages from viewing the injuries and suffering of his wife, which are recoverable under the emotional distress action.⁵⁰

B. Rationale of the Kraszewski Opinion

1. Bystander Versus Direct Victim

The Oklahoma Supreme Court's discussion of the legal issues is a jumble of tort liability theory. First, the court distanced itself from "bystander" cases in which the emotional distress is inflicted on a party not directly involved in the accident.⁵¹ According to the court, bystander cases arise "where the mental pain or suffering is caused from viewing acts which result in another's suffering rather than from the plaintiff's own personal physical involvement."⁵² Rather, the correct focus for a cause of action for intentional infliction of severe emotional distress should be on "direct victims."⁵³ While the emotional damages of direct victims are also caused by viewing the suffering of another, the difference is that these plaintiffs were

47. *See id.* at 245.

48. *See id.* at 244 n.2.

49. Indeed, the wrongful death statute could be interpreted in this manner. According to the statute, recovery includes damages for "[t]he loss of consortium and the grief of the surviving spouse." 12 OKLA. STAT. § 1053 (1991).

50. *See Kraszewski*, 291 P.2d at 244 n.2. Justice Opala filed a dissenting opinion and noted that the majority created a new remedy for post mortem recovery. According to Opala, this was beyond the judiciary's power and ill-advised. *See id.* at 250-51 (Opala, J., dissenting).

51. *See id.* at 246.

52. *See id.* The Oklahoma Supreme Court had previously rejected "bystander" liability in the case of *Slaton v. Vansickle*, 872 P.2d 929 (Okla. 1994). In *Slaton*, the court specifically rejected *Dillon v. Legg*, 441 P.2d 912, 921 (Cal. 1968) (allowing a mother to sue for emotional damages after witnessing the death of her child in a car accident). According to the *Slaton* court, recovery for mental anguish is limited to injuries or wrongs committed against the plaintiff and not for those wrongs committed against a third person. *Slaton*, 872 P.2d at 931.

53. *Id.*

involved directly in the accident.⁵⁴ In "bystander" cases, no preexisting duty exists between the plaintiff and the defendant, whereas in "direct victim" cases, the defendant has assumed a duty to avoid causing the plaintiff severe emotional distress.⁵⁵

The distinction between "bystanders" on the one hand and "direct victims" on the other is an integral part of the court's analysis. This distinction comes from the court's vision of who is deserving of compensation from the alleged harmful actions of a defendant. Accordingly, in Oklahoma, before a defendant can be held liable for the mental or emotional damages of a third party, there must have been some original wrong committed by the defendant against the plaintiff.⁵⁶ The "wrong" is evidently too tenuous to establish in bystander cases, whereas, in direct victim cases, an original wrong has already been committed⁵⁷ and the mental damages can be viewed as attaching to that wrong.⁵⁸

2. Distinguishing *Slaton v. Vansickle*

Second, the court tried to illustrate why recovery should be allowed in this case but denied in *Slaton v. Vansickle*,⁵⁹ the court's most recent bystander-type decision. *Slaton* did not involve the tort of intentional infliction of emotional distress, and it arose out of a manufacturer products liability suit.⁶⁰ It would appear inapplicable to the discussion of the intentional tort in *Kraszewski*, but *Slaton* goes a long way in explaining why the court decided *Kraszewski* the way it did.

In *Slaton*, the plaintiff sought damages for emotional distress from the manufacturer of a rifle when he learned that the primary victim had been killed by the accidental discharge of a rifle manufactured by the defendant. The rifle allegedly discharged when the plaintiff placed it in the back of his pickup truck. The bullet hit and killed the primary victim. The plaintiff, however, did not learn of the accident until hours after it occurred but still claimed mental suffering from learning of the accident.

The Oklahoma Supreme Court characterized the *Slaton* action as one for negligent infliction of emotional distress under the bystander theory of liability.⁶¹ The court emphatically rejected this cause of action because the court does not recognize the bystander theory unless there was an original wrong to the person suing.⁶² Further, in *Slaton*, it was not the act of the defendant which caused the mental suffering but

54. *See id.*

55. *See id.*

56. *See id.* at 247.

57. The "wrong" in direct victim actions is reflected in the "direct physical involvement" requirement. *Id.* ("[W]here a party is actually a direct victim of an accident and suffers mental injuries from the observation of injuries to a third party [other courts have] allowed[ed] recovery for the plaintiff's emotional injuries.")

58. *See Kraszewski*, 916 P.2d at 247.

59. 872 P.2d 929 (Okla. 1994).

60. *See id.* at 930.

61. *See id.* at 931.

62. *See id.*; *see also supra* note 52 (discussing Oklahoma's rejection of *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)).

rather the result of the accident (the death of the young woman) that caused the alleged mental anguish.⁶³ Therefore, no connection existed between the defendant's conduct and the plaintiff's injury, and therefore no breach of duty existed as to the plaintiff.⁶⁴ The *Slaton* opinion seemed to intimate that direct participants could be treated differently than bystanders.⁶⁵

The *Kraszewski* court placed the *Slaton* cause of action into the noncompensable category of bystander liability.⁶⁶ The *Slaton* defendant had committed no original wrong to the plaintiff. Rather, the *Slaton* plaintiff claimed emotional damages from a manufacturer after being told his actions contributed to the death of a young woman.⁶⁷ In contrast, *Kraszewski* was directly involved in the accident. His damages were part and parcel to the accident which caused his wife's injuries and suffering: "The husband is a direct victim who was injured in the same accident which gave rise to his emotional suffering."⁶⁸ Because the husband was subjected to the same fear and danger which caused injury to the primary victim, recovery would be allowed if the plaintiff met the three requirements stated above.⁶⁹

Finally, the *Kraszewski* court remanded the cause for submission to the jury.⁷⁰ The court deemed the facts sufficient to cause a reasonable person to declare the defendant's conduct extreme and outrageous. Therefore, the jury was to decide whether the defendant's conduct was in fact extreme and outrageous and the extent of *Kraszewski's* distress.⁷¹

3. Other Tidbits Thrown in by the Court

Two other issues raised in the case are worth mentioning because they aid in analyzing the *Kraszewski* opinion. First, the court relegated its only discussion of the distinction between negligent and intentional infliction of emotional distress to footnote status. According to the court, no independent cause of action for negligent

63. See *Slaton*, 872 P.2d at 931.

64. See *id.*

65. See *id.* According to the court, the third party must show that his mental or emotional damages "[arose] from an injury or wrong to the person rather than from another's suffering or wrongs committed against another person." *Id.*

66. See *Kraszewski*, 916 P.2d at 246.

67. See *id.* at 247.

68. *Id.*

69. See *supra* note 47 and accompanying text.

70. See *Kraszewski*, 916 P.2d at 250. On the procedural issues such as burdens of proof, the court followed the guidelines established by the RESTATEMENT (SECOND) OF TORTS § 46 (1965):

The court, in the first instance, must determine whether the defendant's conduct may reasonably be regarded so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where, under the facts before the court, reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in any given case has been significantly extreme and outrageous to result in liability. Likewise, it is for the court to determine, in the first instance, whether based upon the evidence presented, severe emotional distress can be found. It is for the jury to determine, on the evidence, severe emotional distress in fact existed.

Breeden, 575 P.2d at 1377-78; see also RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965).

71. See *Kraszewski*, 916 P.2d at 251.

infliction of emotional distress exists.⁷² Rather, the action is based on the precepts of a normal negligence cause of action; the third party distinction is obliterated by the focus on the independent duty of the plaintiff to the defendant.⁷³ Second, the court briefly cited *Restatement* section 46 in support of the conclusion that the intentional nature of Defendant's actions could be inferred from Defendant's conduct.⁷⁴ However, the court did not focus on the nature of the conduct directed at Kraszewski but rather on the nature of the conduct directed at the primary victim, Mrs. Kraszewski.⁷⁵ Further, the issue of Defendant's intent or recklessness was not an issue explicitly remanded for jury consideration.

IV. Analysis

The *Kraszewski* case provided the perfect vehicle for the Oklahoma Supreme Court to speak clearly and to speak forcefully on the issue of emotional distress in the third-party context; it did neither. Defendant's conduct cried out for redress, and the state of the law was undeveloped in the area of "bystander" emotional or mental injuries. Instead of articulating a clear vision, the court provided lawyers and academics with a confused and jumbled opinion that mixes negligent and intentional infliction of emotional distress concepts. Further, the decision wholly sidesteps the effect of the *Restatement (Second) of Torts* in this area.

A. Confusion Between Negligent and Intentional Infliction of Emotional Distress

The holding of the court appears on its face to be a clear enunciation of the cause of action for intentional infliction of severe emotional distress. However, the analysis the court used to distill the three criteria for intentional infliction of emotional distress is merged with an extensive discussion of negligent infliction of emotional distress. Most of the cases the court cites are negligence cases,⁷⁶ and most of the ideas the court expounds are negligence concepts.⁷⁷ The court, however, never addresses why the negligent infliction of emotional distress debate is relevant to the limitations it places on the intentional cause of action. Further, while the court makes it clear that bystander liability is not the law in Oklahoma, the court does not state why actual physical involvement is required in cases in which the court already recognizes the need for an independent action that protects an individual's mental and emotional well being from intentional invasions.

Despite its other problems, the *Kraszewski* opinion makes one issue clear: When approached with a third party action, the best way to proceed will probably be under

72. See *id.* at 244 n.1.

73. See *id.*

74. See *id.* at 250 n.28.

75. See *id.* According to the court, "we need not determine whether the analysis used by the appellate court is correct because there is evidence in the transcript to support a finding that [defendant] may have acted intentionally in either hitting Mrs. Kraszewski or in refusing to stop." *Id.*

76. See *id.* at 244 n.3.

77. See *id.* at 245-48.

the negligent infliction of emotional distress theory. As stated above,⁷⁸ the negligent infliction of emotional distress action is not an independent tort but rather is subsumed under the precepts of a normal negligence cause of action. Therefore, the plaintiff need only allege the normal elements of a negligence action: (1) duty, (2) breach, (3) causation, and (4) injury.⁷⁹

In Oklahoma, the limitations imposed on the plaintiff in an intentional infliction of severe emotional distress action are far more stringent than those imposed on plaintiffs seeking to collect under the theory of negligent infliction of emotional distress. This result is the opposite of orthodox tort law and grinds against common sense. Generally, courts have imposed greater responsibility when the defendant's conduct was intentional as opposed to merely negligent.⁸⁰ When a defendant's conduct is intentional, "[m]ore liberal rules are applied as to the consequences for which the defendant will be held liable, the certainty of proof required, and the type of damage for which recovery is to be permitted, as well as the measure of compensation."⁸¹

This conclusion is further warranted by opinions of the Oklahoma Supreme Court. Early on, the court applied a less stringent standard when the defendant's conduct was characterized as intentional, willful, or wanton.⁸² For example, the plaintiff was not required to prove physical manifestation of the mental distress when the defendant's conduct constituted a "willful wrong" of which the "mental suffering is recognized as an ordinary, natural and proximate result."⁸³

However, in Oklahoma, the as yet ill-defined negligent infliction of emotional distress action may relieve the plaintiff of proving what was so critical to the *Kraszewski* opinion — actual physical involvement. Indeed, the Oklahoma Supreme

78. See *supra* notes 72-73 and accompanying text.

79. See *Kraszewski*, 916 P.2d at 244 n.1 ("[B]efore damages for mental suffering may be collected, the plaintiff must establish: a *duty* on the part of the defendant to protect the plaintiff from injury; a *failure* of the defendant to perform the duty; and an *injury* to the plaintiff *resulting* from the failure.") (emphasis added); see also *Lockhart v. Loosen*, 943 P.2d 1074, 1081 (Okla. 1997). The Oklahoma version of negligent infliction of emotional distress, even though couched in the terms of a normal negligence cause of action, is similar to the independent action for negligent infliction of emotional distress in other jurisdictions. See, e.g., *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (en banc) (allowing an action for mental anguish at witnessing injury to third party occasioned by defendant's negligence when mental anguish has physical manifestations, there is a close personal relationship, and the third party was within the zone of danger of defendant's negligence) (citing RESTATEMENT (SECOND) OF TORTS § 313 (1965)). However, a literal reading of the court's wording would not seem to require familial or proximity requirements. *Kraszewski*, 916 P.2d at 241 n.1.

80. See KEETON, *supra* note 4, § 8, at 37.

81. *Id.*

82. See generally *Dean*, 556 P.2d 257 (public autopsy); *Mashunkashey*, 113 P.2d 190 (fraudulent inducement-into bigamous marriage).

83. *Dean*, 556 P.2d at 261; *Mashunkashey*, 113 P.2d at 191; see also *Rogers v. Willard*, 223 S.W. 15, 17 (Ark. 1920) (allowing recovery when "fright" produces pain and suffering and the defendant's actions can be regarded as a "willful wrong"); *Jeppsen v. Jensen*, 155 P. 429, 429-31 (Utah 1916) (holding, in a case where defendant cursed, abused, threatened, and drew a pistol on plaintiff's husband, that plaintiff could recover if defendant's conduct could be characterized as willful and wanton, even in the absence of physical injury).

Court cites an article⁸⁴ which discusses the new Illinois rule for negligent infliction of emotional distress in the case of direct victims. In *Corgan v. Muehling*,⁸⁵ the Illinois Supreme Court adopted the "simple negligence" rule.⁸⁶ Direct victims of a defendant's negligence in Illinois can now sue for negligent infliction of emotional distress without proving impact, zone of danger, or physical manifestation.⁸⁷ The Illinois court stated that negligent infliction of emotional distress cases were to be pleaded and proven under a negligence cause of action.⁸⁸ Further, the plaintiff is likely relieved of the burden of showing that *severe* distress has resulted.⁸⁹

It is unlikely, however, that the Oklahoma Supreme Court meant to give up so easily the physical manifestation doctrine in cases in which negligent infliction of emotional distress is asserted. While not making the issue entirely clear in *Kraszewski*, the court will probably require the physical manifestation component in negligent infliction of mental suffering cases in order to give these damages the requisite degree of genuineness.⁹⁰ The court wants to be sure that the mental injury is not feigned. By requiring "physical manifestation" of emotional injury, the mental injury is validated and the risk of compensating a fictitious claim is decreased.⁹¹

Therefore, in Oklahoma, when the negligent and intentional actions are placed next to one another, their similarities are more obvious than their differences. For example, like the newly created *Kraszewski* action, an action for negligent infliction of emotional distress will probably require some actual physical injury or some physical manifestation of mental injury. If *Kraszewski* were to assert negligent infliction of emotional distress, which the Oklahoma Supreme Court said was appropriate,⁹² *Kraszewski* would be required to fill in the four elements of a negligence cause of action. Presumably, Defendant had a *duty* to prevent causing emotional distress to *Kraszewski*, Defendant *breached* that duty when he negligently caused injuries to *Kraszewski's* wife, Defendant's negligence *proximately caused*

84. See Eric A. Cunningham, III, *Negligent Infliction of Emotional Distress in Air Crash Cases: A New Flight Path?*, 70 WASH. U. L.Q. 935 (1992).

85. 574 N.E.2d 602 (Ill. 1991).

86. See *id.* at 606.

87. See Cunningham, *supra* note 84, at 952.

88. See *Corgan*, 574 N.E.2d at 606. Even if it is assumed that Mr. *Kraszewski* is a "direct victim" of Defendant's negligence (which is arguable as he sought damages for his distress at *viewing* the harm inflicted on his wife), the Oklahoma Supreme Court leaves unexplained why this negligence concept is blindly transferred into the intentional infliction of severe emotional distress arena.

89. Under the Illinois rule, there is "[n]o impact requirement, no zone of danger requirement, no physical manifestation requirement, and no apparent severe distress requirement." Cunningham, *supra* note 84, at 952.

90. This appears to be the case. See *Kraszewski*, 916 P.2d at 246 ("[A] plaintiff may recover on a claim for physical injury if it is accompanied by mental stress or when mental [sic] distress is accompanied by physical injury if the negligent act created a breach of duty to the party."); see also discussion *supra* part II.A-C (discussing when physical manifestation of mental injury is required in Oklahoma).

91. See *Kraszewski*, 916 P.2d at 246. See generally KEETON, *supra* note 4, § 54, at 361-62.

92. See *id.* at 244 n.1 ("[*Kraszewski*] argues that he may recover for his emotional suffering under the theory of negligent infliction of emotional distress. We agree.").

Kraszewski's mental suffering, and the mental *injuries* are manifested in some physical way.⁹³

Similarly, in the *Kraszewski* action for intentional infliction of severe emotional distress, the Oklahoma Supreme Court requires direct physical involvement in order to guarantee the genuineness of the emotional injury. Because Kraszewski had some direct physical involvement in the accident that gave rise to his injuries, the court is reassured that Kraszewski's mental injuries are valid and that the defendant's conduct was the cause of the mental injuries. The plaintiff's status as a "direct victim" is common to both causes of action or at least similar "physical" or empirical ingredients are involved in both actions.

After *Kraszewski*, however, not only is a plaintiff required to prove direct physical involvement, but he also must show that he has sustained *severe* emotional distress and that the defendant's conduct was extreme and outrageous.⁹⁴ Adding the "direct physical involvement" factor to the intentional infliction of severe emotional distress action appears to burden excessively the plaintiff's already stringent pleading and proof requirements.

Moreover, this structure is confusing and analytically questionable. Even to the lay person, intentional tortious conduct would appear more culpable than mere negligence. Further, Kraszewski's claim is not one of normal negligence where the defendant fails to carry out some duty. Rather, Kraszewski claims damages as a third-party viewing conduct that intentionally or recklessly inflicted severe emotional distress on Kraszewski himself.

In the negligence arena, other jurisdictions view the defendant's duty as one to prevent unreasonable mental injuries to anyone who is a foreseeable victim,⁹⁵ or to anyone who is in the zone of danger,⁹⁶ or to anyone who receives physical impact.⁹⁷ However, what *Kraszewski* leaves unexplained is why Oklahoma's version

93. The physical manifestation requirement would clearly not need by anything significant, as Oklahoma has previously recognized both "shock," *Belt v. St. Louis-San Francisco Ry.*, 195 F.2d 241, 243 (10th Cir. 1952) (Oklahoma law), and "hunger," *Thompson v. Minnis*, 202 P.2d 981, 986 (Okla. 1949), as sufficient manifestations of emotional or mental suffering. Kraszewski himself alleged many similar physical manifestations:

[I] have suffered extreme emotional distress, lost weight, have experienced decreased energy levels, suffered sleeplessness, shed tears, altered my diet due to changes in my digestive system, experienced nausea, seem more susceptible to illness, and have experienced increases in stomach gases, which have distended my stomach. . . . I have [also] suffered psychological manifestations which have affected me physically [and] post-traumatic stress disorder.

Kraszewski, 916 P.2d at 250 n.28.

94. See *Kraszewski*, 916 P.2d at 248. For the pleading requirements of a general intentional infliction of severe emotional distress cause of action, see *Breeden v. League Services Corp.*, 575 P.2d 1374, 1377 (Okla. 1978).

95. See, e.g., *Buck v. Greyhound Lines, Inc.*, 783 P.2d 437 (Nev. 1989) (adopting the rationale of *Dillon*); *Molien v. Kaiser Found. Hosps.* 616 P.2d 813 (Cal. 1980) (allowing a cause of action where doctor allegedly misdiagnosed wife and caused foreseeable distress to husband); *Dillon v. Legg*, 441 P.2d 912, 921 (Cal. 1968).

96. See, e.g., *Bovsun v. Sanperi*, 461 N.E.2d 843, 844 (N.Y. 1984)

97. See John M. Logsdon, *The Rise and Fall of Bystander Recovery for Negligent Infliction of*

of the negligence concepts must be transplanted into the intentional action — why a plaintiff must climb the walls of negligent infliction of emotional distress to get to the normally more lenient standards of an intentional cause of action. When will a plaintiff who is suing under the intentional cause of action and seeking damages from viewing the injuries of another not be a "direct victim" of the defendant's conduct? When the plaintiff has had no physical impact or no physical manifestations of emotional injury? When the plaintiff is not in the zone of danger of the defendant's conduct? And are these not negligence concepts? The intentional cause of action already has a built-in means of determining the "direct-victim" status of the plaintiff (if that is what the Oklahoma Supreme Court wishes to label the plaintiff in such cases) — the proof of the defendant's intent or recklessness with respect to the plaintiff.⁹⁸

Unfortunately these confusing issues have been logged in the case books; the Oklahoma Supreme Court has planted the weeds of the negligent infliction of emotional distress action into the newly plowed field of intentional infliction of emotional distress claimed by third parties. Courts often justify the physical manifestation of mental suffering requirement in negligent infliction of emotional distress cases by the fear of fraudulent claims.⁹⁹ However, those concerns should be absent in intentional infliction of severe emotional distress cases. Because the basis of liability rests in the *intentional* or *reckless* nature of the defendant's conduct, the "direct physical involvement" requirement appears unnecessary and onerous to a plaintiff who must already allege and prove both *severe* emotional distress and intentional or reckless conduct that was extreme and outrageous.¹⁰⁰

Even though the *Kraszewski* opinion leaves many questions unanswered, the Oklahoma Supreme Court's adoption of the direct physical involvement requirement can be explained in two ways. First, the requirement can be seen as an extension of the historical development of emotional damages in Oklahoma. Second, the requirement can be viewed as either an extension or an unhealthy mutation of the *Restatement (Second) of Torts* section 46(2).

B. Historical Answers?

The strict limitations the Oklahoma Supreme Court imposes on the intentional cause of action can be viewed through the lens of history as merely an extension of

Emotional Distress in North Carolina, 21 N.C. CENT. L.J. 319, 322 (1995) (discussing different approaches to bystander liability and noting, in the "physical impact" discussion, *Stoddard v. Davidson*, 513 A.2d 419 (Pa. Super. Ct. 1986), in which the court found sufficient impact where the plaintiff was "jostled" when his car ran over a dead body of a person). Oklahoma, it appears, adopts a version of the physical impact rule by requiring a plaintiff to plead and prove physical manifestations of mental injury. The "physical manifestation" requirement is generally considered less stringent than the "physical impact" requirement. See KEETON, *supra* note 4, § 54, at 364.

98. See also discussion *infra* part VI.B.

99. See KEETON, *supra* note 4, § 54, at 366 ("It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it . . .").

100. See also discussion *infra* part VII.B.

the fears of the past. That is, the court has a skeptical view of emotional damages and desires an independent means of verification such as physical suffering. Here, that concern is transformed into the first requirement of "direct physical involvement." The intentional or negligent nature of the defendant's conduct is irrelevant; the only concern is that there be an objectively verifiable measure of the defendant's conduct. Therefore, because the plaintiff also suffered injuries in the accident, any worries about the genuineness of the emotional damages are allayed due to the overriding nature of the physical damages and the parasitic nature of the emotional damages.

Assuming this is an underlying fear of the court, such concerns are misplaced. It is difficult to explain how the court can link physical involvement in the accident and damages claimed from watching the pain and suffering of a family member. Why is individual physical involvement, unconnected with the primary victim's injuries and suffering, necessary to give rise to a cause of action for emotional damages from watching the primary victim's injuries?¹⁰¹

The court's analysis in this area once again fails to distinguish between the intent to inflict severe emotional distress on the third party and negligent infliction of emotional distress on a third party. In the former, there is no need to worry about direct physical involvement because the defendant either intended to inflict the emotional distress or was in reckless disregard of a high degree of probability that the emotional distress would follow.¹⁰² The nature of the defendant's conduct alone warrants a cause of action in which actual physical involvement is not required. Indeed, under *Restatement* section 46(2), the plaintiff must be a family member and be present at the scene of the accident. It seems reasonable to conclude that the intentional or reckless nature of the action, and the other limitations listed within section 46(2), would severely restrict the number of cases in which such damages could be claimed.

C. Gleaning from the Restatement

On the other hand, and probably more likely, the court may be viewing section 46(2) with a skeptical eye by adding a requirement to its strictures. In addition to the subsection's familial and proximity requirements, the *Kraszewski* opinion could be viewed as adding the requirement of actual physical involvement in the incident giving rise to the plaintiff's emotional damages. In this way, the court is further restricting the cases in which a plaintiff may recover for such emotional damages.

101. The court answers this question in terms of *duty*: "[Defendant] argues that the breach of that duty [to *Kraszewski*] will not support a cause of action for the husband's emotional injuries from seeing his wife's suffering. We do not agree. The driver breached his duty to the husband when he negligently struck and injured him with his truck." See *Kraszewski*, 916 P.2d at 247. However, the *Kraszewski* court's fear of expanding the intentional infliction of severe emotional distress to include conduct directed at third-parties seems to have resulted in an expansive "duty" concept. After all, the compensated mental injury (watching the injuries to a close family member) seems to result from the breach of the defendant's duty to not strike and injure the plaintiff with the vehicle. *Id.*

102. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965).

Reading *Kraszewski* in this light is also arguable. First, the court is silent about section 46(2) of the *Restatement*, neither discussing nor citing the subsection. Second, recognition of the subsection would controvert the major premise of the *Kraszewski* opinion — that some independent harm was committed against the plaintiff that does not depend on the existence of the three-party relationship.

Even though the Oklahoma Supreme Court never discusses the issue, the distinction between section 46(1) and section 46(2) of the *Restatement* is a clear and concrete separation between direct infliction of emotional distress and third-party infliction of emotional distress, respectively. The Oklahoma Supreme Court either fails to recognize the distinction or tacitly declines to accept it. While it is true that cases discussing "bystander" or "witnessing" cases often make minute distinctions and cases can often be found to support any position,¹⁰³ the *Kraszewski* case is even more adrift. While stating that Oklahoma explicitly adopts section 46 as governing the intentional infliction of emotional distress cause of action, the court declines to follow it. The requirements the court develops seem to follow the guidelines of section 46(2), but the language of the opinion appears devoted to section 46(1). Therefore, to analyze the case and predict what the future holds in this area of tort law, it seems appropriate to describe both section 46(1) and section 46(2).

V. Where to Go After *Kraszewski*

A. The *Restatement (Second) of Torts*

As stated above, Oklahoma has recognized the need to protect an individual's mental and emotional security from intentional invasions.¹⁰⁴ The court accordingly adopted the "narrow standards"¹⁰⁵ of section 46(1) of the *Restatement*.¹⁰⁶ The court, however, has been silent about section 46(2), neither discussing nor citing the subsection in *Kraszewski*. Ironically, section 46(2) appears to provide the best means to resolve the conflict created by the Oklahoma Supreme Court in *Kraszewski*. Section 46(1) also provides some answers to the questions presented in *Kraszewski*.

1. Extension of Section 46(1)?

The cause of action under section 46(1) is generally considered to contain four elements: (1) the defendant must act intentionally or recklessly; (2) the conduct must be extreme and outrageous; and (3) the conduct must be the cause (4) of severe

103. See 4 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 16:23 (1987) (citing *Dillon v. Legg*, 441 P.2d 912, 929 (Cal. 1968); *Archibald v. Braverman*, 79 Cal. Rptr. 723, 725 (Cal. 1969); *D'Amicol v. Alvarez Shipping Co.*, 326 A.2d 129, 132 (Conn. 1973)).

104. See *Breeden v. League Servs. Corp.*, 575 P.2d 1374, 1376 (Okla. 1978).

105. See *Hadnot v. Shaw*, 826 P.2d 978, 985 n.27 (Okla. 1992) (holding, in action by excommunicated church members against church leaders, that defendant's conduct was not sufficiently extreme and outrageous as a matter of law and noting that the intentional infliction of severe emotional distress tort is "governed by the narrow standards" of the *Restatement*); *Eddy v. Brown*, 715 P.2d 74, 76-77 (Okla. 1986) (holding, in a suit by an employee against employer, that the employer's conduct was not sufficiently extreme and outrageous as a matter of law).

106. See *Breeden*, 575 P.2d at 1376.

emotional distress.¹⁰⁷ Most of the Oklahoma cases dealing with section 46(1) have discussed the requirement of extreme and outrageous conduct. The court rather methodically states that section 46(1) requires conduct that is extreme and outrageous and that the defendant's conduct could or could not be interpreted by a reasonable person as outrageous. The case is then disposed of on these considerations.¹⁰⁸

The *Kraszewski* court's emphasis on harm to the plaintiff could, however, support a conclusion that this is a section 46(1) claim. The third party issue would be immaterial because of the independent harm inflicted on the plaintiff. Therefore, if the court is adamant about requiring harm to the person suing, the court should follow the requirements of section 46(1) and wholly ignore the issue of whether the plaintiff is a bystander or direct victim. By following this normal cause of action that the court has repeatedly developed in its case law, confusion will abate because of the absence of the third-party variable. All the court would need to consider, pursuant to the language adopted in *Breeden*,¹⁰⁹ is whether the conduct directed at the plaintiff could reasonably be interpreted as extreme and outrageous and whether the harm suffered by the plaintiff could reasonably be interpreted as severe. Other considerations worthy of the court's attention are whether the conduct could reasonably be interpreted as intentional or reckless and whether the conduct reasonably supports the causation requirement. These four factors would then help decide the summary judgment motion.

The problem with this view is that *Kraszewski's* damages allegedly stem from viewing the harm inflicted on his wife. It is difficult to reconcile a section 46(1) action with this third party involvement. In fact, section 46(1) presupposes recovery for the harm inflicted on the plaintiff, not recovery for viewing harm inflicted on another. This latter scenario is delegated to the guidelines of section 46(2).

However, if the court remains committed to the rule of direct physical involvement, its rationale will probably follow the historical cases cited above.¹¹⁰ That is, *Kraszewski's* mental damages from viewing the injuries to his wife could be

107. See *Shoen v. Amerco, Inc.*, 896 P.2d 469, 476 (Nev. 1995); *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1145 (Nev. 1983); *Wigfall v. Society Nat'l Bank*, 669 N.E.2d 313, 318 (Ohio Ct. App. 1995); *Lewmaster v. Ward*, 125 F.3d 1341, 1353 (10th Cir. 1997) (Oklahoma law); *Ford v. Hutson*, 276 S.E.2d 776, 778-79 (S.C. 1981) (citing *Vicnire v. Ford Motor Co.*, 401 A.2d 148, 154 (Me. 1979)); see also RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress By Outrageous Conduct*, 82 COLUM. L. REV. 42, 46 (1982); 4 SPEISER, *supra* note 103, § 16:13.

108. See *Smith v. Farmers Coop. Ass'n of Butler*, 825 P.2d 1323, 1327 (Okla. 1992); *Eddy v. Brown*, 715 P.2d 74, 77 (Okla. 1986); *Breeden*, 575 P.2d at 1378; *McMullen v. City of Del City*, 920 P.2d 528, 531 (Okla. Ct. App. 1996); *Zahorsky v. Community Nat'l Bank of Alva*, 883 P.2d 198, 200 (Okla. Ct. App. 1994); *Haynes v. South Community Hosp. Management, Inc.*, 793 P.2d 303, 307 (Okla. Ct. App. 1990); cf. *Miller v. Miller*, No. 87615, 1998 WL 128795, at *8 (Okla. 1998) (recognizing that plaintiff must prove intentional or reckless conduct and show severe emotional distress); *Marshall v. OK Rental & Leasing, Inc.*, 939 P.2d 1116, 1122 (Okla. 1997) (dismissing intentional infliction of emotional distress claim because plaintiff failed to show defendant intentionally caused employee to sexually harass plaintiff or extreme and outrageous conduct which recklessly caused severe emotional distress).

109. *Breeden*, 575 P.2d at 1377-78.

110. See discussion *supra* part II.A-B.

viewed as part and parcel to the physical damages he suffered in the accident. Using this formula, the court could remain true to its requirement of physical involvement while still allowing a bystander-type plaintiff to recover for intentional infliction of severe emotional distress.¹¹¹

However, this is a wholly illusory structure and strikingly similar to the confusing doctrine enunciated in *Kraszewski*. Adoption of section 46(2) would be a more precise analytical approach.

2. Adoption of Section 46(2)

This section of the *Restatement* requires three actors: a defendant, a primary victim, and a plaintiff-third party.¹¹² According to courts in other jurisdictions, the elements of a cause of action for damages under section 46(2)(a), which is also appropriate in the *Kraszewski* case as a familial relationship was involved, are as follows: (1) the conduct complained of was extreme and outrageous; (2) the conduct was directed at a primary victim; (3) the plaintiff is a member of the immediate family of that primary victim; (4) the plaintiff was personally present when the extreme and outrageous conduct took place; (5) the plaintiff sustained severe emotional distress as a direct result of the conduct; and (6) the person whose conduct is complained of intentionally or recklessly caused severe emotional distress to the plaintiff.¹¹³

This analytical framework was developed by the Kansas Supreme Court in *Wiehe v. Kukal*.¹¹⁴ The case involved a boundary dispute between the plaintiff's husband and the defendant. The defendant allegedly waved a pitchfork at the plaintiff's

111. What still remains questionable is why the independent protection of mental security is not recognized in third-party cases. No rationale is given to explain why direct physical involvement guarantees the authenticity of the mental damages arising from viewing injuries to another party.

112. For the distinction between a "primary victim" and a "third party," see *supra* note 5.

113. See *Wiehe v. Kukal*, 592 P.2d 860, 863 (Kan. 1979); see also *Anspach v. Tomkins Indus., Inc.*, 817 F. Supp. 1499, 1508-09 (D. Kan. 1993) (recognizing the rule stated in *Wiehe*, but holding conduct of defendant-company was not sufficiently outrageous to allow husband to collect for the sexual harassment allegedly inflicted on wife, nor did defendant's conduct cause husband sufficiently extreme emotional distress); *Foster v. Trentham's Inc.*, 458 F. Supp. 1382, 1384 (E.D. Tenn. 1978) (citing section 46(2) of the *Restatement* and holding cause of action stated for intentional infliction of severe emotional distress when complaint alleged defendant maliciously instituted criminal proceedings against plaintiff's husband); *Courtney v. Courtney*, 413 S.E.2d 418, 422 (W. Va. 1991) (adopting formula similar to that of *Wiehe* but changing the sixth element to "if the emotional distress results in bodily injury, any person who was present at the time of the outrageous conduct may recover"); cf. *Latremore v. Latremore*, 584 A.2d 626, 631-32 (Me. 1990) ("[S]ection [46(2)] is designed to apply to a situation where the intent to cause harm is directed toward a third party [the primary victim] and the plaintiff [third party or bystander] is injured indirectly by watching the third party [the primary victim] suffer."). For an interesting line of cases involving the Arkansas state and federal courts, see the following: *Orlando v. Alamo*, 646 F.2d 1288, 1291 n.5 (8th Cir. 1981) (noting it was "probable" that Arkansas would adopt section 46(2) of the *Restatement*); *Deason v. Farmers & Merchants Bank*, 771 S.W.2d 749, 753 (Ark. 1989) (failing to recognize section 46(2) when given the opportunity); *Poindexter v. Armstrong*, 934 F. Supp. 1052, 1455 (W.D. Ark. 1994) (citing *Deason* and noting that Arkansas refused to recognize section 46(2) and therefore the Arkansas tort of intentional infliction of severe emotional distress only includes conduct directed at the person bringing the action).

114. 592 P.2d at 863.

husband and hurled a "spontaneous verbal outburst [that was] profane and disparaging."¹¹⁵ The plaintiff asserted a claim for intentional infliction of severe emotional distress arising out of the defendant's conduct directed at her husband. According to the plaintiff, ever since the incident, "her health has been poor; she cries a lot, has no appetite, has lost weight, and is depressed."¹¹⁶

The Kansas Supreme Court eventually held that the defendant could not be held liable for the plaintiff's distress because the defendant's conduct was not extreme and outrageous as a matter of law.¹¹⁷ However, the court did leave room for an action of this type. The most significant part of the Kansas opinion is the court's recognition of the intent requirement — it requires that the defendant recklessly or intentionally cause severe emotional distress to the third party, while also recognizing that the defendant's conduct is directed at the primary victim.¹¹⁸ This element of the cause of action is omitted by the Oklahoma Supreme Court in its analysis of the *Kraszewski* case.

By ignoring section 46(2), the Oklahoma Supreme Court creates confusion about the intentional tort when invoked by plaintiffs who seek recovery for emotional damages from viewing an incident. The *Kraszewski* court refused to focus on the distinction between negligence and intentional/reckless concepts, whereas, the six-step analysis provided by the Kansas court carefully parses out this subsection, focusing on the intentional or reckless nature of the action. The Oklahoma Supreme Court may characterize this action as a bystander-type action and therefore nonactionable. But it does so at the price of creating confusion for attorneys and academics.

The reason for denying recovery in cases like *Kraszewski* is the supposed absence of any wrong against the plaintiff. This concern is, however, abrogated by the careful six-step analysis enunciated above. When the defendant's conduct is intentional or reckless, there is sufficient wrong to justify an independent action where actual physical involvement in the incident is not required. The Oklahoma court has already recognized that emotional security warrants independent protection. The six-step process ensures that the plaintiff has severe emotional distress and that liability is based on the intentional or reckless nature of the defendant's conduct. Validity of injury is ensured by the distilling process of this clear doctrine, which provides assurance that the plaintiff has suffered sufficient injury to warrant recovery.

B. Basis of Liability

As this note has tried to make clear, the most significant part of the tort of intentional infliction of severe emotional distress needed for analyzing the *Kraszewski* fact pattern is the tort's basis of liability. According to the *Restatement*, the defendant must act either intentionally or recklessly with respect to the plaintiff.¹¹⁹ That is, the defendant must either desire to cause the mental distress or know that the mental

115. *Id.* at 863-64.

116. *Id.* at 862.

117. *See id.* at 865.

118. *See id.* at 864-65.

119. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965); *see also id.* § 46 cmt. i.

distress is substantially certain to follow from the defendant's conduct.¹²⁰ The defendant can also be held liable for intentional infliction of severe emotional distress when his conduct is reckless, recklessness being "deliberate disregard of a high degree of probability that the emotional distress will follow."¹²¹

1. Intent

When a court decides whether a defendant intended to inflict severe emotional distress, the court must make the decision with reference to the consequences of the act rather than the act itself.¹²² The actor is held liable for consequences that he intended to inflict or for consequences he knew were substantially certain to result from his act.¹²³ According to Prosser, there are three basic elements to the common usage of "intent": intent (1) is a state of mind, (2) is about the consequences of an act (or omission) and not about the act itself, and (3) extends to both having a purpose to bring about a given consequence and having a belief that certain consequences were substantially certain to follow.¹²⁴

One of the earliest cases dealing with the intent requirement in the context of third-party liability was *Taylor v. Vallelunga*.¹²⁵ In *Taylor*, the plaintiff-daughter witnessed a beating inflicted on her father by the defendants. She asserted an intentional infliction of severe emotional distress cause of action. The California District Court of Appeals, however, denied her claim because she failed to show that the defendants intended to cause her to suffer severe emotional distress or knew that severe emotional distress was substantially certain to follow.¹²⁶

Even though *Taylor* was decided before the *Restatement (Second) of Torts*, the case does emphasize the required mental state for the intentional aspect of the tort: The defendant must intentionally seek to inflict severe emotional distress on the *third party*, and not necessarily only the primary victim.¹²⁷ That is, the defendant must have acted with the intent to cause the severe emotional distress to the third party, or the defendant must have acted with the knowledge that the severe emotional distress to the third party was substantially certain to result.¹²⁸ Moreover, *Taylor* was decided before the *Restatement* allowed reckless conduct to fall within the confines of this tort.¹²⁹ As a result, more conduct will fall under the intentional cause of action by the inclusion of reckless conduct.

120. See *id.* § 8A.

121. *Id.* § 46 cmt. i.

122. See *id.* § 8A cmt. a.

123. See *id.* § 8A cmt. b.

124. See KEETON, *supra* note 4, § 8, at 34 (footnotes omitted).

125. 339 P.2d 910 (Cal. Ct. App. 1959).

126. See *id.* at 911. The court also denied her claim because the defendants did not know that the plaintiff-daughter was present and watching the beating. *Id.*

127. See *id.*; see also *Vescovo v. New Way Enters., Ltd.*, 130 Cal. Rptr. 86, 89-90 (Cal. Ct. App. 1976) (allowing a cause of action to proceed against defendant-newspaper because complaint alleged defendant intended to inflict harm on plaintiff, the son of a co-plaintiff about whom the defendant had published a sexual solicitation advertisement).

128. See RESTATEMENT (SECOND) OF TORTS § 8A (1965).

129. See *Taylor*, 339 P.2d at 911 (quoting RESTATEMENT (FIRST) OF TORTS § 46 (1946 Supp.)).

2. Reckless Conduct

The standard for recklessness is defined in the *Restatement*.¹³⁰ Recklessness is often described as a state of mind in between the intent to do harm and the mere unreasonable risk of harm.¹³¹ Reckless conduct is still a sort of negligence and therefore does not necessarily involve an intention to do harm, but it is also conduct so far from the reasonable state of mind that it is treated as intentional conduct.¹³² According to one court, the defendant must have prior knowledge of specific facts, he must know or have reason to know of facts which create a high degree of risk of harm to another, and he must proceed to act with disregard as to the harm that may result.¹³³

The *Restatement* itself distinguishes intent from recklessness. Recklessness, unlike intent, has both a subjective and an objective component: The act must have been intended by the actor, but the actor need not intend the harm which results from the act.¹³⁴ It is sufficient if the actor realizes or should have realized from the facts as he knew them that there was a strong probability that harm would result.¹³⁵ The *Restatement* makes clear that recklessness differs from negligence in that reckless conduct requires a conscious choice of a course of action, either with knowledge of certain facts that create a strong likelihood of danger or with knowledge of facts which would disclose such a danger to a reasonable person.¹³⁶

Applying the reckless standard in the *Wiehe* case, the Kansas Supreme Court held that the defendant's conduct could not be considered reckless as directed to the plaintiff.¹³⁷ According to the court, even an assault on the plaintiff's husband was not the type of conduct that would ordinarily result in severe emotional distress to bystanders, even though the plaintiff was a member of the primary victim's family.¹³⁸

130. The *Restatement (Second) of Torts* defines recklessness as follows:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965).

131. See KEETON, *supra* note 4, § 34, at 212. The words "willful" or "wanton" are usually interchangeable with "recklessness." *Id.*

132. See *id.* at 212-13.

133. See *Wiehe*, 592 P.2d at 864-65; see also *Nancy P. v. D'Amato*, 517 N.E.2d 824, 827 (Mass. 1988) (stating in dicta, in action by mother and brother of sexually abused child to collect for intentional infliction of severe emotional distress, that defendant did not *intend* to cause severe emotional distress, but it was for the trier of fact to determine whether defendant acted *recklessly* or "indifferent to the likely effect of his conduct on family members who would be apt in time to learn of his outrageous conduct") (emphasis added).

134. See RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965).

135. See *id.*

136. See *id.* § 500 cmt. g.

137. See *Wiehe*, 592 P.2d at 865.

138. See *id.*

The basis of liability issue is important in analyzing the *Kraszewski* case because it goes to the heart of the court's confusion. For some unexplained reason, the court believes the intent or reckless requirement applies to the defendant's conduct relative to the primary victim. According to the court, there is no need to discuss the intent requirement because "there is evidence . . . to support a finding that [Defendant] may have acted intentionally in either hitting Mrs. Kraszewski or in refusing to stop . . ." ¹³⁹

However, the proper application of the intent requirement in the *Kraszewski* case, as illustrated in *Taylor* and *Wiehe*, is whether the defendant acted with the intent to inflict severe emotional distress on the *plaintiff-third party* or knew with substantial certainty that such severe emotional distress was likely to result. Alternatively, the defendant can be held liable under the intentional tort if he acted in reckless disregard of whether such severe emotional distress would actually result.

While it is debatable whether Defendant intended to inflict severe emotional distress on Kraszewski,¹⁴⁰ it appears almost certain that Defendant's conduct could be classified as reckless with respect to his duty to prevent severe emotional distress to Kraszewski. The court's explanation of intent appears to resemble the *Restatement's* definition of recklessness, at least insofar as the Oklahoma Supreme Court only requires that the plaintiff intend the act that leads to the emotional distress — hitting Mrs. Kraszewski.¹⁴¹ Defendant's intent to bring about the consequences of his actions, on the other hand, is not discussed.¹⁴²

Assuming Defendant intended to hit Mrs. Kraszewski, it appears clear, almost as a matter of law, that Defendant acted recklessly with respect to Mr. Kraszewski: Defendant drove through the parking lot knowing that, were he to proceed, the result would be serious emotional harm to Mr. Kraszewski. At the very least, Defendant had knowledge of facts that would cause a reasonable person to stop in order to prevent serious harm. Because Defendant proceeded through the intersection, his conduct could properly be characterized as reckless with respect to Kraszewski's emotional distress and therefore render Defendant liable.

139. *Kraszewski*, 916 P.2d at 249 n.28.

140. See *infra* note 142.

141. See *Kraszewski*, 916 P.2d at 249 n.28; see also *Keel v. Hainline*, 331 P.2d 397, 399 (Okla. 1958) (holding, in an action for assault and battery, that intent was proven when the plaintiff showed a "wrongful act" on the part of the defendant, which, in this case, was the "willful and deliberate throwing of wooden blackboard erasers."); RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965) ("While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it.").

142. See *Kraszewski*, 916 P.2d at 249 n.28. Moreover, because Defendant was legally intoxicated, a serious question exists as to whether Defendant had the requisite mental faculties to meet the subjective standards of the intent requirement. See *supra* note 41 and accompanying text. In criminal law, the Oklahoma Court of Criminal Appeals has stated that intoxication cannot exculpate a defendant, but intoxication can be considered by the jury to determine whether a defendant possessed the necessary intent to commit the crime. See, e.g., *Wooldridge v. State*, 801 P.2d 729, 734 (Okla. Crim. App. 1990) (burglary); *Jones v. State*, 648 P.2d 1251, 1255 (Okla. Crim. App. 1982) (homicide); *Williams v. State*, 513 P.2d 335, 339 (Okla. Crim. App. 1973) (homicide); *Gower v. State*, 298 P.2d 461, 463-64 (Okla. Crim. App. 1956) (larceny).

While the *Kraszewski* decision was correct to focus on the plight of the third party, it nevertheless misconceived the nature of the plaintiff's claim. Mr. Kraszewski's claim did not arise because he was physically involved in the accident which gave rise to his injuries. Rather, Mr. Kraszewski's claim arose out of the alleged intentional or reckless conduct of Defendant directed at Kraszewski himself.

VI. Conclusion

Emotional or mental damages have had a long and tortured history in Oklahoma. From the early requirement of physical suffering to the modern requirement of direct physical involvement, emotional damages have always been viewed with skepticism by the Oklahoma Supreme Court.

However, with Oklahoma's adoption of the *Restatement (Second) of Torts* section 46, many considered the guidelines of that section to be controlling and believed the law in this area to be relatively settled. Unfortunately, this has not been the case. Rather, the Oklahoma Supreme Court has embarked on a confusing and inconsistent path regarding recovery for emotional damages in third-party situations. While explicitly adopting section 46(1) in run-of-the-mill intentional infliction of emotional distress cases, it has started down a different path regarding section 46(2). *Kraszewski* started this descent, and hopefully future cases will change its direction.

The court's decision in *Kraszewski* can be explained in two ways: (1) the court is merely following the traditions of the past with respect to emotional damages or (2) the court is reading the *Restatement (Second) of Torts* section 46(2), tacitly rejecting it, and supplanting it with a new view taken from negligence concepts. This latter position is more likely and the more confusing.

Instead of rejecting section 46(2), the court should reconsider its decision in light of the criteria developed in cases in other jurisdictions. The court's concerns over a wrong committed against the plaintiff would be appeased by the intentional nature of the action itself. Actual physical involvement is not the guarantee of a genuine claim in cases like *Kraszewski*; rather the intentional or reckless nature of the defendant's conduct is the "wrong" committed, and this aspect of the tort of intentional infliction of emotional distress guarantees the validity of the emotional distress claim. This conclusion is further warranted by the court's recognition of the independent right to be free from intentional invasions of mental and emotional security. This right should not be diminished merely because a third party is involved.

Matthew B. Free