

**Wake Forest University School of Law  
Symposium on the Third Restatement of Torts  
April 2-3, 2009**

**Negligent Infliction of Emotional Distress  
Chief Justice Jefferson's Remarks  
Thursday, April 2, 11am – 1pm**

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I would like to begin by thanking the American Law Institute, Wake Forest School of Law, and my alma mater, the University of Texas School of Law for inviting me to be a part of this distinguished panel. I became a member of the American Law Institute shortly after joining the Supreme Court of Texas, and have found its legal scholarship to be central to my decisionmaking in many areas. I am honored play a small role in the Institute's ongoing efforts "to promote the clarification and simplification of the law, to secure better administration of justice, and to encourage and carry on scholarly and scientific legal work." I can attest to the Restatement's importance to our own jurisprudence. In fact, the Supreme Court of Texas has cited various provisions of the Restatement of Torts almost one hundred times in the last ten years.

For example, several of our cases have discussed the Products Liability chapter of the Restatement Third of Torts since its release in 1998. We noted in an opinion in 2007 that the Restatement (Third) of Torts provisions related to the concept of deviation from a manufacturer's intended design was consistent with our law on products liability.<sup>1</sup> In *Ford Motor Co. v. Ridgway*, a frequently cited products liability case in our state, we discussed a party's reliance on section 3 of the Third Restatement of Torts, then noted that the comment to

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<sup>1</sup> *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 42 (Tex. 2007).

that provision did not actually support the party's position.<sup>2</sup> Parties frequently rely on the Restatement in their briefing before our Court, and the thoroughness of each Restatement provision provides ample resources both to the bench and the bar to vet each side's arguments.

Our Court has also considered the proposed drafts of the Third Restatement. In *Dew v. Crown Derrick Erectors*, a case from 2006, a party urged us to adopt section 29 of the Third Restatement's Liability for Physical Harm chapter, which suggests redefining "proximate cause" from its traditional "cause nearest in time or geography to the plaintiff's harm" formulation to a "scope of liability" analysis.<sup>3</sup> We stated however that "[w]hile we applaud any effort to bring greater clarity to this difficult area of the law, we must decline the invitation to abandon decades of case law, not to mention the Restatement (Second) of Torts, before even the American Law Institute has done so." Our decision in this respect tells a cautionary tale – the common law's development must take into account the eccentricities of many jurisdictions. The goal for uniformity will sometimes yield to parochial interests, superior judgment, or political reality. I will leave it to scholars to judge which category *Crown Derrick* falls under.

There are other examples in which our Court has declined to adopt the Restatement. In 1998, we rejected a comment to the Second Restatement of Torts related to product liability that was ultimately revised in the Third Restatement.<sup>4</sup> In that case, the plaintiff urged us to adopt comment j to section 402A of the Second Restatement of Torts, which stated: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it

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<sup>2</sup> 135 S.W.3d 598, 601 (Tex. 2004) (discussing section 3 of the Restatement (Third) of Torts which states that a plaintiff's can be inferred to have been caused by a product defect when such harm ordinarily occurs as the result of a product defect and was not solely the result of causes other than the product defect).

<sup>3</sup> 208 S.W.3d 448, 452 n.4 (Tex. 2006).

<sup>4</sup> *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335-37 (Tex. 1998).

unreasonably dangerous.”<sup>5</sup> We refused to adopt this comment, and the Third Restatement also rejected this, referring to it as “unfortunate language.”<sup>6</sup> Our Court has also declined to adopt certain sections from the Second Restatement suggesting the viability of claims based on “carrying on an abnormally dangerous activity,” in Restatement Section 5.19.<sup>7</sup>

On the whole, though, we have cited the Restatement as a reinforcement of our law and as an indicator of where developing law is heading. In this respect, I believe that Justice Cardozo’s vision of the Restatement’s “unify[ing] our law” has been realized.

Negligent infliction of emotional distress is certainly one of those areas of the law that is developing, as the varied treatments in the panel’s papers suggest. As the authors point out, causes of action based on negligent emotional injury have been treated very differently from state to state, and I agree with Professor Gray that the Third Restatement provides the ALI a golden opportunity to improve analysis in this area.

In Texas, though, we have staked out a clear position on whether to recognize a stand-alone cause of action for negligent infliction of emotional distress: We simply do not recognize one. I understand that this position is met with skepticism from some of the panelists, but as of today, there has been no decision from our Court retreating from this stance. That is not to say we do not allow recovery for emotional distress at all... we allow compensation for these injuries as mental anguish damages arising out of already-existing causes of action.

Our most notable case dealing with this subject is *Boyles v. Kerr*<sup>8</sup>, decided in 1993, and discussed at some length in Professor Chamallas’s paper. *Boyles* involved a suit brought by a young woman, Kerr, against her former boyfriend, Boyles, for surreptitiously videotaping a

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<sup>5</sup> See *id.* (citing Restatement (Second) of Torts § 402A cmt. j (1965)).

<sup>6</sup> *Id.*

<sup>7</sup> *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 438 (Tex. 1997).

<sup>8</sup> 855 S.W.2d 593 (Tex. 1993).

sexual encounter between them. Boyles hid a camcorder at a friend's house, and then invited Kerr over. Boyles and his friends tested the camera shortly before she arrived, and the tape contained approximately ten minutes of the young men joking about the impending encounter. Boyles retrieved the tape shortly after the encounter, and over the course of the next couple of months, he showed it to approximately ten friends.<sup>9</sup> Technology has advanced, of course, to the point that widespread dissemination of this appalling behavior is as simple as hitting the send button on a cell phone. And I can foresee a necessity for the law to evolve to keep pace with these advances. In Kerr's case, the revelation that her image was appropriated in this manner did not occur until several months after the event. By this point, several people from her school knew about the tape. Kerr alleged that this caused her "humiliation and severe emotional distress." Kerr sued on several theories, but eventually dropped all of her causes of action except for negligent infliction of emotional distress, presumably to reach Boyles' parents' homeowners' insurance policy.<sup>10</sup>

We began our analysis by noting that a holding from our Court six years earlier *had* "create[d] a general duty not to inflict reasonably foreseeable emotional distress."<sup>11</sup> We held, though, that this was an erroneous interpretation of an earlier case, and that "to the extent that [that case] recognizes an independent right to recover for negligently inflicted emotional distress," we overruled that holding.<sup>12</sup> Instead, we held that "mental anguish damages should be compensated only in connection with [a] defendant's breach of some other duty imposed by law."<sup>13</sup> This means that under Texas law, there is no general duty not to negligently inflict emotional distress; however, claimants can still recover for mental anguish tied to some other

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<sup>9</sup> *Id.* at 594.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 595.

<sup>12</sup> *Id.* at 595-96.

<sup>13</sup> *Id.* at 596.

legal duty. This analysis also makes it clear that Texas law views this as a *duty* issue, rather than a proximate causation issue, as discussed in Professor Keating’s article.

We also noted in *Boyles* that our holding did not limit a bystander’s right to recover for emotional distress arising from witnessing a serious or fatal accident.<sup>14</sup> Texas has adopted the California test from *Dillon v. Legg* for these claims.<sup>15</sup> In addition, we held that “[w]here emotional distress is a recognized element of damages for breach of a legal duty, the claimant may recover without demonstrating a physical manifestation of the emotional distress.”<sup>16</sup>

We developed our stance on mental anguish further in a case decided a few years later, *City of Tyler v. Likes*.<sup>17</sup> The mental anguish claim in that case arose out of a claim for flood damage allegedly caused by the city’s negligence in constructing a municipal storm drainage system.<sup>18</sup> The plaintiff sued for mental anguish stemming from the flooding of her property<sup>19</sup>. We noted that under *Boyles*, Texas does not recognize “a general legal duty to avoid negligently inflicting mental anguish.”<sup>20</sup> And while *Boyles* pointed out that mental anguish damages may be available based on the breach of another legal duty, “this depends on both the nature of the duty breached and the quality of proof offered by the plaintiff. For many breaches of legal duties, even tortious ones, the law affords no right to recover for resulting mental anguish.”<sup>21</sup> Ultimately, we held that Texas law did not recognize mental anguish damages for negligently damaging another person’s property.<sup>22</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing *Freeman v. City of Pasadena*, 744 S.W.2d 923 (Tex. 1988)).

<sup>16</sup> *Id.* at 598.

<sup>17</sup> 962 S.W.2d 489 (Tex. 1997).

<sup>18</sup> *Id.* at 493.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 494 (citing *Boyles*, 855 S.W.2d at 597).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 497.

We reached this conclusion for two reasons. The first is that mental anguish can be difficult to predict in property injury cases. We said that “[t]he invasion of the same legal right may lead to extreme anguish in one person while causing essentially no emotional damage to another. Because of this variability in human nature, it is difficult for the law to distinguish between those instances when mental anguish is reasonably foreseeable from particular conduct and those when it is so remote that the law should impose no duty to prevent it.”<sup>23</sup> This raises the foreseeability concerns discussed in Professor Matthews’ article. The second reason was that such damage is “inherently difficult to verify.”<sup>24</sup> Summarizing the causes of action where Texas allows mental anguish damages, we stated:

Without intent or malice on the defendant's part, serious bodily injury to the plaintiff, or a special relationship between the two parties [e.g. physician-patient or “contracts dealing with intensely emotional noncommercial subjects such as preparing a corpse for burial”], we permit recovery for mental anguish in only a few types of cases involving injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result. These include suits for wrongful death, and actions by bystanders for a close family member's serious injury.<sup>25</sup>

I found Professor Chamallas’s discussion of gender-related issues in this area of law to be very interesting. The discussion of the types of relationships that can give rise to an emotional distress claim probably represents the biggest gap between current Texas law and Professor Chamallas’s view. The Texas rule that there is no general legal duty not to negligently inflict serious emotional harm prevents recovery in a case like *Boyles*, where the relationship is an

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<sup>23</sup> *Id.* at 494.

<sup>24</sup> *Id.* at 495.

<sup>25</sup> *Id.* at 496.

intimate one. I was not on the Court at the time *Boyles* was decided, but I would presume that part of the reason the Court took this position was to establish some clear boundaries as to what can form the basis for mental anguish claims. Line-drawing, although often imprecise, is a compelling means to ensure predictability in the law. That said, I am intrigued by Professor Chamallas's contribution to this area of the law.

As the commentary to the new Restatement provisions point out, the boundaries our Court carved may appear to be arbitrary<sup>26</sup>, but a more nebulous jurisprudence would, perhaps, sacrifice clarity and, therefore, predictability. As the comments put it, “[i]t is too easy and tempting to relax flexible standards to extend recovery for the broad spectrum of emotional disturbance that occurs, a result we believe (and courts have found) unwarranted and undesirable. To put the point somewhat differently, the slope is steep, especially slippery, and lengthy.”<sup>27</sup> This sort of policy consideration has also led to the requirements adopted in bystander claims, which Texas also uses.

Professor Chamallas compared our holding in *Boyles* to *Corgan v. Mueling*<sup>28</sup>, a case from the Supreme Court of Illinois involving an inappropriate sexual relationship between a therapist and his patient. The *Corgan* Court held that the patient could allege a claim for negligent infliction of emotional distress arising out of the therapist's psychological malpractice.<sup>29</sup> The professor notes that the Illinois court's holding was in “sharp contrast” to the reasoning in *Boyles*, but I am not so sure that the result would be different in Texas, based on the presence in that case of the therapist-patient relationship. Although our Court has not directly addressed this relationship in connection with a mental anguish claim, it is arguable that this relationship would

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<sup>26</sup> See Reporter's Memorandum, Draft Restatement (Third) of Torts, (“There is a recurring (and new) theme in these materials: the use of arbitrary lines to limit recovery for emotional disturbance.”).

<sup>27</sup> *Id.*

<sup>28</sup> 574 N.E.2d 602 (Ill. 1991).

<sup>29</sup> *Id.* at 606-07.

likely rise to the level of a special relationship that would support a compensable mental anguish claim in Texas. Those parameters will have to be explored in a future decision, in which the advocates can present their arguments and, perhaps, urge the Court to adopt the new Restatement's view.

Professor Matthews, in his article discussing English law on NIED, also raised some interesting points. As I mentioned before, foreseeability is not a major focus for mental anguish in Texas. As we noted in *Likes*: “there are some categories of cases in which the problems of foreseeability and genuineness are sufficiently mitigated that the law should allow recovery for anguish.”<sup>30</sup> These are the cases (special relationship, pre-existing legal duty, etc) in which Texas allows mental anguish damages.

Professor Matthews also noted that there is a growing number of cases in England involving the employer-employee relationship. We recently heard oral argument in a case called *Waffle House, Inc. v. Williams*<sup>31</sup> which came to mind as I read Professor Matthew's work. Because the case is still pending before the Court, I will not discuss it in too much detail, but I would like to discuss the parties' positions.<sup>32</sup> The petitioner is asking the Court to decide the extent of the duty an employer owes to an employee to adequately supervise its employees. Williams, the plaintiff, alleged that her supervisor sexually harassed her at work. Williams sued under negligent supervision and negligent retention theories, recovered actual and punitive damages in the trial court, and the court of appeals affirmed the trial court's judgment. Waffle House argued that the court of appeals' holding expanded the duty traditionally owed under this cause of action, which is to reasonably investigate, screen and supervise employees, and that this

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<sup>30</sup> *Likes*, 962 S.W.2d at 495.

<sup>31</sup> 2007 WL 290808 (Tex. App.—Fort Worth 2007, pet. granted [07-0205]).

<sup>32</sup> The parties' briefing for this case is available online at the Supreme Court of Texas's website at <http://www.supreme.courts.state.tx.us/ebriefs/files/20070205.htm>.

duty did not make an employer “the insurer of the safety of all those who came in contact with its employees.” Waffle House also quoted a previous holding from our Court which stated: “a negligent supervision claim cannot be based solely upon an underlying claim of sexual harassment *per se*, because the effect would be to impose liability for employers for failing to prevent a harm that is not a cognizable injury under the common law.” Williams responded that Waffle House misrepresented the negligence issue, stating that the jury’s finding was based on assault rather than sexual harassment, and therefore her claim was validly based on a “cognizable injury under the common law.”

Professors Matthews and Chamallas both discussed the unique challenge of defining “closely related” in bystander cases. Our Court has not directly addressed the meaning of “closely related,” but the variability in relationships that exists in the diverse population found not only in Texas, but across the country, would certainly affect just how closely related a claimant would have to be in order to prevail in one of these claims. Allegations of arbitrary lines being drawn based on consanguinity or any other distinction will understandably arise, so this could be prove to be a thorny issue.

I would also like to comment on the toxic exposure/cancerphobia issues that Professor Rabin raised in his paper. In Texas, all asbestos-related cases are handled through multi-district litigation, a policy choice made by the legislature, so common law tort claims related to asbestos have been abrogated by legislation. Claimants are required to submit to particular discovery and screening procedures before they can actually take an asbestos-related claim to verdict in Texas. Furthermore, our Court has explicitly held that a person exposed to asbestos cannot claim mental anguish damages for fear of contracting an asbestos-related disease if bodily injury is “latent and

any eventual consequences uncertain.”<sup>33</sup> I believe this issue falls under the recurring theme of line-drawing. The courts have to draw the line somewhere, and these decisions will inevitably leave claimants with arguably viable claims out in the cold, but failing to cut these off somewhere could lead to the slippery slope the comments spoke of.

Professor Rabin argues that toxic exposure and cancerphobia claims should be treated more like wrongful death and loss of consortium claims, which compensate ongoing emotional trauma, and less like traditional negligence claims, which tend to focus on a single negligent act. As the professor notes, though, the “crushing liability” and “floodgates” concerns are not raised by wrongful death and loss of consortium cases, which limit recovery to close family members. Recovery in toxic exposure cases, on the other hand, could potentially extend to tens of thousands of people based on a single contamination incident. If I were a member of the Texas Legislature, I would engage the debate at a policy level. For our purposes, however, the statute says what it says and the courts are bound to interpret it only, absent constitutional concerns about which I will defer until a live controversy arrives on my desk.

The final case I would like to discuss from our Court is a decision we released about a year ago: *Pleasant Glade Assembly of God v. Schubert*.<sup>34</sup> That case involved the “exorcism” of a seventeen-year-old girl at her church on two separate occasions over the course of four days.<sup>35</sup> The claimant, Laura Schubert, collapsed during a Sunday evening worship service. Several church members then took her into a classroom and “laid hands” on her, a practice where the members place their hands on a person and pray for them.<sup>36</sup> Laura alleged that during this episode, the “church members forcibly held her arms crossed over her chest, despite her demands

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<sup>33</sup> *Temple Inland v. Carter*, 993 S.W.2d 88, 92-93 (Tex. 1999).

<sup>34</sup> 264 S.W.3d 1 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (Jan. 21, 2009).

<sup>35</sup> *Id.* at 2-5.

<sup>36</sup> *Id.* at 3-4.

to be freed.”<sup>37</sup> The church members present testified that Laura “clenched her fists, gritted her teeth, foamed at the mouth, made guttural noises, cried, yelled, kicked, sweated, and hallucinated” throughout the incident.<sup>38</sup>

A similar incident occurred three nights later at a Wednesday evening youth service. At some point Laura collapsed and writhed on the floor.<sup>39</sup> Her youth director and several youth members held her down for over two hours while the church’s senior pastor prayed over her. During the incident, Laura suffered carpet burns, a scrape on her back, and bruises on her wrists and shoulders.<sup>40</sup> Laura and her family left the church shortly after this incident.<sup>41</sup>

Over the next few months, Laura exhibited several symptoms of emotional disturbance, including “angry outbursts, weight loss, sleeplessness, nightmares, hallucinations, self-mutilation, fear of abandonment, and agoraphobia,” among others.<sup>42</sup> Psychiatrists eventually diagnosed Laura as suffering from post traumatic stress disorder.<sup>43</sup>

Laura and her parents sued the church, the senior pastor, the youth minister, and other members, alleging “negligence, gross negligence, professional negligence, intentional infliction of emotional distress, false imprisonment, assault, battery, loss of consortium, and child abuse.”<sup>44</sup> The Schuberts also claimed that the defendants’ conduct “had caused Laura ‘mental, emotional and psychological injuries including physical pain, mental anguish, fear, humiliation, embarrassment, physical and emotional distress, post-traumatic stress disorder[,] and loss of employment.’”<sup>45</sup> The defendants responded that her suit violated the 1<sup>st</sup> Amendment’s Free

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<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 5.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Exercise clause.<sup>46</sup> The jury found that Laura had been falsely imprisoned and assaulted by the defendants.<sup>47</sup> The jury awarded her \$300,000 for her pain and suffering, loss of earning capacity and medical expenses.<sup>48</sup> The court of appeals eliminated the damages for lost earning capacity, but otherwise affirmed the trial court's judgment.<sup>49</sup>

Our Court reversed the court of appeals' judgment, holding that the religious aspects of the causes of Laura's injuries could not be separated from the secular aspects, and therefore, the church should have prevailed on its Free Exercise defense.<sup>50</sup> The Court noted that "while we can imagine circumstances under which an adherent might have a claim for compensable emotional damages as a consequence of religiously motivated conduct, this is not such a case."<sup>51</sup> The Court summarized its holding by stating: "Because providing a remedy for the very real, but religiously motivated emotional distress in this case would require us to take sides in what is essentially a religious controversy, we cannot resolve that dispute."<sup>52</sup> This holding is yet another illustration of the difficult decisions we as courts make in drawing lines for recovery in these sorts of cases.

I wrote one of two dissenting opinions in this case.<sup>53</sup> I disagreed that the religious and secular aspects were so intertwined as to prevent Laura from recovering because of the Free Exercise clause. The jury in that case determined that she had been falsely imprisoned and assaulted during the physical restraint that was "not proven to be part of any established church practice."<sup>54</sup> As I viewed the case, these claims were "at [their] core . . . secular, intentional tort

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 5-6.

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.* at 6.

<sup>50</sup> *Id.* at 13.

<sup>51</sup> *Id.* at 12.

<sup>52</sup> *Id.* at 13.

<sup>53</sup> *Id.* (Jefferson, C.J., dissenting).

<sup>54</sup> *Id.* at 15.

claims squarely within our jurisdiction.”<sup>55</sup> I noted that the jury in the case heard almost nothing about religion, and that this case, as it was tried, was not about beliefs or intangible harms, such as emotional damages stemming from excommunication. It was about “violent action—specifically, twice pinning a screaming, crying teenage girl to the floor for extended periods of time.”<sup>56</sup> Based on a mandamus action brought prior to the trial, the trial court judge carefully instructed both sides not to introduce religion as a possible reason for Laura’s restraint.<sup>57</sup> I also noted that the Court appeared to disregard the availability of mental anguish damages available to successful false imprisonment and assault claimants, such as Ms. Schubert.<sup>58</sup> Ultimately, I would have held that the church could not hide behind the Free Exercise clause to excuse what I saw as a severe and compensable emotional injury.<sup>59</sup>

These cases highlight the relevance of the issues we’ll be discussing at this symposium. As I mentioned at the beginning of my remarks, the ALI provides an invaluable service to the entire legal community. The Restatements of Law provide a phenomenal resource for those of us on the bench, and it is an honor for me to serve in the ALI and participate in this panel. I commend the contributors on their efforts, and I look forward to this and future discussions of this developing area of the law.

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 18.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 16 (“It is a basic tenet of tort law that emotional damages may be recovered for intentional torts involving physical invasions, such as assault, battery, and false imprisonment.”).

<sup>59</sup> *Id.* at 23.