UIC Law Review

Volume 17 | Issue 2 Article 13

Spring 1984

Rickey v. Chicago Transit Authority: Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois, 17 J. Marshall L. Rev. 563 (1984)

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RICKEY v. CHICAGO TRANSIT AUTHORITY:* CONSISTENT LIMITATION ON RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN ILLINOIS

Historically, the "impact rule" in Illinois has limited recovery for negligent infliction of emotional distress[1] to that mental pain and suffering[2] directly caused by a negligently inflicted physical injury or impact.[3] Illinois courts persistently imposed

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* 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

1. For general discussions on the subject of damages for negligently inflicted emotional distress in Illinois see Proehl, *Anguish of Mind: Damages for Mental Suffering under Illinois Law*, 56 NW. U.L. REV. 477 (1961); Reidy, *Negligent Infliction of Emotional Distress in Illinois: Living in the Past, Suffering in the Present*, 30 DE PAUL L. REV. 295 (1981) [hereinafter cited as Reidy]. *See also* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 327-35 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 436, 436A (1965).

2. For purposes of this casenote the term "mental pain and suffering" shall be used interchangeably with such terms as "emotional disturbance," "emotional distress," "mental anguish," and "emotional trauma." These terms are often used interchangeably in the cases. *Compare* City of Chicago v. McLean, 133 Ill. 148, 153, 24 N.E. 527, 528 (1890) (term "mental suffering" used) *with* Kaiserman v. Bright, 61 Ill. App. 3d 67, 69, 377 N.E.2d 261, 263 (1978) (term "emotional distress" used). The term "emotional distress" shall not include "shock" or "nervous shock," which has been found to be a physical injury. Braun v. Craven, 175 Ill. 401, 420, 51 N.E. 657, 664 (1898); Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 440, 428 N.E.2d 596, 597 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); Chicago & A. Ry. Co. v. Averill, 127 Ill. App. 275, 280, *aff'd*, 224 Ill. 516, 79 N.E. 654 (1906).

3. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 550, 457 N.E.2d 1, 2 (1983). The mental pain and suffering that is compenable is associated with the physical pain suffered:

> [T]he body and mind are so intimately connected that the mind is very often directly and necessarily affected by physical injury. There cannot be severe physical pain without a certain amount of mental suffering. The mind, unless it is so overpowered that consciousness is destroyed, takes cognizance of physical pain and must be more or less affected thereby.

City of Chicago v. McLean, 133 Ill. 148, 153, 24 N.E. 527, 528 (1890); *accord* Indianapolis & St. L.R.R. v. Stables, 62 Ill. 313, 320 (1872). This is the only type of mental pain and suffering or emotional distress that has been held a proper element of damage in Illinois. Chicago C. Ry. Co. v. Canevin, 72 Ill. App. 81, 90 (1897). Where emotional distress is caused by a reaction to one's own physical injury, or "comes about by reflection or contemplation, then in a legal sense it is not caused by the injury, but arises from and is produced by a combination of circumstances other than the injury." Chicago, B. & Q. R.R. v. Hines, 45 Ill. App. 299, 303 (1892). Damages for such purely emotional pain and suffering have never been available in Illinois under the impact

this limitation[4] because it discouraged fraudulent claims and prevented liability where emotional injury is only marginally foreseeable.[5] This was done even as many other states modified or abolished similar limitations.[6] In *Rickey v. Chicago Transit Authority*,[7] the Illinois Supreme Court addressed the question of whether a small child who had suffered no physical injury or impact could recover for negligent infliction of emotional distress after witnessing a terrifying accident involving his younger brother.[8] The court held that a bystander[9] who suffers emo-

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rule. *Id.* Thus, in Duncan v. Martin's Restaurant, Inc., 347 Ill. App. 183, 106 N.E.2d 731 (1952), a woman who suffered a miscarriage as a result of food poisoning she received in defendant's restaurant sued for emotional distress and was only partially successful: "Plaintiff can recover for pain and mental anguish as a consequence of the injury and miscarriage [citation omitted] but not for anguish of mind, wholly sentimental, caused by the loss of a child through miscarriage." *Id.* at 190, 106 N.E.2d at 734. Similarly, in Horan v. Klein's-Sheridan, Inc., 62 Ill. App. 2d 455, 211 N.E.2d 116 (1965), a woman sued for injuries to her scalp and emotional distress resulting from a cold-wave permanent that the defendant had administered. The court held that emotional distress resulting from embarrassment and humiliation in reaction to disfigurement was not directly caused by physical injury, and was therefore not recoverable. *Id.* at 459-60, 211 N.E.2d at 118.

The impact rule also prevented recovery in Illinois for emotional distress which arose from fear or emotional trauma. *In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 507 F. Supp. 21, 23 (N.D. Ill. 1980) (no recovery for fear experienced by crash victims as aircraft plummeted toward earth), *modified on reh'g*, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983) (applying *Rickey*'s zone-of-physical-danger rule), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983); *see also* Peoria Bridge Ass'n v. Loomis, 20 Ill. 235, 252 (1858) (no recovery for danger to one's life even though impact occurred). *But see* Wetherill v. University of Chicago, 565 F. Supp. 1553, 1559-60 (N.D. Ill. 1983) (allowed recovery under impact rule for fear in reaction to physical impact). Since such fear is a reaction to anticipated or actual injury and is not caused by the physical pain and injury itself, it has not been a proper element of damage under the impact rule.

If no physical injury or impact could be shown at all, the impact rule likewise prevented recovery. Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898) (victim of negligently inflicted abusive conduct could not recover for emotional distress absent impact); Benza v. Shulman Air Freight, 46 Ill. App. 3d 521, 361 N.E.2d 91 (1977) (victim of negligently caused near-miss auto accident could not recover for emotional distress absent impact). In this manner the impact rule effectively prevented recovery in Illinois for purely emotional loss, including fear, embarrassment and humiliation. *See also infra* note 9.

4. *See, e.g.*, Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898) (credited with first articulating the impact rule) *and* Neuberg v. Michael Reese Hosp., 60 Ill. App. 3d 679, 377 N.E.2d 215 (1978) (impact rule prevented recovery for emotional distress).

5. For a discussion of the policies and objectives underlying the impact rule see *infra* notes 51-55 and accompanying text.

6. Over forty states have now modified or rejected the impact rule. For a list of leading cases which modify, retain or reject the impact rule see Reidy, *supra* note 1, at 296-97 n.4.

7. 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

8. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 549, 457 N.E.2d 1, 2 (1983).

tional distress from being in a negligently created zone of physical danger and having reasonable fear for his own safety, has a cause of action for physical injury or illness resulting from emotional distress.[10] This new zone of physical danger rule is consistent with the impact rule. It substantially limits recovery for negligent infliction of emotional distress in Illinois.

On February 12, 1972, eight-year-old Robert Rickey and his five-year-old brother Richard Rickey descended a subway escalator[11] owned and operated by the Chicago Transit Authority.[12] Part of Richard's clothing[13] became entangled in the mechanism at the bottom of the escalator.[14] While Robert Rickey watched from a few feet away, the escalator choked his brother Richard into unconsciousness.[15] Richard has never awakened.[16]

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9. Typically, a bystander who seeks recovery for emotional distress as a result of witnessing an injury to another has suffered no physical impact or injury. The impact rule has therefore barred bystander recovery in Illinois. Rickey v. Chicago Transit Auth. 101 Ill. App. 3d 439, 440, 428 N.E.2d 596, 597 (1981) (new rule adopted because impact rule would bar recovery). *aff'd as modified*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); *see also* Phillips v. Dickerson, 85 Ill. 11 (1877) (wife who saw husband threatened could not recover for emotional distress because she suffered no impact). Those who were not true bystanders because they did not actually witness an accident were also barred if no physical impact or injury was shown. Neuberg v. Michael Reese Hosp., 60 Ill. App. 3d 679, 377 N.E.2d 215 (1978) (no recovery where father suffered emotional distress absent impact after son developed cancer due to hospital's negligence); Kaiserman v. Bright, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978) (family who learned of child's death denied recovery for emotional distress because no impact to them).

Even if a bystander could prove physical impact or injury, the impact rule has still prevented recovery for emotional distress suffered as a result of witnessing injury to another. In Carlinville Nat'l Bank v. Rhoades, 63 Ill. App. 3d 502, 380 N.E.2d 63 (1978), a woman who suffered a broken leg in an automobile accident sued for emotional distress. Her husband, who had been driving the car, was killed in the accident. She was denied relief because the emotional distress she suffered was a reaction to her husband's death and was not directly caused by her own physical injury. *Id.* at 502-05, 380 N.E.2d at 64-66; *see supra* note 3 and accompanying text.

10. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983).

11. There is confusion about who accompanied the two children into the subway. The complaint, drafted by James J. Reidy, Ltd. of Chicago, states that the boys' father accompanied them. Complaint at Law, Count I, ¶ 5, Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983). A law review article written by Reidy, however, states that the boys' mother accompanied them. Reidy, *supra* note 1, at 295.

12. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 549, 457 N.E.2d 1, 2 (1983).

13. A "dangling scarf" was the article of Richard's clothing that became entangled in the escalator. Reidy, *supra* note 1, at 295.

14. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 549, 457 N.E.2d 1, 2 (1983).

15. *Id.*

16. *Id.*

An action was brought on behalf of Robert Rickey seeking damages for the emotional injury he suffered upon witnessing the injury to his brother.[17] The complaint alleged that the Chicago Transit Authority was negligent in its operation of the escalator.[18] No allegation of physical injury or impact to Robert was

17. *Id.* at 548, 457 N.E.2d at 1 (1983). The emotional distress allegedly "became manifest in physical injury, including 'definite functional, emotional, psychiatric and behavioral disorders, extreme depression, prolonged and continued mental disturbances, inability to attend school and engage in gainful employment and engage in his usual and customary affairs.'" *Id.* at 550, 457 N.E. 2d at 2. Proof that emotional distress resulted in physical illness or injury is a prerequisite to recovery under *Rickey*'s new zone-of-physical-danger rule. *See infra* text accompanying note 42. Whether such manifestations of emotional distress as the complaint in *Rickey* sets forth are actually physical in nature is a point of much controversy. *See, e.g.*, Gnirk v. Ford Motor Co., 572 F. Supp. 1201, 1204-05 (D.S.D. 1983) (holding such disturbances are physical in nature). The Illinois Supreme Court in *Rickey* did not accept or reject the notion that such disturbances are physical. It recognized only that the plaintiff alleged them to be physical. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 556, 457 N.E.2d 1, 5 (1983). *See infra* note 42.

18. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 548, 457 N.E. 2d 1,1 (1983). The specific acts of negligence alleged included numerous violations of the American Standard Safety Code for Escalators A17.1 (1955), pertaining to excessively large gaps and clearances between the treads, comb teeth plate and adjacent skirt guards of the escalator, as well as the positioning of the emergency shut-off buttons. It was also alleged that the Chicago Transit Authority had been negligent in failing to properly maintain, inspect and supervise the escalator, and that sufficient safety devices had not been provided. Complaint at Law, Count I, ¶ 11, Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Midland Elevator Company, who had contracted to inspect and repair the escalator, merged with United States Elevator Company in 1971, and thus both companies were also named as defendants. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 548, 457 N.E.2d 1, 1 (1983). The plaintiff alleged negligence as a result of these defendants' failure to adequately inspect and repair the escalator. *Id.*

The plaintiff also sought recovery for emotional distress under a strict product liability theory against Otis Elevator Company, who manufactured and sold the escalator to the Chicago Transit Authority. *Id.* The circuit court dismissed this claim with prejudice. *Id.* at 549, 457 N.E.2d at 1-2. Illinois has adopted Restatement (Second) of Torts § 402A (1965), which is entitled: "Special Liability of Seller of Product for *Physical Harm* to User or Consumer;" and provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to user or consumer or to his property is subject to liability for *physical harm* thereby caused to the ultimate user or consumer. . . ." (emphasis added). *See* Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 355, 374 N.E.2d 683, 688 (1978) (applying § 402A to prevent recovery for emotional injury), *aff'd*, 79 Ill. 2d 26, 38, 402 N.E.2d 194, 196 (1980); *see also* Rahn v. Gerdts, 119 Ill. App. 3d 781, 784-85, 455 N.E.2d 807, 809 (1983) (holding that *Woodill* still prevents recovery for emotional distress in products liability cases despite supreme court's holding in *Rickey*). Thus, in Illinois, damages have never been allowed for emotional distress in strict products liability actions, even if the emotional distress arose out of a physical injury or impact. *But see* Wetherill v. University of Chicago, 565 F. Supp. 1553, 1560-61 (N.D. Ill. 1983) (allowing recovery in products liability action for fear in reaction to physical impact).

The appellate court in *Rickey* affirmed the dismissal of plaintiff's strict product liability action against Otis Elevator Company based on *Woodill*

made.[19] The circuit court dismissed the action, holding that the impact rule prevented recovery for negligent infliction of emotional distress in Illinois when emotional distress was not directly caused by a negligently inflicted physical injury or impact.[20]

On appeal, the appellate court reasoned that the rejection of the impact rule in a majority of jurisdictions[21] and recent developments in Illinois concerning recovery for emotional distress justified a reevaluation of the impact rule in Illinois.[22] It held that an individual who witnesses a negligently caused physical injury to a member of his family may recover for emotional distress even if the individual suffers no physical injury or impact

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and because plaintiff "failed to argue or cite authority in support of recognizing a strict product liability theory of recovery for mental or emotional distress." Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 443, 428 N.E.2d 596, 599 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). This quotation indicates that the appellate court might have reversed the dismissal of the strict product liability action had the plaintiff argued that recent developments in the area of emotional distress required a reevaluation of *Woodill* and recovery for emotional distress in products liability cases. The appellate panel was persuaded by a similar argument and set aside Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898), the impact rule precedent for negligence actions that had stood for over eighty years. *See infra* notes 21-23 and 31 and accompanying text. It is quite possible that the panel would have set aside *Woodill* and its limitation as well. The appellate court's determination that no cause of action existed for emotional distress under a strict product liability theory was not presented to the supreme court for review. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 549, 457 N.E.2d 1, 2 (1983).

19. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 549, 457 N.E.2d 1, 2 (1983).

20. *Id.* at 548-49, 457 N.E.2d at 1-2. *See* Rickey v. Chicago Transit Auth., No. 79 L 15963 (C.C. Cook Cty. 1980).

21. The appellate court cited three cases as illustrative of the jurisdictions which had rejected the impact rule's underlying policies: Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968) (emotional distress can be reasonably foreseeable); Niederman v. Brodsky, 436 Pa. 401, 411, 261 A.2d 84, 89 (1970) ("the feared flood tide of litigation has not appeared"); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524, 530 (1975) (unjust to bar entire class of plaintiffs based on fear of frivolous or fictitious claims). Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 441-42, 428 N.E.2d 596, 598-99 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). For a more detailed discussion of the policies underlying the impact rule see *infra* notes 51-55 and accompanying text.

22. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 441, 428 N.E.2d 596, 598 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). The appellate court held that two developments in the law pertaining to recovery for emotional distress justified a reevaluation of the impact rule: the Illinois Supreme Court had already allowed damages for emotional distress absent impact where intentional conduct was shown in Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); and six of the precedents the supreme court had used to support the impact rule in Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898), had since been overruled. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 441, 428 N.E.2d 596, 598 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

himself.[23] The appellate court concluded that as a witness to the injury of his brother, Robert Rickey had stated a cause of action for negligent infliction of emotional distress.[24] It reversed the circuit court's dismissal of the action and remanded the case for trial.[25]

The Illinois Supreme Court granted leave to appeal[26] because the appellate court decision conflicted with the consistent

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23. The appellate court followed Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), and D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975), to determine whether recovery for negligent infliction of emotional distress was proper. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 442, 428 N.E.2d 596, 599 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). *Dillon* and *D'Ambra* used a three-prong test to determine whether the emotional distress was reasonably foreseeable and therefore recoverable: 1) whether the plaintiff was in close proximity to the accident; 2) whether the emotional injury resulted from direct emotional impact caused by the sensory observance of the accident; and 3) whether the plaintiff and victim were closely related family members. *Id.* at 442, 428 N.E.2d at 599. The appellate court added that the allegations must be such that "the consequences of [plaintiff's] distress are sufficient to establish a real compensable injury as opposed to mere temporary fright." *Id.* at 443, 428 N.E.2d at 599. Since all these factors had been satisfied, the appellate court concluded that the plaintiff had stated a cause of action. *Id.* The appellate court did not address nor adopt *Dillon*'s requirement that emotional distress result in physical injury for recovery to be possible. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 554, 457 N.E.2d 1, 4 (1983); *see* Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). For a discussion of *Dillon* and the standard it first set forth see Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between New York and California*, 51 ST. JOHN'S L. REV. 1 (1976). *See also* RESTATEMENT (SECOND) OF TORTS § 436(3) (1965).

24. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 442-43, 428 N.E.2d 596, 599 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

25. *Id.*

26. Defendants Chicago Transit Authority and United States Elevator Company applied for certificates of importance by the appellate court to the Illinois Supreme Court under Illinois Supreme Court Rule 316, 73 Ill. 2d R. 316, ILL. REV. STAT. ch. 110A, ¶ 316 (1983). The appellate court denied these applications. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 549, 457 N.E.2d 1, 2 (1983). The supreme court cannot exercise its discretion not to review a case once it receives "certification by the appellate court that a case decided by it involves a question of such importance that it should be decided by the Supreme Court." Illinois Supreme Court Rule 316, 73 Ill. 2d R. 316, ILL. REV. STAT. ch. 110A, ¶ 316 (1983); *see also* ILL. CONST. of 1970, art. 6, §§ 4(c) and 5. The denial of these applications is significant because it is possible that the appellate court could have utilized Rule 316 to force the supreme court to review *Rickey* and the impact rule. Instead, the appellate court itself reevaluated the impact rule, and in doing so overruled Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898), the supreme court precedent for the impact rule. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 441, 428 N.E.2d 596, 597 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

After the appellate court denied the applications for certificates of importance to the Illinois Supreme Court, defendants Chicago Transit Authority and United States Elevator Company filed petitions for leave to appeal, which the supreme court granted under Illinois Supreme Court Rule 315, 73 Ill. 2d R. 315, ILL. REV. STAT. ch. 110A, ¶ 315 (1983). Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 549, 457 N.E.2d 1, 2 (1983). The granting of leave to ap-

application of the impact rule by the other appellate districts.[27] The supreme court agreed with the appellate court's decision to remand the case for trial,[28] but did not adopt the appellate court's test for negligent infliction of emotional distress.[29] Writing for the court, Justice Ward first set forth the impact rule in Illinois.[30] He noted that the single exception to the impact rule

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peal is purely discretionary. Illinois Supreme Court Rule 315, 73 Ill. 2d R. 315, ILL. REV. STAT. ch. 110A, ¶ 315 (1983).

27. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 552, 457 N.E.2d 1, 3 (1983). The court noted that had it not exercised its discretion to grant the defendants' petitions for leave to appeal, the opinion of the appellate court would have stood without challenge. *Id.* Since the appellate court had in essence overruled supreme court precedent when it failed to affirm the circuit court's dismissal for failure to state a cause of action under the impact rule, the appellate court had created an inconsistency in the following of the impact rule. *Id.* *See also* Gilliam v. Stewart, 271 So. 2d 466 (Fla. Dist. Ct. App. 1973), *rev'd*, 291 So. 2d 593 (Fla. 1974) (supreme court reversal of similar inconsistency which appellate court created). The defendants in *Rickey* also set forth a constitutional argument against the appellate court's conduct:

> If a circuit court in the First District chooses to follow the [appellate] *Rickey* opinion, First District defendants will be subject to unequal treatment under the law created by judicial fiat. This itself is a problem of constitutional dimension. U.S. Const., Amend. XIV, Ill. Const. of 1970, Art. 1, § 2.

Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Defendant Chicago Transit Authority at 10, Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

28. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 556, 457 N.E.2d 1, 5 (1983). No concurring or dissenting opinions were filed.

29. *Id.* at 554-55, 457 N.E.2d at 4-5. The appellate court fashioned its test mainly after Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). That case involved a mother's claim for damages resulting from emotional distress caused by seeing her infant daughter fatally struck by a negligent motorist. For further discussion of *Dillon* and the standard which the appellate court adopted see *supra* note 23.

30. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 550, 457 N.E.2d 1, 2 (1983). The court stated the impact rule as: "In this state recovery for negligently caused emotional distress suffered by the direct victim or by a bystander who witnesses the injury of another has been consistently denied unless it was accompanied by a contemporaneous physical injury to or impact on the plaintiff." *Id.* The Illinois Supreme Court, in Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898), made one of the earliest statements of the impact rule: "[L]iability cannot exist consequent on mere fright or terror. . . ." *Id.* at 420, 51 N.E. at 664. From this the notion developed that only emotional distress that was directly caused by a negligently inflicted physical impact or injury was recoverable in Illinois. *See supra* note 3 and accompanying text and note 9.

Some courts mitigated the harshness of the impact rule by interpreting it to allow recovery where emotional distress was not directly caused by a negligently inflicted physical injury or impact. *See, e.g.*, Louisville & N.R.R. Co. v. Roberts, 207 Ky. 310, 269 S.W. 333 (1925) (recovery allowed for all emotional distress once any impact shown). Several Illinois courts have similarly misinterpreted the rule. In McCullough v. Orcutt, 14 Ill. App. 2d 513, 145 N.E.2d 109 (1957), a wife sought recovery for emotional distress which manifested itself in miscarriage after she learned of an accident in which her husband had been seriously injured. The court stated that *Braun* stood

allowed for intentional infliction of emotional distress did not

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for the proposition "that liability could not be predicated on fright, terror, emotional shock, distress or anxiety, unaccompanied by a physical injury *sustained at the same time.*" *Id.*, at 522-23, 145 N.E.2d at 114 (emphasis added). This statement of the impact rule is erroneous because it allows recovery for all emotional distress that occurs at the same time as impact, rather than requiring a direct causal connection between physical pain and injury and emotional distress. Such an erroneous interpretation allows recovery for fear for one's life or safety experienced at the same time as impact. This is not possible under the proper interpretation of impact rule because it is a reaction to anticipated impact or injury rather than directly caused by the physical pain or injury suffered. *See supra* note 3. The *McCullough* court's error likely resulted from confusion over use of the term "contemporaneous" by some courts to describe the type of physical injury which must accompany emotional distress for recovery to be had under the impact rule. *See, e.g.*, Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 550, 457 N.E.2d 1, 2 (1983) (impact rule allows recovery only for emotional distress "accompanied by a contemporaneous physical injury" or impact). Though "contemporaneous" may literally be synonomous with "at the same time," as a term of art in Illinois "accompanied by a contemporaneous physical injury or impact" excludes recovery for fear, embarrassment, humiliation and other reactions to one's own or another's physical injuries, regardless of when they occur, because they are not directly caused by a negligently inflicted physical injury or impact. *See supra* notes 3 and 9.

Even more alarming is the interpretation of the impact rule which the appellate court gave in *Rickey*. The opinion quotes an excerpt from Prosser as exemplifying the impact rule in Illinois:

> [C]ourts have found 'impact' in minor contacts with the person which play no part in causing the real harm, and in themselves can have no importance whatsoever. 'Impact' has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or the inhalation of smoke. The requirement has even been satisfied by a fall brought about by a faint after a collision, or the plaintiff's own wrenching of her shoulder in reaction to the fright. *The magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery.*

W. PROSSER, HANDBOOK OF THE LAW OF TORTS 331 (4th ed. 1971), *quoted in* Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 442, 428 N.E.2d 596, 599 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983) (emphasis added). This view of the impact rule in Illinois is incorrect. In Illinois damages for emotional distress have always been limited to those which are directly caused by the physical pain or injury suffered. *See supra* note 3 and accompanying text and note 9. Under the impact rule, if only a trivial impact occurs, damages would be nominal or non-existent, because great mental pain and suffering is not likely to be caused by a trivial physical impact or injury. Under no circumstances has the door been open in Illinois to the "full joy of a complete recovery" for emotional distress which has no causal connection to a trivial impact. This interpretation of the requirement of impact as a mere formality or as evidentiary rather than causal in nature has never been sanctioned in Illinois. *See supra* notes 3 and 9. *But see, e.g.*, Louisville & N. R.R. Co. v. Roberts, 207 Ky. 310, 269 S.W. 333 (1925) (slight jolt or jar sufficed to get past evidentiary hurdle of impact).

There can be no doubt of the Illinois Supreme Court's perception of the impact rule at the time it wrote *Rickey*. The court cited four cases to exemplify the rule. In three of these cases, actions for emotional distress were dismissed for failure to prove impact. Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Kaiserman v. Bright, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978); Neuberg v. Michael Reese Hosp., 60 Ill. App. 3d 679, 377 N.E.2d 215 (1978). In the fourth case, Carlinville Nat'l Bank v. Rhoades, 63 Ill. App. 3d 502, 380

apply.[31] The issue of when damages could properly be recov-

N.E.2d 63 (1978), a woman who suffered a broken leg in an automobile accident sought damages for emotional distress arising from her broken leg, and also for emotional distress caused by witnessing the death of her husband, who had been driving the car. This case best exemplifies the impact rule in Illinois because the plaintiff sought recovery as both a direct victim and as a bystander to the injury of a family member after impact had occurred. Under an evidentiary interpretation of the impact rule, the plaintiff in *Carlinville* would have recovered for all her emotional distress, including the emotional distress suffered as a result of witnessing her husband's death, because she was able to prove that she suffered a physical impact and injury. The appellate court in *Carlinville*, however, properly gave the impact rule a causal interpretation. It limited recovery to that emotional distress directly caused by the physical pain the plaintiff suffered as a result of her broken leg, and did not allow recovery for the purely emotional suffering the plaintiff experienced as a reaction to her husband's death. Carlinville Nat'l Bank v. Rhoades, 63 Ill. App. 3d 502, 503-05, 380 N.E.2d 63, 65-66 (1978); *see supra* note 9. The citation of these four cases indicates that, at the time it decided *Rickey*, the Illinois Supreme Court viewed the proper interpretation of the impact rule as causal rather than evidentiary.

31. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 550, 457 N.E.2d 1, 2-3 (1983). Intentional infliction of emotional distress was first recognized in Illinois in Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961). In Illinois, intentional infliction of emotional distress has not been thought of so much as a separate "tort" as it has an exception to the impact rule: "The only recognized exception to the 'physical impact' rule is that set forth by the supreme court in Knierim v. Izzo. . . ." Neuberg v. Michael Reese Hosp., 60 Ill. App. 3d 679, 683, 377 N.E.2d 215, 217-18 (1978). Under the exception set forth in *Knierim* no physical injury or impact need be proven if the plaintiff's emotional distress arises out of defendant's intentional rather than negligent acts. The precise allegations necessary to state a cause of action for intentional infliction of emotional distress are: 1) the defendant's actions must be intentional; 2) the defendant's actions must be extreme and outrageous so as to go beyond all possible bounds of decency; and 3) the emotional injury to the plaintiff must be severe. Public Finance Corp. v. Davis, 66 Ill. 2d 85, 89, 360 N.E.2d 765, 767 (1976); *see also* Corcoran v. Village of Libertyville, 73 Ill. 2d 316, 383 N.E.2d 177 (1978) (reiterating the *Public Finance* standard); Sabin, *Intentional Infliction of Emotional Distress—Seventeen Years Later*, 66 ILL. B.J. 248 (1978) (overview of the tort in Illinois). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, at 49-63 (4th ed. 1971). For a comparison of negligent and intentional infliction of emotional distress see Millard, *Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation*, 15 IND. L. REV. 617 (1982).

Another collateral issue addressed was whether the appellate court had usurped the power of the supreme court by failing to adhere to the impact rule. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 551-52, 457 N.E.2d 1, 3 (1983). The defendants had asserted that the appellate panel was "duty bound" to refuse recovery to the plaintiff because he had not suffered any physical impact or injury. *Id.* at 551, 457 N.E.2d at 3. The contention that precedent must be judicially respected has support in the case law. The court in Aetna Ins. Co. v. Jansen, 60 Ill. App. 3d 957, 963, 377 N.E.2d 296, 301 (1978) stated that appellate courts are "bound by the pronouncement of the supreme court and cannot consider usurping its authority upon the allegation that its judgment was unwise." Similarly, in Beagley v. Andel, 58 Ill. App. 3d 588, 591, 374 N.E.2d 929, 932 (1978), *cert. denied*, 440 U.S. 917 (1979), the court held: "Appellate courts are without authority to overrule the supreme court or to modify its decision." On this subject the supreme court itself has said: "[I]t is our duty as a court of last result to overrule [out-

ered for negligent infliction of emotional distress that was not directly caused by a negligently inflicted physical injury or impact was then addressed.[32]

The court began its analysis by noting the impact rule's rejection in many states[33] and its relegation to a mere evidentiary formality in others.[34] The court stated that in its consideration recovery for negligently caused emotional distress should not be based solely on whether a contemporaneous physical injury or impact directly caused emotional distress.[35] It rejected the appellate court's test of physical proximity and close family rela-

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dated] decisions and establish a rule consonant with our present day concepts of right and justice." Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 26, 163 N.E.2d 89, 96 (1959), *cert. denied*, 362 U.S. 968 (1960), *quoted in* Murphy v. Martin Oil Co., 56 Ill. 2d 423, 431, 308 N.E.2d 583, 587 (1974) (allowing damages for the first time for a decedent's emotional distress under the Illinois Wrongful Death Act, Ill. Rev. Stat. ch. 70, ¶¶ 1-2 (1983)). As to whether the appellate court had in fact gone beyond the limits ot its power when it reevaluated the impact rule instead of affirming the circuit court's dismissal for lack of impact, the supreme court stated simply: "The significance of *stare decisis et non quieta movere* does not require extended discussion here." Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 552, 457 N.E.2d 1, 3 (1983). Justice Jiganti, author of the appellate *Rickey* opinion, has since changed his position about reevaluating specific areas of the law on which the supreme court has spoken. In an unrelated case, where supreme court precedent existed that a landlord could not be liable to a tenant for criminal acts of third parties, Justice Jiganti and the appellate panel refused plaintiff's request that the panel reevaluate that rule. Justice Jiganti wrote: "[W]here our supreme court has spoken as such on this matter, we will not consider the merits of the plaintiff's arguments. See Rickey v. Chicago Transit Authority. . . ." Morgan v. Dalton Management Co., 117 Ill. App. 3d 815, 820, 454 N.E.2d 57, 61 (1983) (Jiganti, J.).

The same year the appellate panel gave its decision in *Rickey*, there were allegations that the Illinois Supreme Court had overstepped its own powers when it adopted a comparative negligence system in Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), despite the Illinois General Assembly's purposeful silence on the issue for thirteen years. As Justice Underwood pointed out in his dissenting opinion in *Alvis*: "[T]he substantial volume of proposed legislation on the subject which had failed to pass indicated the General Assembly's considered judgment that no change should be made." *Id.* at 34, 421 N.E.2d at 901 (Underwood, J., dissenting). A virtually identical situation confronted the appellate court in *Rickey*, and it reacted in much the same way when it ignored the impact rule despite the supreme court's sanction of the rule through silence since Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898). It can be argued therefore that both the supreme court in *Alvis* and the appellate panel in *Rickey* overstepped the recognized limits of their powers in the area of negligence in Illinois in 1981.

32. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 552-56, 457 N.E.2d 1, 4-5 (1983).

33. *Id.* at 552-53, 457 N.E.2d at 4. *See also supra* note 6.

34. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 553-54, 457 N.E.2d 1, 4 (1983). *See also supra* note 30.

35. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 554, 457 N.E.2d 1, 4 (1983). For a discussion of whether *Rickey's* zone-of-physical-danger rule displaces or supplements the impact rule see *infra* note 74 and accompanying text.

tionship between plaintiff and victim, however, because the test was too vague for courts to apply.[36] The supreme court also concluded that the appellate court's test was overbroad because it allowed recovery for emotional disturbance alone.[37] Instead, the court substituted a zone-of-physical-danger rule in these circumstances for the impact rule's requirement that a negligently inflicted physical injury or impact directly cause emotional distress.[38] Under this new rule, an individual[39] who is in a negligently created zone of physical danger[40] and who has reasonable fear for his own safety,[41] has a cause of action for

36. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 554, 457 N.E.2d 1, 4 (1983). *See supra* note 23.

37. Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 554-55, 457 N.E.2d 1, 4 (1983). The rule that the appellate panel set forth allowed recovery for emotional disturbance alone if the plaintiff was in close proximity to the accident and if the plaintiff and victim of the accident were closely related family members. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 442, 428 N.E.2d 596, 599 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); *see also supra* note 23. The impact rule required emotional distress to be directly caused by a negligently inflicted physical impact or injury for recovery to be possible. *See supra* note 3 and accompanying text and note 9. It therefore prevented recovery for emotional disturbance alone. *Id.* The zone-of-physical-danger rule that the supreme court adopted in *Rickey* does not allow recovery for emotional distress at all, but only for its physical manifestations. *See infra* note 64 and accompanying text.

38. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983).

39. For a discussion of why the new standard does not apply exclusively to bystanders despite the supreme court's reference to the plaintiff in *Rickey* as a bystander, see *infra* note 73.

40. Several courts have interpreted *Rickey*'s requirement that the plaintiff be in a zone of physical danger. In Maere v. Churchill, 116 Ill. App. 3d 939, 945, 452 N.E.2d 694, 698 (1983), the appellate court affirmed the dismissal of a claim for negligent infliction of emotional distress. Citing *Rickey*, the court held that because the act of negligence complained of was faulty legal work, the emotional distress was not inflicted in a negligently created zone of physical danger. *Id.*; *see also In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983) (passengers on crashing jetliner were in zone of physical danger), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983). *Cf.* Wetherill v. University of Chicago, 565 F. Supp. 1553, 1568 (N.D. Ill. 1983) (pre-*Rickey* decision indicating in post-publication addendum that *Rickey* decision "would likely support" district court's conclusions).

In Bullard v. Barnes, 112 Ill. App. 3d 384, 445 N.E.2d 485 (1983), a mother suffered emotional distress after she arrived at the scene of an accident involving her child. *Id.* at 386-88, 445 N.E.2d at 489-90. The child's father, who was never present at the scene, also suffered emotional distress upon hearing of the incident. *Id.* Citing the appellate *Rickey* decision, the court denied recovery to both parents because neither had been in close proximity to the accident when it occurred. *Id.* at 394, 445 N.E.2d at 493. *See supra* note 23. Even if the supreme court *Rickey* opinion had been available to the *Bullard* court, the parents could not properly have recovered for negligent infliction of emotional distress because they were not in a zone of physical danger nor did they fear for their own safety.

41. Under the new rule, the physical illness or injury that is recoverable must result from emotional distress that arises from the plaintiff's fear for

physical injury or illness resulting from emotional distress.[42] The rule requires that the plaintiff be in such proximity to the negligent act that there be a high risk of physical impact to

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his own safety. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983). Proof that the plaintiff experienced fear is not an evidentiary hurdle, which, if satisfied, allows recovery for physical illness or injury resulting from emotional distress that did not arise from the fear itself. For example, if the plaintiff in *Rickey* truly seeks recovery only for emotional distress and its physical manifestations suffered as a result of watching his brother's injury, he should receive nothing under the new rule. Because such emotional distress is only a reaction to his brother's injury and did not arise from the plaintiff's own fear, it is not recoverable. *Cf. supra* note 9. The requirement that fear must directly cause the physical illness or injury that is recoverable is evidenced by the supreme court's remand of the case because it did "not know whether [the plaintiff] had reasonable fear for his own safety, causing emotional distress." *Id.* at 556, 457 N.E.2d at 5. The cases the court cited to illustrate the zone-of-physical-danger rule also allowed recovery only for physical illness or injury directly caused by the fear experienced. *See infra* cases cited in note 64. For a discussion of the requirement that fear must produce the emotional distress that leads to recovery and how this prevents bystander recovery under the new rule, see *infra* notes 70-73 and accompanying text. Under the impact rule, the requirement of impact was also given a causal rather than evidentiary interpretation. *See supra* note 30. *Rickey*'s requirement that the emotional distress associated with fear result in physical illness or injury should also properly be given a causal rather than evidentiary interpretation. *See infra* notes 66-69 and accompanying text.

42. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983). The supreme court cited three cases as authority for the requirement that physical illness or injury result from emotional distress. In Dailey v. LaCroix, 384 Mich. 4, 179 N.W.2d 390, the court stated: "[W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused . . . [the plaintiff] may recover in damages for such physical consequences to himself." *Id.* at 4, 179 N.W.2d at 355. In Fournell v. Usher Pest Control Co., 208 Neb. 684, 385 N.W.2d 605 (1981), a woman sued for emotional distress upon finding termites in her home. The supreme court affirmed the dismissal of the action because no physical injury resulted from the emotional distress, nor were the plaintiffs in fear of physical harm. *Id.* In Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980), a mother suffered emotional distress after she "heard screeching brakes and turned in time to see her son fly through the air and hit the pavement." *Id.* at 553. The child's injuries "reduced him to a state of vegetation such that he [could] not have meaningful interaction with others." *Id.* Both parents of the child sued for negligent infliction of emotional distress. Although they sought recovery for physical illness and injury resulting from emotional distress, the court held that they failed to state a cause of action because they were not in a zone of physical danger. *Id.* at 553-54.

The supreme court also cited Restatement (Second) of Torts § 436A comment c to illustrate the type of resultant physical illness or injury that is recoverable. Section 436A comment c states that there is no liability for "transitory, non-recurring physical phenomena." The physical manifestations of the plaintiff's emotional distress alleged in *Rickey* may therefore not be recoverable. *See supra* note 17. Such minor, transitory physical manifestations have also been alleged in *In re* Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 18 Av. Cas. (CCH) 17,215, 17,217 (N.D. Ill. 1983), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983). Section 436A comment c may therefore prevent recovery in that case as well.

him.[43]

The new rule set forth in *Rickey* can best be understood by viewing the case in its historical context. In Illinois, damages for emotional distress have always been tied to damages for physical injury.[44] Several very early cases denied recovery for purely emotional distress where no physical impact or injury occurred[45] or where emotional distress occurred only as a reaction to physical injury.[46] These emotional injuries were considered

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43. Rickey v. Chicago Transit Auth., 98 Ill. 2d. 546, 555, 457 N.E. 2d 1,5 (1983). See supra note 40. The court concluded its opinion with several procedural matters. The new rule was made applicable to all cases not finally adjudicated as of June 17, 1983, when the opinion was filed. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 556, 457 N.E.2d 1, 5 (1983). A similar application of a new rule was utilized in Elliot v. Willis, 92 Ill. 2d 530, 545, 442 N.E.2d 163, 170 (1982), which first allowed damages for loss of consortium under the Illinois Wrongful Death Act, Ill. Rev. Stat. ch. 70, ¶¶ 1-2 (1983). Unfortunately, neither *Rickey* nor *Elliot* give much insight into precisely what "not finally adjudicated" means. Its plain meaning would make the rule applicable to suits filed and still ongoing as of the filing of *Rickey* on June 17, 1983. The new rule would also apply to any suits filed after June 17, 1983, regardless of when the cause of action arose. The result is that plaintiffs' attorneys who turned away clients with emotional distress claims before *Rickey* because no impact had occurred must inform them that a cause of action may now exist if a suit can be filed before the statute of limitations runs. For a discussion of when the statute of limitations begins to run and *Rickey*'s "not finally adjudicated" standard see Rahn v. Gerdts, 119 Ill. App. 3d 781, 785-86, 455 N.E.2d 807, 810 (1983). Plaintiffs' attorneys encountered a similar predicament when the Illinois Supreme Court applied the comparative negligence standard adopted in Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), to all cases which were tried after the filing of that opinion, regardless of when the cause of action arose. *Id.* at 28, 421 N.E.2d at 898. There the clients who had been turned away because they were partially contributorily negligent had to be informed that a cause of action existed if a suit could be filed before the running of the statute of limitations.

The Illinois Supreme Court's retroactive application of new rules in this manner places a considerable burden on the plaintiffs' bar to investigate their files and contact clients who were once turned away. Such retroactive application is equitable, however, because it does not limit application of the new rule to the one plaintiff who was fortuitously granted leave to appeal so a new rule could be made. Rather, this method allows all plaintiffs who are still in court or whose actions are not barred by the statute of limitations to benefit from the new rule.

The court also directed that the plaintiff be allowed to plead again because the complaint had not been drawn with the new rule in mind. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 556, 457 N.E.2d 1, 5 (1983). The judgment of the appellate court was affirmed as modified and the cause remanded to the circuit court for further proceedings. *Id.*

44. *See supra* note 3 and accompanying text and note 9.

45. *See, e.g.*, Phillips v. Dickerson, 85 Ill. 11 (1877) (bystander denied recovery for emotional distress where no impact occurred).

46. Van de Venter v. Chicago City Ry., 26 F. 32, 35 (C.C.N.D. Ill. 1885) (damages recoverable only for mental pain and suffering consequent to physical injury); Chicago City Ry. v. Anderson, 182 Ill. 298, 300, 55 N.E. 366, 366 (1899) (per curiam) (no recovery for embarrassment or humiliation resulting from crippled condition); Indianapolis & St. L.R.R. Co. v. Stables, 62

too remote to be a foreseeable consequence of the defendant's negligence.[47] In this same line of cases, however, emotional distress was considered foreseeable and recoverable if it arose out of a contemporaneous physical injury or impact.[48] Consequently, recovery was limited to the mental pain and suffering directly caused by the physical injury.[49] Thus, the so-called "impact rule" was born in Illinois.[50]

Illinois courts have applied the impact rule for over one hundred and twenty five years in response to several underlying concerns. First, as noted above, the lack of foreseeability of emotional injuries has been a justification for the impact rule.[51] Concern also developed that fraudulent and fictitious claims would appear if a remedy were available for purely emotional disturbance.[52] Additionally, apprehension arose over the poten-

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Ill. 313, 321 (1872) (dicta) (no damages for emotional distress caused by mental conception not arising from physical injury); Peoria Bridge Ass'n v. Loomis, 20 Ill. 235, 248-252 (1858) (no recovery for damage to intellect or danger to one's life not directly caused by physical injury); North Chicago St. R.R. Co. v. Duebner, 85 Ill. App. 602, 605 (1899) (no recovery for mental pain not directly or necessarily connected with physical pain); Chicago, B. & Q. R.R. Co. v. Hines, 45 Ill. App. 299, 302-03 (1892) (no recovery for wholly sentimental anguish arising from contemplation of physical disfigurement).

47. In *Chicago, B. & Q. R.R. Co. v. Hines,* the court stated: "The law regards supposed injuries to sentimental feelings [that come about by reflection or contemplation] as too remote and speculative to allow it [sic] as an element of damages. . . ." 45 Ill. App. 299, 303 (1892); *see also* Chicago City Ry. v. Anderson, 182 Ill. 298, 300, 55 N.E. 366, 366 (1899) (per curiam) (humiliation over crippled condition too remote to be element of damage); Phillips v. Dickerson, 85 Ill. 11, 14 (1877) (wholly sentimental emotional injury not reasonable foreseeable).

48. City of Chicago v. McLean, 133 Ill. 148, 152-53, 24 N.E. 527, 528 (1890) (emotional distress arising out of physical injury is natural and proximate consequence of negligent act); *see also supra* note 46.

49. *See supra* note 3 and accompanying text.

50. Because of its statement that "liability cannot exist consequent on mere fright or terror," Braun v. Craven, 175 Ill. 401, 420, 51 N.E. 657, 664 (1898), is generally cited as having first established the impact rule in Illinois. *See, e.g.*, Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 551, 457 N.E.2d 1, 3 (1983). The rule that *Braun* applied had actually been fully established in many earlier cases. *See supra* notes 45-48 and accompanying text. The "impact rule" is nothing more than a recognition that emotional distress which arises out of a physical impact or injury is foreseeable and recoverable, and that purely emotional distress not arising out of physical impact or injury is not foreseeable and therefore not recoverable. *Id.*

51. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983) (emotional injuries are hardly foreseeable); Braun v. Craven, 175 Ill. 401, 406-07, 51 N.E. 657, 659 (1898) (emotional injuries cannot be reasonably anticipated); Phillips v. Dickerson, 85 Ill. 11, 16 (1877) (defendant could not reasonably be expected to anticipate such injury). For a criticism of the emphasis on foreseeability in this area of the law see Note, *Negligent Infliction of Serious Emotional Distress*, 50 U. OF CIN. L. REV. 200, 210-11 (1981).

52. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983) (apprehension over fictitious claims a consideration); Knierim v. Izzo, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961) (allowance of such an action

tial for increased and frivolous litigation such a remedy could facilitate.[53] Juries have traditionally been erratic in arriving at damage figures for emotional injuries and thus the courts had misgivings about providing an unlimited remedy for emotional distress.[54] Finally, the problem of determining with certainty that the defendant's negligence was the proximate cause of emotional injury has arisen.[55] The impact rule's requirement that a direct causal connection exist between physical and emotional injury significantly limits recovery for emotional distress and thus, seeks to prevent these problems from arising.

Many states have abandoned the impact rule and similar limitations on recovery for negligent infliction of emotional distress in the belief that the concerns underlying these limitations are no longer valid.[56] Some courts have held that emotional distress not directly caused by a contemporaneous physical injury or impact can nevertheless be a foreseeable consequence of negligence.[57] Others stated that advances in medicine and psychol-

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would open door to fictitious claims); Braun v. Craven, 175 Ill. 401, 420, 51 N.E. 657, 664 (1898) (dangerous use may be made of such an action); Reidy, *supra* note 1, at 299.

53. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983) (potential for frivolous litigation justifies impact rule); Knierim v. Izzo, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961) (potential for frivolous claims a fear); Reidy, *supra* note 1, at 299.

54. Knierim v. Izzo, 22 Ill. 2d 73, 84, 174 N.E.2d 157, 163 (1961) (emotional distress cannot be measured in terms of money); Horan v. Klein's-Sheridan, Inc., 62 Ill. App. 2d 455, 460, 211 N.E.2d 116, 118 (1965) (certain results fixing exact dollar recovery are not possible); Duncan v. Martin's Restaurant, Inc., 347 Ill. App. 183, 190, 106 N.E.2d 731, 734 (1952) (allegation of grossly excessive and unreasonable recovery); O'Connell & Simon, *Payment for Pain and Suffering: Who Wants What, When and Why*, 1972 U. ILL. L.F. 1, 2-6 (1972) (translating anguish into dollars can only be an arbitrary allowance).

55. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 55, 75 N.E. 436, 438 (1905) (other injuries alleged as cause of emotional distress); Chicago & A. Ry. Co. v. Averill, 127 Ill. App. 275, 279-80 (pre-existing condition alleged as cause of emotional distress), *aff'd*, 244 Ill. 516, 79 N.E. 654 (1906). *See generally* Leubsdorf, *Remedies for Uncertainty*, 61 B.U.L. REV. 132 (1981) (discussion of damage recovery where uncertainty exists); Note, *Negligently Induced Fright Causing Physical Injury to Hypersensitive Plaintiff*, 39 N. CAR. L. REV. 303 (1961) (causation problems with hypersensitively emotional plaintiffs).

56. *See supra* note 6. *See also* Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922) (rejecting policies against recovery for emotional distress); Reidy, *supra* note 1, at 301-02; Smith, *Relations of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 197 (1944) (policies denying a right of action are open to attack). For a discussion of deterrence of accidents as a policy consideration in support of liability, see Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1, 23-27 (1979).

57. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 441-42, 428 N.E.2d 596, 598 (1981) (illogical to maintain that emotional injury is not fore-

ogy have reached a level adequate to prevent fraudulent and fictitious claims and to solve problems of causation.[58] Further, courts have held that the potential for fraudulent claims should not bar a whole class of plaintiffs from seeking a remedy.[59] There is also evidence from states that abandoned the impact rule some time ago indicating the feared flood of litigation has not materialized.[60]

Despite criticism of the concerns underlying the impact rule, the Illinois Supreme Court has reiterated in *Rickey* that some nexus must exist between physical and emotional injury before recovery is possible for negligent infliction of emotional distress.[61] The zone-of-physical-danger rule requires this nexus

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seeable), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). *See also* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (plaintiff in close proximity to injury of closely related family member is foreseeable).

58. Battala v. State, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38 (1961) (courts must rely on sophistication of medical profession); Niederman v. Brodsky, 436 Pa. 401, 406, 261 A.2d 84, 86 (1970) (technological developments and increased knowledge allow better understanding of emotional distress). For an excellent discussion of recent medical advances useful in the area of emotional distress, see Reidy, *supra* note 1, at 300-03. *Cf.* Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974) (tracing adequacy of medical advancements in the area of physical pain and suffering).

59. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 917, 69 Cal. Rptr. 72, 79 (1968) (no reason to deny legitimate claims due to possibility of fraud); Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980) (zone of danger test can be readily and consistently applied); Battala v. State, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 38 (1961) (possibility of fraud, extra litigation and speculation no reason to deny recovery).

60. Niederman v. Brodsky, 436 Pa. 401, 411, 261 A.2d 84, 89 (1970) (the feared flood tide of litigation has not materialized); *see also* Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969) (burden on courts should not be a consideration).

61. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983). Ultimately, it is in the Illinois Supreme Court that must "establish a rule consonant with . . . present day concepts of right and justice." Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 26, 163 N.E.2d 89, 96 (1959), *cert. denied*, 362 U.S. 968 (1960); *see* Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime," supra* note 56, at 16-28 (1979) (interaction between logic, fairness and policy in emotional distress); Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. OF FLA. L. REV. 477, 481 (1982) (public expects judicial opinions to be faithful to an enunciated policy). Even though the concerns underlying the impact rule have been subject to attack, they nonetheless do protect valid interests. For example, the notion that all wrongs deserve a remedy must compete with the argument that greatly expanded liability in marginally foreseeable situations is not to be encouraged. The primary purpose of the law of torts "is to make a fair adjustment of the conflicting claims of the litigating parties." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 15 (4th ed. 1971). The Illinois Supreme Court has determined this fair adjustment to be consistent with traditional limitations on liability for negligent infliction of emotional distress. *See* Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983); *see also infra* text accompanying note 65.

in the form of physical illness or injury resulting from emotional distress.[62] This requirement that emotional distress produce physical manifestations limits recovery in a manner similar to the impact rule and its requirement that physical injury or impact directly cause emotional distress.[63] The zone-of-physical-danger rule is also consistent with the impact rule because it does not allow recovery for purely emotional disturbance. In fact, the new rule limits recovery to physical illness or injury that results from emotional distress. It never allows recovery for emotional distress itself.[64] The particular injury for which recovery is possible and the required nexus between physical and emotional injury differ between the two rules. The zone-of-

62. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983).

63. *Compare infra* notes 64-73 and accompanying text *with supra* notes 3, 9 and 30.

64. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983). The opinion states clearly and unequivocally that a plaintiff who properly proves negligent infliction of emotional distress under the new rule "has a right of action for physical injury or illness resulting from emotional distress." *Id.* The court chose eight cases to exemplify the new zone-of-physical-danger rule, none of which allowed recovery for emotional distress itself. Robb v. Pennsylvania R.R. Co., 210 A.2d 709, 714-15 (Del. 1965) (recovery only for physical manifestations of emotional distress, not emotional distress itself); Stadler v. Cross, 295 N.W.2d 552, 553 (Minn. 1980) (no recovery for emotional distress of parents who learned of injury to their child but were not in zone of physical danger) (citing Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d 259, 262-63 (1969), which allowed recovery only for physical manifestations of emotional distress, not emotional distress itself); Owens v. Children's Mem. Hosp., 480 F.2d 465, 466-67 (8th Cir. 1973) (applying Nebraska law) (no recovery for emotional distress of parents who watched son suffer in hospital but were not in zone of physical danger) (citing Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937), *reh'g denied*, 135 Neb. 232, 280 N.W. 890 (1938), which allowed recovery only for physical manifestations of emotional distress, not emotional distress itself); Tobin v. Grossman, 24 N.Y.2d 609, 611-14, 249 N.E.2d 419, 420-21, 301 N.Y.S.2d 554, 555-57 (1969) (mother who saw child hit by automobile denied recovery because not in zone of physical danger); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972) (parents who saw hospital employee drop new-born baby denied recovery for emotional distress because not in zone of physical danger); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84, 84-85 (1970) (plaintiff in zone of physical danger stated cause of action for physical manifestations of fear and for mental pain directly caused by physical manifestations, but not for fear itself); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861, 864 (Tenn. 1978) (recovery allowed under zone-of-physical-danger rule only for physical manifestations of emotional distress, not emotional distress itself); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12, 13-14 (1969) (no recovery for parent who witnessed daughter's injury because not in zone of physical danger). The language of *Rickey* and its citation of these cases indicate that damages in Illinois under the zone-of-physical-danger rule are only for the physical manifestations of emotional distress and not for the emotional distress itself. *See also infra* notes 66-68 and accompanying text. For a discussion of how emotional distress causes physical disorders see Reidy, *supra* note 1, at 301-02. *See also* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 215-26 (1944).

physical-danger rule therefore allows recovery under a different set of limited circumstances than does the impact rule. The similarities between the two rules, however, indicate that under these different circumstances the objective of the new zone-of-physical-danger rule is to prevent the same problems associated with unlimited recovery that the impact rule has sought to prevent.[65]

Under the zone-of-physical-danger rule, the requirement that there be allegation and proof of physical illness or injury resulting from emotional distress is not simply an evidentiary hurdle, satisfaction of which opens the door to recovery for emotional distress itself.[66] Such a construction would make the re-

65. *See supra* notes 51-55 and accompanying text.

66. A federal district court has interpreted the requirement of physical injury or illness under *Rickey* as an evidentiary hurdle, satisfaction of which opens the door to damages for emotional distress itself. *In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983). In that case, survivors of the deceased victims of a commercial airline crash sought damages under *Rickey* for emotional distress that the victims suffered as the jetliner plummeted toward the earth. *Id.*, 18 Av. Cas. at 17,215. There is no doubt the passengers on the plane were in a zone of physical danger and experienced fear for their own lives. The plaintiffs alleged that they could satisfy the requirement of resultant physical injury or illness through expert testimony that "the passengers did suffer physical manifestations resulting from their extreme fright and terror such as increased heart rate, sweating, pupil dilation, bladder and bowel incontinence, muscular tremors, increased respiration, restriction of coronary arteries, hyperirratability of the nervous system and shock." *Id.* at 17,217. The court found that a prima facie case had been stated under *Rickey* and allowed discovery on the issue of pre-impact emotional distress. *Id.* The court went on to say that "there is nothing in *Rickey* to suggest that, assuming the physical manifestations are established, emotional distress and the resultant physical manifestations are not both compensable." *Id.* at 17,218. This interpretation of the new rule set forth in *Rickey* is incorrect. If the plaintiffs show such relatively minor physical manifestations, their damages should be nominal. They should properly recover for those minor physical manifestations alone, and not for the pre-impact fear and emotional distress itself. *See supra* note 64 and accompanying text. For a discussion of why minor physical manifestations such as those alleged in *Air Crash* may not themselves be compensable under *Rickey*, see *supra* note 42. The district court supported its evidentiary interpretation by citing two Illinois cases in which damages for emotional distress itself were recovered: City of Chicago v. McLean, 133 Ill. 148, 24 N.E. 527 (1890) and Chicago & A. Ry. Co. v. Averill, 127 Ill. App. 275, *aff'd*, 224 Ill. 516, 79 N.E. 654 (1906). Both these cases, however, allowed recovery under the impact rule for emotional distress which had arisen out of a physical impact or injury. As such they were irrelevant to the defendant's position in *Air Crash* that, where no physical injury or impact had occurred, the new rule set forth in *Rickey* limited liability to the physical manifestations of pre-impact fear and emotional distress. *See supra* text accompanying notes 61-65; *see also* Memorandum of Defendant McDonnell Douglas Corporation in Opposition to Plaintiff's Motion for Reconsideration at 3, *In re* Air Crash Diaster Near Chicago, Illinois on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983). For a consideration of *Air Crash* and all its aspects see

quirement of resultant physical illness or injury a mere formality. Any trivial physical injury or illness could trigger potentially massive recovery for emotional distress itself. This would be no limitation at all.[67] Furthermore, if this requirement is given an evidentiary interpretation, arbitrary results may occur.[68] Because slight or trivial physical injury or illness will

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Kennelly, *Litigation Implications of the Chicago O'Hare Airport Crash of American Airlines Flight 191*, 15 J. MAR. L. REV. 273 (1982).

In a later *Air Crash* opinion, the same court denied motions by defendants McDonnell Douglas Corporation and American Airlines to dismiss certain plaintiffs. The court reiterated its misinterpretation of the *Rickey* rule: "[A] plaintiff, in a zone of danger, who can prove that he suffered severe emotional distress that has become physically manifest is entitled to recover for the injury to mind and body." *In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, No. MDL-391, slip op. at 7 (N.D. Ill. Dec. 13, 1983).

67. Formalization of the impact rule was a contributing factor to the rule's demise in many jurisdictions. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 553, 457 N.E.2d 1, 4 (1983). The Illinois Supreme Court recognized that the impact rule's formalization prevented it from solving the problems for which it was developed. *Id. See supra* notes 51-55 and accompanying text. The zone-of-physical-danger rule seeks to prevent these same problems from arising. *See supra* notes 61-65 and accompanying text. It follows, therefore, that the court did not set forth the new zone-of-physical-danger rule intending that it be construed as a mere formality, satisfaction of which would open the door to complete recovery for emotional distress. Such an interpretation would make recovery for negligent infliction of emotional distress easier than recovery for intentional infliction of emotional distress in many cases, an anomaly because the latter involves greater fault. *See supra* note 31. Further, to allow recovery for emotional distress itself when any minor physical manifestation is shown is essentially the same as allowing recovery for emotional distress alone. One of the main reasons the supreme court rejected the appellate court's foreseeability test was because it was overbroad in allowing recovery for emotional disturbance alone. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 554, 457 N.E.2d 1, 4 (1983). It is unfortunate that one of the first courts called on to apply *Rickey* has given the case such a construction, where minor physical manifestations of pre-impact fear such as increased heart rate and sweating have been allowed to open the door to a potentially enormous liability for emotional distress. *See In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983).

68. Under the impact rule, courts that required impact as simply an evidentiary hurdle complained that it resulted in arbitrary recovery. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 441, 428 N.E.2d 596, 598 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); *see also* Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILLA. L. REV. 232, 235 (1961) (recognizing the arbitrariness of both impact rule and zone of danger limitations when given evidentiary interpretation); Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. OF CHI. L. REV. 512, 516 (1968) (any limiting factor is too arbitrary to be a consistently just formula). *See generally* Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—a Comment on the Nature of Arbitrary Rules*, 34 U. OF FLA. L. REV. 477 (1982). The impact rule limitation is arbitrary under an evidentiary interpretation because a plaintiff who can prove even a trivial impact may recover extensively for emotional distress not arising out of the impact itself, while a plaintiff who suffers the same possibly severe emotional distress cannot recover if a fortuitous trivial im-

open the door to recovery for emotional distress itself, one who experiences a trivial physical injury or illness resulting from emotional distress will recover while those who suffer identical emotional injury but cannot prove such a fortuitous trivial physical manifestation will be arbitrarily denied recovery.[69]

Neither the impact rule nor the zone-of-physical-danger rule allow recovery for emotional distress or its physical manifestations when they result from witnessing an injury to another. The impact rule has never allowed recovery for such emotional distress because it is a reaction to someone else's injury and is not directly caused by one's own physical injury or impact.[70] Similarly, there is no recovery under the zone-of-physical danger rule because such emotional distress does not arise out of a reasonable fear for one's own safety.[71] Because a bystander typically seeks damages for emotional distress suffered as a result of witnessing injury to another, both the zone-of-physical-danger rule and the impact rule therefore prevent bystander recovery.[72] Despite the supreme court's reference to the plaintiff in *Rickey* as a "bystander," the nature of the zone-of-physical-danger rule is such that it allows recovery only to direct victims of negligence, because recovery must be predicated on a reason-

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pact does not take place. *See* Note, *Negligent Infliction of Emotional Distress*, 26 A.T.L.A.L. REP. 302, 302-03 (Sept. 1983) (discussion of recent cases rejecting all such limitations). Under the proper interpretation of the impact rule, however, there need be a direct causal connection between physical injury and emotional distress. *See supra* note 3. This is not arbitrary because emotional distress which does not arise out of physical injury or impact but is wholly sentimental was *never* recoverable. *See, e.g.*, Cutright v. City Nat'l Bank of Kankakee, 88 Ill. App. 3d 742, 410 N.E.2d 1142 (1980) (woman trapped in flooded elevator who feared electrocution denied recovery despite minor impact). The same potential for arbitrary results exists if the new zone-of-physical-danger rule is given a purely formal evidentiary interpretation. *See infra* text accompanying note 69.

69. *See In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983) (interpreting *Rickey*'s requirement of physical injury or illness as a purely formal evidentiary hurdle).

70. *See supra* note 9.

71. *See supra* note 41.

72. It follows that since recovery can only be predicated on fear for one's own safety, and not on witnessing injury to another, the question of whether the plaintiff was a closely related family member to direct victims of negligence is irrelevant under the zone-of-physical-danger rule. Such a family relationship was an important factor that the appellate court used under its test, which allowed recovery for severe emotional distress suffered upon witnessing injury to another. Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 442, 428 N.E.2d 596, 599 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); *see also* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (family relationship an important factor where bystander recovery possible).

able fear for one's own safety.[73]

Rickey does not change or alter the impact rule as it applies to recovery for negligent infliction of emotional distress where a physical injury or impact is proven.[74] Rather, the zone-of-physi-

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73. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 549, 457 N.E.2d 1, 2 (1983). The court was accurate in labeling the plaintiff a bystander, because the damages sought were consistent with typical bystander recovery: "[The plaintiff sought] to recover damages for emotional distress allegedly suffered when he viewed an accidental injury to his brother. . . ." *Id.* at 548, 457 N.E.2d at 1. Because the plaintiff sought these damages, it is natural that the court would phrase the new standard in terms of its applicability to such a bystander. It does not follow, however, that the rule is only to be applied in bystander cases. *But see* Westrom v. Kerr-McGee Chem. Corp., No. 82 C 2034, slip op. at 8 (N.D. Ill. Oct. 4, 1983) (holding that *Rickey* was concerned only with bystanders who witness traumatic injury to others). If *Rickey* is used only in bystander situations, the new rule will be meaningless. Since bystanders suffer emotional distress from witnessing injury to others and not from fearing for their own safety, no one could ever recover under the rule if given such an interpretation. *See supra* note 41. Moreover, several bystander cases were among those the supreme court cited to illustrate the new zone-of-physical-danger rule. Stadler v. Cross, 295 N.W.2d 552, 553 (Minn. 1980); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 679 (N.D. 1972); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 419, 301 N.Y.S.2d 554 (1969). *See supra* note 64. None of these cases allowed bystander recovery under the zone-of-physical-danger rule.

74. The court stated that in its consideration recovery for negligent infliction of emotional distress should not be based "solely on whether there was a contemporaneous physical impact upon the plaintiff." Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 554, 457 N.E.2d 1, 4 (1983). This language indicates that the new standard is in addition to the impact rule, which would still apply if emotional distress was directly caused by a negligently inflicted physical impact or injury. *See* Westrom v. Kerr-McGee Chem. Corp., No. 82 C 2034, slip op. at 7-9 (N.D. Ill. Oct. 4, 1983) (plaintiff could recover under either rule if proper showing made); *In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, No. MDL-391, slip op. at 5-7 (N.D. Ill. Dec. 13, 1983) (recognizing that a cause of action exists based on fear experienced before occurrence of impact).

There is no language in *Rickey* which specifically eliminates the impact rule. The court states that for these circumstances the new rule will "substitute" for the impact rule. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983). If the new rule is interpreted to displace the impact rule for all circumstances, Illinois will have a much greater limitation on recovery for emotional distress than before *Rickey*. Under no circumstances, even if physical impact or injury can be proven, will a plaintiff be able to recover for emotional distress itself. Recovery will always be limited to the physical manifestations of emotional distress. *See supra* notes 64-67. An individual is also less likely to be in a zone of physical danger and experience fear for his own safety than he is to suffer emotional distress arising out of a physical impact or injury. If *Rickey* is construed to eliminate the impact rule rather than to supplement it, the stringent requirements of the new rule standing alone will yield a more limited recovery under more limited circumstances than previously under the impact rule.

The supreme court's discussion in *Rickey* of the demise of the impact rule likewise does not specifically eliminate it. *See* Rickey v. Chicago Transit, Auth., 98 Ill. 2d 546, 553, 457 N.E.2d 1, 4 (1983). The court simply states that other courts have abandoned the rule due to its improper formalization. *Id.* Such formalization has not taken place in Illinois in the vast majority of cases. *But see* Wetherill v. University of Chicago, 565 F.

cal-danger rule substitutes for the impact rule in pre-impact or non-impact situations.[75] A single plaintiff who is the victim of one incident of negligence involving physical injury or impact may now recover damages for emotional distress in two ways. First, recovery is still possible under the impact rule for emotional distress directly caused by the physical injury or impact. Second, if the plaintiff can prove he was in a negligently created zone of physical danger and experienced a reasonable fear for his own safety before physical injury or impact occurred, he may also recover under *Rickey* for the physical manifestations of the emotional distress that arose from his fear.[76] If the plaintiff proves no impact at all, the impact rule no longer completely bars him. He may recover for the physical manifestations of emotional distress if he meets the requirements of the zone-of-

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Supp. 1553, 1559-60 (N.D. Ill. 1983) (allowing recovery under impact rule for fear in reaction to physical injury); Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 442, 428 N.E.2d 596, 599 (1981) (improperly describing impact rule as mere formality), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); McCullough v. Orcutt, 14 Ill. App. 2d 513, 522-23, 145 N.E.2d 109, 114 (1957) (dicta giving definition of impact rule that would allow improper recovery); *see also supra* note 30. The new standard was drawn to prevent the same problems which underlie the impact rule's limitation on recovery for negligent infliction of emotional distress. *See supra* notes 61-65 and accompanying text. The new rule should be construed so that it can mitigate the harshness of the impact rule by expanding liability under certain circumstances. This requires that it stand together with the impact rule.

75. Thus, in Benza v. Shulman Air Freight, 46 Ill. App. 3d 521, 523, 361 N.E.2d 91, 92 (1977), a plaintiff who feared for her safety in a near-miss auto accident was denied recovery due to lack of impact. A cause of action for the physical manifestation of that fear would now be possible under *Rickey*. In Owens v. Chicago Telephone Co., 159 Ill. App. 80, 81 (1910), a child who was "frightened into insensibility" when the defendant's negligently installed phone wires attracted lightening to his house was denied recovery due to lack of impact. Since the child was in a zone of physical danger and experienced reasonable fear for his own safety, a cause of action under *Rickey* for the physical manifestations of that fear would now be possible. In Cutright v. City Nat'l Bank of Kankakee, 88 Ill. App. 3d 742, 744, 410 N.E.2d 1142, 1144 (1980) a woman who feared electrocution after being trapped in a flooded elevator was denied recovery because she failed to prove impact. Since she experienced fear for her safety and was in a zone of physical danger she would now have a cause of action under *Rickey* for the physical manifestations of her fear. *See In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983) (recognizing *Rickey*'s applicability in pre-impact situations).

76. Under the facts of *Rickey*, the plaintiff's brother whose scarf became entangled in the escalator would now have a cause of action for the physical manifestations of the pre-impact fear he suffered as his scarf began to slowly tighten around his neck. *See also In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 507 F. Supp. 21, 24 (N.D. Ill. 1981), *modified on reh'g*, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983) (recovery under both *Rickey* and the impact rule now possible).

physical-danger rule.[77]

With the new rule set forth in *Rickey*, Illinois has chosen not to abandon its longstanding policy of limitation on recovery for negligent infliction of emotional distress. It has instead broadened the class of people entitled to recover for emotional distress by adopting a new rule which, like the impact rule, prevents problems associated with less limited recovery. The zone-of-physical-danger rule and the impact rule are to be used in conjunction with one another. Both rules prevent arbitrary recovery if given their proper interpretation. Neither rule allows recovery for bystanders. The question remains whether the case will be properly interpreted as a narrow supplement to the impact rule or whether it will create a broad expansion of liability.

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77. An example of this would be where a crashing jetliner pulled out of a nosedive at the last instant before impact. Under *Rickey*, the passengers would have a cause of action for the physical manifestations of emotional distress suffered from being in the diving aircraft, a zone of physical danger, and fearing for their safety. Had the crash actually occurred, the survivors would have also had a cause of action under the impact rule for emotional distress arising out of their physical injuries. *See supra* note 75. *Cf.* Solomon v. Warren, 540 F.2d 777, 797 (5th Cir. 1977) (Gee, J., dissenting) (posing similar hypothetical).