

Emotional Distress in Tort Law: Themes of Constraint

Robert L. Rabin
A. Calder Mackay Professor of Law
Stanford Law School

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I. Introduction

There is a standard story about the recognition of emotional distress as a stand-alone tort claim. Although its roots can be detected in earlier, isolated cases of compensation for both intentional outrageous behavior and negligent conduct of a particularly grievous sort, the torts gain respectability only with the adoption in 1948 of Restatement §46, addressing intentionally inflicted emotional distress (IIED), and negligence cases beginning around 1960, surmounting the physical contact barrier (NIED).¹

On reflection, the historical roots of recovery for “pure” emotional distress run much deeper, and are considerably more complicated to disentangle.² The intentional torts of assault and false imprisonment can be traced back at least to

¹ See e.g. *Battalia v. New York*, 176 N.E.2d 729 (N.Y.1961) for a landmark in turning the corner on NIED.

² I have discussed these historical matters earlier in Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DePaul L.Rev. 359 (2006).

medieval times; relational torts such as alienation of affections and criminal conversation offer a distinctly Victorian flavor; and defamation claims can be located prior to the sixteenth century in the English ecclesiastical courts. Without exception, these sources of liability required no showing of related physical injury.³

If the emergent torts of more recent vintage – IIED and NIED – reflect a broader-based sensitivity to emotional security, they nonetheless offer a narrative of expansive tendencies in tension with strong constraints – constraints both pragmatic and normative.⁴ These constraints shape the doctrine as it has crystallized, and as it is reflected both in the Restatement Second and the successor sections in the Restatement Third, creating a patchwork of liability rules that would appear puzzling to an unschooled, outside observer.⁵

Whether the overall design of these rules – generally expressed as “no-duty” or “limited-duty” rules – hangs together in a satisfying way is a principal question I will address. But my discussion will be organized around the larger themes, both pragmatic and normative, which run through the cross-currents of doctrine, making reference along the way to the superstructure of rules and limitations that rise

³ As distinguished from recovery for pain and suffering.

⁴ A similar tension is found in the common law and constitutional privileges in the privacy torts and defamation, which I will also briefly discuss.

⁵ Comment on relationship between Restatement Second and Third provisions.

above the surface. Then, I will turn to a brief discussion of emotional distress associated with *protracted* loss of companionship or anxiety, as contrasted to claims focused on immediate reactions to unexpected, traumatic events, to consider whether these scenarios make out a special case for recovery. Finally, I will offer a concluding comment.

II. Themes of Constraint

As I see it, limitations on recovery for emotional distress reflect both instrumental concerns and the reinforcement of social norms – two distinct but at times convergent functions. In the following two subsections, I will discuss each in turn, offering my thoughts on how they have played out in the doctrinal structure of emotional distress.

A. Theme #1: Liability Limits Enforcing Instrumental Concerns

1. Floodgates and crushing liability

Early in the twentieth century, the common law of torts still reflected a pervasive caution about opening the proverbial floodgates of litigation to unconstrained claims of responsibility for negligent conduct. This theme is prominent in personal injury and economic loss cases, ranging from product and

workplace accidents to loss associated with professional services.⁶ And, it constituted an absolute barrier to claims for stand-alone NIED.⁷

The initial breach, in the latter area, was modest: The doctrinal recognition of two scenarios – mishandling of corpses and erroneous announcement by telegraphic communication of a death in the family – in which recovery was allowed.⁸ These scenarios, of course, reflected built-in assurances of both genuineness of distress and infrequency of claims.⁹

After the mid-twentieth century, when the barrier to recovery was further lowered, it continued nonetheless to reflect the same concerns. By limiting recovery in spatial terms to emotional distress victims in “the zone of danger” of serious physical harm – a far narrower conception, it should be noted, than locationally unconstrained fear or fright – the courts remained committed to a predisposition against widespread litigation rights.¹⁰

The limitation is most strikingly apparent in toxic exposure, or cancerphobia, cases where the courts have been particularly resistant to allowing

⁶ Cite privity barrier; workplace defenses; *Ultramares*

⁷ See *Mitchell v. Rochester Rwy. Co.* overruled by *Battalia*, *supra*.

⁸ Cite *Dobbs*.

⁹ *Gammon* as a modern day example.

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recovery.¹¹ From a doctrinal perspective, when the toxic exposure poses substantial risks of long-latency physical harm, it would take only a modest degree of metaphorical thinking to treat the victim as figuratively within the zone of danger.

Moreover, it almost certainly would strike the lay observer as odd to deny recovery to the toxic exposure victim destined, perhaps, to live 20-30 years with anxiety about contracting a life-threatening cancer, while affording recovery to the “victim” of a near-miss auto injury, or indeed even the commercial airline passenger subjected to a nose-diving airplane that is brought under pilot control.¹² In these near-miss situations, a lay response to the claim of continuing serious trauma might well be “get over it.” Few, if any, would respond similarly to the sustained anxiety experienced by the individual discovering that she had been unknowingly subjected to long-term, serious health-compromising prospects from a toxic brew of chemicals in her supply of drinking water.¹³ But the zone of danger requirement has not been read figuratively; to the contrary, it has served as a near-

¹¹ See e.g. *Metro North v. Buckley*

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¹³ *Potter* as a superficially more lenient limitation. Elaborate.

absolute barrier to NIED cases based on environmental or drug-related long-latency claims.¹⁴

Moreover, these cases rest on a second instrumentally-based policy consideration: the concern about crushing liability.¹⁵ This has been a principal takeaway from the asbestos litigation. Not too far into the tidal wave of bankruptcies, it became apparent that prioritizing of claims was an absolute necessity if depletion of the limited pool of available funds was to reflect fairness considerations; namely, recognizing the compelling claims for “most deserving” on the part of those suffering the most serious physical consequences.¹⁶

The principle can be generalized. When a design defect in a life-sustaining medical device generates a mass tort episode of physical injury claims, legions of other implant recipients suffer quite reasonable anxiety that they are walking time bombs. But their claims compete with those destined unfortunately to have their fears come to fruition at a later date. A similar scenario unfolds when unanticipated hazards of a prescription drug or chemical exposure put multitudes at risk – an

¹⁴ “Near-absolute.” Consider HIV pin-prick cases; negligent mis-diagnosis of serious health consequences cases. Normally, however, anxiety in these cases has a bounded time-frame. Elaborate.

¹⁵ Crushing liability and floodgates are distinct concerns, even if sometimes convergent. Elaborate.

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exposed class enduring severe distress; a subset fated to experience life-threatening physical harm.¹⁷

The asbestos litigation provides an intermediate situation testing the limits of these instrumentally-oriented barriers to recovery. Suppose the emotional distress claimant is already suffering from a defendant-induced “gateway” physical disability at the point when she seeks recovery for anxiety at the prospect of the condition ripening into a life-threatening disease. Should this heightened sense of anxiety be sufficient to trigger recovery?

Perhaps unsurprisingly, in this intermediate zone the courts are divided. In a much-noted pair of U.S. Supreme Court decisions involving worker claims under the FELA for asbestos exposure, the Court first adopted the now-conventional position that stand-alone cancerphobia cases are not actionable.¹⁸ But just six years later, in a claim by a worker suffering from asbestosis – a non-fatal pulmonary impairment – who feared the likelihood of a later-developing cancer, the Court distinguished its earlier decision and allowed recovery for distress and anxiety arising from latency-based health concerns.¹⁹

¹⁷ I limit discussion here to the crushing liability concern in toxic exposure cases. Reliance on a crushing liability limitation in other contexts, such as mass claims for physical injuries, triggers somewhat different insolvency concerns beyond the scope of this paper. See e.g. *Strauss v. Belle Realty*.

¹⁸ *Metro North v. Buckley* (1997), *supra*.

¹⁹ *Norfolk & Western Rwy. v. Ayers*, 538 U.S. 135 (2003).

In this latter precursor disease context, the courts are in fact divided over recognizing a duty to compensate for emotional distress. The position contrary to *Ayers* is articulated as the “two-disease rule” and holds that the exposure victim’s long-latency emotional distress is only recoverable (retrospectively) when the cancerous condition is manifested.²⁰ The two-disease rule is supported by the same instrumental considerations as the no-duty rule invoked in pure stand-alone emotional distress cases; in particular, prioritizing a limited pool of funds. But of course, both the floodgates and crushing liability concerns are diminished to a considerable extent by a threshold requirement of a gateway disease. Indeed outside the etiology of asbestos-related diseases, discrete pre-cancerous physical conditions are likely to be relatively infrequent occurrences. It should not be especially surprising, then, that one finds no consensus here on recognizing claims for toxics-induced emotional distress.

2. Disproportionality

The bystander cases offer an interesting variation on the theme of constrained recovery for emotional distress. The typical scenario is a claim by a

²⁰ See e.g. *Simmons v. Pacor*, (Pa.1996).

distraught parent who has eyewitnessed the death or serious injury of his/her child as a consequence of defendant's negligence (often, driving).²¹

The instrumental considerations counseling restraint in "direct" emotional distress cases in fact play out differently here. Floodgates considerations are absent because bystander claims would generally be handled through joinder with the primary claim on behalf of the physical injury victim. Crushing liability considerations are similarly absent because of the confined exposure ordinarily characterizing these third-party claims; mass third party eyewitnessing of scenes of fatal injuries is the exception rather than the rule.²²

Yet recovery is nonetheless sharply circumscribed; generally, through articulated requirements of close family relationship, direct observation, and serious physical injury to the "primary" victim.²³ As many have pointed out, these limitations cannot be explained by reference to the sometime liability threshold of "foreseeability."²⁴ Surely, it is foreseeable that a parent, informed *ex post*, of a child's death by accidental injury, or a close friend eyewitnessing the horrific event, will experience serious emotional distress. But if one puts aside as *de*

²¹ See e.g. *Dillon v. Legg* (Cal.1968).

²² But consider 9/11 eyewitnesses or more broadly mass eyewitnessing of catastrophic events.

²³ And in some states, the conceptually odd, and perhaps overkill additional requirement, of bystander location in the zone of danger. See e.g. *Bovsun* (N.Y.1984).

²⁴ See Restatement Third comments.

minimis theoretically conceivable claims of bystander strangers, even adoption of a foreseeability test would not engender crushing liability concerns.

Instead, the bystander limitations express what superficially might be regarded as a softer version of crushing liability; more specifically, a fairness concern about disproportionality between responsibility for accidentally imposed harm and stacked claims. But even this weak resemblance to policy considerations undergirding the crushing liability limitation is superficial. At root, the latter constraints express, as indicated above, concerns about prioritizing claims – that is, from the *victims*’ perspective, maintaining an adequate pool of funds to recompense the most “deserving” injuries. By contrast, the focal point of the fairness consideration expressed in the disproportionality constraint is on the *injurers*’ perspective: taking account of the elementary moral principle that the punishment should fit the crime.

3. Chilling effect

A less frequently observed form of instrumentalism takes us outside the scope of the Restatement Third coverage of emotional distress. A cluster of constitutional, common law, and statutory limitations mark the crossroads between recognizing the threat to emotional harm from hurtful speech and protections afforded the widespread public dissemination of ideas and information. The rationale for protective measures is frequently expressed as a concern about the

“chilling effect” of tort liability; in essence, a close cousin of the crushing liability concern discussed earlier.²⁵

Thus, in the defamation area, beginning with the landmark Supreme Court decision in *New York Times v. Sullivan*,²⁶ First Amendment protection was extended to media defendants in a series of cases adopting restrictions on tort claims brought by government officials and public figures through a privilege requiring the establishment of “actual malice” (and likewise, in cases of private figures involving matters of public concern, a requirement of negligence and “actual damages”).²⁷ These restrictions, constituting a superstructure imposed on a more limited set of common law privileges to defame, were adopted in an era of heightened recognition of the media’s role in disseminating information about current events triggered by the civil rights movement.²⁸ Restrictions on emotional distress from reputational harm came to be seen as a necessary price to pay for a relatively unfettered marketplace of ideas and information – albeit a high price,

²⁵ Although here the focal point of the solvency concern is the impact on media defendants (and concomitantly on protecting robust criticism), not on inadequate compensation for seriously injured plaintiffs.

²⁶ 376 U.S. 254 (1964).

²⁷ *Gertz* and brief descriptive expansion.

²⁸ See e.g. A. Lewis, “Make No Law” (1991).

based on the data revealing strikingly low plaintiff success rates in the years succeeding the *Times* case.²⁹

Similarly, the privacy torts animated by the classic Warren & Brandeis article, *The Right to Privacy*,³⁰ have floundered despite superficially widespread judicial recognition by state courts.³¹ A common law defense, newsworthiness, has if anything proven to be an even more substantial barrier to claims for emotional distress from public disclosure of private facts than the counterpart *Times* privilege in the defamation area.³² Once again, a highly public-sensitive conception of the social value of access to cultural cross-currents and current events information has trumped individual claims for a restricted zone of revelations about private conduct.

A final illustration comes from the sea-change in access to information and expansive networks of communication associated with the development of the Internet. At a relatively early point in the short history of this technological phenomenon, it became clear that along with all of its window-to-the-world benefits in conveying information and promoting communications came a new

²⁹ See Media Law Resource Center data.

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³¹ Compare *Gates* (Cal.2004) overruling *Briscoe* (Cal.1971).

³² Discuss in context of landmark *Sidis* case

potential for doing mischief to personality interests in freedom from emotional distress and reputational harm.³³

One particularly insidious form of malevolence has been identity theft coupled with the false attribution of loathsome ideas or loose morals to helpless victims. A logical counter by the victim was a personality-based claim for emotional distress – defamation, privacy, NIED – against the internet service provider (ISP) who offered the channel of communication to the malevolent (and anonymous) content generator.³⁴ Concerned that potentially unlimited numbers of claims might choke off unconstrained access to the Internet, Congress took quick remedial action, enacting §230(c)(1) of the (perhaps ironically entitled) Communications Decency Act of 1996.³⁵

The provision, which states that, “[no] provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,”³⁶ has been very broadly interpreted to immunize ISPs under virtually all circumstances other than highly

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³⁵ See *Zeran v. America Online* (4th Cir.1997).

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proactive contribution to the malicious content.³⁷ Here one finds unparalleled reliance on the chilling effect concern. Repeatedly, the courts opine that freedom of communication and exchange of information would grind to a halt if ISPs confronted an obligation to monitor and edit a virtually limitless stream of postings in order to weed out veiled malice.³⁸ The result has been a good deal of extraordinarily harmful character assassination with very limited recourse to redress.³⁹

B. Theme #2: Liability Limits Addressing Social Norms: Defining and Delimiting Civility Obligations

In the preceding discussion of emotional distress, I have suggested that the limitations on recovery could best be thought of as serving instrumental liability-limiting functions. In this subsection, I focus on scope of duty limitations that play a different role: policing the boundary between aberrant and acceptable social behavior. The prime example is the IIED tort. Here, the limitation on recovery – that the tortious conduct must be “extreme and outrageous” to be actionable – articulates a social norm, a rule of conduct defining the boundary between tolerable and socially unacceptable behavior in interpersonal relations.

³⁷ See e.g. *Carafano v. Metroplash*, 339 F.3d 1119 (9th Cir.2003) and cases cited in opinion.

³⁸ *Id.* at __.

³⁹ See e.g. Margolick, *Slimed Online*, Portfolio, March 2009.

In a series of articles discussing respectively the torts of defamation, privacy and IIED, Robert Post expressed this notion as “civility rules,” drawing on the earlier work of sociologist Erving Goffman.⁴⁰ In the context of the right of privacy, but with clear applicability to the IIED tort, Post observed that:

Social life is thick with territorial norms. For obvious reasons, however, the law can protect only a small subset of these norms. The common law itself claims to enforce only the most important of them, only those whose breach is “highly offensive.” This selection criterion serves the interest of legal institutions, which otherwise would be inundated with trivial lawsuits. It also, and somewhat less obviously, preserves the flexibility and vitality of social life, which undoubtedly would be hardened and otherwise altered for the worse if every indiscretion could be transformed into formal legal action.⁴¹

In the context of IIED, the flip side of the proscribed offensive behavior is that below the “extreme and outrageous” threshold, putting up with conduct that is harsh and hurtful, in essence is part of the normal course of life. Beginning in early youth, the child is asked to internalize the adage that “stick and stones may break my bones, but names can never hurt me.” The lesson, of course, is the necessity of

⁴⁰ Post, 74 Cal. L.Rev. (defamation); 77 Cal. L.Rev. (privacy); 103 Harv. L.Rev. (IIED). Erving Goffman, *Interaction Ritual* (1967).

⁴¹ Post, *Tort Law and the Communitarian Foundations of Privacy, The Responsive Community*, Vol. 10, pp. 19-30 (1998), at p. __.

developing a thick skin to deal with the inevitable unpleasantries that come one's way from time to time.⁴²

Until near mid-twentieth century, it was the difficulty in demarcating this boundary that gave the common law courts pause about recognizing even a strong-form verbal standard establishing liability for aberrant and overly aggressive social misconduct.⁴³ *Wallace v. Shoreham Hotel*,⁴⁴ a mid-1940s case, is illustrative of the concern. Plaintiff paid his cocktail lounge check with a \$20 bill and after protesting the waiter's return of change for a \$10, was greeted with a loud and public denunciation, "We have had people try this before." In rejecting the plaintiff's subsequent claim for humiliation and embarrassment, the court noted that:

If insults beyond the bounds of decency, causing mental disturbance, give rise to legal liability, and if there are no rules or standards by which courts may be guided in determining whether the evidence warrants submitting the case to the jury, and no rules or standards for the jury in determining whether the evidence sustains the charge, then every case of fancied insult and hurt feelings must be submitted to the jury and its verdict must stand. This...would make life intolerable.⁴⁵

⁴² It is interesting to compare the imagery of developing a "thick skin" with protecting the "thin-skulled" plaintiff. The reconciliation involves the interplay between liability and damages: Once a victim satisfies the liability threshold by establishing offensive conduct then his/her personal harm is recoverable, notwithstanding personal frailties.

⁴³ In this regard consider also the tort of offensive battery. See e.g. *Huey v. Wishnatsky*.

⁴⁴ 49 A.2d 821 (D.C. Munic. Ct. App. 1946).

⁴⁵ Doubts about the resolution of the borderline issue reached in the Restatement §46 "extreme and outrageous" standard remain. See e.g. Givelber, 82 Colum. L.Rev. 42 (1982).

While both the *Wallace* case and Post excerpt evince concern about the floodgates prospect of loose limitations on compensation for intentionally inflicted emotional harm, there is more at stake here. What is singular about the IIED tort is the normative character of the boundary, fencing out the trivial abuses that once recognized would undermine an expressive social life. In fact, failed intrusion privacy claims frequently support a correlative proposition: The dynamic character of social life would be compromised if the domain of the privacy tort was extended to include recovery for disclosure of embarrassing conduct in public.⁴⁶

III. Protracted Emotional Harm: A Special Case for Recovery?

In a critical sense, the categorical emotional distress claims that have attained legitimacy over the past half century – IIED and NIED (both direct and bystander versions) – rest on a prima facie liability claim that can be likened to a dagger thrust into the victim’s emotional stability. Consider, in this regard, the prima facie case for outrageous interpersonal misconduct; for a narrow avoidance of physical injury; or for the trauma of viewing serious or fatal harm to a loved

⁴⁶ Give examples.

one. Traumatic shock (or affront) is a common theme.⁴⁷ Surely, there is a longitudinal element to the distress. Traumatic shock has reverberating overtones. But the sustained aspect of these claims addresses the issue of damages, not liability.

Suppose instead, the essence of the stand-alone claim is long-term loss: a sense of sustained grief, or what perhaps can be best described as existential angst, rather than the reverberations (and replay) of a shocking episode. Does this “protracted” (for lack of a better term) emotional distress claim make out a special case for compensation? In the relationally-based claims for loss of consortium (better thought of, in its modern guise, as diminished or lost companionship) and wrongful death noneconomic loss, there is support for this conclusion, in my view.⁴⁸ By contrast, in cancerphobia cases, discussed earlier, instrumental concerns have been taken to overwhelm the salience of protracted harm.

How does the special character of these claims manifest itself? There are of course, limitations on the scope of responsibility in claims for loss of consortium and wrongful death noneconomic loss. In consortium cases, the common law

⁴⁷ There are exceptions, of course. Consider for example an abusive course of workplace sexual harassment, which may lead to both an IIED claim and its statutory counterpart, a Title VII claim for creating a hostile and abusive work environment. See e.g. *Kanzler v. Renner*, 937 P.2d 1337 (Wyo.1997). Even here, however, the claim generally arises out of a relatively brief and oppressive course of conduct.

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duties run only to close family relations: in some states, only to spouses; in others, it is extended to children of the physical injury victim as well.⁴⁹ In the statutory actions for wrongful death, many states still preclude recovery, retaining a limitation to economic loss.⁵⁰ But in recent years a growing number of states have extended recovery to designated beneficiaries (limited again to dependent close family relations).⁵¹ But notably, the more arbitrary limitations imposed in NIED cases – zone of danger, direct observance, in some states, physical consequences (let alone, the restrictive IIED standard of extreme and outrageous conduct) – have no counterpart in these protracted loss of companionship scenarios.

What of toxic exposure claims? Categorical denial of recovery can be seen as a notable exception to the recognition of the special character of protracted emotional distress. And as discussed earlier, it is in my view an arguably disconcerting exception: Living with the prospect of cancer from ingestion of toxic chemicals in one's water supply strikes me as a different order of anxiety from experiencing a near-miss accident situation. Yet it is the latter that is actionable and not the former. But the protracted fear and sustained anxiety generated by toxic exposure does pose the instrumental floodgates and crushing liability

⁴⁹ Cite *Borer* (Cal.) for the narrower view; *Ferriter* (Mass.) for the broader view.

⁵⁰ Contrast New York and California wrongful death statutes.

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concerns that have systematically undercut the recognition of a duty to compensate. And critically, these concerns are not present in the consortium and wrongful death settings where protracted loss is recognized.

IV. A Final Word

Putting aside IIED, no one would argue that emotional distress is inconsequential for those who fall just short of these various recovery thresholds: Eyewitnesses to the 9/11 catastrophe; bearers of a life-threatening medical implant; unwitting victims of online character assassination; life-long friends of a wrongful death victim – and the list of the categorically excluded goes on. These are all “deserving victims.” There is no social disapproval of their claims. Rather, they are the unfortunate among us whose emotional suffering is simply overridden, in the courts (and legislatures as well) by a conception of the “greater good” achieved by precluding their claims for liability. Instrumental limitations abound, and at times normative judgments about what constitutes de minimis harm, as in the IIED cases, provide background support.

There is, in my view, no grand summation that pulls together this patchwork of duties and limitations that define the universe of compensation for emotional distress. But why should there be? This patchwork design simply mirrors the larger world of tort, which is not an orderly place.