The Anatomy of Emotional Distress Claims in Minnesota

Michael K. Steenson
Mitchell Hamline School of Law, mke.steenson@mitchellhamline.edu

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Abstract
This Article examines the right to recover damages for emotional distress in Minnesota, with emphasis on claims for negligent and intentional infliction of emotional distress. The recovery of damages for emotional distress is subject to varying and perhaps seemingly inconsistent standards. After a brief history of emotional distress law, the Article will discuss claims for emotional distress based on negligence, intentional torts, and statutory violations. These areas are examined in detail to determine the standards for the recovery of emotional harm in Minnesota and to evaluate whether the standards are applied consistently. The Article also examines the right to recover damages for emotional distress in specific contexts, including contractual disputes, professional malpractice, and business torts.

Keywords
IIED, NIED, Minnesota torts, Hubbard v. United Press International, Hubbard Standards, Defamation, zone of danger, emotional injury, negligent infliction of emotional distress, mental anguish

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THE ANATOMY OF EMOTIONAL DISTRESS CLAIMS IN MINNESOTA

MICHAEL K. STEENSON†

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† Margaret H. and James E. Kelley Professor of Tort Law, William Mitchell
   College of Law.
The right to recover damages for emotional distress is firmly established in Minnesota law.¹ In 1886, the Minnesota Supreme Court first recognized this right in *Keyes v. Minneapolis & St. Louis Railway.*² The court stated:

The mental distress and anxiety which may be proven in actions for personal injuries is confined to such as is connected with the bodily injury, and is fairly and reasonably the plain consequence of such injury. The mental anguish, like physical pain, to be taken into consideration in such cases, is confined to such as is endured by the plaintiff in consequence of a personal injury to himself.³

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1. Minnesota Jury Instruction Guide (JIG) 155 covers personal injury damages and states that damages are recoverable for “[a]ny pain, disability, (disfigurement), (embarrassment), or emotional distress experienced . . . up to the time of trial.” *Minnesota Practice, Civil Jury Instruction Guides* No. 155 at 141 (3d ed. 1986). JIG 158 also recognizes the right to recover similar damages that the injured person “is reasonably certain to experience in the future.” *Id.* No. 158, at 147.

2. 36 Minn. 290, 30 N.W. 888 (1886).

3. *Id.* at 293, 30 N.W. at 889. In *Keyes*, the plaintiff sought to recover damages caused by the defendant’s obstruction of a public highway. The plaintiff testified that his greatest anxiety in attempting to extract his horses from a barbwire obstruction was not for himself but for his wife and daughter, who were in the carriage while he attempted to free his horses. The admission of that evidence was assigned as error by the defendant following a verdict for the plaintiff. Although the court found that the evidence of the plaintiff’s anxiety for his wife and daughter should not have been
Again, in 1916, in *Patterson v. Blatti*, the Minnesota Supreme Court said that "it is well settled that in an action for personal injury, mental suffering reasonably certain to be endured in the future may be taken into account in estimating damage." The *Patterson* court also considered whether damages for emotional distress arising from a disfigurement were recoverable. The court noted that the decisions in other jurisdictions were in “hopeless conflict” as to whether “humiliation or mortification to arise in the future on account of disfigurement of a person is a proper element of damage.” However, having recognized that damages for mental suffering in a personal injury claim are recoverable, the court saw no reason to treat mental suffering consisting of humiliation or mortification differently:

The cause is in no sense uncertain. It is no more intangible or difficult of proof than is mental suffering in general. The fact that it may survive the physical pain does not seem to us decisive as long as it has its inception with the physical injury. We hold that it was proper for the court to instruct the jury that they might take into account the humiliation, if any, from permanent disfigurement of person.

Despite these unequivocal statements, many questions remain unanswered. The recovery of damages for emotional distress is subject to varying and perhaps seemingly inconsistent standards. Recovery may depend on whether a claim is based on negligence or an intentional tort. Recovery may also depend on whether the emotional distress arose from the commission of a recognized tort, a statutory violation, or forms the sole basis of the claim. Likewise, recovery in accident cases de-
pends on whether the claimant suffered physical injury, was in
the zone of danger but not injured, or was simply a bystander
who was neither injured nor threatened with physical injury.

This Article will examine the right to recover damages for
emotional distress in Minnesota, with emphasis on claims for
negligent and intentional infliction of emotional distress. Af­
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discuss claims for emotional distress based on negligence, in­
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emotional harm in Minnesota and to evaluate whether the
standards are applied consistently. The Article also examines
the right to recover damages for emotional distress in specific
contexts, including contractual disputes, professional malprac­
tice, and business torts.

II. NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS

In cases where the plaintiff is physically injured by the de­
fendant’s negligence, the plaintiff will clearly be entitled to re­
cover for the past and future mental anguish suffered as a
result of those injuries. Over the past one hundred years, the
primary issue in determining recovery in negligence cases has
been whether the plaintiff was in the zone of danger. A secon­
dary issue, and one that calls into question the legitimacy of
the zone of danger rule, is whether a plaintiff who neither suf­
fers nor is threatened by physical injury may recover for emo­
tional distress.

In 1892, the Minnesota Supreme Court questioned whether
emotional distress alone is a sufficient injury to justify recov­
er. In Purcell v. St. Paul City Railway,8 the plaintiff, a passenger
in one of defendant’s streetcars, alleged that she suffered “sud­
den fright and reasonable fear of immediate death or great
bodily injury” when the defendant’s street car negligently
crossed in front of a cable train.9 The shock suffered by the
plaintiff “threw her into violent convulsions, and caused ... a
miscarriage, and subsequent illness.”10 The defendant de­
murred to the complaint.

The court never reached a conclusion to its initial inquiry,

8. 48 Minn. 134, 50 N.W. 1034 (1892).
9. Id. at 137, 50 N.W. at 1034.
10. Id.
finding that the plaintiff had suffered "physical injury, as seri­
ous, certainly, as would be the breaking of an arm or a leg." ¹¹
Instead, most of the court's opinion focused on whether the
defendant's negligence was the proximate cause of the plain­
tiff's injuries:

[If] the fright was the natural consequence of—was brought
about, caused by—the circumstances of peril and alarm in
which defendant's negligence placed plaintiff, and the fright
caus ed the nervous shock and convulsions and consequent
illness, the negligence was the proximate cause of those in­
juries. That a mental condition or operation on the part of
the one injured comes between the negligence and injury
does not necessarily break the required sequence of inter­
mediate causes. . . . The defendant suggested that plain­
tiff's pregnancy rendered her more susceptible to
groundless alarm, and accounts more naturally and fairly
than defendant's negligence for the injurious consequences.
Certainly a woman in her condition has as good a right to
be carried as any one, and is entitled to at least as high a
degree of care on the part of the carrier. . . . If the recovery
of a passenger in feeble health were to be limited to what he
would have been entitled to had he been sound, then, in
case of a destruction by fire or wrecking of a railroad car
through the negligence of those in charge of it, if all the
passengers but one were able to leave it in time to escape
injury, and that one could not because sick or lame, he
could not recover at all. The suggestion mentioned would,
if carried to its logical consequences, lead to such a
conclusion. ¹²

Thus, Purcell adopted the zone of danger rule, waiving any
requirement of an actual impact to sustain the claim for mental
anguish. The Purcell court also imposed the requirement that a
physical manifestation must arise from the mental anguish. ¹³
Minnesota thus took the lead in extending a plaintiff's right to
recover in negligence actions where the emotional distress was
not accompanied by physical impact. The next two sections of
this Article analyze the zone of danger and the physical injury
requirements in more depth. Part A analyzes the zone of dan­
ger requirement; Part B analyzes the physical injury
requirement.

¹¹ Id.
¹² Id. at 138-39, 50 N.W. at 1035.
¹³ Purcell v. St. Paul City Ry., 48 Minn. 134, 137, 50 N.W. 1034 (1892).
A. The Zone of Danger Requirement

The zone of danger issue raises several questions. First, and most significant, is whether the requirement is confined only to the risk of physical injury. Second, is whether a plaintiff in the zone of danger must fear for her own safety or whether fear for the safety of another will suffice. Third, is whether the zone of danger limitation should give way to a bystander recovery rule. The fourth issue concerns the "direct victim" standard and asks whether the standard would be appropriate for some cases, even if the Minnesota Supreme Court continues to adhere to the zone of danger rule. This section examines the zone of danger requirement as it has been applied by the Minnesota courts.

1. The Zone of Physical Danger?

In 1969, in Okrina v. Midwestern Corp.,14 the Minnesota Supreme Court adhered to the Purcell rule but expressed concern about compensating a person whose injuries are "the result of unusual sensitivity or susceptibility to shock."15 The plaintiff in Okrina was almost hit when a wall collapsed near a construction site. Immediately prior to the collapse, she heard what sounded like a bomb. Having witnessed the fall of the wall, the plaintiff thought the entire building would collapse. Although she escaped without being hit by any of the debris, the plaintiff "became sick and numb" immediately after the accident and was hospitalized for five days.16 Afterward, she had chronic pain in her head, back, and leg. Her personality changed. Her doctor attributed her condition to the emotional shock caused by the wall collapse.17

The defendant argued that the plaintiff's injury could not have been reasonably foreseen. The court replied, however, that "foreseeability is a test of negligence and not of damages. If a defendant can foresee some harm to one to whom he owes a duty, the exact nature and extent of the harm need not be foreseeable to permit recovery for all of the damages proximately caused."18 Since failing to shore up the wall properly

15. Id. at 405, 165 N.W.2d at 263.
16. Id. at 403, 165 N.W.2d at 262.
17. Id.
18. Id. at 405, 165 N.W.2d at 263.
amounted to negligence, the defendant could have foreseen some risk of injury. Further, the court stated that the "defendant had a duty to foresee some harm to plaintiff by the collapse of a wall supporting a building occupied by her . . . ." The court found that it would be unusual if a person in the plaintiff’s position did not suffer severe shock from the experience. Thus, because injury was foreseeable and the defendant was negligent, the court held that the plaintiff was entitled to recover, "notwithstanding her unusual susceptibility to the consequences of her fear . . . ."  

In Stadler v. Cross, parents of a child struck by the defendants’ pickup truck alleged that they suffered emotional distress with physical symptoms, even though they were not in the zone of danger at the time their child was injured. The mother, standing only a few yards from the road, heard the screeching of the pickup truck’s brakes and turned to see her son fly through the air and hit the pavement. The father, approximately 100 yards away, heard the accident and realized when he arrived at the scene that it was his son who was hit.  

The sole issue in Stadler was whether Minnesota should extend the zone of danger rule to allow bystander recovery. The court found that long-established policy dictated adherence to the zone of danger rule:  

A person’s liability for the consequences of her or his actions cannot be unlimited. The limits imposed must be as workable, reasonable, logical, and just as possible. If the limits cannot be consistently and meaningfully applied by courts and juries, then the imposition of liability would become arbitrary and capricious. Consequently, the cause of just apportionment of the losses would suffer . . . . Under the zone-of-danger rule the courts and juries can objectively determine whether plaintiffs were within the zone of danger. Furthermore, plaintiffs can be cross-examined regarding whether their fear was for themselves or for another. None of the other proposed limitations can be as readily and consistently applied.  

The court concluded that the line-drawing problems presented

20. Id.  
21. 295 N.W.2d 552 (Minn. 1980).  
22. Id. at 553.  
23. Id. at 554.
by the bystander recovery rule could not be overcome, thus ensuring that the zone of danger rule would continue to be the law in Minnesota.\textsuperscript{24}

In 1982, the Minnesota Supreme Court refused yet another opportunity to expand the bases allowing for recovery in negligent infliction of emotional distress claims. In \textit{Langeland v. Farmers State Bank},\textsuperscript{25} plaintiff landowners lost their right to redeem their farm from mortgage foreclosure because the defendants' misinterpreted the redemption statute. The plaintiffs sought, \textit{inter alia}, to recover for negligent infliction of emotional distress.\textsuperscript{26} The defendants included Farmers State Bank, the bank's president, the bank's attorney, and one of the judgment creditors and its attorney.\textsuperscript{27}

In arguing to the court, the plaintiffs relied on a California appellate decision. In \textit{Jarchow v. Transamerica Title Insurance Co.},\textsuperscript{28} the California Court of Appeals allowed a plaintiff to recover damages for emotional distress that occurred when a title insurance company failed to discover two easements on the plaintiff's property. The title insurance company's negligence resulted in litigation expenses and financial hardship.\textsuperscript{29} The court of appeals held that "courts may adjudicate negligence claims for mental distress when sufficient guarantees of genuineness [sic] are found in the facts of the case, e.g., when the plaintiff has suffered \textit{substantial damage} apart from the alleged emotional injury."\textsuperscript{30}

The plaintiffs in \textit{Langeland} claimed that the loss of title to their farm resulted in illness, marital problems, problems in obtaining credit, and public embarrassment and humiliation for them and their children.\textsuperscript{31} Further, Gerald Langeland

\textsuperscript{24} The court noted other potential, but nondispositive, justifications for the limitation:

Other factors frequently considered in these cases but which we do not consider dispositive in light of the problems with limiting liability include the fear of a proliferation of claims, the potential for fraudulent claims, the foreseeability of the injury, and unduly burdensome liability.

\textit{Id.} at 555 n.3 (citations omitted).

\textsuperscript{25} 319 N.W.2d 26, 30 (Minn. 1982).

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} at 29.


\textsuperscript{29} \textit{Jarchow}, 122 Cal. Rptr. at 486.

\textsuperscript{30} \textit{Id.} at 484 (citation omitted).

\textsuperscript{31} \textit{Langeland}, 319 N.W.2d at 29.
claimed that he was unable to work.\textsuperscript{32} The Langelands sought neither medical advice nor counseling for their problems.\textsuperscript{33} The Minnesota Supreme Court rejected their claim:

The Langelands’ only injury beyond their claimed emotional distress is attorneys fees expended in having the certificate set aside. Were we to adopt the \textit{Jarchow} rule, it is possible that this expense could constitute “substantial damage” sufficient to sustain the additional claim for emotional distress. However, we decline to do so. We have consistently held that no cause of action exists for the negligent infliction of emotional distress absent either physical injury or physical danger to the plaintiff.\textsuperscript{34}

\textit{Leaon v. Washington County},\textsuperscript{35} decided in 1986, discussed the right to recover damages for both negligent and intentional infliction of emotional distress. In \textit{Leaon}, a Washington County deputy sheriff was humiliated at a stag party organized by four deputies. When the plaintiff arrived late at the party, six men took him to the stage and forced him to lie down with a dollar bill in his mouth. A nude dancer touched her vagina to his face and removed the dollar bill from his mouth with her hand. The plaintiff, distressed and humiliated, left the party shortly thereafter.

The incident gave rise to several claims by \textit{Leaon} and his wife, including a claim for negligent infliction of emotional distress.\textsuperscript{36} The Minnesota Supreme Court affirmed the trial court’s denial of the plaintiffs’ negligent infliction of emotional distress claim.\textsuperscript{37}

In discussing the zone of danger requirement, the court held that a plaintiff who does \textit{not} suffer a physical impact may “recover for emotional disorders if plaintiff was within the \textit{scope of danger of the negligent act} and if plaintiff exhibits physical manifestations of the emotional distress.”\textsuperscript{38} The court held that \textit{Leaon}’s spouse’s claim was barred because she was not in the zone of danger, and that \textit{Leaon}’s claim was barred because he was unable to show physical manifestations of emotional distress.

\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 32 (citations omitted).
\textsuperscript{35} 397 N.W.2d 867 (Minn. 1986).
\textsuperscript{36} Id. at 870.
\textsuperscript{37} Id. at 874.
\textsuperscript{38} Id. at 875 (emphasis added) (citations omitted).
distress.\textsuperscript{39}

The court relied on \textit{Stadler v. Cross}\textsuperscript{40} in denying the plaintiffs' claims.\textsuperscript{41} However, in \textit{Stadler}, the court had "recognized that a person \textit{within the zone of danger of physical impact} who reasonably fears for his or her own safety" would be entitled to recover for severe emotional distress, if the distress resulted in physical injury.\textsuperscript{42} Similarly, \textit{Langeland} required that the plaintiff be in "some personal \textit{physical} danger caused by the defendant's negligence" before damages for emotional distress may be awarded.\textsuperscript{43}

Accordingly, \textit{Purcell} and \textit{Langeland} view the zone of danger issue narrowly, requiring a physical element to be in the zone of danger. But the language in \textit{Leaon} has the potential to be broader, requiring the plaintiff to be in the zone of danger, not the zone of physical danger. However, \textit{Leaon} may be reconciled with \textit{Langeland} because there were personal threats to Leaon's bodily integrity from the nude dancer and the police officers who physically forced him to lie down on the stage with the dollar bill in his mouth.\textsuperscript{44} Further, Leaon's complaint included claims for false imprisonment and battery.\textsuperscript{45} On that basis, the claim for the negligent infliction of emotional distress arguably placed the plaintiff in the zone of physical danger. Thus, although the \textit{Leaon} court's description of the zone of danger requirement appears broader than \textit{Langeland}'s, in application, the court did not broaden the requirement because Leaon was arguably in the zone of physical danger. The court of appeals has adhered to the supreme court's guidelines,\textsuperscript{46} with an implied potential extension in \textit{State v. Tonka Corp.},\textsuperscript{47} for

\textsuperscript{39} \textit{Id.}
\textsuperscript{40} 295 N.W.2d 552, 553 (Minn. 1982).
\textsuperscript{41} \textit{Leaon}, 397 N.W.2d 867, 875 (Minn. 1986).
\textsuperscript{42} \textit{Stadler}, 295 N.W.2d at 553 (emphasis added).
\textsuperscript{43} \textit{Langeland} v. Farmers State Bank, 319 N.W.2d 26, 31 (Minn. 1982) (emphasis added).
\textsuperscript{44} \textit{Leaon}, 397 N.W.2d at 869.
\textsuperscript{45} \textit{Id.} at 869-70.
\textsuperscript{47} 420 N.W.2d 624 (Minn. Ct. App. 1988), review denied, (Minn. May 4, 1988).
emotional harm that results from pollution.

2. Where Emotional Harm is the Product of Fear for Another's Safety

The general rule in Minnesota requires that a plaintiff in order to recover for emotional distress must be in the zone of danger. Courts have refused to extend recovery to plaintiffs who simply fear that another will sustain injury. The requirement that emotional distress claimants fear for their own safety is based on the continued repetition of the requirements of an emotional distress claim since they were first established in Purcell.48 Although Minnesota courts have had ample opportunity to consider adopting a "bystander recovery" rule, the courts have rigidly adhered to the zone of danger rule.

In 1991, in Silberstein v. Cordie,49 the court of appeals held that the issue of whether family members were in the zone of danger when the husband and father of the family was murdered in the family home was a question for the jury.50 The case arose out of the brutal murder of Delton Silberstein by a mentally ill individual, Randy Cordie.51 Silberstein was murdered in his home when his wife and children were present in the home, but in a different room.52

50. Id. at 856-57.
51. Id. at 853.
52. Id.
Bonnie Silberstein and her two minor children were within the physical zone of danger. Though Bonnie and her children did not see the shooting, they heard the five gunshots. Moreover, during the shooting spree, Cordie, armed with the shotgun, twice entered the bedroom where Bonnie and the children were. While Cordie was in the bedroom, Bonnie testified she was "filled with terror" personally and feared for the safety of her children. Under these circumstances, questions of fact exist whether Bonnie and her children reasonably feared for their safety.53

Although not at issue in the case, whether Bonnie Silberstein feared for her own safety or that of her children should be irrelevant under the circumstances. This analysis suggests a slight modification of the Purcell rule as it has carried forward to include cases where the emotional injury in a negligence case includes claims where the claimant fears for the safety of others, if the claimant is in the zone of danger.

Application of existing Minnesota proximate cause principles could justify recovery in those cases without conflicting with the zone of danger cases such as Stadler and Purcell.

In Christianson v. Chicago, St. P., M & O. Ry.,54 the Minnesota Supreme Court formulated a direct consequences rule for resolving proximate cause issues:

What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is

53. Id. at 856-57. The court elaborated in a footnote:
Cordie's irrational conduct plainly extended the contours of the zone of danger to include the children's bedroom. During the gruesome events, Cordie told Bonnie Silberstein that her husband had killed thirty people; he also quoted scripture and tossed a Bible on her child's bed; and he said he must cut out Delton's liver to prove Delton was a woman disguised as a man. Further, Cordie told Bonnie not to be "grossed out" by the brains or "guts hanging out," that the blood was not real, that Delton would be on the street tommorrow [sic] in disguise, and that he would have to shoot him again.

Id. at 856 n.3.
54. 67 Minn. 94, 69 N.W. 640 (1896).
that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. 55

The Christianson approach has been reaffirmed many times, including in Okrina. 56 Application of this approach to cases where the claimant claims emotional distress as a result of witnessing injury to another results in the following argument:

The plaintiff was in the zone of danger. She reasonably feared for her own safety. She suffered severe emotional distress that was the product of fear for herself or the safety of a family member. The distress resulted in physical harm within the meaning of Okrina. Because emotional harm and resultant physical injury were foreseeable under the circumstances, it is irrelevant if the defendant was unable to foresee the exact manner of occurrence.

This result has some support in case law, including the 1923 English case of Hambrook v. Stokes Brothers. 57 In Hambrook, the court said:

[W]hat a man ought to have anticipated is material when considering the extent of his duty. . . . [T]he defendant ought to have anticipated that if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health. Can any real distinction be drawn from the point of view of what the defendant ought to have anticipated and what, therefore, his duty was, between that case and the case of a woman whose fear is for her child, and not for herself? Take a case in point as a test. Assume two mothers crossing this street at the same time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to her child,

55. Id. at 97, 69 N.W. at 641.
57. 1 K.B. 141 (1925).
and not at all about herself. The other woman is timid and lacking in the motherly instinct. She also is terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any distinction be drawn between the two cases? Will the law recognize a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not. 58

Section 436 of the Restatement (Second) of Torts also supports recovery:

(1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

(3) The rule stated in subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence. 59

The Restatement's comments make it clear that the first subsection is applicable only in a narrow range of cases where the actor's conduct is intended or obviously likely to cause severe fright or other emotional disturbance, although it is not intended to cause the bodily harm which results from it. It applies only when the fright or emotional disturbance to which the actor intends to subject the other or to which he should realize the other is likely to be subjected, is such, because of its severe character, that a reasonable man would

58. Id. at 156 (Bankes, L.J.).
59. Restatement (Second) of Torts § 436 (1965).
realize the likelihood that it might produce harmful physical consequences . . . 60

Comment f explains paragraph (3) of section 436:
Under the rule stated in Subsection (3), that stated in Subsection (2) applies where the defendant's negligent conduct threatens bodily harm to the plaintiff through direct impact upon his person, or in some other way than through emotional disturbance, and the bodily harm is brought about instead by the plaintiff's emotional disturbance at the peril or harm of a third person. In such a case the defendant is subject to liability if the third person is a member of the plaintiff's immediate family, and the peril or harm to such a person occurs in the plaintiff's presence. In other words, the rule stated in Subsection (2) applies in such cases, even though the plaintiff's shock or fright is not due to any fear for his own safety, but to fear for the safety of his wife or child . . . 61

In summary, both the Restatement and the Minnesota proximate cause decisions support recovery under a negligence theory by a claimant who is in the zone of danger and fears for the safety of either herself or a family member.

3. A Bystander Recovery Rule for Minnesota?

In 1968, in Dillon v. Legg, 62 the California Supreme Court established guidelines for the recovery of damages by a bystander for the negligent infliction of emotional distress:

We note, first, that we deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case. In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff [mother], or in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether

60. Id. § 436 cmt. a.
61. Id. § 436 cmt. f. The illustration following comment f is drawn from Hambrook.
plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. . . .

In light of these factors the court will determine whether the accident and harm was reasonably foreseeable. Such reasonable foreseeability does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected.63

Subsequent decisions of the California Supreme Court and California Court of Appeals have expanded Dillon and relaxed the guidelines in order to avoid creating arbitrary limitations on the right to recover for the negligent infliction of emotional distress.64

But the California courts' loose application of the Dillon guidelines prompted the California Supreme Court, in Thing v. La Chusa,65 to limit the right of a bystander to recover for negligent infliction of emotional distress by solidifying the factors that were only guidelines in Dillon:

We conclude, therefore, that a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.66

In one sense, La Chusa answers criticisms of the bystander recovery rule. The La Chusa court established rigid limitations on the right of a bystander to recover for emotional harm and created a rule that is easier to administer than one that simply uses the Dillon factors as "guidelines." Any court considering

63. Id. at 920-21.
64. For a discussion of the post-Dillon expansions, see Thing v. La Chusa, 771 P.2d 814, 821-25 (Cal. 1989).
66. Id. at 829-30.
the bystander recovery rule profits from the California courts' past experience in applying the bystander recovery rule.

In another sense, the rule adopted in *La Chusa* establishes yet another set of guidelines that will permit recovery in some bystander recovery cases but deny recovery in many others where the injury is as serious. For example, the limitation on recovery to plaintiffs who are closely related to the victim will foreclose recovery by any person who suffers serious emotional harm but is not in a state-sanctioned relationship. The rule adopted by the court in *La Chusa* is a two-edged sword, permitting recovery in some cases, but arbitrarily denying it in others. The rule raises questions of fundamental fairness in the development and application of common law rules and necessitates an answer to the question of whether the rule should be extended to permit bystander recovery if the rule can only be applied arbitrarily.

Irrespective of the position the Minnesota Supreme Court will ultimately take on the bystander recovery issue, a question remains as to whether recovery should be allowed when the plaintiff is not in the zone of danger but is a “direct victim” of negligent conduct by another and suffers emotional distress as a result of the breach.

4. **Direct Victim Recovery?**

The California Supreme Court adopted the “direct victim” theory of recovery in *Molien v. Kaiser Foundation Hospitals.* 67 Suit in *Molien* arose from an alleged negligent diagnosis of syphilis in the plaintiff’s wife. 68 The plaintiff’s wife became upset and suspected that her husband had engaged in extramarital affairs. 69 The tension and hostility that arose resulted in the breakup of their marriage. 70 The plaintiff alleged that the defendant doctors “knew or should have known their diagnosis that plaintiff’s wife had syphilis and that he might also have the disease would cause him emotional distress.” 71

While *Dillon* presented an impediment to the plaintiff’s recovery, the *Molien* court distinguished it:

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67. 616 P.2d 813 (Cal. 1980).
68. *Id.* at 814.
69. *Id.*
70. *Id.* at 814-15.
71. *Id.* at 815.
It must be remembered, however, that in *Dillon* the plaintiff sought recovery of damages she suffered as a percipient witness to the injury of a third person, and the three guidelines there noted served as a limitation on that particular cause of action. Here, by contrast, plaintiff was himself a direct victim of the assertedly negligent act. By insisting that the present facts fail to satisfy the first and second of the *Dillon* criteria, defendants urge a rote application of the guidelines to a case factually dissimilar to the bystander scenario. In so doing, they overlook our explicit statement in *Dillon* that an obligation hinging on foreseeability "must necessarily be adjudicated only upon a case-by-case basis. . . . [N]o immutable rule can establish the extent of that obligation for every circumstance in the future."

Hence the significance of *Dillon* for the present action lies not in its delineation of guidelines fashioned for resolution of the precise issue then before us; rather, we apply its general principle of foreseeability to the facts at hand, much as we have done in other cases presenting complex questions of tort liability. 72

Given the foreseeability of the harm, the court held that the defendants owed a duty to exercise care in diagnosing the plaintiff's wife's physical condition. 73 Further, in allowing recovery, the court concluded that the risk of harm to the plaintiff was reasonably foreseeable and that the defendants' tortious conduct was directed toward the plaintiff and his wife. 74 Thus, *Molien* established that, if a person suffering emotional distress is a "direct victim" of that distress, the *Dillon* guidelines are inapplicable.

Later, in *Ochoa v. Superior Court*, 75 the California Supreme Court limited the *Molien* court's "direct victim" recovery to cases where the defendant's negligence is "by its very nature directed at" the plaintiff. 76 At the same time, *Ochoa* expanded the right to recover damages for the negligent infliction of emotional distress by holding that the *Dillon* factors were only guidelines and satisfaction of the guidelines was not essential.

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73. *Id.* The court also abandoned the physical injury requirement by holding that the plaintiff was not barred from recovery because he sustained no physical injury. *Id.* at 819-21.
74. *Id.* at 817.
75. 703 P.2d 1 (Cal. 1985).
76. *Id.* at 10.
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The status of the Molien "direct victim" standard has been tenuous. In Thing v. La Chusa, the California Supreme Court expressed its reservations with the "direct victim" standard but was not presented with an occasion to directly overrule Molien.

More recently, in Burgess v. Superior Court, the court acknowledged criticism of the "direct victim" approach in Molien, including its own criticism, but nonetheless reaffirmed Molien while attempting to provide more specific guidelines for the continued application of the "direct victim" approach.

The plaintiffs in Burgess were the mother of a child delivered by her obstetrician, the child, and the child's father. The child suffered permanent brain damage and injury to his central nervous system because of oxygen deprivation during the course of the delivery, allegedly due to the negligence of the obstetrician. During the course of the litigation, the child died, allegedly from injuries sustained in the delivery. The parents subsequently instituted a wrongful death action that was consolidated with the plaintiffs' malpractice action. Adhering to La Chusa, the trial court granted the motion. The court of appeals vacated the trial court's order, holding that La Chusa was inapplicable because Burgess, the mother, was a "direct victim" under Molien.

In Burgess, the court reiterated its concern expressed in La Chusa: "foreseeability of the injury alone is not a useful 'guide-line' or a meaningful restriction on the scope" of an action for the negligent infliction of emotional distress, but the court noted that, unlike the facts in Ochoa and Molien, the plaintiff in Burgess was a "'traditional' plaintiff with a professional negligence cause of action." Thus understood, the court characterized the claim simply as "an ordinary professional malpractice claim, which seeks as an element of damage com-

77. Id. at 8.
78. 771 P.2d 814 (Cal. 1989).
80. Id. at 1202.
81. Id. at 1199.
82. Id.
83. Id.
85. Burgess, 831 P.2d at 1202.
pensation for her serious emotional distress."^86

In "direct victim" cases the plaintiff would be precluded from recovering because of inability to meet the prerequisites of *La Chusa*. The distinction is illustrated in *Burgess* in a footnote discussion of the father's claim in cases involving negligent prenatal care of his child:

We note . . . that the physician-patient relationship critical to a mother's cause of action is almost always absent in a father's claim. It, therefore, appears that a father must meet the criteria set forth in *La Chusa* if he is to state a viable claim.^87

^86. Id. at 1203. The court drew a parallel to its earlier decision in *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 770 P.2d 278 (Cal. 1989). In *Marlene F.*, the court permitted recovery of damages for emotional distress by a mother whose son was molested by a therapist who was treating both mother and son for intrafamily problems. The action of the therapist constituted a breach of a direct duty to the mother under circumstances where the emotional injury was foreseeable. *Marlene F.*, 831 P.2d at 1203. For a good discussion of *Marlene F.*, its implications, and suggestions for building on the approach in direct victim actions, see Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 U. WASH. L. REV. 1 (1992).

The *Burgess* court also confronted its own rule precluding recovery of damages for the loss of filial consortium, holding that the rule should not bar the plaintiff's claim for damages for emotional distress but that it should limit her recovery:

While some portion of Burgess' emotional distress may have arisen from her loss of Joseph's consortium, other portions of her emotional distress may have separate, distinct origins that would not subject damages for these portions of her emotional distress to a bar mandated by the policy concerns underlying the prohibition of the loss of filial consortium claim. Thus, we hold that damages arising from loss of Joseph's affection, society, companionship, love and disruption of Burgess' "normal" routine of life to care for Joseph cannot be recovered by Burgess no matter how her claim for these damages is denominated. We believe that this limitation on recovery eliminates the possibility of duplicative recovery by Burgess for damages which may be recovered by her child. We further hold to the extent, however, that Burgess's emotional distress arose from the "abnormal event" of participating in a negligent delivery and reacting to the unexpected outcome of her pregnancy with resulting "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain resulting from defendant's breach of duty, then Burgess's [sic] emotional distress is of the type for which we have previously recognized recovery should be provided and is distinguishable from the type of emotional distress for which recovery is prohibited by virtue of the policy considerations underlying the prohibition of filial consortium claims.

*Burgess*, 831 P.2d at 1208-09 (citations omitted).

^87. Id. at 1204 n.8 (citations omitted). *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992), *review denied*, (Minn. May 24, 1992), is a good example of a Minnesota case where the claim might be denied under a direct victim standard. The parents in the case sustained emotional injury and sued for intentional infliction of emotional distress. Had they sued for negligent infliction of emotional distress, they would not have met the zone of danger rules established by the Minnesota Supreme Court because they were clearly outside the zone of physical danger. The parents also would not have met the *Burgess* guidelines for the recov-
The Minnesota Supreme Court has considered exceptions to the zone of danger rule. Whether the Minnesota Supreme Court would adopt the approach suggested by the California Supreme Court in *Burgess* is unclear. In *Langeland v. Farmers State Bank*, landowners sued for losses incurred because of a mortgage foreclosure. The plaintiffs brought, *inter alia*, a negligent infliction of emotional distress claim. The court refused to follow California's lead, noting that "[w]ere we to adopt the [California] rule, it is possible that this expense could constitute 'substantial damage' sufficient to sustain the additional claim for emotional distress. However, we decline to do so."91

The supreme court opinion in *Langeland* does not appear, in effect, to completely rule out the possibility of a negligent infliction of emotional distress claim in cases other than those involving actual physical injury or the threat of injury to the plaintiff. In either, the physical disability requirement must be met.92 The problem is in defining the types of cases where negligent infliction claims will be recognized without the zone of danger requirement.

It is important to note that the California rule the Minnesota Supreme Court rejected in *Langeland* was not the rule the court formulated in *Burgess*, a rule that both permitted and limited direct victim recovery. Thus, the possibility still exists for the Minnesota Supreme Court to adopt the *Burgess* approach, even if it adheres to the basic zone of danger/physical formulation as the standard for resolving negligent infliction of emotional distress cases.

*Langeland* is arguably overinclusive insofar as it results in the denial of recovery in cases where a breach of an underlying obligation owed by the defendant to the claimant, unless the claimant is able to establish that she is in the zone of danger or suffers physical injury. That means that, in any case where the

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88. 319 N.W.2d 26 (Minn. 1982).
89. *Id.* at 28-29.
90. *Id.* at 31.
91. *Id.* at 32.
92. *Langeland*, 319 N.W.2d at 32.
primary harm suffered is economic harm, there cannot be recovery for emotional distress unless the claimant establishes the zone of danger requirements or the elements of a section 46 claim. Yet, there may be a variety of cases where the defendant has acted negligently and caused emotional injury to the claimant but has caused no physical harm. Putting aside the requirement that physical injury arise out of the emotional distress for the moment, rigid adherence to the zone of danger rules will prohibit recovery even in situations where the defendant owes a duty to the plaintiff and has breached that duty. A broader rule in the "direct victim" cases, such as Burgess, would permit Minnesota courts to analyze the issue of whether recovery should be granted by using the same policy factors used to analyze duty cases in general.

B. The Physical Injury Requirement

In analyzing the physical injury requirement of negligent infliction of emotional distress claims, two questions arise: (1) How should the standard be applied after Purcell; and (2) Is the requirement still reasonable in light of its abandonment in other jurisdictions.

The Minnesota Supreme Court's 1980 decision in Stadler seemed to change the physical injury requirement. Even though the court adhered to the zone of danger requirement, the court stated, "[w]e have recognized that a person within the zone of danger of physical impact who reasonably fears for his or her own safety and who consequently suffers severe emotional distress with resultant physical injury may recover." Thus, the court appeared to add a requirement of "severe emotional distress" to the equation, an element that neither Purcell nor Okrina appear to have required.

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94. See infra Part IIIA.
95. See, e.g., Erickson v. Curtis Inv. Co., 447 N.W.2d 165 (Minn. 1989) (holding that a commercial parking ramp owner-operator owes a duty to its customers to protect them from criminal assaults, based on existence of a special relationship); Madsen v. Park Nicollet Medical Ctr., 414 N.W.2d 399 (Minn. 1987) (refusing to extend right to recover under informed consent theory to genetic counseling cases and limiting the informed consent rule to cases where the plaintiff's physical integrity is violated); Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982) (denying recovery for loss of parental consortium).
96. Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980).
97. Id. at 553.
While the difference in the court's language could be merely semantics, the *Stadler* decision could command greater weight, particularly in cases where the emotional injury appears to be minor but the physical consequences are substantial. Perhaps it is fair to say that, in any situation where there are physical manifestations of the emotional injury, the emotional injury will undoubtedly be deemed severe.

The severe emotional distress requirement was applied in *Leaon*, where the plaintiff was subjected to ridicule and humiliation at a stag party but was barred from asserting a claim for the negligent infliction of emotional distress:

> Here the trial court ruled that Donald Leaon failed to show physical manifestations of emotional distress. . . . Donald Leaon testified he lost weight (later regained), became depressed, and exhibited feelings of anger, fear, and bitterness. These symptoms do not satisfy the physical manifestations test, a test designed to assure the genuineness of the alleged emotional distress.

The *Leaon* court contrasted the Minnesota Court of Appeals decision in *Quill v. Trans-World Airlines, Inc.* In *Quill*, the plaintiff suffered emotional distress when the commercial airplane in which he was riding suddenly rolled over and plunged downward, at just below the speed of sound, in a tailspin that lasted forty seconds. Five seconds before impact, the pilot managed to pull the airplane out of the tailspin. The G force on the plaintiff was so strong that he was unable to reach the oxygen mask above his head. The noise was extremely loud. After the pilot pulled the airplane out of the tailspin the plane continued to shake for the next forty minutes. The crew advised the passengers on emergency landing procedures.

The court of appeals in *Quill* recognized that the Minnesota cases did not answer the narrower question of how severely the

100. Leaon v. Washington County, 397 N.W.2d 867 (Minn. 1986).
101. *Id.* at 875.
103. *Id.* at 440.
104. *Id.*
105. *Id.*
106. *Id.*
emotional distress must physically manifest itself before recovery will be allowed.\textsuperscript{108} The court decided that the standards applicable to the intentional infliction of emotional distress cause\textsuperscript{109} of action were inapplicable to a claim for negligent infliction of emotional distress:

First, the supreme court did not state the independent tort of intentional infliction of emotional distress displaced all other torts in which damages for emotional distress had been allowed. Second, [recent cases] refer to physical symptoms without suggesting plaintiffs must meet the high threshold [for intentional infliction of emotional distress claims]. Minnesota law has long separated the two emotional distress torts, not recognizing one until 90 years after adopting the other. We see little basis for borrowing an element from one to add to the other, particularly when the zone of danger rule provides an indicia of genuineness the intentional tort requirements lack.\textsuperscript{110}

The court then considered whether the plaintiff met the physical injury or symptom requirement for negligent infliction claims. The court noted a lack of consistency on the issue and that some jurisdictions, such as California, have abandoned the requirement.\textsuperscript{111} Notwithstanding the presence of real physical injury or symptoms, the court concluded that recovery should be allowed:

Although plaintiff's symptoms are less severe than those in Okrina and Purcell, we hold under the circumstances of this case that he has stated a prima facie case. The trial court upheld the jury's verdict finding that the "unique nature of the accident in this case [resolves] all doubts of the genuineness of the claim."\textsuperscript{112}

The court concluded that the unusually disturbing experience suffered by the plaintiff, along with the physical symptoms, which consist of anxiety in about half of the flights he takes, manifested by physical problems, including "adrenaline surges, sweaty hands, elevated pulse and blood pressure"\textsuperscript{113}

\textsuperscript{108} Id. at 442.
\textsuperscript{109} For a detailed discussion of intentional infliction of emotional distress, see infra Part III.
\textsuperscript{110} Quill, 361 N.W.2d at 443.
\textsuperscript{111} Id.
\textsuperscript{113} Id. at 441.
establish that his claim was real.114 "The nature of that experience guarantees plaintiff suffered severe emotional distress during the descent and the emergency detour to Detroit."115

Thus, the court justified its holding in *Quill*, not because of the seriousness of the physical manifestations but because of the surrounding circumstances. To the court, the surrounding circumstances provided strong evidence that the claim was genuine, even though the plaintiff's physical manifestations did not appear to rise to the level of the physical harm as in *Purcell, Okrina*, or *Leaon*. Accordingly, the reference to *Quill* in *Leaon* raises a question concerning the continuing legitimacy of the physical manifestation requirement.

The more recent court of appeals decision of *Silberstein v. Cordie* raised the same issue.116 In *Silberstein*, the family members, who survived the murder of the family father while they were in an adjacent room from where the murder took place, all alleged varying degrees of emotional distress:

After her husband's killing, Bonnie Silberstein experienced insomnia, loss of appetite, headaches and muscle tension for several months. Presently, she still is fearful about being alone and loud noises elevate her pulse and fill her with a "sense of dread." After the incident Bonnie's daughter required medical treatment for abdominal pain and constipation, started biting her nails and developed highly sensitive skin. Bonnie's son experienced blurred vision, dizziness and stomach problems. He also has become afraid of the dark. These symptoms plainly raise fact issues as to the manifestation of physical injury.117

The *Silberstein* court cited *Quill* to support its conclusion that the emotional distress claim could survive a motion for summary judgment.118 Even where the symptoms appear to constitute less than the "physical disability" initially required by *Purcell* and *Okrina*, the court concluded that the surrounding circumstances in both *Quill* and *Silberstein* legitimized the plaintiffs' claims for emotional distress. In *Silberstein*, the family members heard five shots from a shotgun and the murderer, while carrying the shotgun, twice entered the bedroom where

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114. Id. at 443.
115. Id.
117. Id. at 857.
118. Id.
the other family members were.\textsuperscript{119} The facts not only confirm the argument that the family members were within the zone of danger but also that the emotional distress suffered was real.

Taken together, Quill and Silberstein may provide the bridge from the physical disability requirement to a rule allowing recovery for emotional distress absent physical injury, so long as the surrounding circumstances provide proof of the emotional distress. Failure to recognize the court’s shift in focus makes these two decisions difficult to explain. At the very least, the cases raise questions concerning the value of the physical injury requirement as the primary means of determining whether a claim for negligently inflicted emotional distress is legitimate.

The California Supreme Court has also considered the continuing validity of its “nervous shock rule,” the counterpart to Minnesota’s physical manifestation rule. In Molien v. Kaiser Foundation Hospitals,\textsuperscript{120} the court stated that “if a plaintiff has suffered a shock to the nervous system or other physical harm which was proximately caused by negligent conduct of a defendant, then such plaintiff is entitled to recover damages from such a defendant for any resulting physical harm and emotional distress.”\textsuperscript{121} Prior to Molien, California did not permit recovery of damages for emotional distress absent physical injury if the emotional distress arose from negligence.

California’s nervous shock rule derived from Sloane v. Southern California Railway,\textsuperscript{122} an 1896 California Supreme Court case. The Molien court also noted that the rule apparently “has been immutable since its early origin, with virtually no regard for the factual contexts in which claims arose, or the alleged causes of emotional distress, or the prevailing state of medical knowledge.”\textsuperscript{123}

The Molien court had several problems with the physical injury requirement. First, the court concluded that the requirement was both underinclusive and overinclusive in light of the purpose for the requirement. If screening false claims is the basis for the requirement, the rule is underinclusive because it

\textsuperscript{119} Id. at 853.
\textsuperscript{120} 616 P.2d 813 (Cal. 1980).
\textsuperscript{121} Id. at 818 (citations omitted).
\textsuperscript{122} 44 P. 320 (Cal. 1896).
\textsuperscript{123} Molien, 616 P.2d at 818.
screens out claims that might otherwise be valid even without proof of physical injury. The rule is also overinclusive by permitting claims where the injury is minor or trivial.\textsuperscript{124} Second, the \textit{Molien} court found that the nervous shock requirement "encourages extravagant pleading and distorted testimony."\textsuperscript{125} And, third, the court could not discern a clear distinction between physical injury and emotional injury.\textsuperscript{126}

In conclusion, the \textit{Molien} court determined that the distinction between physical and psychological injury was a false issue:

The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme. We thus agree with the view of the Rodrigues court: "In cases other than where proof of mental distress is of a medically significant nature, the general standards of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case. This standard is not as difficult to apply as it may seem in the abstract. As Justice Traynor explained in this court's unanimous opinion in \textit{State Rubbish Collectors Ass'n v. Siliznoff}, . . . the jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience. In addition, there will doubtless be circumstances in which the alleged emotional injury is susceptible of objective ascertainment by expert medical testimony. . . . To repeat: this is a matter of proof to be presented to the trier of fact.\textsuperscript{127}

The Minnesota Court of Appeals has already indicated a weakening of the physical manifestation requirement in its \textit{Quill} and \textit{Silberstein} opinions. Likewise, the Minnesota Supreme Court could readily justify abandoning the physical manifestation requirement based on the policy reasons that justified the departure in \textit{Molien}.

\section{III. Intentional Infliction of Emotional Distress}

In 1983, in \textit{Hubbard v. United Press International, Inc.},\textsuperscript{128} the

\begin{itemize}
  \item \textsuperscript{124} \textit{Id.} at 820.
  \item \textsuperscript{125} \textit{Molien v. Kaiser Found. Hosp.}, 616 P.2d 813, 820 (Cal. 1980).
  \item \textsuperscript{126} \textit{Id.}
  \item \textsuperscript{127} \textit{Id.} at 821 (citing Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970); \textit{State Rubbish Collectors Ass'n v. Siliznoff}, 240 P.2d 282 (Cal. 1952) (citations omitted).
  \item \textsuperscript{128} 330 N.W.2d 428, 438 (Minn. 1983).
\end{itemize}
Minnesota Supreme Court adopted the tort of intentional infliction of emotional distress as a separate and independent tort. Prior to *Hubbard*, Minnesota allowed recovery of damages for emotional distress in situations where the plaintiff was not specifically threatened with physical injury but nonetheless suffered emotional distress as a result of intentional action taken by the tortfeasor. This section provides a brief history of judicial treatment of emotional distress claims prior to *Hubbard*, a more detailed explanation of the supreme court's adoption of the tort of intentional infliction of emotional distress in that case, and an examination of some of the cases that have followed *Hubbard*. These subsequent cases illustrate the appellate courts' punctilious adherence to its guidelines. Finally, this section will analyze the legitimacy of the rigid guidelines the courts have applied in thwarting intentional infliction of emotional distress claims.

A. Judicial Treatment of Intentional Infliction of Emotional Distress pre-*Hubbard*: A Short History

Prior to *Hubbard*, the supreme court historically treated emotional distress claims sympathetically. Yet, the court's willingness to countenance emotional distress claims was balanced by carefully maintained limitations on the right to recover.129 In *Lesch v. Great Northern Railway Co.*,130 the plaintiff suffered emotional distress as a result of the defendant's trespass and search of her personal property. The trespass and search were committed by two employees of the railroad, who were searching for railroad property.131 The plaintiff's husband was an employee of the railroad. The defendant's employees entered her yard and house, without permission. The plaintiff watched the two men as they walked from room to room and looked through a trunk and some boxes. The men did not make any threats or engage in any acts of violence, and the facts

129. See *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926). The *Johnson* court noted:

[T]here is always a possibility of trumped-up claims if there may be a recovery when no evidence of bodily injury can be discovered immediately. However, the matter is in the control of the trial courts and verdicts for plaintiffs for any substantial amounts, when based chiefly on proof of subjective symptoms, will not usually be allowed to stand.

*Id.* at 207, 208 N.W. at 816.

130. 97 Minn. 503, 106 N.W. 955 (1906).

131. *Id.* at 505, 106 N.W. at 956.
presented indicate that the men had no intent to cause the plaintiff injury or to interfere in any way with her person.\textsuperscript{132}

The court described the plaintiff’s emotional state as follows:

She was frightened by their acts, and immediately after they left she became sick, feverish, her head ached, she trembled, and had spells of vomiting. She was obliged to go to bed, and was confined to her bed most of the time for about two weeks, and was not well for a considerable time afterwards.\textsuperscript{133}

The defendant argued that the plaintiff was not entitled to recover because there was no indication that the fright was the result of any legal wrong committed against her.\textsuperscript{134}

With no differentiation in principle between cases involving negligent and intentional conduct, the court held that, in order to recover for fright, the fright must be “the proximate result of a legal wrong against the plaintiff by the defendant.”\textsuperscript{135} The court found that the plaintiff had established the necessary “legal wrong” in two ways: First, the defendant’s employees interfered with the plaintiff’s peaceful enjoyment of her home, in which she had an interest, even though her husband held legal title to the house. Second, the defendant’s employees interfered with the plaintiff’s clothing. The court concluded that the evidence was sufficient to justify a finding that the employees had committed a tort against the plaintiff.\textsuperscript{136}

The defendant also argued that the plaintiff’s fright and illness were not proximately caused by the two employees.\textsuperscript{137} Again, the court disagreed:

It is a matter of common knowledge that fright may, and often does, affect the nervous system to such an extent as to cause physical pain and serious bodily injury. The acts complained of in this case were, if committed, an outrageous invasion of the sanctity of the home and the constitutional rights of the citizen, well calculated to frighten the wife and mother left alone in charge of her home. Whether she was frightened by such acts, and whether her illness, which im-

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\textsuperscript{132} \textit{Id.}
\textsuperscript{133} 97 Minn. at 505-06, 106 N.W. at 956-57.
\textsuperscript{134} \textit{Id.} at 506, 106 N.W. at 957.
\textsuperscript{135} Lesch v. Great N. Ry., 97 Minn. 503, 106 N.W. 955 (1906).
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
mediately followed, was the proximate result of such acts, were questions of fact for the jury.\textsuperscript{138}

In 1926, in \textit{Johnson v. Sampson},\textsuperscript{139} the plaintiff, a fifteen-year-old high school girl, alleged that the defendants came to her schoolhouse, took her into a separate room, and questioned her about her sexual activities.\textsuperscript{140} The defendants accused her of having sexual intercourse with various men, which she truthfully denied.\textsuperscript{141} Additionally, the defendants told the fifteen-year-old that if she did not confess, she would be sent to reform school. She alleged that she suffered great mental anguish as a result of their actions and received a nervous shock that permanently impaired her health.\textsuperscript{142}

Further, the plaintiff alleged that the facts made out a claim for assault, but the supreme court found the assault claim untenable, since there was no threat of physical violence. However, the court concluded that the complaint stated a cause of action for damages involving the wrongful "invasion of plaintiff's legal right."\textsuperscript{143}

Citing an earlier opinion,\textsuperscript{144} the \textit{Sampson} court stated that the law will not permit recovery for a wrong unless the act had an effect upon the plaintiff's person, property, or other legal interest.\textsuperscript{145} However, the \textit{Sampson} court also recognized that "wherever there is a wrongful act which infringes on a legal right, even though no physical harm was done or threatened, there may be a recovery, if mental suffering was a proximate result of the act."\textsuperscript{146}

The court in \textit{Sampson} distinguished cases involving negligent infliction of emotional distress, where fright was the only consequence, stating that "in such cases there is no element of wilful [sic] wrong."\textsuperscript{147} The court concluded that a willful wrong should lead to recovery:

On the whole we see no good reason why a wrongful invasion of a legal right, causing an injury to the body or mind

\begin{footnotes}
\item[138] \textit{Id.} at 506-07, 106 N.W. at 957.
\item[139] 167 Minn. 203, 208 N.W. 814 (1926).
\item[140] \textit{Id.} at 204, 208 N.W. at 815.
\item[141] \textit{Id.}
\item[142] \textit{Id.}
\item[143] \textit{Id.} at 207, 208 N.W. at 816.
\item[144] Larson v. Chase, 47 Minn. 307, 311, 50 N.W. 298, 299 (1891).
\item[145] Johnson v. Sampson, 167 Minn. 203, 205, 208 N.W. 814, 815 (1926).
\item[146] \textit{Id.} (citation omitted).
\item[147] \textit{Id.} at 206, 208 N.W. at 815.
\end{footnotes}
which reputable physicians recognize and can trace with reasonable certainty to the act as its true cause, should not give rise to a right of action against the wrongdoer, although there was no visible hurt at the time of the act complained of. Of course, there is always a possibility of trumped-up claims if there may be a recovery when no evidence of bodily injury can be discovered immediately. However, the matter is in the control of the trial courts, and verdicts for plaintiffs for any substantial amounts, when based chiefly on proof of subjective symptoms, will not usually be allowed to stand.\footnote{148}

Thus, the court concluded that the defendants violated a statutory prohibition against accusations of fornication and invaded the plaintiff's "legal right to be secure in her reputation for virtue. . . ."\footnote{149}

Assuming the facts to be true, the plaintiff stated a claim not only for slander but also for the intentional and wrongful acts of the defendants that resulted in both physical injury and mental suffering. In addition, the surrounding circumstances made it likely that a person in the plaintiff's position would be shocked and would suffer some degree of emotional harm and "would be likely to do harm to her nervous system."\footnote{150} The court found the defendants intended to harm the plaintiff.\footnote{151}

In Schuh v. Prudential Insurance Co. of America,\footnote{152} the United States District Court for the District of Minnesota foreshadowed the Minnesota Supreme Court's opinion in Hubbard. Schuh involved a workplace harassment claim. The plaintiff alleged that his employer attempted to terminate him in order to cancel the plaintiff's insurance benefits before he became permanently disabled. The plaintiff alleged that he suffered severe mental anguish and nervous disability as a result of the defendant's actions.\footnote{153}

The court found that the defendant did not intentionally cause the plaintiff's mental or physical breakdown nor did it intend to aggravate the plaintiff's condition.\footnote{154}

\footnotesize
\begin{itemize}
\item[148.] Id. at 207, 208 N.W. at 816.
\item[149.] Id.
\item[150.] Johnson v. Sampson, 167 Minn. 203, 208, 208 N.W. 814, 816 (1926).
\item[151.] Id.
\item[152.] 96 F. Supp. 400 (D. Minn. 1950).
\item[153.] Id. at 401-02.
\item[154.] Id. at 402.
\end{itemize}
court found no threatened physical injury to the plaintiff.\textsuperscript{155} The district court concluded that any aggravation of plaintiff’s health by the defendant’s conduct was necessarily a result of the plaintiff’s worrying or concern, which in turn caused the plaintiff’s breakdown.\textsuperscript{156}

The district court recognized prevailing Minnesota law, which disallowed recovery for fright resulting in physical injuries “in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant.”\textsuperscript{157} In the absence of a clear interpretation of the “legal wrong” requirement by Minnesota courts, the district court interpreted the phrase to mean “the invasion of some legal right of another.”\textsuperscript{158}

The \textit{Schuh} court concluded that the plaintiff failed to establish a legal wrong. Absent a showing that the defendant intentionally caused the plaintiff’s mental breakdown or a showing that the defendant should have known his conduct created an unreasonable risk that distress would occur and result in illness or bodily harm,\textsuperscript{159} the plaintiff could not recover.

In 1979, in \textit{Haagenson v. National Farmers Union Property & Casualty Co.},\textsuperscript{160} the Minnesota Supreme Court presaged its opinion in \textit{Hubbard}. \textit{Haagenson} involved an insurer’s failure to pay no-fault benefits. The court appeared to intimate that the tort of intentional infliction of emotional distress would be an independent tort, given appropriate facts; however, the court stopped short of adopting intentional infliction of emotional distress as an independent tort.\textsuperscript{161}

\section{B. Hubbard v. United Press International: Minnesota’s New Tort}

Finally, in 1983, the Minnesota Supreme Court adopted the tort of intentional infliction of emotional distress as a separate and independent tort.\textsuperscript{162} In \textit{Hubbard v. United Press Interna-}

\begin{footnotesize}
\begin{enumerate}
\item[155.] Id.
\item[156.] Id.
\item[158.] Id.
\item[159.] Id.
\item[160.] 277 N.W.2d 649 (Minn. 1979).
\item[161.] Id. at 652.
\item[162.] Id. at 653.
\end{enumerate}
\end{footnotesize}
ational, a discharged employee brought claims of retaliatory discharge, discrimination, and intentional infliction of emotional distress. Although the supreme court adopted the tort of intentional infliction of emotional distress, the court denied relief, holding that the evidence was insufficient to sustain the plaintiff’s recovery under the newly adopted tort.

1. Basis for Intentional Infliction of Emotional Distress

As the basic formulation for the tort of intentional infliction of emotional distress, the court adopted section 46 of the Restatement (Second) of Torts. Section 46 provides that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”

Against the backdrop of its conservative common law approach to damages for emotional distress, the Hubbard court noted:

Hubbard’s argument that his independent claim for intentional infliction of emotional distress should be given full recognition raises the issue of whether contemporaneous physical injury or the allegation of malicious conduct sufficient to constitute an underlying tort is critical to that claim or whether a claim of intentional infliction of emotional distress can stand alone as a separate cause of action. Our past reluctance to provide a direct remedy through the recognition of an independent tort reflects a policy consideration that an independent claim of mental anguish is speculative and so likely to lead to fictitious allegations that there is a considerable potential for abuse of the judicial process. Although our support of the policy of protecting the judicial process from trivial and speculative claims by restricting tort recoveries for mental distress is undiminished, we no longer feel that a rule requiring physical injury or an underlying tort is the most effective way to promote this policy. Rather, it is the view of this court that the problems inherent in allowing recoveries for mental and emotional disturbances can be more clearly and adequately addressed if

163. 330 N.W.2d 428 (Minn. 1983).
164. Id. at 430.
165. Id. at 438-39.
166. Id. at 439.
167. Restatement (Second) of Torts § 46(1) (1965).
intentional infliction of emotional distress is recognized as a separate and independent tort. Accordingly, we believe it is appropriate to recognize it in Minnesota at this time. 168

2. Elements of Intentional Infliction of Emotional Distress

The court established four elements that the plaintiff must prove in order to prevail in an intentional infliction of emotional distress claim: “(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe.” 169

The Hubbard court defined “extreme and outrageous” to mean that the conduct has to be “so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.” 170 In addition, “severe emotional distress” requires distress that “is so severe that no reasonable [person] could be expected to endure it.” 171

The court clearly expressed its intent to circumscribe the new tort’s role in Minnesota tort law:

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168. Hubbard v. United Press Int’l, 330 N.W.2d 428, 438 (Minn. 1983). The court specifically noted that it did not adopt subsection (2) of section 46, which deals with the right of bystanders to recovery for the intentional or reckless infliction of emotional distress. Id. at 439 n.8.

Restatement (Second) of Torts § 46(2) (1965) provides:
Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.

Id.

Given the fact that the court requires some physical manifestation of the emotional distress in all cases, it seems clear that a claimant would be entitled to recover for that physical manifestation, or bodily harm, under the Minnesota formulation, even if the language of subsection (2) is not specifically adopted. The theory of bystander recovery in subsection (2) should not conflict with Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980), because the defendant’s conduct must be intentional or reckless, rather than simply negligent, in order for the claimant to be entitled to recover. The right to recover for emotional distress under either subsection (1) or (2) does not in any event depend on whether the claimant is in the zone of danger. That concept is not a necessary condition to the imposition of liability under § 46.


170. Id. at 439 (quoting Haagenson v. National Farmers Union Property and Casualty Co., 277 N.W.2d 648, 652 n.3 (Minn. 1979) (citing Restatement (Second) of Torts § 46 cmt. d (1965)).

171. 330 N.W.2d at 439 (citing Restatement (Second) of Torts § 46 cmt. j (1965)).
In explaining both the extreme nature of the conduct necessary to invoke this tort, and the necessary degree of severity of the consequent mental distress, the Restatement’s commentary emphasizes the limited scope of this cause of action, and clearly reflects a strong policy to prevent fictitious and speculative claims. Because this policy has long been a central feature of Minnesota law on the availability of damages for mental distress, our adoption of the Restatement formulation as the standard for the independent tort of intentional infliction of emotional distress does not signal an appreciable expansion in the scope of conduct actionable under this theory of recovery. The operation of this tort is sharply limited to cases involving particularly egregious facts.172

3. Standards for Measuring Intentional Infliction of Emotional Distress

The facts in Hubbard provided a basis for the supreme court’s denial of the claim for intentional infliction of emotional distress. They also established a standard against which subsequent claims for emotional distress have been measured and routinely denied. The plaintiff’s claim failed both because the defendant’s conduct was not deemed extreme and outrageous and because the emotional distress was not severe enough.173 In Hubbard, the plaintiff was disciplined by his employer, both verbally and in writing. In reviewing all the actions of the employer, the court concluded that as a matter of law, the employer’s actions were neither extreme nor outrageous. Additionally, the court found that the employer’s actions did not rise to the level of conduct that is “utterly intolerable in a civilized community.”174 Lacking proof of these two elements, the court also concluded that the evidence of emotional distress was insufficient to sustain the plaintiff’s claim:

[T]he primary evidence of Hubbard’s emotional distress was his own testimony that “because of” UPI’s conduct he “had been depressed,” that he had become “physically ill in terms of throwing up, and had stomach disorders,” and that he had developed a skin rash and high blood pressure. De-

172. 330 N.W.2d at 439 (citation omitted).
174. Id. (citing Restatement (Second) of Torts § 46 cmt. d (1965)).
spite this testimony about his problems, Hubbard never missed work, never filed a claim for workers’ compensation, and never saw a doctor until June 1980, and went then only because he had the flu. Medical evidence as to Hubbard’s injuries is conspicuously absent from the record. The extent of the “injury” proven by this record does not exceed that of any employee who experiences an employer’s criticism or reproof concerning job performance. Accordingly, the jury should not have been permitted to find that the distress was so severe that no reasonable person could be expected to endure it.175

The stringent standard adopted by the court for evaluating emotional distress claims, coupled with its careful scrutiny of the record and its admonition to trial courts to do the same,176 provides trial and appellate courts with the mandate and authority to rigidly limit emotional distress claims. Courts have followed this mandate and concluded with little difficulty that recovery should be denied as a matter of law in emotional distress cases, either because the defendant’s conduct was not sufficiently extreme and outrageous177 or because the plain-

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175. Id. at 440 (citation omitted).
176. Id. at 440 n.9.
177. See, e.g., Leaon v. Washington County, 397 N.W.2d 867 (Minn. 1986). As previously discussed, the plaintiff in Leaon was humiliated at a stag party organized by four Washington County deputies. The supreme court disallowed the plaintiff’s intentional infliction of emotional distress claim. Citing the elements established in Hubbard, the court concluded:

The trier of fact could find that the incident at the stag party was outrageous and intentional, and also, perhaps, that the incident caused at least Donald Leaon severe emotional distress. As a matter of law, however, we hold that events occurring after the party do not qualify as extreme and outrageous. Id. at 873. The court of appeals took the same position in Saltou v. Dependable Ins. Co., 394 N.W.2d 629 (Minn. Ct. App. 1986). In Saltou, the insured, a veteran who suffered from a service-related nervous condition, and a mentally impaired companion with whom he was living and planned to marry, sued his insurer and its agents for wrongfully delaying payment of insurance benefits to him to cover damage to his mobile home. As a result of the delay in payment the plaintiffs claimed that they suffered both financial hardship and emotional injury. Mr. Saltou “lost weight, was put on valium, and had to go to [a crisis center] several times for emotional problems.” The plaintiffs’ suit alleged intentional infliction of emotional distress, fraud, and unfair and discriminatory insurance practices. The plaintiffs requested both compensatory and punitive damages. Id. at 631-32.

The trial court granted summary judgment on the plaintiffs’ claims. The court of appeals affirmed on two bases. First, the court held that “the failure to pay an insurance claim in itself, no matter how malicious, does not constitute a tort; it constitutes a breach of an insurance contract.” Id. at 633. Because the plaintiff is required to establish an independent tort, and the court concluded that the facts were insufficient to support the claims for fraud and intentional infliction of emotional distress. As to
tiff's emotional distress was not severe enough.  

C. Illustrative Applications of the Hubbard Standards

Much of the rigidity of the Minnesota law governing claims for the intentional infliction of emotional distress has developed in breach of contract and employment discharge cases, although that analysis has spilled over into other areas as well. This section examines illustrative cases arising in breach of contract, employment discharge, sexual abuse, and defamation cases.

1. Breach of Contract and Employment Discharge Claims

Minnesota's rigid approach to intentional infliction of emotional distress claims has also developed parallels in breach of contract claims. The court said that "[a]lthough bad faith failure to pay insurance claims is not to be encouraged, and respondents took advantage of appellants' vulnerable mental and economic condition, appellants must show more than malicious failure to pay an insurance claim in order to recover extra-contractual damages."  

Id. 178. See, e.g., Born v. Medico Life Ins. Co., 428 N.W.2d 585 (Minn. Ct. App. 1988), review denied, (Minn. Nov. 16, 1988). In Born, the wife of the deceased insured brought suit against the insurer for failure of the insurer, the insurer's agent, and a related company for failure to pay insurance benefits under the policy. Mr. Born misrepresented to the company his health condition at the time he applied for and obtained the policy coverage. When the company discovered that he had preexisting medical problems, the company rescinded the policy and provided a full premium refund, along with an explanation of the reasons for the rescission. The Borns did not cash the refund check. Two months later, they received a computer-generated letter stating that because the six-month waiting period for coverage of preexisting medical conditions had expired, Mr. Born was now covered for any preexisting medical conditions. The coverage letter was sent erroneously. Medico subsequently refused to pay any claims, arguing that the policy was null and void.

The insured's spouse, acting as personal representative of her husband's estate, brought suit against various defendants, alleging breach of contract and separate claims for negligence and waiver of forfeiture. She brought a claim on her own behalf for the intentional infliction of emotional distress.

Following a jury trial, the jury, by answer to the special verdict form, found that Medico had waived its right to rescind the policy, that all parties were causally negligent, that the plaintiff was entitled to contract damages and damages for her own pain and suffering, and that Mr. Born materially represented his health history. The trial court reduced Ms. Born's recovery by her percentage of fault, entered judgment against the defendants, and denied all post-trial motions.

On appeal, the court of appeals held that the plaintiff did not establish her claim of intentional infliction of emotional distress. The court held that there was no evidence establishing that Medico's conduct was extreme and outrageous. Because of the material representation, the company had a right to rescind. In addition, the court held that the plaintiff did not "present medical testimony to substantiate any concrete physical manifestations of physical distress."  

Id. at 590.
contract and employment discharge cases. In cases involving breach of contract claims, the non-breaching party may allege various injuries flowing from the breach. Because the contract measure of damages is typically limited, the plaintiff will generally not include damages for mental suffering.\footnote{Beaulieu v. Great N. Ry., 103 Minn. 47, 51, 114 N.W. 353, 354 (1907). The Beaulieu court noted that mental anguish, while properly an element of damages in some tort actions, is "to be considered in actions for breach of contract in exceptional cases only."} For example, in cases involving breach of an insurance contract, damages are limited to "the loss that naturally and proximately flows from the breach."\footnote{Olson v. Rugloski, 277 N.W.2d 385, 387-88 (Minn. 1979) (finding that an insurer's liability for refusal to pay benefits includes liability for lost profits that are a direct and proximate result of the breach).} In Haagenson v. National Farmers Union Property & Casualty Co., the Minnesota Supreme Court held that "in the absence of specific statutory provision . . . extra-contract damages are not recoverable for breach of contract except in exceptional cases where the breach is accompanied by an independent tort,"\footnote{277 N.W.2d 648, 652 (Minn. 1979).} and, that "[a] malicious or bad-faith motive in breaching a contract does not convert a contract action into a tort action."\footnote{Id.}

Faced with the limitations on recoverable damages imposed by contract law, the non-breaching party will typically attempt to broaden the recoverable damages by alleging various torts—e.g., defamation, intentional interference with contractual relations, or the negligent and intentional infliction of emotional distress—along with claims for punitive damages.\footnote{See, e.g., Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 1991).} These tort claims are usually not successful and reflect the courts' unwillingness to expand the historically limited remedies and damages available for breach of contract.

In employment cases, the results are the same. Claims for intentional infliction of emotional distress and defamation are increasingly common in cases where the employer discharges an employee or otherwise takes action affecting the employee's job status. Whether the claim is for defamation\footnote{Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990). In Wirig, the Minnesota Supreme Court considered the relationship between common law tort claims and claims brought under the Minnesota Human Rights Act. The plaintiff had been harassed by a co-employee on numerous occasions. The store managers were} or the inten-
tional infliction of emotional distress, the Minnesota Supreme Court has been reluctant to expand tort remedies to supplement the traditional contract remedies available to discharged employees. One of the factors that appears to be at work in cases such as Hubbard, even if not explicitly stated, is the desire to avoid that expansion. Several appellate decisions illustrate this reluctance post-Hubbard.

Cases involving contract breaches and employment discharges present difficult issues, whether the tort claims are based on defamation or intentional infliction of emotional distress, because, as the courts have recognized, every employment discharge involves some emotional distress. To avoid opening the floodgates and readily converting contract claims and employment discharges into tort claims, the court has required the plaintiff to prove distress over and above that experienced by employees who are discharged. A discharge in and of itself cannot be deemed extreme and outrageous.

However, the rigid approach to claims for the intentional infliction of emotional distress has transferred into other areas, even where the claims do not involve contract breaches or em-

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187. See Diamond Shamrock Ref. & Mktg. Co. v. Mendez, No. D-1090, 1992 WL 388116 (Tex. Dec. 31, 1992) (noting that while in some instances an employment termination may be accompanied by extreme and outrageous behavior sufficient to satisfy § 46, "there would be little left of the employment-at-will doctrine if an employer's public statement of the reason for termination was, so long as the employee disputed that reason, in and of itself some evidence" of the intentional infliction of emotional distress).
ployment discharges. Two recent cases illustrate the rigidity of the court’s approach in other areas.

2. Sexual Abuse Cases

In *Mrozka v. Archdiocese of St. Paul & Minneapolis*,188 the plaintiffs were an adult who was a child-victim of sexual abuse by a priest and the victim’s parents. The defendants were the priest’s Archdiocese and Diocese. The parents sued the Archdiocese alleging, *inter alia*, intentional infliction of emotional distress. The victim sued the Archdiocese and Diocese for negligently allowing the priest to sexually abuse him when he was a minor.189

The jury awarded the victim compensatory and punitive damages. Yet the trial court remitted the punitive damage award, a decision which was affirmed by the court of appeals. In addition, the trial court dismissed the parents’ claim for intentional infliction of emotional distress, also affirmed by the court of appeals.190

Repeating its previous characterization of intentional infliction of emotional distress as a “disfavored tort,”191 the court of appeals acknowledged that the “emotional distress suffered by the parents was significant.”192 Nonetheless, the court affirmed the trial court’s dismissal of the claim because the proof was insufficient to overcome the “high threshold standard of proof required of a complainant before [the issue] may be submitted to a jury.”193

3. Defamation

In *Strauss v. Thorne*,194 the plaintiff sued the defendant-physician and his clinic for defamation because of statements made suggesting that the plaintiff was abusing her children. The plaintiff’s suit was based on defamation and negligent and intentional infliction of emotional distress. The trial court

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189. *Id.* at 810.
190. *Id.* at 814.
192. *Mrozka*, 482 N.W.2d at 813.
granted summary judgment on all claims. The court of appeals reversed as to the defamation and negligent infliction of emotional distress claims but sustained the trial court's grant of summary judgment on the plaintiff's claim for intentional infliction of emotional distress. Noting the "high standard of proof needed for an intentional infliction of emotional distress claim," the court of appeals agreed with the trial court that the defendant-physician's conduct "could not be considered extreme or outrageous by reasonable standards." The court of appeals also agreed that the plaintiff "failed to show manifestations of severe emotional distress" as a result of the defendants' actions. The court of appeals concluded that "[g]eneral embarrassment, nervousness and depression are not in themselves a sufficient basis for a claim of intentional infliction of emotional distress."  

D. Are the Guidelines Appropriate?

While contract breaches, employment discharges, or employer discipline of an employee invariably involve emotional distress claims, the courts' reluctance to readily allow recovery in those cases is understandable. Something over and above the action that an employer typically takes in discharging an employee has to be established. But establishing the range of normal—or at least "tolerable"—conduct may be accomplished more readily in employment situations than other claims. A baseline of conduct that has to be tolerated in contract breach and employment discharge cases is easily discernible by courts. Too, a court's conclusion that an employer's conduct is not extreme and outrageous when it consists of

195. Although there was a qualified privilege, the trial court held that there was insufficient evidence of malice to take the issue of abuse to the jury. The court of appeals reversed. The trial court's grant of summary judgment on the negligent infliction of emotional distress claim was also reversed because it was supported by the defamation claim. However, the court's conclusion is questionable in light of Covey v. Detroit Lakes Printing Co., 490 N.W.2d 138, 144 (Minn. Ct. App. 1992). Emotional distress need not be established by a separate negligence theory. Rather, in Covey, it was an offshoot of the defamation claim. Negligence becomes superfluous under the circumstances.  

196. Id. at 913 (citing Lee v. Metropolitan Airport Comm'n, 428 N.W.2d 815, 823 (Minn. Ct. App. 1988)).  

197. Id. at 913.  

198. Id. at 913 (citing Eklund v. Vincent Brass & Aluminum, 351 N.W.2d 371, 379 (Minn. Ct. App. 1984), review denied, (Minn. Nov. 1, 1984)).
usual or standard practices in discharging an employee is more palatable than a bold assertion that conduct "could not be considered extreme or outrageous by reasonable standards."\textsuperscript{199}

The standard used to determine "severe emotional distress" element also presents problems. The Restatement's discussion of the "severe emotional distress" requirement is as follows:

The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed. . . .\textsuperscript{200}

In applying this standard, Minnesota cases seem to have magnified the Restatement's standard that the distress be "so severe that no reasonable person could be expected to endure it." While the \textit{Hubbard} court adopted that standard as a baseline, in application, the courts have required not only physical manifestations but also corroborating medical testimony.\textsuperscript{201}

Getting back to the basics, it seems clear that the supreme court did not intend to impose a physical injury requirement in cases involving intentional infliction of emotional distress claims. \textit{Hubbard} imposed no such requirement. \textit{Hubbard} was reaffirmed in \textit{Pikop v. Burlington Northern Railroad Co.}\textsuperscript{202} In \textit{Pikop}, the court stated that "[i]n order to recover for the inten-

\textsuperscript{199} This was the court's conclusion in Strauss v. Thorne, 490 N.W.2d 908, 913 (Minn. Ct. App. 1992).
\textsuperscript{200} \textit{RESTATEMENT (SECOND) OF TORTS} § 46 cmt. j (1965) (emphasis added).
\textsuperscript{202} 390 N.W.2d 743 (Minn. 1986).
tional infliction of emotional distress, a plaintiff need not es­
(tablish any physical injury, for the action seeks to compensate
purely emotional injuries resulting from intentional acts.”

In *Johnson v. Morris*, the plaintiff brought suit against two
police officers, a deputy sheriff, and the cities and county that
employed them. The plaintiff’s claims stemmed from his
arrest and restraint and an allegation that one of the officers
shot at the plaintiff’s truck tires after the plaintiff left the vehi-
cle. In addition to a claim for violation of his civil rights, the
plaintiff alleged common law claims of false arrest, false im-
prisonment, assault, battery, and the intentional and negligent
infliction of emotional distress. The trial court granted
summary judgment for the defendants on all claims. The
supreme court affirmed except for the assault claim.

The court noted that the intentional infliction of emotional
distress claim required the plaintiff to establish that the de-
defendants’ “conduct was extreme and outrageous, intentional
or reckless, and that it caused severe emotional distress.”
However, the court held that the plaintiff failed to “demon-
strate the level of distress needed as an element of this type of
cause of action. His ‘signs and symptoms of depression’ fall far
short of being that type of distress which ‘no reasonable man
could be expected to endure . . . .’”

In *Hubbard*, the court held that the degree of the plaintiff’s
emotional distress and supporting proof were insufficient to
justify recovery. And, although the court said that “[m]edical
evidence as to Hubbard’s injuries is conspicuously absent from
the record,” it did not impose a medical evidence requirement
as an element of the prima facie case of intentional infliction of
emotional distress.

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203. *Id.* at 754.
204. 453 N.W.2d 31 (Minn. 1990).
205. *Id.* at 32-33.
206. *Id.* at 33.
207. *Id.*
208. *Id.* at 41.
209. *Id.* (citing *Hubbard v. United Press Int’l*, 330 N.W.2d 428, 436 (Minn. 1983)).
211. The situation is analogous to the court’s position on feasible alternatives in
strict liability design defect cases in products liability litigation. In *Kallio v. Ford
Motor Co.*, 407 N.W.2d 92 (Minn. 1987), the court rejected the defendant’s argu-
ment that proof of a feasible alternative was an element of the plaintiff’s case:
Although normally evidence of a safer alternative design will be presented
initially by the plaintiff, it is not necessarily required in all cases. Such evi-
There are aberrations and some apparent confusion over the standards, however, as is to be expected in areas where the law is still being worked out. There are two good examples.

The first is *Quill v. Trans World Airlines, Inc.*, in which the court of appeals concluded that the supreme court did not intend for the *Hubbard* standard to apply in negligent infliction cases, both because the supreme court did not indicate in *Hubbard* that the requirements of intentional infliction of emotional distress were to replace other torts in which damages for emotional distress are claimed, and second, because the supreme court in recent cases such as *Langeland*, referred to "physical symptoms" without suggesting that claimants have to meet *Hubbard* standards. The court of appeals in *Quill* viewed the zone of danger rule as providing "an indicia of genuineness the intentional tort requirements lack." The court perceived the standards for intentional infliction of emotional distress to be harsher in requiring stronger proof of emotional injury than in negligence cases.

In the second decision, *M.H. v. Caritas Family Services*, the supreme court has recently indicated that the court of appeals may have been incorrect in its view of the two torts. In *Caritas*, the supreme court held that public policy does not preclude an action for negligent misrepresentation against an adoption agency that undertook to provide information concerning the genetic background of a child's genetic parents and then negligently failed to disclose information in a way that misled the adoptive parents.

The court also held that the record did not support the claim of intentional misrepresentation and that, without the claim of intentional misrepresentation, the plaintiffs' claim for emotional distress could not stand. In discussing the emotional distress claim the court said that

> *Infliction of emotional distress, whether intentional or negligent, generally requires plaintiffs to suffer a physical injury as evidence of*

\[\text{d. at 96-97 (citation omitted).}\]

\[212. 361 N.W.2d 438 (Minn. Ct. App. 1985), review denied, (Minn. Apr. 18, 1985).}\]

\[213. Quill, 361 N.W.2d at 443.}\]

\[214. 488 N.W.2d 282 (Minn. 1992).\]
their severe emotional distress. . . . Because plaintiffs have alleged no physical injury resulting from their alleged emotional distress, their motion to amend was properly denied unless they alleged a "direct invasion" of their rights by "willful, wanton, or malicious conduct. . . ." There is no evidence of such a direct invasion of plaintiffs' rights, or of willful, wanton, or malicious conduct on the part of Caritas. Plaintiffs have provided no evidence that Caritas deliberately misled them, much less wantonly did so.215

The court's statement in Caritas is inconsistent with the court's prior rejection of the physical injury requirement in Hubbard and Pikop. The court may simply have blurred the lines between physical injury arising out of emotional distress and physical manifestation of emotional distress, or the court's statement may be a reflection of the fact that the physical injury requirement from the negligent infliction of emotional distress cases is in reality the same as the physical manifestation requirement in the intentional infliction of emotional distress cases. Either way, the court's opinion is understandable. The lines may have also been blurred in the negligent infliction of emotional distress cases. While the court has framed the requirement in negligent infliction cases as a "physical injury" requirement, the court has also discussed the required proof of physical injury as a "physical manifestation" requirement. For example, in Leaon v. Washington County,216 the court upheld a trial court's dismissal of a claim for negligent infliction of emotional distress because the plaintiff "failed to show physical manifestations of emotional distress."217

If the common ground for both negligent and intentional infliction of emotional distress cases is a "physical manifestation" requirement, the decisions become easier to understand.

Whether the enhanced requirements are justifiable is a different question. The Restatement's theory is that the surrounding circumstances are the best indicator of whether the claimant has sustained severe emotional distress. In addition, the same concerns that other courts have expressed over the retention of the physical injury requirement in negligent infliction cases apply at least in part to claims for the intentional infliction of emotional distress. The questionable link between

215. Id. at 290 (emphasis added).
216. 397 N.W.2d 867 (Minn. 1986).
217. Id. at 875.
physical manifestations and emotional distress, and the potential unreliability of medical testimony linking emotional trauma to a certain occurrence should be concerns in the intentional infliction cases as well.

The greater concern is that the guidelines the supreme court has established for intentional infliction of emotional distress may have become more than guidelines, however, in application by the lower courts and court of appeals. These guidelines appear to have become "shackles." At the very least, it is arguable that the severe emotional distress requirement should not be viewed as an insurmountable requirement provable only by physical manifestations confirmed by medical evidence. Instead, scrutiny of the record to determine whether under all the circumstances the plaintiff has a legitimate claim for severe emotional distress seems more consistent with the initial guidelines established by the supreme court.

In Hubbard the court specifically noted that it did not adopt subsection (2) of section 46, which deals with the right of bystanders to recover for the intentional or reckless infliction of emotional distress.219

218. See John E. Simonett, The Use of the Term "Result-Oriented" to Characterize Appellate Decisions, 10 WM. MITCHELL L. REV. 187 (1984). Justice Simonett states in his article that "[I]legal rules are a powerful restraint on result-oriented decisions, but there must still be enough elasticity in the rules to allow for the law's evolution. The rules are guides, not shackles." Id. at 203.

219. Hubbard v. United Press Int'l, 330 N.W.2d 428, 438 (Minn. 1983). In Dornfeld v. Oberg, 491 N.W.2d 297 (Minn. Ct. App. 1992), the court was presented with a novel issue involving the right of a plaintiff to recover for emotional injury that was produced by fear for the safety of another. In Dornfeld, the plaintiff was waiting in the car while her husband of three days changed a tire on their car. A driver of another vehicle crossed the northbound lanes of the highway and hit the Dornfeld vehicle, striking Mr. Dornfeld and dragging him 200 to 230 feet down the highway, killing him. Ms. Dornfeld was thrown around the inside of the vehicle but suffered no physical injury. The driver of the other vehicle was arrested. A blood test revealed a blood alcohol content of .224. Id. at 299.

Following the accident, Ms. Dornfeld was unable to concentrate, had serious migraine headaches, had an ulcer attack, and had a flare-up of ileitis. . . . [S]he was unable to sleep, had memory problems and had nightmares, including flashbacks of the crash. She sought counseling for her problems, but her condition did not improve. Dornfeld has been diagnosed as suffering from post-traumatic stress disorder as a result of the accident. Id.

She brought suit against the driver of the other car and her underinsured motorist carrier, alleging both negligent and intentional infliction of emotional distress. The jury returned a verdict finding that the plaintiff "was in the zone of physical danger at the time of the accident, that she reasonably feared for her own safety at
Subsection (2) of the Restatement (Second) of Torts § 46 provides:

the time, but that she did not suffer severe emotional distress as a result of her fear for her own safety.” *Id.*

The jury awarded the plaintiff $230,600 in compensatory damages for the distress she suffered because she was present at the accident scene and witnessed her husband’s death. Concluding that the plaintiff had a valid claim for the intentional infliction of emotional distress, the trial court entered judgment for the plaintiff on the verdict against the driver of the other car. The court determined later that the plaintiff’s policy with American Family provided her $100,000 in underinsured motorist insurance coverage. That determination was also affirmed by the court of appeals. *Id.* at 302.

The defendants argued on appeal that permitting recovery by Dornfeld would require the court of appeals to create a new cause of action. The court of appeals disagreed, concluding that recovery “is warranted by application of an established body of Minnesota tort law.” *Id.* at 300.

The court then said that the Minnesota Supreme Court in *Hubbard* merely corrected the physical injury requirement prior Minnesota cases had imposed on persons seeking to recover for emotional distress. *Hubbard* did not limit the development of the law up to that time. Minnesota has long allowed recovery to persons within the zone of danger. Recovery was denied in *Stadler* solely because the plaintiffs were not within the zone of danger, thus implying that if the plaintiffs had been within the zone of danger, recovery would have been permitted. *Id.*

In a footnote, the court noted that the New York Court of Appeals had adopted the zone of danger rule but permitted a claim for emotional harm under similar circumstances. *Id.* at 300 n.1 (citing Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984)).

Recovery was predicated on the theory of intentional infliction of emotional distress. The potential impediment to allowing recovery under a negligence theory is the jury’s finding that the plaintiff “reasonably feared for her own safety at the time” of the accident but that she did not suffer severe emotional distress as a result of her fear for her own safety. For a discussion of the impact of negligence theory on recovery under such circumstances, see *supra* notes 119-126 and accompanying text.

*Dornfeld* thus appears to straddle two lines of cases, one permitting recovery for the plaintiff where the plaintiff’s emotional distress is fear for her own safety if she is in the zone of danger and the other denying recovery to a bystander who fears for the safety of another. In *Dornfeld*, the plaintiff’s claim does not fit squarely within either line of cases. The plaintiff is in the zone of danger, but her emotional distress is the product of fear for the safety of another. And, although the plaintiff suffers emotional distress as the result of fear for the safety of another, she is not a bystander so as to fall within the line of cases prohibiting recovery solely on that basis.

The court of appeals avoided the dilemma by applying § 46 of the Restatement (Second) of Torts. The critical issue is whether the common law should permit recovery in cases where the plaintiff is in the zone of physical danger created by a defendant’s reckless misconduct, suffers emotional distress severe enough to constitute bodily harm within the meaning of the Restatement and physical harm within the meaning of the Minnesota zone of danger cases, but where the emotional distress and physical consequences are the product of fear for the safety of her husband. Given the jury’s findings, the result could be supported either by the application of general negligence principles or by § 46 of the Restatement.

In general, § 46 provides an alternative theory of recovery in cases where the plaintiff suffers emotional distress but, because of inability to satisfy the zone of dan-
Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.220

Given that the court requires a showing of some physical manifestation of the emotional distress in all cases, it seems clear that a claimant would be entitled to recover for that physical manifestation or for bodily harm, under the Minnesota formulation, even if the language of paragraph (2) is not specifically adopted. Less clear is what position the court might take on the issue of whether a bystander should be entitled to recover under paragraph (2), without being in the zone of danger.

Section 46 applies to a person who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another and for any bodily harm that results. Where the defendant's conduct is directed at a third person, the defendant is subject to liability if the defendant “intentionally or recklessly causes severe emotional distress . . . to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or . . . to any other person who is present at the time, if such distress results in bodily harm.”

Comment i addresses the state of mind issue:

The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially cer-
tain, to result from his conduct. It applies also where he acts recklessly, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow. 221

Liability follows if the defendant acts intending to cause the severe emotional distress and where he acts “in deliberate disregard of a high degree of probability that the emotional distress will follow.”

Comment I explains the bystander recovery provision:

Where the extreme and outrageous conduct is directed at a third person, as where, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the plaintiff. In such cases the rule of this section applies. The cases thus far decided, however, have limited such liability to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred. The limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband’s murder ten years afterward may lack the guarantee of genuineness which her presence on the spot would afford. The Caveat is intended, however, to leave open the possibility of situations in which presence at the time may not be required.

Furthermore, the decided cases in which recovery has been allowed have been those in which the plaintiffs have been near relatives, or at least close associates, of the person attacked. The language of the cases is not, however, limited to such plaintiffs, and there appears to be no essential reason why a stranger who is asked for match on the street should not recover when the man who asks for it is shot down before his eyes, at least where his emotional distress results in bodily harm. 222

The right to recover for emotional distress under either paragraph in section 46 does not in any event depend on whether the claimant is in the zone of physical danger. Although the theory of bystander recovery in the second paragraph should not conflict with Stadler, because the defendant’s conduct must

221. Id. § 46 cmt. i.
222. Id. § 46 cmt. i.
be more culpable—intentional or reckless—rather than simply negligent in order for the claimant to be entitled to recover. If the difference in culpability is insufficient to justify a different treatment for bystanders who seek to recover for intentionally or recklessly inflicted emotional distress, the second paragraph will not present an advantage, unless the physical manifestation requirement is dropped.

Where the claimant seeks to establish that she is entitled to recover based not on the defendant's intent to cause severe emotional distress but rather the defendant's recklessness, the Restatement standards governing reckless misconduct have to be consulted, particularly in light of the potential paradox created by the comparison of section 46 to the sections that govern reckless misconduct.

Section 500 of the Restatement defines reckless disregard of the safety of another:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.223

Comment d covers cases involving claimants who are in the zone of danger:

If the actor's conduct is such as to involve a high degree of risk that serious harm will result from it to anyone who is within range of its effect, the fact that he knows or has reason to know that others are within such range is conclusive of the recklessness of his conduct toward them. It is not, however, necessary that the actor know that there is anyone within the area made dangerous by his conduct. It is enough that he knows that there is strong probability that others may rightfully come within such zone.224

Section 501 of the Restatement states that, subject to two exceptions covering causation225 and defenses,226 "the rules which determine the actor's liability to another for reckless dis-

\[\text{223. Id. \textsection} 500.\]
\[\text{224. Id. \textsection} 500 \text{cmt. d.}\]
\[\text{225. Id. \textsection} 501(2).\]
\[\text{226. Id. \textsection} 503.\]
regard of the other's safety are the same as those which determine his liability for negligent misconduct."227 The Restatement, therefore, funnels claims based on reckless misconduct through the usual negligence rules to determine when a defendant is subject to liability. The right to recover, therefore, still hinges on the acceptance of the Hambbrook approach in negligence cases.

The contradiction seems to exist because section 500, requires that the plaintiff be within the zone of danger, whereas section 46 does not. However, the provisions may be reconcilable because sections 500 and 501 involve cases where there is a threat of physical injury to the plaintiff, making it logical to apply negligence rules as the baseline to determine whether recovery should be allowed. Conversely, where the defendant's conduct threatens the plaintiff with serious emotional harm, it is arguable that section 46 should control, and that the plaintiff should be entitled to recover, as a bystander, without being in the zone of danger, upon establishing that the defendant acted recklessly in causing the plaintiff severe emotional distress.

IV. STATUTORY ACTIONS, TORT CLAIMS, AND WRONGFUL DEATH

Given the rigidity of the Hubbard guidelines, it is important to determine whether alternative theories of recovery may permit a claimant's recovery for emotional injury without meeting the Hubbard guidelines.

A. Statutory Actions

In cases where no underlying tort justifies an award of damages for emotional suffering, the Hubbard standards may still be circumvented where the legislature has created a statutory

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227. Restatement (Second) of Torts § 501 (1965). The two exceptions are in subsection (2) of § 501 and § 503 of the Restatement. Subsection (2) reads as follows:

(2) The fact that the actor's misconduct is in reckless disregard of another's safety rather than merely negligent is a matter to be taken into account in determining whether a jury may reasonably find that the actor's conduct bears a sufficient causal relation to another's harm to make the actor liable therefor.

Id. Section 503 governs defenses, taking the position that ordinary contributory negligence is not a defense to a claim of reckless misconduct, although the plaintiff's own reckless misconduct would be a defense.
cause of action. The statutory action may either provide directly for the award of damages for mental suffering,228 or may provide a statutory action for civil damages without mentioning damages for emotional suffering. In the latter case, the statutory action itself may be deemed the same as an underlying tort in order to justify damages for emotional suffering without meeting the Hubbard standards.

1. Minnesota Human Rights Act Claims

In cases involving discrimination or harassment in employment, an aggrieved employee may have different paths to pursue. The employee may proceed with an administrative claim of discrimination or harassment against the employer under the Minnesota Human Rights Act,229 or the employee may bring a civil claim against the employer.

The Minnesota Human Rights Act applies to discrimination or harassment based on sex, including "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when ... that conduct or communication has the purpose or effect of substantially interfering with an individual's employment ... or creating an intimidating, hostile, or offensive employment ... environment."230 The Act also applies to discrimination based on "race, color, creed, religion, national origin, ... marital status, status with regard to public assistance, membership or activity in a local commission, disability, or age."231 The Act makes it a violation for an employer "to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment."232

Damages available under the Minnesota Human Rights Act include compensatory and punitive damages. The court may also award damages for "mental anguish or suffering."233

In State v. Mower County Social Services,234 the court found that the rigid standards established by the Hubbard court in inten-

229. Id.
230. Id. § 363.01(41)(3).
231. Id. § 363.03(1)(2).
232. Id. § 363.03(1)(2)(c).
233. Id. § 363.071(2).
tional infliction of emotional distress claims do not have to be met in order for damages for "mental anguish or suffering" to be awarded under the Human Rights Act.\textsuperscript{235} The lesser standard for the award of damages for mental anguish or suffering will be justified even absent proof of the elements of the tort of intentional infliction of emotional distress.\textsuperscript{236}

The facts in \textit{Mower County} provide a good illustration of the differences in standards of recovery. The plaintiff alleged that her employer passed her over for permanent employment as a clerk-typist because of her pregnancy and marital status.\textsuperscript{237} The administrative law judge concluded that the employer had discriminated against the plaintiff and awarded her damages for backpay and medical expenses that would have been covered by insurance had she been hired. In addition, the judge awarded the plaintiff $2,000 in damages for mental anguish and suffering and $2,000 in punitive damages.\textsuperscript{238}

The administrative law judge justified the damage award by finding that the plaintiff had become "frustrated, angry and depressed" after the county rejected her application.\textsuperscript{239} The judge also noted that the county's rejection aggravated her relationship with her husband and others, and her "experience in having to ask her former co-workers for welfare was degrading."\textsuperscript{240}

The county argued that the evidence was insufficient to justify a damage award for emotional suffering under \textit{Hubbard}, which requires severe emotional distress caused by egregious circumstances. The court of appeals held that the \textit{Hubbard} standard was inapplicable:

In \textit{Hubbard}, the supreme court concluded the plaintiff could not recover damages for mental distress because the plaintiff's distress was not sufficiently severe or caused by "particularly egregious facts." \textit{Hubbard} is distinguishable on two grounds. First, the plaintiff in \textit{Hubbard} asserted an independent tort claim for intentional infliction of emotional distress in addition to his employment discrimination

\begin{itemize}
\item \textsuperscript{235} 434 N.W.2d at 499-500.
\item \textsuperscript{236} \textit{Id}.
\item \textsuperscript{237} \textit{Id.} at 496.
\item \textsuperscript{238} \textit{Id.} at 497.
\item \textsuperscript{239} State v. Mower County Social Serv., 434 N.W.2d 494, 497 (Minn. Ct. App. 1989).
\item \textsuperscript{240} \textit{Mower County}, 434 N.W.2d at 497.
\end{itemize}
claims. The claim for mental anguish in Hoy's case is based on statutory law rather than common law. Second, at the time of the Hubbard suit, the Human Rights Act did not allow damages for mental anguish or suffering. The court of appeals found substantial evidence in the record to support the findings of the administrative law judge's award of damages for mental anguish. The court emphasized the fact that the claimant was awarded $2,000 in punitive damages under circumstances where the defendant's acts showed a "willful indifference to the rights or safety of others." Based upon that finding, the court of appeals concluded that "the county's conduct was sufficiently severe to also cause Hoy compensable mental anguish and suffering."

The court of appeals, affirming the judgment, emphasized the egregious nature of the defendant's actions and deemphasized the severity of the emotional distress. A comparison of the analysis in Hubbard and Mower County illustrates that a gap exists between fact patterns that may justify a common law claim for emotional distress, on the one hand, and those that justify a claim under the Human Rights Act, on the other.

2. Polygraph Examinations

Asking a person to take a polygraph test may give rise to a claim for intentional infliction of emotional distress. In Kamrath v. Suburban National Bank, the plaintiff's employer asked her to take a polygraph test, a request that violated state law. The polygraph statute in effect at the time read: "No employer or agent thereof shall directly or indirectly solicit or require a polygraph, voice stress analysis, or any test purporting to test the honesty of any employee or prospective employee." The statute also contained a specific provision authorizing civil remedies:

In addition to the remedies otherwise provided by law, any person injured by a violation of this section may bring a civil action to recover any and all damages recoverable at law.

241. Id. at 499-500 (citation omitted).
242. Id. at 500.
243. Id.
244. 363 N.W.2d 108 (Minn. Ct. App. 1985).
together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court.246

The facts in Kamrath arose out of a police investigation of certain missing deposits from a local McDonald's restaurant. The local police asked several McDonald's employees to take a polygraph test,247 and, in addition, two of the bank's tellers who were not suspects in the case. The plaintiff was one of the tellers. The plaintiff testified that a bank vice-president asked her to take the test, telling her that she could refuse.248

Several days after she took the test, she began experiencing problems. She began to have nightmares. Family members testified that "she became more withdrawn, gained weight, and was very tired."249 The plaintiff sought neither counseling nor medical treatment for her problems.250

At her attorney's request, the plaintiff was later examined by a psychiatrist. Although initially skeptical that a polygraph test could have such a strong impact, the psychiatrist determined that the plaintiff suffered from post-traumatic stress disorder. A professor of psychiatry and psychology testified that someone with the plaintiff's strongly religious background, with a strong religious code that emphasized honesty, could react to the test more severely than an average person.251 To her, the test was an accusation of dishonesty.252

The examining psychiatrist concluded that the plaintiff had a "15% permanent emotional disability based on (1) her emotional inability to work at any job involving handling money, and (2) her increased dependence on her husband, resulting from her inability to express her feelings and develop close relationships with others."253 The jury found that the bank asked the plaintiff to take the test and that the bank's conduct directly resulted in harm to her. The jury awarded her

246. Id. § 181.75(4).
247. Kamrath, 363 N.W.2d at 110.
248. Id.
250. Id.
251. Id.
252. Id.
253. Id.
$60,000 in damages.\textsuperscript{254} The trial court in the case refused to instruct the jury on the theory of intentional infliction of emotional distress or to grant a new trial on the basis that the jury was not required to find that the elements of intentional infliction of emotional distress existed before awarding damages.\textsuperscript{255} The bank argued that, absent a physical injury, the plaintiff had to meet the Hubbard requirements in order to recover for emotional distress. The court of appeals rejected the argument:

Traditionally a plaintiff is not entitled to damages for mental distress without a physical injury unless there is some conduct constituting a direct invasion of her rights, such as slander, libel, malicious prosecution, willful, wanton or malicious misconduct. Hubbard recognizes the independent tort of intentional infliction of emotional distress and adopts elements intended to ensure that a tort actually occurred and that injury was intentionally inflicted.\textsuperscript{256} Because of the underlying statutory cause of action, the court of appeals concluded that "harm of the type Kamrath suffered, based in emotional distress, flows naturally from the act constituting the underlying tort."\textsuperscript{257}

3. Fair Debt Collection Practices Act

In \textit{Venes v. Professional Service Bureau, Inc.},\textsuperscript{258} the Minnesota Court of Appeals held that a plaintiff who was subjected to debt collection practices that violated the Federal Debt Collection Practices Act was entitled to recover damages for emotional distress.\textsuperscript{259} The plaintiffs in the case received harassing phone calls from a collection agency that was attempting to collect certain debts for the Mayo Clinic.\textsuperscript{260} The jury awarded the plaintiff $6,000 for emotional distress. On appeal, the court considered whether the evidence was sufficient to justify a finding that the defendant's conduct was extreme and outrageous.\textsuperscript{261}

\begin{footnotesize}
\textsuperscript{255} Kamrath, 363 N.W.2d at 111.
\textsuperscript{256} Id. (citations omitted).
\textsuperscript{257} Id. at 112.
\textsuperscript{258} 353 N.W.2d 671 (Minn. Ct. App. 1984).
\textsuperscript{259} Id. at 675.
\textsuperscript{260} Id. at 673.
\textsuperscript{261} Id.
\end{footnotesize}
The trial court instructed the jury that, to recover for emotional distress under the Fair Debt Collection Practices Act, the plaintiff had to establish the elements of an intentional infliction of emotional distress claim.\(^{262}\) The court of appeals concluded that the jury could have found that the collection agency's conduct "exceeded its legal rights and recklessly or intentionally inflicted severe emotional distress" upon the plaintiff.\(^{263}\) The court did not discuss the severity of the plaintiff's emotional distress. The plaintiff testified that the agency's conduct had threatened, insulted, and irritated him, and that "the stress of the calls and the litigation aggravated his preexisting medical problems, such as migraines, ulcers and his spastic bowel syndrome."\(^{264}\) Whether such testimony would support an award under the specific standards of \textit{Hubbard} is questionable.

The more interesting, and more difficult, question raised by \textit{Venes} is whether a plaintiff who asserts a violation of the Federal Debt Collection Practices Act, or any other statute that establishes a specific remedy for its violation, should be entitled to recover damages for the emotional injury sustained by the violation, even if the \textit{Hubbard} standard for the intentional infliction of emotional distress is not met.

\textit{Venes} and \textit{Kamrath} appear to conflict on this question when the statute does not directly provide for damages. The Human Rights Act is not part of the conflict, because that Act specifically provides for the award of damages for mental anguish and suffering. \textit{Venes} indicates that, if damages for emotional distress are to be recoverable, the \textit{Hubbard} standards must be met,\(^{265}\) while \textit{Kamrath} indicates to the contrary.

The Federal Debt Collection Practices Act provides a civil remedy for "any actual damage sustained by such person as a result of such failure."\(^{266}\) The polygraph statute from \textit{Kamrath} also provides a specific civil remedy for "any and all damages recoverable at law."\(^{267}\) Consistency should dictate a uniform approach to the question of statutory causes of action that do

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 674.
\item \textit{Venes v. Professional Serv. Bureau, 353 N.W.2d 671, 675 (Minn. Ct. App. 1984).}
\item \textit{Id.} at 673.
\item \textit{Id.} at 674.
\item MINN. STAT. § 181.75(4) (1990).
\end{enumerate}
\end{footnotesize}
not specifically provide for the award of damages for mental anguish and suffering.

In *Carrigan v. Central Adjustment Bureau, Inc.*, 268 the United States District Court for the Northern District of Georgia noted that although the term “actual damage” in the Federal Debt Collection Practices Act is not defined, plaintiff’s right to damages “should turn on whether or not he would be entitled to collect damages, were this a cause of action for the intentional infliction of mental distress.” 269 Although the court held that the plaintiff was entitled to recover minimal damages for emotional suffering, 270 it is not clear why the court tied the right to recover to state law requirements for the intentional infliction of emotional distress.

In *Bingham v. Collection Bureau, Inc.*, 271 the United States District Court for the District of North Dakota held that a plaintiff was entitled to recover damages for emotional suffering for harassing phone calls. The plaintiff’s husband was awarded damages for loss of consortium. 272 The facts of the case suggested that the emotional distress was minimal and likely would not meet the requirements for an independent claim for the intentional infliction of emotional distress. 273 The actual damages in the case were relatively small. 274 A psychologist testified:

[The plaintiff] was no longer childlike in her happiness, that she had lost her interest in housework, that she was not paranoid, but distrustful of telephones. That her sleep was disturbed, she had nightmares, headaches, a sensitive stomach, and was prone to cry. He accepted her statements at face value and despite her obvious physical problems, concluded without further investigation that all her physical problems were psychosomatic, and caused by the wrongful acts of the telephone collectors. . . . Peggy herself testified that after the first call she “cried and cried and cried and cried.” 275

The trial court concluded that “she suffered no permanent ill

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269. Id. at 470.
270. Id. at 471.
272. Id. at 875.
273. Id. at 866-70.
274. Id. at 875.
275. Id.
effects from the experience of the calls, and that most of her crying was habitual or cosmetic. However, she is of the group to be protected and she has suffered injury."\textsuperscript{276} The trial court awarded her damages of $1,000, and her husband $100.\textsuperscript{277}

If \textit{Venes} is based upon the conclusion that the Federal Debt Collections Practices Act includes only the damages that are recoverable under an independent tort claim under state law, then \textit{Venes} appears to be consistent with \textit{Carrigan}. However, there is no clear reason why the damage must be so limited. An alternative explanation of \textit{Venes} is that the case was submitted to determine whether the elements of intentional infliction of emotional distress were satisfied. The issue of whether those elements had to be satisfied was not before the court in \textit{Carrigan}.

As the court intimated in \textit{Bingham}, the damages, whatever they are, are compensable where evidence supports the claim. The legislative judgment that a debt collector who engages in the prohibited conduct should be responsible for the harm caused should be a sufficient basis to justify an award of damages for emotional distress, regardless of whether the independent state standards for intentional infliction of emotional distress are satisfied. If so, then \textit{Kamrath} would state the prevailing rule that recovery for an emotional injury is allowed for an express statutory violation.

\textbf{B. Interference with Family Relationships}

The Minnesota Supreme Court has long emphasized the importance of family relationships.\textsuperscript{278} The court has recognized two types of family rights: "(1) those of the members of the

\begin{footnotes}
\footnote{277. Id.}
\footnote{278. See, e.g., Miller v. Monsen, 228 Minn. 400, 402, 37 N.W.2d 543, 545 (1949).}
\end{footnotes}

In \textit{Miller}, the court stated:

\begin{quote}
As a practical proposition, the family is in large measure a self-governing unit so far as concerns its internal affairs. From a social point of view it is also a most important one. It is the foundation of civil society, sanctioned as such by both civil and ecclesiastical authority. It provides not only shelter, food, comfort, family life, happiness, and security for its members, but also instruction in, and example of, virtue, morality, and character. . . . Human society could not endure without it. Among the rights of the members of a family as against the world are those of having the family maintained intact without interference by outsiders. . . . In the \textit{Heck} case, it was held that not only "every member" of the family has a "right" to protect family rights against outside interference (there criminal conversation with the wife), but that the state also has an interest in the protection thereof. This right is
family among themselves, and (2) those of the members of the family as against the world." Further, the court has attempted to protect these relationships by permitting tort claims for alienation of affections, criminal conversation, or enticing a parent to abandon a child, and by barring tort claims by family members against each other via the application of intrafamily tort immunities.

The demise of the intrafamily tort immunities and the supreme court’s adoption of the tort of intentional infliction of emotional distress have created new opportunities for lawsuits by family members against each other. However, the statutory abolition of alienation of affections actions and the supreme court’s refusal to recognize a new tort of interference with custodial relationships may act as a brake on expanded tort recoveries against persons who interfere with family relationships. Marriage dissolution is an additional factor to consider. The law is not clear on the issue of whether an emotional distress action is barred in a dissolution action and whether the judgment in a dissolution action extinguishes any claim for emotional distress.

Several types of claims may be brought by family members for emotional distress. The abolition of family tort immunities leaves open the possibility of intrafamily tort claims for emotional distress by family members against each other. Subject to statutory and common law restrictions, family members may also have tort claims for emotional distress against third persons who interfere with family relationships. Interference with family relationships may occur in a variety of situations, including cases where family relationships are upset by outsid-

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279. Id. at 401, 37 N.W.2d at 544.
280. Id. at 402, 37 N.W.2d at 545.
281. MINN. STAT. § 553.01 (1990).
ers who disrupt or destroy those relationships and in post-dissolution cases where a noncustodial parent interferes with the custodial parent's relationship with the child. Although the abolition of family tort immunities has created the possibility of increased tort liability, mitigating factors against expansion exist, including the legislature's judgment that actions for alienation of affections and criminal conversation are inimical to the best interests of the state and should be abolished.

Claims for emotional distress run headlong into these limitations. The issue may be whether the presence of an underlying claim or the legislative or judicial prohibition of such a claim should preclude assertion of a claim for the intentional or negligent infliction of emotional distress to circumvent the limitations on claims for abuse of family relationships.

1. Intrafamily Claims for Emotional Distress

In Beaudette v. Frana, the Minnesota Supreme Court abolished interspousal tort immunity but not without reservations:

There is an intimate sharing of contact within the marriage relationship, both intentional and unintentional, that is uniquely unlike the exposure among strangers. The risks of intentional contact in marriage are such that one spouse should not recover damages from the other without substantial evidence that the injurious contact was plainly excessive or a gross abuse of normal privilege. The risks of negligent conduct are likewise so usual that it would be an unusual case in which the trial court would not instruct the jury as to the injured spouse's peculiar assumption of risk.

While abolishing the interspousal tort immunity, the court advises caution in approaching the issue of tort recovery by suggesting a threshold of "plainly excessive" action or action that is a "gross abuse of normal privilege."

Instead of focusing on the "privilege" that one spouse may have to engage in tortious conduct with respect to the other spouse, a court should focus on whether the tort claims of as-
sault and battery have been established. In cases involving extreme and outrageous conduct by one spouse against the other, the question should be whether the facts establish the tort of intentional infliction of emotional distress. Assault and battery are predicated on threatened contact or unconsented contact while intentional infliction of emotional distress focuses on extreme and outrageous conduct. Those requirements are arguably sufficient guarantees against abuse of the marital relationship and should suffice to sort out meritless claims. Where the claim is for the intentional infliction of emotional distress, the requirements of extreme and outrageous conduct should preclude action for the usual distress inherent in family relationships. The requirements should also offset and highlight action that causes an impermissible level of emotional distress to a family member.288

Actions for dissolution of a marriage may complicate the picture when one spouse sues another for torts committed during the marital relationship. No Minnesota cases have resolved the issue of whether tort claims may be brought in conjunction with a dissolution action or whether the tort claims may be barred by the dissolution. Although Minnesota eliminated fault as a requirement for dissolution in 1974,289 fault may still provide the basis for a tort claim by one spouse against another.290 A tort claim for the intentional infliction of emotional distress could be joined with the dissolution action,291 or it could be litigated separately, subject to the court’s admonition in Beaudette v. Frana.292

A court has several options when confronted with a claim for intentional infliction of emotional distress in conjunction with a dissolution action. The court might conclude (1) that the dis-

290. See Robert E. Oliphant, Minnesota Family Law Primer § 47.5 (3d ed. 1991) (suggesting that a claim for domestic assault may be combined with the divorce action “with a reasonable expectation of recovery—even if it is ‘his’ portion of the homestead.”).
solution action extinguishes the claim for intentional infliction of emotional distress if the claim is based on the same ground that justified the dissolution;\textsuperscript{293} (2) that the claim for intentional infliction is incompatible with the dissolution action because it resurrects fault-based dissolution and creates the same problems that the legislature intended to avoid by removing fault as a basis for dissolution;\textsuperscript{294} (3) that the claimant is barred because he or she has failed to meet the standards for intentional infliction of emotional distress;\textsuperscript{295} or (4) allow the claim even when unaccompanied by physical injury.\textsuperscript{296}

In \textit{Stuart v. Stuart},\textsuperscript{297} the Wisconsin Supreme Court held that a judgment in a marital dissolution did not bar a subsequent suit for intentional torts, including the intentional infliction of emotional distress, committed during the marriage. The court concluded that the legal principles underlying "res judicata, equitable estoppel and waiver" did not bar recovery.\textsuperscript{298}

The court also concluded that joinder of the tort claims in the dissolution action was not required:

\begin{quote}
If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or
\end{quote}

\textsuperscript{293} See, e.g., Pickering v. Pickering, 434 N.W.2d 758, 761 (S.D. 1989). The Pickering court stated that "[w]e believe the tort of intentional infliction of emotional distress should be unavailable as a matter of public policy when it is predicado on conduct which leads to the dissolution of a marriage." \textit{Id.} The court also barred the plaintiff's claims for fraud and deceit. \textit{Id.}


\textsuperscript{296} See, e.g., Ruprecht, 599 A.2d at 606. The Ruprecht court noted:

This court is not satisfied that a flood of litigation with fraudulent claims or the resurrecting of fault, or the possibility of confusing the issues of custody, support, and equitable distribution should deny one spouse from suing the other in a divorce proceeding for emotional distress without physical injury. There is no valid policy interest nor logical reason to allow one spouse to sue the other for physical injury but not for emotional distress absent physical injury. Certainly mental and emotional distress is just as "real" as physical pain.


\textsuperscript{297} 421 N.W.2d 505 (Wis. 1988).

\textsuperscript{298} \textit{Id.} at 507.
(3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse. To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do.

Although joinder is permissible, the administration of justice is better served by keeping tort and divorce actions separate. . . . Divorce actions will become unduly complicated if tort claims must be litigated in the same action. A divorce action is equitable in nature and involves a trial to the court. On the other hand, a trial of a tort claim is one at law and may involve, as in this case, a request for a jury trial. Resolution of tort claims may necessarily involve numerous witnesses and other parties such as joint tortfeasors and insurance carriers whose interests are at stake. Consequently, requiring joinder of tort claims in a divorce action could unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations. The legislature did not intend such a result in enacting the divorce code.299

2. Interference with the Custodial Relationship

In 1978, the legislature abolished actions for alienation of affections, criminal conversation, seduction and breach of promise to marry:

Actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, have been subject to grave abuses, have caused intimidation and harassment, to innocent persons and have resulted in the perpetration of frauds. It is declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of these causes of action.300

In Bock v. Lindquist,301 the Minnesota Supreme Court declined to recognize a parent's claim against a third party for alienation of a child's affections. While not banned by the statutory prohibition on alienation of affections actions because

299. Id. at 508, (quoting Stuart v. Stuart, 410 N.W.2d 632, 637-38 (Wis. Ct. App. 1987) (citations omitted)).
300. MINN. STAT. § 553.01 (1990).
301. 278 N.W.2d 326 (Minn. 1979).
the statute had not yet become effective, the court found the legislative history strong enough to justify a ban on the action as contrary to public policy.302

However, the court in Bock limited its holding:

Nothing in this opinion diminishes other remedies for interference with familial relationships, remedies which make actions for alienation of affections unnecessary as well as undesirable. Violations of judicial orders establishing custodial or visitational rights in one parent may in appropriate situations be corrected by habeas corpus or, more commonly, by citation for contempt of court. Actions for defamation, enticement, or contributing to the delinquency of a minor remain available against a stranger who meretriciously intrudes into a family relationship.303

In Larson v. Dunn,304 the supreme court considered the question of whether it should recognize a new tort for the intentional interference with parental custodial or visitation rights. The plaintiff brought suit against his ex-spouse as well as members of her family who allegedly aided her in hiding their daughter.305 The plaintiff, who had permanent legal custody, searched for his daughter for seven years.306 After his daughter was returned to him, he commenced suit against his ex-spouse and her relatives for interfering with his custodial rights.307 The court of appeals recognized the tort of interference with custodial rights:

One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.308

The court of appeals concluded that the aggrieved parent would be entitled to recover for the following damages: (1) damages for lost society of the child; (2) damages for emotional distress; (3) damages for the lost services of the child; (4) expenses incurred in reasonable efforts to locate the child; and

302. Id. at 328.
303. Id. at 328.
304. 460 N.W.2d 39 (Minn. 1990).
305. Id. at 41.
306. Id. at 42.
307. Id.
reasonable expenses incurred in treatment of the child.\textsuperscript{309} The Minnesota Supreme Court reversed.\textsuperscript{310} The court's reasons for rejecting the tort centered around the common theme of protecting the best interests of the child, who is already subject to significant emotional injury as a result of the marital breakup leading to the custody problems. The court recognized the potential for the abuse of the tort as a new weapon in family disputes.\textsuperscript{311} Creating a new tort would create a new wrong, placing innocent children in the middle of lawsuits between parents.\textsuperscript{312} "For the good of our children, the law should seek to promote such harmony as is possible in families fractured by the dissolution process. At a minimum, the law should not provide a means of escalating intrafamily warfare."\textsuperscript{313} In addition, the law already provides redress for a custodial parent whose rights are infringed.\textsuperscript{314} The parental kidnapping statute provides for an award of costs incurred by the custodial parent in recovering the child.\textsuperscript{315} However, this restitution does not compensate for emotional injury associated with deprivation of a child's presence. The court also noted that "emotional distress could possibly be recovered in egregious cases through the independent tort of Intentional Infliction of Emotional Distress."\textsuperscript{316} In addition,

\begin{itemize}
\item \textsuperscript{309} 449 N.W.2d at 756-58.
\item \textsuperscript{310} Id. at 758.
\item \textsuperscript{311} Larson v. Dunn, 460 N.W.2d 39, 46 (Minn. 1990). The Larson court noted its prior opinion in Bock v. Lindquist, 278 N.W.2d 326 (Minn. 1979). The Bock case involved a claim for alienation of a child's affections after the legislature had abolished alienation of affections actions. The Bock court rejected the claim:
\begin{quote}
The circumstances under which the right has here been asserted demonstrate the potential for grave abuses, in which a child becomes the object of intrafamily controversy and, indeed, a pawn in disputes over monetary matters. In the more usual case of marriage dissolution resulting in deteriorated relationships, a cause of action by one parent against another for alienation of a child's affections would exacerbate the unhappy relationships and become a strategic tool for advantageous use of one family member over another.
\end{quote}
Id. at 327-28.
\item \textsuperscript{312} Larson, 460 N.W.2d at 46.
\item \textsuperscript{313} Id.
\item \textsuperscript{314} Id. The court referred to MINN. STAT. § 611A.04(1) (1990), which states that, before a sentencing or dispositional hearing, the court may consider a crime victim's request for restitution.
\item \textsuperscript{315} See MINN. STAT. § 609.26(4) (1990).
\item \textsuperscript{316} Larson v. Dunn, 460 N.W.2d 39, 46 (Minn. 1990) (citing Hubbard v. United Press Int'l, 330 N.W.2d 428 (Minn. 1983)).
\end{itemize}
the supreme court held that "Minnesota already recognizes the action for lost services of the child." However, the compensation for loss of a child's services will not include the broader element of loss of consortium, which is limited to cases where one spouse claims damages because of injury to the other.

The Larson court also concluded that the tort would not deter parental abduction and that it would result in a proliferation of litigation. In conclusion, the court held: "Expanding the adversarial process to include this new tort is contrary to the best interests of children and will only intensify intrafamily conflict growing out of marriage dissolution without deterring parental abduction."

While Larson qualifies Bock by foreclosing a specific action for interference with custodial rights, the court nonetheless left open the possibility of an action for intentional infliction of emotional distress. The tort of intentional infliction of emotional distress is both narrower and broader than the tort of intentional interference with custodial rights. Intentional infliction of emotional distress is broader because the tort may be utilized by noncustodial parents. The tort is narrower because it requires proof of severe emotional distress; the tort of interference with custodial rights does not.

The difference in the interests protected by the two torts also means that the damages are different. Under the custodial claim, the plaintiff-parent is entitled to recover damages for

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317. Larson, 460 N.W.2d at 46. The Larson court referred to Eichten v. Central Minn. Power Ass'n, 224 Minn. 180, 195, 28 N.W.2d 862, 871 (1947), which recognized a parent's right to recover for loss of a child's services, even though the evidence of the loss is "indirect, hypothetical, and to some extent speculative."

318. Salin v. Kloempken, 322 N.W.2d 736, 738 (Minn. 1982).

319. 460 N.W.2d at 47.

320. Id.

321. Larson v. Dunn, 460 N.W.2d 39, 46 (Minn 1990). The supreme court's opinion is somewhat equivocal. After indicating that the tort of intentional infliction of emotional distress would be available in "egregious" cases, the court also stated that while "the conduct in this case is egregious, and done in defiance of a court order, the proper remedy for such violation of the court's integrity lies in contempt and other such sanctions; not in providing the other party with compensation." Id. The court then referred to Bock v. Lindquist, 278 N.W.2d 326 (Minn. 1979), noting that the Bock court denied the parent recovery for alienation of a child's affections, partially because the action was prospectively abolished by statute and the availability of other remedies made the action unnecessary. Larson, 460 N.W.2d at 46. However, given the court's initial recognition of the availability of the action for intentional infliction of emotional distress as a potential remedy in an appropriate case, it appears that the court did not intend to completely foreclose the action.
the emotional distress flowing from the abduction, loss of the child's society or services, and reasonable expenses the custodial parent may have incurred in regaining custody of the child. Under the emotional distress claim, the plaintiff would be entitled to recover for emotional distress, but the plaintiff must demonstrate severe distress. The tort of intentional interference with custodial rights does not require such proof. While the tort of intentional infliction of emotional distress provides an alternative, the tort of intentional infliction of emotional distress is a less effective remedy than the tort of intentional interference with custodial rights.

Use of the tort of intentional infliction of emotional distress in cases involving custodial rights will create problems based on the degree of outrageousness necessary to establish a prima facie case. Cases allowing the tort for interference with custodial rights bear out the problem.

Additional problems arise where the claim for intentional infliction of emotional distress is based not on the interference with custodial rights but on visitation rights. Most of the jurisdictions that have rejected claims for alienation of affections or the intentional infliction of emotional distress for interference with custodial rights have done so where the interference was with visitation rights, short of complete removal of the child. These jurisdictions have reasoned, similar to the Larson court, that this use of the tort fosters neither the child's best interests nor the best interests of the judicial system. That reasoning may be sufficient to establish a bright line between cases involving interference with custodial rights and those involving visitation rights.

While Larson resolves the issue of intentional interference with custodial rights, the problem of recovery for actions previously covered by alienation of affections actions remains. Two potential claims for emotional distress may be brought in cases previously covered by the tort of alienation of affections. The

322. Restatement (Second) of Torts § 700 cmt. g (1977).
plaintiff may sue either for negligent or intentional infliction of emotional distress. The claim for negligent infliction of emotional distress is not exactly parallel to the alienation of affections action, an action that courts have clearly held to be an intentional tort. Additionally, assertion of a claim for negligent infliction of emotional distress would likely run afoul of the zone of danger and physical disability requirements. The claim of intentional infliction of emotional distress presents different problems.

It is unclear what position the Minnesota Supreme Court will take with respect to the right to pursue a claim for intentional infliction of emotional distress in cases previously covered by alienation of affections. The court's choice depends on whether it will consider the legislative policy behind abolishing the alienation of affections action strong enough to preclude an emotional distress claim.

In an action for alienation of affections, an aggrieved spouse was required to prove the following:

(1) That one spouse had the other spouse's affections until defendant interfered; (2) that one lost the other's affections; (3) that defendant took an active and intentional part in causing the plaintiff-spouse's loss of affections; and (4) that defendant acted willfully and intentionally.

The "defendant's wrongful and intentional conduct" must have been "the controlling cause of the estrangement between plaintiff and his wife."

The tort of alienation of affections is an intentional tort based on the tort of enticement. There is a strong element of loss of consortium underlying the claim. A showing of negligence is insufficient to establish the tort. "The acts which lead to the loss of affection must be wrongful and intentional, calculated to entice the affections of one spouse away

326. Bhama, 425 N.W.2d at 734. A third potential claim would be loss of consortium, but, because the supreme court has recognized that the essence of the alienation of affections claim is loss of consortium, it does not seem likely that the consortium claim could circumvent the statutory limitation of alienation of affections actions. See generally Larson v. Dunn, 449 N.W.2d 751 (Minn. Ct. App. 1990).
328. Id. at 52, 125 N.W.2d at 42.
329. Id. at 54, 125 N.W.2d at 43.
331. Id.
from the other."

Notwithstanding the statutory abolition of the tort of alienation of affections, the possibility remains that the torts of intentional or negligent infliction of emotional distress could be asserted. There are two potential approaches to the problem with respect to the intentional infliction of emotional distress. One is to bar the action for intentional infliction of emotional distress where the claim is asserted against the defendant for the same conduct that would have given rise to a claim for alienation of affections prior to the statutory abolition of the action. The other is to take the position the supreme court took in Larson: the separate and independent tort of intentional infliction of emotional distress is sufficiently distinct from the disfavored action, such that it is actionable even though the claim for alienation of affections is no longer assertable.

In Wilson v. Still, the Supreme Court of Oklahoma held that the statutory abolition of alienation of affections actions precluded recovery for the intentional infliction of emotional distress:

Regardless of what the plaintiff calls her cause of action, she has sued the defendant for wilfully taking away her husband. It could have been called “alienation of affections”; it could have been called “seduction”; it could have been called “criminal conversation.” But all civil law suits under those theories have now been prohibited. Can she proceed on the theory of “outrage”? The law . . . tells us she can not. The plaintiff is asking us to allow a jury to find certain conduct so outrageous as to be “regarded as atrocious and utterly intolerable in a civilized community”, when the legislative body freely elected from the same community has expressly and deliberately, within our own generation, removed the acts complained of from those bearing civil liability in tort. We cannot accommodate the plaintiff without doing grave insult to our legislators and those who elected them. This we will not do.

The court’s opinion in Wilson is typical of the rationale used by courts denying the claim for emotional distress.

Other courts have concluded that the judicial or statutory

334. Id. at 716.
335. See Christopher J. Whitesell, Note, Loss of Consortium and Intentional Infliction of
abolition of alienation of affections claims does not preclude assertion of claims for the intentional infliction of emotional

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[A]bolition of the actions for alienation of affections and criminal conversation does not preclude a person from maintaining a traditional breach of contract action or a recognized tort action merely because the breach arose from an improper liaison with the plaintiff’s spouse or because one effect of the alleged breach or tortious conduct was a disruption or breakup of his or her marriage. . . . What is precluded . . . is the refitting of the abolished actions into other forms. One cannot sue to recover for injuries arising from “defilement of the marriage bed” or from an interference with the marriage by simply casting the defendant’s conduct as a breach of contract, or negligence, or some other intentional tort.

Id. at 1360.

In Homer v. Long, 599 A.2d 1193, 1201 (Md. Ct. Spec. App. 1992), the court held that a claim of intentional infliction of emotional distress could not be asserted in face of a legislative and judicial abrogation of tort actions for criminal conversation and alienation of affections. In *Homer*, the plaintiff sued under various theories, including the intentional infliction of emotional distress, because a doctor had engaged in sexual relations with the plaintiff’s spouse while his spouse was a patient. Id. at 1194. The court denied the claim for intentional infliction of emotional distress. Id. The court recognized that the doctor’s conduct may have been extreme and outrageous and that the conduct violated clear standards established by the medical community, but the court noted that “the essence of the requirement is that the conduct must not simply be extreme and outrageous from the perspective of society at large, or from the perspective of someone else, but must be so as to the plaintiff. Outrageous conduct directed at A does not necessarily give B a cause of action.” Id. at 1198. The court treated the claim as a bystander recovery case, denying the claim because it has typically been limited to those plaintiffs who are present at the time of the tortious action and who are known to be present by the defendant. Id. at 1199.

The court’s rationale in barring recovery because the conduct is not intentional as to the husband would, of course, bar virtually any emotional distress claim arising out of interference with a family relationship, unless done in the presence of the person making the claim, an unlikely probability. Knowledge to a substantial certainty that another will sustain injury should be sufficient.

While the court noted that some courts have relaxed the requirement in compelling cases, the court saw no reason not to apply the general rule:

The emotional and economic trauma likely to arise from the seduction of one’s spouse is not limited to the case where the seducer is the spouse’s therapist. The conduct may be just as outrageous and the harm may be just as great where the seducer is a neighbor, a good friend, a relative, an employee or business associate of the plaintiff, or indeed anyone in whom the plaintiff has imposed trust or for whom he or she has special regard. To relax or abrogate the presence requirement in such cases would greatly expand the scope of the tort as framed and adopted by the Court of Appeals, which we are unwilling to do.

Id. at 1199-1200; see also Koestler v. Pollard, 471 N.W.2d 7 (Wis. 1991) (barring a claim by a mother’s husband against the biological father for concealing paternity through application of a statute abolishing actions for criminal conversation, public policy, and public policy underlying the statute).
The arguments for allowing the claim for emotional distress are stronger when one considers the differences between the torts. Both the damages and elements of the claims are different.

Perhaps the most telling argument is based on the pattern of analysis followed by the supreme court in *Larson.* If the public policy that precludes the separate tort of interference with custodial rights does not preclude assertion of the claim for intentional infliction of emotional distress, the legislative policy precluding alienation of affection actions should not displace the later developed tort of intentional infliction of emotional distress.

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*336. See, e.g.,* Spiess v. Johnson, 748 P.2d 1020 (Or. Ct. App.), *aff'd en banc by an equally divided court,* 765 P.2d 811 (1988). In Spiess, the plaintiff's claim was based on the actions of his wife's psychiatrist, who engaged in sexual relations with her during the course of treatment that was intended to preserve the marriage. The plaintiff alleged that he suffered severe emotional distress as a result. The defendant argued that the plaintiff's claim was actually a claim for alienation of affections and criminal conversation. The court of appeals rejected the claim:

> [C]riminal conversation consists of sexual intercourse with the spouse of another person, and the elements of alienation of affection are wrongful conduct of the defendant which is intended to cause and which actually does cause the plaintiff the loss of the affection and consortium of the plaintiff's spouse. The gravamen of the tort of intentional infliction of severe emotional distress, on the other hand, is that the plaintiff has suffered a loss due to intentionally inflicted severe emotional distress. It is the nature of the loss allegedly suffered by plaintiff in this case that distinguishes his claim of intentional infliction of severe emotional distress from the torts of alienation of affections and criminal conversation. He claims to have suffered severe emotional distress as a result of Johnson's alleged intentional conduct; his claimed loss is not the loss of his wife's society and companionship. That Johnson allegedly used his sexual relationship with plaintiff's wife as the means to intentionally inflict severe emotional distress on plaintiff does not transform plaintiff's claim into one for either alienation of affections or criminal conversation.

*Spiess,* 748 P.2d at 1023-24 (citation omitted) (emphasis added).

In *Figueiredo-Torres v. Nickel,* 584 A.2d 69 (Md. 1991), the court took the same position on similar facts:

> The gravamen of Torres' claim for intentional infliction of emotional distress is not merely the sexual act or the alienation of his wife's affections. It is the entire course of conduct engaged in by his therapist, with whom he enjoyed a special relationship. This conduct constitutes more than the abolished amatory causes of action. On the record before us, we hold that Torres' claims for professional negligence and intentional infliction of emotional distress should not have been dismissed by the trial court.

*Id.* at 77.

*337. In* Raftery v. Scott, 756 F.2d 335 (4th Cir. 1985), for example, the Fourth Circuit concluded that Virginia's abolition of the alienation of affections action did not bar a claim by a father against the mother for intentional infliction of emotional distress based on her attempts to turn the child against him. Although tinged with the alienation of affections action, the court concluded that intentional infliction of emotional distress is an independent tort. *Id.* at 339.

emotional distress. The differences in the elements of the torts and the high threshold established by the supreme court for the intentional infliction of emotional distress should serve to avoid the problems that the legislature intended to avoid in abrogating alienation of affections actions.

C. Intentional Interference with Contractual Relations

In Potthoff v. Jefferson Lines, Inc., the court of appeals took the position that damages for emotional distress may be compensable for interference with contractual relations. The plaintiff brought suit against the defendant bus company for interfering with the plaintiff's employment with a newly formed bus company. Suit was based upon the intentional interference with contractual relations.

The jury found that the defendants had wrongfully interfered with the plaintiff's employment contract and awarded him damages for lost income and emotional suffering, as well as punitive damages. The defendants argued on appeal that the plaintiff was not entitled to recover damages for emotional suffering.

The court of appeals noted that, while damages for emotional suffering are not recoverable in a breach of contract case, that limitation does not apply in cases involving intentional interference with contractual relations. The trial court had relied on the Restatement (Second) of Torts in concluding that damages for emotional harm may be compensable in an intentional interference action. Section 774A subdivision 1 of the Restatement reads:

One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for
   (a) the pecuniary loss of the benefits of the contract or the prospective relation;

340. Id. at 777.
341. Id. at 773.
342. Id.
343. Id. at 774.
345. Id. at 777; see also Haagenson v. National Farmers Union Prop. & Cas. Co., 277 N.W.2d 648, 652 (Minn. 1979).
(b) consequential losses for which the interference is a legal cause; and
(c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.\(^{346}\)

The court of appeals affirmed, agreeing "that emotional distress could be a natural result of interference with contract relations,"\(^{347}\) and that "in appropriate cases emotional distress damages are recoverable in this type of action."\(^{348}\)

Potthoff illustrates the import of a holding allowing recovery of damages for emotional distress where one party has intentionally interfered with a contractual relationship. The court of appeals held that the plaintiff’s injury was insufficient to sustain a claim for the intentional infliction of emotional distress.\(^{349}\) After the plaintiff lost his job, due to his first employer's interference with his contract of employment, the plaintiff applied for more than fifty jobs and was rejected. He incurred substantial debts, and his mental state was not "too good" as a result.\(^{350}\) His mental state related to the difficulties he had in not being able to live normally, not having anything

\(^{346}\) \textit{Restatement (Second) of Torts} § 774A (1979). The \textit{Potthoff} trial court also relied on an Oregon case, \textit{Mooney v. Johnson Cattle Co.}, 634 P.2d 1333 (Or. 1981), where the Oregon Supreme Court permitted recovery for emotional distress where the injury is "a common and predictable result of disrupting the type of relationship or transaction involved." \textit{Id.} at 1338.

Comment d to § 774A, discussing damages, reads as follows:

The action for interference with contract is one in tort and damages are not based on the contract rules, and it is not required that the loss incurred be one within the contemplation of the parties to the contract itself at the time it was made. The plaintiff can also recover for consequential harms, provided they were legally caused by the defendant's interference.

The tests for legal causation for the tort of interference with a contract of prospective contractual relation, like the tests for determining when an interference is improper . . ., have not been reduced to precise rules. By analogy to the rules for legal causation for negligent physical injury, it is sometimes held that the particular loss need not be contemplated, expected or foreseen by the defendant. . . . At other times, it is held that the loss must be expectable, by analogy to legal causation for the tort of deceit. . . . It seems likely that the issue in a particular case may be affected by some of the factors listed in § 767. Emphasis may be given, for example, to the means used (i.e., physical force or oral persuasion) and to the motive (e.g., intent in broad sense of knowledge of result, or sole purpose motivated by ill will).

\(^{347}\) \textit{Potthoff}, 363 N.W.2d at 777.


\(^{349}\) \textit{Id.}

\(^{350}\) \textit{Id.}
to do with his time, and not having a sense of self-security.\footnote{351} Nonetheless, the court held that the finding of intentional interference with contractual relations justified the jury in awarding the plaintiff damages in the amount of $15,000 for the emotional distress he sustained, for the same emotional distress that was not independently actionable under the tort of intentional infliction of emotional distress.\footnote{352}

D. Misrepresentation and Fraud

Generally, in Minnesota, damages from fraud and misrepresentation are limited to the out-of-pocket loss sustained by the plaintiff.\footnote{353} However, there are variations depending on the type of misrepresentation and the damages sustained.\footnote{354} For example, damages may be broadened to include recovery for injury to reputation and lost profits, even if the damages were not within the contemplation of either the wrongdoer or the person who relied upon the fraudulent misrepresentations.\footnote{355} Nevertheless, courts have not conclusively answered whether damages may be awarded for emotional suffering that is the product of the fraud or misrepresentation.

In \textit{Brooks v. Doherty, Rumble \& Butler},\footnote{356} suit was brought by an attorney who was discharged by his firm. The plaintiff sued for breach of contract, fraud, emotional distress, and defama-

\begin{footnotesize}
\begin{enumerate}
\item Id.\footnote{351}
\item Id.\footnote{352}
\item See, e.g., B.F. Goodrich Co. v. Mesabi Tire Co., 430 N.W.2d 180, 182 (Minn. 1988).\footnote{353}
\item See, e.g., Peterson v. Johnston, 254 N.W.2d 360, 362 (Minn. 1977) (measure of damages is the amount paid less the fair market value of the property where the fraudulent misrepresentation is made to a buyer of real estate); Lowrey v. Dingmann, 251 Minn. 124, 127, 86 N.W.2d 499, 502 (1957) (where property is purchased in reliance on fraudulent misrepresentation and the property is not returned, proper measure of damages is difference between actual value of the property received and price paid for it, plus other or special damages naturally and proximately caused by the fraud before its discovery); Nave v. Dovolos, 395 N.W.2d 393, 398 n.1 (Minn. Ct. App. 1986) (measure of damages in fraudulent misrepresentation involving the sale of real estate is the amount paid less the fair market value of the property); Melin v. Johnson, 387 N.W.2d 230, 231-32 (Minn. Ct. App. 1986) (measure of damages in case involving misrepresentation by insurance agent is amount of benefits as represented minus the benefits actually received); Whitney v. Buttrick, 376 N.W.2d 274, 280-81 (Minn. Ct. App. 1985) (measure of damages in case involving negligent misrepresentation of a third party in a collateral matter related to the sale of property is not limited to out-of-pocket losses).\footnote{354}
\item See Lowrey, 251 Minn. at 127, 86 N.W.2d at 499.\footnote{355}
\item 481 N.W.2d 120 (Minn. Ct. App. 1992), \textit{review denied}, (Minn. Apr. 29, 1992).\footnote{356}
\end{enumerate}
\end{footnotesize}
tion. The jury returned a special verdict in favor of the plaintiff on all issues but the emotional distress claim. Several issues were raised on appeal, including the question of whether the plaintiff was entitled to recover damages for both breach of contract and fraud in the inducement to the contract. The court of appeals held that the theories were independent and that damages for both were recoverable. The plaintiff had the burden of proof in such a case to establish separate damages to avoid a duplicative damages award.

The court concluded that the plaintiff had met his burden:

In his complaint, he alleged that the breach of his employment contract caused him to suffer a loss of income. In addition and in contrast, appellant alleged that the fraud perpetrated by respondents caused him to enter into a situation that ultimately caused emotional distress, damage to his personal and professional reputation, lost income, and a move to Arizona.

At trial, [plaintiff] presented evidence relevant to the issue of fraud that was separate and distinct from that which supported his contract claims. He testified to the long-term financial difficulty he and his wife experienced as a consequence of his fraudulent inducement to enter the employment contract with DRB. In addition, he testified to the disgrace of borrowing money to meet expenses; the loss of clients; the strain on [him], his wife and their two small children; and the anger and depression he experienced. He testified that in each interview for employment the firm would ask the reasons for his termination, and that no firm offered him employment after he divulged this information. His inability to procure a job with any firm in Minnesota caused him to seek employment in Arizona where he had business contacts. The move to Arizona was not by choice, because [his] family lives in Minnesota. [Plaintiff], who moved first to Arizona, testified that the five-month separation from his wife and children and their ultimate move from Minnesota was difficult and upsetting.

The firm’s argument that the plaintiff’s damages should be limited to out-of-pocket loss was rejected by the court of appeals. The direct economic loss he sustained was not covered by the out-of-pocket rule nor were the other damages he sus-

357. Id.
358. Id.
359. Id. at 128.
tained. Notwithstanding the appellant's inability to recover for emotional distress as a separate and independent tort, the fraud claim appeared to justify recovery for damages beyond the out-of-pocket loss.360

In *M.H. & J.L.H. v. Caritas Family Services*,361 the Minnesota Court of Appeals considered the question of whether a negligent misrepresentation theory of recovery against an adoption agency would support damages for emotional distress that resulted from plaintiffs' adoption of a child whose natural parents were siblings. The child was diagnosed as suffering from attention deficit hyperactivity disorder.362

The court recognized the claim for negligent misrepresentation against an adoption agency, concluding that its holding did not offend public policy.363 The trial court held that the agency's conduct was "not sufficiently egregious to support an intentional infliction of emotional distress claim"364 and also barred the plaintiffs' claim for the negligent infliction of emotional distress.365 The court of appeals agreed that the facts were insufficient to support a claim for the intentional infliction of emotional distress but concluded that the trial court should have allowed a claim for the negligent infliction of emotional distress.366 Relying on *Lee v. Metropolitan Airport Commission*,367 the court held that a "negligent infliction of emotional distress claim is properly pleaded where supported by a separately pleaded intentional tort."368 The court also held that the plaintiffs did not have to prove any resulting physical injuries where the claim constituted a direct invasion of the plaintiff's rights. Therefore, the court concluded that because "the intentional misrepresentation claim may go forward, respondents are entitled to add the negligent infliction of emotional

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360. *Id.* at 128-29.
362. *Id.* at 97.
363. *Id.* at 98.
364. *Id.* at 99-100.
365. *Id.* at 99.
368. *Caritas*, 475 N.W.2d at 100.
distress claim." The Minnesota Supreme Court affirmed the court of appeals holding permitting the claim for negligent misrepresentation to go forward, but reversed the court of appeals' conclusion that the claim for negligent infliction of emotional distress supported the plaintiffs' claim for the negligent infliction of emotional distress. The supreme court held that the plaintiff was not entitled to assert the emotional distress claims for two reasons. First, the plaintiffs alleged no physical injury to support the claims, and second, the plaintiffs were unable to establish a "direct invasion" of their rights by "willful, wanton, or malicious conduct." Once the trial court dismissed the plaintiffs' claim for intentional misrepresentation, there was no basis for concluding that the defendants engaged in willful, wanton, or malicious conduct.

In State Farm Mutual Automobile Insurance Co. v. Village of Isle, the supreme court held that recovery for mental anguish where the plaintiff has not suffered an accompanying physical injury will not be allowed "unless there has been some conduct on the part of defendant constituting a direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct." As the Caritas court noted, there must be a "direct invasion" and it must be "willful, wanton, or malicious conduct." The requirements are not disjunctive, but conjunctive. The plaintiffs failed on both counts. Negligent misrepresentation is not the right kind of "direct invasion," and it does not constitute "willful, wanton, or malicious conduct."

Notwithstanding the supreme court's disposition of the case, there are two aspects of the court of appeals' decision that necessitate comment. First, rather than stating that a claim for negligent infliction of emotional distress may be asserted once a direct invasion of the plaintiff's rights is established, the court of appeals may have been more accurate in holding that damages for emotional distress might be awarded for intentional misrepresentation without utilizing the negligent mis-

369. Id.
370. 488 N.W.2d 282 (Minn. 1992).
371. Id. at 290 (citing State Farm Mut. Auto. Ins. Co. v. Village of Isle, 265 Minn. 360, 367-68, 122 N.W.2d 36, 41 (1963)).
373. Id. at 367-68, 122 N.W.2d at 41.
representation language. A claim for emotional distress is contingent upon establishing the underlying intentional tort. Thus, any award of damages for emotional suffering is a product not of proof of negligence, but rather of the intentional tort claim. Recognizing that the right to recover for emotional suffering as a product of the intentional tort avoids any tendency to incorporate the more restrictive requirements for the award of damages for negligent infliction of emotional distress, especially the physical disability requirement. Where the distress is caused by the defendant's intentional conduct, the plaintiff should be entitled to recover for that distress without meeting any additional requirements imposed by the law of negligence.

Second, no clear rationale can be gleaned from the court's opinion for allowing recovery of damages for emotional distress in misrepresentation actions. The predominant position in such cases is to limit recovery for damages to pecuniary loss.374

The same concerns that limit the right to recover in cases involving breach of contract claims justify limiting the right to recover in cases where the essence of the claim is misconduct with respect to a commercial or business transaction. As Professor Dobbs has noted:

In general, it would seem that so long as the plaintiff's recovery is based on an intentional fraud and nothing else, the tort policy of allowing a broad range of damages, provided they are proved with adequate certainty, should be followed. To the extent that the plaintiff's claim is based on something like mutual mistake, or strict liability, special damages may appropriately be limited or denied altogether.

But even if a broad range of damages is to be permitted in cases of intentional fraud, it must be remembered that deceit is an economic, not a dignitary tort, and resembles, in the interests it seeks to protect, a contract claim more than a tort claim. For this reason, though strong men may cry at the loss of money, separate recovery for mental anguish is usually denied in deceit cases, just as it is denied in contract cases, simply because emotional distress, though resulting naturally enough from many frauds, is not one of the interests the law ordinarily seeks to protect in deceit.

cases. 375

Where the plaintiff's claim arises out of a business transaction, the losses should be limited to the business or pecuniary losses that arise from the transaction. However, a court should take into account losses such as injury to reputation or credit rating 376 but not recovery for emotional distress, unless that distress is probable from the nature of the representation involved.

A variety of approaches to the issue are possible. 377 However, if there is to be a general acceptance of the right to recover damages for emotional distress in fraud litigation, it will have to be based on recognition of fraud as a dignitary tort, rather than a tort implicating only pecuniary interests. 378 Absent such a recognition, permitting recovery for emotional distress under circumstances where personal interests are affected at least offers a middle position that justifies the result in the Caritas case, yet raises questions about the award of damages for emotional distress in Brooks. Brooks, on the other hand, offers compelling reasons for rejecting any rigid distinction between business and personal transactions.

E. Legal Malpractice

In a legal malpractice action, the plaintiff is obligated to prove: (1) the existence of an attorney-client relationship; and

376. In Autrey v. Trkla, 350 N.W.2d 409, 412 (Minn. Ct. App. 1984), the court of appeals noted that recovery under the out-of-pocket rule normally will limit the plaintiff to the recovery of the difference between what the plaintiff parted with and what the plaintiff received, but the court created an exception in cases where the plaintiff would be uncompensated for damages caused by the misrepresentation under the out-of-pocket rule. Uncompensated damages in Whitney v. Buttrick, 376 N.W.2d 274 (Minn. Ct. App. 1985), included the tax liability for the sale of property. The court held that the out-of-pocket measure of damages was irrelevant because the harm arose not out of the sale, "but rather out of the negligent misrepresentation of a third party in a collateral, but related, transaction to the sale." Id. at 280.

The court of appeals concluded in Whitney that the plaintiff should have been instructed that the defendant could be found liable for damages proximately resulting from his negligent misrepresentation that he could structure the sale with no tax. The court should also have instructed the jury that the taxes paid could be an element of those damages if the jury found from the evidence that the sale could have been structured in a manner to yield a tax liability of less than [the actual amount assessed].

Id. at 281.
377. See Merritt, supra note 373, at 7-15.
378. Id. at 38.
(2) that the plaintiff sustained damages because of the attorney's negligence or breach of contract. The plaintiff is entitled to recover for all damages proximately caused by the attorney's negligence or breach of contract. For example, in a case where an attorney fails to file an action within the statute of limitations, the attorney's liability will be for the damages that would have been recovered had the action been filed.

Consequential damages may be recovered in cases involving negligent misrepresentation, with no out-of-pocket loss limitation on damages. The right to recover for other damages, including damages for emotional distress arising out of legal malpractice, is less clear.

In Gillespie v. Klun, suit for legal malpractice was brought against an attorney who represented the Gillespies in purchasing an apartment building on a contract for deed. The attorney drew up the purchase agreement and the contract for deed, representing both the purchasers and sellers in different capacities. He continued that representation after problems with the apartment created an adverse situation between the purchasers and sellers. The purchasers signed documents prepared by the attorney that they believed canceled the contract for deed. The papers were an agreement, a confession of judgment, and a quit claim deed that required the purchasers to execute a confession of judgment in favor of the sellers for all the debts that were incurred during the purchasers' possession of the apartment building, and to waive their statutory redemption right. As a result, the purchasers experienced financial and personal problems. The jury awarded damages for injury to the purchasers' credit and emotional distress. The court of appeals held that "extra contractual damages are not recoverable for breach of contract unless the breach is accompanied by an independent tort," but since the record

379. See, e.g., Christy v. Salitennan, 288 Minn. 144, 150, 179 N.W.2d 288, 293-94 (1970). In cases where the defendant-attorney has failed to take some action or raise some defense, the plaintiff must prove "(1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; (4) that but for defendant's conduct the plaintiff would have been successful in the prosecution or defense of the action." Blue Water Corp. v. O'Toole, 336 N.W.2d 279, 281 (Minn. 1983).
382. Id. at 549.
383. Id. at 550.
supported a finding of negligence, the award of damages for emotional distress was appropriate.\textsuperscript{384}

There is no clear rationale for the court's decision. While causation between the defendant's malpractice and the plaintiffs' emotional distress was established, the court did not address the policy problems raised in permitting recovery of damages for emotional injury in malpractice actions. The majority rule is to permit recovery of damages for emotional distress if the defendant-attorney acted egregiously or the plaintiff suffered physical injury.\textsuperscript{385} Various factors mitigate against a ready acceptance of the right to recover damages for emotional distress in malpractice actions, including the fear of spurious claims and the recognition that, in virtually all cases where there is an adverse result, the clients will suffer at least some degree of emotional injury.\textsuperscript{386}

There is a trend toward recognition of the claim for emotional distress, depending on whether the interest of the client is pecuniary or personal. Where pecuniary damages for emotional distress may be rigidly limited, but the interest is personal and the damage results in loss of liberty, the client may recover for emotional distress.\textsuperscript{387}

\textbf{F. Invasion of Privacy}

The Minnesota Supreme Court has not yet recognized the tort of invasion of privacy.\textsuperscript{388} When the courts have discussed the tort, they have used Prosser's classification scheme, which breaks the tort into four separate types of invasion of privacy: (1) unreasonable intrusion upon another's seclusion; (2) appropriation of another's name or likeness; (3) unreasonable publicity to the private life of another; and (4) publicity unreasonably placing another person in a false light in the public eye.\textsuperscript{389}

\textsuperscript{384} Id. at 558.
\textsuperscript{386} Id.
\textsuperscript{387} Id. at 1320-21.
\textsuperscript{389} Stubbs, 448 N.W.2d at 80 (citation omitted).
The void created by the lack of a recognized action for invasion of privacy is illustrated by the Minnesota Court of Appeals decision in *Stubbs v. North Memorial Medical Center*.\(^{390}\) The plaintiff was a patient of a physician who performed cosmetic surgery on her. The physician photographed her nose and chin before and after surgery.\(^{391}\) Later, the hospital began circulating the photographs of the plaintiff.\(^{392}\) She did not consent to the publication of the photographs.\(^{393}\)

The plaintiff claimed that because of the circulation of the photographs, she "lost sleep, and had sore throats, cold sores and headaches."\(^{394}\) While noting the need for a tort to provide redress in cases where unwanted publicity is given to some private aspect of a person's life, the court, constrained by the "long established rule in Minnesota" held that "invasion of privacy is not recognized as a cause of action" and dismissed the privacy claim.\(^{395}\)

The plaintiff also asserted a claim for the intentional infliction of emotional distress against the physician and hospital.\(^{396}\) However, the court noted that the plaintiff's allegations did not meet the severity standard of *Hubbard* and dismissed the claim.\(^{397}\)

While an intentional infliction of emotional distress claim can parallel a privacy claim, the elements of an emotional distress claim are more difficult to establish, as *Stubbs* so clearly indicates. The level of severity required by the intentional infliction of emotional distress claim is unnecessary in a privacy claim. If invasion of privacy is recognized as a separate tort, then it should be an independent tort supporting the recovery of damages for emotional distress, even if the plaintiff is unable to meet the elements of intentional infliction of emotional distress.

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390. *Id.*
391. *Id.* at 79.
392. *Id.* at 79-80.
394. *Id.*
395. *Id.* at 81.
396. *Id.* at 80.
397. *Id.* at 81.
G. Defamation

Claimants will frequently assert both defamation and intentional and negligent infliction of emotional distress claims in the same complaint. That practice raises questions concerning the relationship between the claims.

It is clear that recovery for defamation will support the award of damages for emotional distress. The primary issue that arises is whether defamation law imposes a limitation on the right to recover damages for emotional distress when the defamation claims fail. The answer depends, in part, on whether the plaintiff asserted a claim for the negligent infliction of emotional distress or the intentional infliction of emotional distress and, in part, on the reason for the failure of the defamation claim.

1. Defamation and Intentional Infliction of Emotional Distress

The Minnesota Supreme Court and the Minnesota Court of Appeals have repeatedly stated that recovery for negligent infliction of emotional distress is allowed only if the plaintiff is within the zone of danger of a physical impact, fears for her own safety, and suffers emotional distress as established by physical injury or manifestations. An exception exists when the plaintiff suffers a direct invasion of her rights, such as "defamation, malicious prosecution or other willful or malicious conduct."

Where the plaintiff asserts claims for defamation and the negligent infliction of emotional distress, the answer should be relatively simple. Recovery under the defamation theory supports recovery for consequent emotional harm; failure of the defamation claim precludes recovery for emotional distress under the negligence theory. However, the cases are in con-

398. Defamation requires proof of a defamatory statement that is false, that refers to the plaintiff, and that is published. See, e.g., Stuemper v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980).


flict concerning the mechanics and propriety of submitting claims for defamation and negligent infliction of emotional distress, particularly when the defamation claim fails.

In Covey v. Detroit Lakes Printing Co., the court of appeals considered the relationship between a defamation claim and claims for the intentional and negligent infliction of emotional distress. The plaintiffs sued the Detroit Lakes Printing Company because it printed an article concerning a murder that occurred outside the trailer home of some of their relatives which, by implication, defamed the plaintiffs. The plaintiffs sued for "negligent defamation, negligent and intentional infliction of emotional distress, and libel per se." In answer to special verdict questions, the jury found that the newspaper was negligent in publishing the article, that the paper's negligence was a direct cause of the plaintiffs' injury, and that the plaintiffs sustained damages of approximately $100,000 for their embarrassment, mental distress and humiliation. However, the jury also found that the article could not reasonably be understood to refer to the plaintiffs. Based on the latter finding, the trial court dismissed the negligent defamation claim and refused to award any damages to the plaintiffs. The trial court had previously granted summary judgment for the paper on the plaintiffs' claim for intentional infliction of emotional distress and a directed verdict on their claim for negligent infliction of emotional distress.

The court of appeals affirmed the trial court's judgment on the intentional infliction of emotional distress issue, concluding that the plaintiffs' injuries did not reach the level of severity required by the tort.

The court of appeals, however, concluded that the trial court should have allowed the claim for the negligent infliction of emotional distress to go to the jury. While the evidence of physical manifestation of the emotional distress was minimal, the court of appeals found the level was sufficient to take the

403. Id. at 141.
404. Id.
405. Id.
406. Id.
408. Id.
case to the jury. However, the court held that the trial court’s error was harmless, given the jury’s findings on the defamation claims.\textsuperscript{409}

The court’s conclusion concerning the claim for negligent infliction of emotional distress is questionable, because the defamation claim supported the claim for emotional distress and other mental suffering—not the separate claim for negligent infliction of emotional distress. It seems clear that the negligent infliction of emotional distress claim would be superfluous, both theoretically and in the context of the case. The separate and independent defamation claim, supporting a claim for emotional distress, stands on its own. If the plaintiff establishes the defamation claim, the plaintiff is entitled to recover for the emotional suffering engendered by the defamatory statements. If the plaintiff loses on the defamation claim, for whatever reason, the claim for negligent infliction of emotional distress cannot stand independently. Because it is superfluous, the trial court’s directed verdict on the issue appears to be correct.

\textit{Covey} appears to be in conflict with the court of appeals’ opinion in \textit{Strauss v. Thorne},\textsuperscript{410} decided a month later. In \textit{Strauss}, the trial court held that dismissal on a motion for summary judgment of the plaintiff’s defamation claim also necessitated dismissal of the plaintiff’s claim for negligent infliction of emotional distress. The court of appeals concluded that, because the trial court’s dismissal of the defamation claim was erroneous, the plaintiff was “entitled to have her claim of negligent infliction of emotional distress considered on remand as well.”\textsuperscript{411} By implication, had the court upheld the dismissal of the defamation claim, the claim for negligent infliction of emotional distress could have not been considered.

If \textit{Strauss} is correct, then the court in \textit{Covey} is incorrect in sending a message to trial courts to instruct juries on negligent infliction of emotional distress, even if there are physical manifestations of the emotional distress. If the defamation claim does not succeed, the basis for recovery for emotional harm also evaporates, unless some other tort claim justifies recovery for that harm.

\textsuperscript{409} Id.
\textsuperscript{410} 490 N.W.2d 908 (Minn. Ct. App. 1992).
\textsuperscript{411} Id. at 912.
2. Defamation and Intentional Infliction of Emotional Distress—Limitations

Intentional infliction of emotional distress claims are frequently asserted with defamation claims. This practice raises a question concerning the relationship of intentional infliction of emotional distress to defamation claims. The limitations to negligent infliction of emotional distress are inapplicable to a claim for the intentional infliction of emotional distress. Intentional infliction of emotional distress, unlike the claim for negligent infliction of emotional distress, stands alone. The plaintiff's right to recover for intentional infliction of emotional distress does not depend on his ability to establish the defamation claim. Thus, the issue becomes whether defamation law, nonetheless, establishes a baseline or limitation that precludes recovery for the intentional infliction of emotional distress under some circumstances.

The fact that a plaintiff is not entitled to recover for defamation should not automatically preclude recovery for the intentional infliction of emotional distress. Rather, the impact of the dismissal of the defamation claim should be dependent on the basis for the claim of intentional infliction of emotional distress. For example, the defamation claim might be only a small part of an overall pattern of harassment. If so, the fact that the plaintiff is not entitled to recover for defamation should not necessarily preclude recovery for the intentional infliction of emotional distress. Conversely, if the conduct that gives rise to both the defamation and emotional distress claims is the same, arguably the plaintiff should not be able to circumvent limitations on defamation recovery simply by recasting the claim as one for the intentional infliction of emotional distress. This is particularly true where strong policy reasons exist to limit or to deny the defamation claim.

If the plaintiff alleges intentional infliction of emotional distress, then this claim may justify recovery for the emotional harm sustained by the plaintiff, irrespective of the disposition of the defamation claim. The courts have not explored this relationship in detail, but the basic question is whether a plaintiff, barred from recovering for defamation, should also be barred from recovering under the theory of intentional infliction of emotional distress.

There are a variety of reasons why a defamation claim may
fail or be limited: (1) the plaintiff may be barred by First Amendment limitations under the federal constitution or its state equivalent; (2) the fact/opinion limitation may apply, precluding recovery for an opinion; (3) a common law absolute or qualified privilege may apply, precluding recovery for defamation either because the privilege is absolute or because the plaintiff is unable to make the showing necessary to overcome the qualified privilege; (4) the plaintiff also may be unable to recover anything other than special damages because of a failure to demand a retraction; (5) the plaintiff may fail to prove one of the essential elements of the defamation claim; or (6) in a slander case, the plaintiff may lose because he is unable to establish either slander per se or pecuniary loss.

a. First Amendment Limitations

In cases where the plaintiff is a public official or figure seeking to recover damages for emotional injury based on defamatory statements, it is clear that the First Amendment limitations of New York Times Co. v. Sullivan will apply.412 In Hustler Magazine, Inc. v. Falwell,413 the Supreme Court took the following position:

[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a blind application of the New York Times standard, . . . it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.414

The same limitation logically extends to any situation where Gertz v. Robert Welch, Inc.415 applies, even where a private person is involved, so long as the case involves a situation where the plaintiff has the burden of proving the falsity of a statement. In Philadelphia Newspapers, Inc. v. Hepps,416 the Court held

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414. Id. at 56.
that in cases where the publication concerning a private person is about a matter of public concern, the plaintiff has the burden of proving the falsity of the statement.

If Gertz applies and a claimant asserts claims for both defamation and intentional infliction of emotional distress, the Court would likely reach the same result as in Falwell. The plaintiff would have to prove the falsity of the statement, and an inability to do so would preclude recovery for defamation. The plaintiff would not be able to avoid the constitutional limitations in such a case by pleading the intentional infliction of emotional distress.

**b. Fact/Opinion Dichotomy**

The tort of intentional infliction of emotional distress may also be limited by defamation law's fact/opinion dichotomy, even if not constitutionally compelled.\(^{417}\) In situations where the defendant defames the plaintiff, and the plaintiff is a public figure or official, or the statement concerns a public issue, the same limitation in Falwell applies to preclude recovery. The plaintiff's inability to establish a false statement of fact means that recovery is precluded under New York Times Co. v. Sullivan.\(^{418}\) Thus, if the defamatory statement does not imply the

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417. In Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), the Supreme Court held that there is no constitutionally mandated protection of opinion. However, in Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990), cert. denied, 111 S. Ct. 1071 (1991), decided before Milkovich, the Minnesota Supreme Court anticipated the Supreme Court's holding and held that the fact/opinion distinction rests on state law grounds:

> We reiterate that like protected opinion and "fair comment" on public officials, "[t]he doctrine of privileged communication rests upon public policy considerations [and] results from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory. . . ." Thus, while first amendment and other policy considerations underlie this restraint, we note our decision here is rooted in state defamation law.

455 N.W.2d at 452 (citation omitted).

418. 376 U.S. 254 (1964). In Huyen v. Driscoll, 479 N.W.2d 76 (Minn. Ct. App. 1991), the plaintiff, a public official, argued to the court of appeals that Milkovich abolished constitutional protection for opinions. The court of appeals disagreed:

> The United States Supreme Court recently determined freedom of expression "is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." . . . After stating that the appellate courts' fact/opinion analysis mistakenly relied on dicta in Gertz, the Court said all statements of opinion are not automatically protected by the first amendment. . . . Citing existing law, the Court clarified that only statements regarding matters of public concern which are not sufficiently factual to be capable of being proven true or false, and state-
existence of facts, recovery for defamation will be precluded. If the fact/opinion distinction limits recovery for defamation it would also appear to be applicable to claims for the intentional infliction of emotional distress where the emotional distress claim is based on the same statement or statements.

\[c. \text{ Qualified Privileges} \]

Where common law absolute or qualified privileges apply, the plaintiff may also be precluded from recovery for both defamation and intentional infliction of emotional distress. If an absolute privilege applies, the plaintiff may not recover for defamation, even if the defendant uttered the statement with common law actual malice. If a qualified privilege applies, the plaintiff may overcome the privilege by showing common law actual malice or abuse of the privilege. If an absolute privilege applies, or a qualified privilege applies and the plaintiff is unable to make the showing necessary to overcome the privilege, the policies underlying the privilege seem to be strong enough to preclude recovery for intentional infliction of emotional distress where the emotional distress claim is based on the same statements that the defendant was privileged to make.

\[ments which cannot be reasonably interpreted as stating actual facts, are absolutely protected by the first amendment. . . . Thus, contrary to Huyen's argument, Milkovich did not abolish constitutional protection for opinions, but instead merely narrowed the privilege. \]

\[Id. \text{ at 79.} \]

\[419. \text{ See e.g., Huyen, 479 N.W.2d at 79-80.} \]

\[420. \text{ However, in cases where there is no constitutional limitation flowing from Falwell, the court of appeals has noted that at common law there is no fact/opinion distinction. See Bradley v. Hubbard Broadcasting, Inc., 471 N.W.2d 670, 673-74 (Minn. Ct. App. 1991), review denied, (Minn. Aug. 2, 1991).} \]

\[\text{If the statement implies or states facts, the statement may not be protected “opinion” and is therefore actionable. See Yetman v. English, 811 P.2d 323 (Ariz. 1991). In Yetman, a county supervisor brought suit against a state legislator who called the supervisor a “communist.” The court held that the jury must determine whether the statement implied or stated facts about the plaintiff.} \]

\[421. \text{ The existence of the privilege is a question of law for the court. See Lewis v. Equitable Life Assurance Soc’y, 389 N.W.2d 876, 890 (Minn. 1986). The plaintiff has the burden of proving abuse of the privilege. See id.; Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980). Common law actual malice differs from New York Times Co. actual malice. Common law malice necessitates a showing that the defendant “made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.” McKenzie v. William J. Burns Int’l Detective Agency, 149 Minn. 311, 312, 183 N.W. 516, 517 (1921).} \]

\[422. \text{ See supra note 421.} \]
pursuant to an absolute or qualified privilege.\textsuperscript{423} For example, an absolute privilege protecting participants in a judicial proceeding from defamation claims should also bar recovery for any ancillary torts based on the same testimony. The policy favoring open disclosure and free expression would be chilled if the prohibition against libel claims could be circumvented by simply recasting the claim in another form.\textsuperscript{424}

In each of the situations discussed in this section, it should also be clear that the privileges, whether First Amendment or common law, should not provide protection for statements that exceed the boundaries of the privilege. Where these statements do exceed the boundaries, defamation and other tort actions, including a claim for the intentional infliction of emotional distress, should be available.\textsuperscript{425}

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\textsuperscript{423} See, e.g., Kanengiser v. Kanengiser, 590 A.2d 1223 (N.J. Super. Ct. Law Div. 1991). In Kanengiser, an attorney, who received a letter written by another attorney on behalf of a client, brought suit, alleging four causes of action. The principal claim was that the letter was libelous and actionable per se. The court concluded that the letter was absolutely privileged because it was preliminary to a judicial proceeding. That privilege also barred other claims, including the non-libel causes of action, such as the allegation for an "extortionate demand:")

This rule is predicated on the common sense observation that the privilege exists to counteract the chilling effect that the potential for civil liability would otherwise have on the participants in judicial proceedings. This chilling effect would exist regardless of the tag that plaintiff attaches to his cause of action.

\textit{Id.} at 1234.

See also Barr v. Mateo, 360 U.S. 564, 569 (1959), where the Supreme Court stated that the absolute liability from libel accorded to federal officials will also immunize them from liability for "kindred torts" arising out of the same statements.

\textsuperscript{424} In Rainier's Dairies v. Raritan Valley Farms, Inc., 117 A.2d 889 (N.J. 1955), the New Jersey Supreme Court explained the reasons why a privilege from a libel action for disclosures in a dispute resolution proceeding also barred ancillary torts:

The libel action privilege grows out of the public policy favoring free expression in statutorily-required informal dispute resolution proceedings, without fear of ensuing libel action, short of outright lies or reckless disregard of falsity. An action for tortious interference based on the same verbal conduct would equally chill the free expression we seek to protect.

\textit{Id.} at 895. The court also stated that "[i]f the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and quasi-judicial proceedings is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label."

\textit{Id.}

\textsuperscript{425} See, e.g., S & W Seafoods Co. v. Jacor Broadcasting, 390 S.E.2d 228 (Ga. Ct. App. 1989), cert. denied, (Ga. Feb. 15, 1990). The owner and manager of a restaurant brought suit against an Atlanta radio station for defamation, intentional infliction of emotional distress, negligence, invasion of privacy, and tortious interference with business relations, based on comments made by a radio talk show host during the course of a restaurant review portion of his talk-show. The defamation claim was
d. Retraction Defense

If the defamation claim is limited because the plaintiff failed to demand a retraction, arguably the plaintiff should not be able to circumvent that limitation by making an ancillary tort claim for the same harm. The policy that underlies the retraction statute—providing the newspaper with an opportunity to minimize damages by retracting a defamatory statement—is strong enough to justify preclusion of the ancillary tort.

e. Failure to Prove an Essential Element

If the plaintiff's defamation claim fails because she is unable to establish an essential element of the defamation claim, that same finding may preclude recovery for the intentional infliction of emotional distress. For example, if the defendant did not intend to refer to the plaintiff, the plaintiff may be unable to establish the necessary intent to inflict emotional distress on her. At the very least, a finding that the defendant did not intend to refer to the plaintiff but did intend to inflict emotional distress on the plaintiff, creates the possibility of a perverse verdict.

Other limitations, such as lack of publication, should not be a defense to the claim for the intentional infliction of emotional distress. Publication is not an essential element of the claim for intentional infliction of emotional distress, and it seems apparent that the emotional distress claim could be established, notwithstanding the lack of publication of the defamatory statements that caused the plaintiff to suffer

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dismissed on summary judgment because the comments made on the talk show slamming the restaurant and the owner-manager either were not shown to have been false or because the statements were protected speech. However, while some of the comments were protected expression, the court concluded that the protection did not extend to comments made by the host that encouraged listeners to “[g]o by and see this guy Weinberg at S & W on Roswell Road [and] [t]ell him he stinks,” to “go by and spit in his face for me,” and to “[g]o by there today and give a little five fingers in the face . . . to [him].” Id. at 231.

The court concluded that the words were not protected because they were calculated “to provoke an imminent breach of the peace.” The court reached the same conclusion with respect to the claim for intentional infliction of emotional distress. Id.

Judge Pope, in dissent, argued that all the words, including those that the majority perceived to be “fighting words,” were constitutionally protected. The exhortations were not such that they could reasonably have been interpreted by listeners as imminent direction to assault Weinberg, and, although the words were obnoxious, they were entitled to constitutional protection. Id. at 233 (Pope, J., dissenting).
emotional distress. There are no strong policy reasons such as those that support the absolute and qualified privileges that should preclude recovery for emotional distress where the harmful statement is not published.

The same should be true if the words are simply not found to be defamatory. In such a case there would be no more reason to deny the emotional distress claim than in a case where the plaintiff alleged assault and intentional infliction of emotional distress, and the assault claim failed.

h. Slander

If the plaintiff is unable to recover in a slander action because the statements are not slander per se or the plaintiff is unable to establish pecuniary loss flowing from the slanderous statement, the same analysis should apply. The limitations on the right to recover for slander are not supported by the policy considerations that underlie first amendment or common law absolute or qualified privileges. While those policy considerations may preclude claims for emotional distress where the privileges apply, the inapplicability of the privileges and limiting policies should mean that the plaintiff should be entitled to go forward with the emotional distress claim when the slander claim fails for a reason not associated with the limiting policy.

H. Wrongful Death

Minnesota Statutes section 573.02 seemingly allows for recovery of only pecuniary loss in wrongful death cases. Fussner v. Andert, decided in 1961, is the key Minnesota Supreme Court case on the definition of pecuniary loss in wrongful death actions. The case arose out of the death of a family’s daughter. The court discussed the elements of recoverable loss for a wrongful death action of a child:

We cannot agree that loss of earnings, contributions, and services in terms of dollars represents the only real loss the parent sustains by the death of his child. With the passage of time the significance of money loss has been diminished. Conversely, there is a growing appreciation of the true

428. Id. at 348, 113 N.W.2d at 356.
value to the parent of the rewards which flow from the family relationship and are manifested in acts of material aid, comfort, and assistance which were once considered to be only of sentimental character.\textsuperscript{429}

The court provided a historical perspective to the recovery of wrongful death damages:

An examination of these and other authorities compels the conclusion that courts and juries in the exercise of their judgment and experience have not conformed to the limited pecuniary-loss test. It should be no secret to the bar or the courts that jurors have circumvented the test in order to provide substantial recoveries which they feel are equitable under the circumstances. Courts have sanctioned this practice by holding that such verdicts are not excessive. It appears from a review of our authorities that damages are awarded not only on the basis of contributions and such services as the evidence may establish but for those additional elements of loss within the broad definition of society and companionship which include aid, advice, comfort, and protection which the survivor might reasonably expect from the decedent and which, while not having an easily determined market value, are fully justified since they are elements of loss for which money can supply a practical substitute.\textsuperscript{430}

The court then indicated how the jury should be instructed in a wrongful death case:

The jurors should be told that where the evidence warrants recovery the survivor may be compensated not only for actual pecuniary loss of contributions and services but should be compensated as well for loss of advice, comfort, assistance, and protection which the jury might find to be of pecuniary value and which the survivor could reasonably have expected if the decedent had lived.\textsuperscript{431}

\textit{Fussner} expanded the recoverable elements of damage in a wrongful death action for the death of a child. The same extension applies to cases involving the death of adults. In the 1988 decision of \textit{Ferguson v. Orr},\textsuperscript{432} the court of appeals discussed the recoverable losses in a case involving the wrongful death of an adult. The issue concerned the jury's award of

\textsuperscript{429} \textit{Id.} at 358, 113 N.W.2d at 359 (emphasis added).
\textsuperscript{430} \textit{Id.} at 358-59, 113 N.W.2d at 362 (emphasis added).
\textsuperscript{431} \textit{Id.} at 359, 113 N.W.2d at 363.
zero damages. The court held that the evidence did not support the zero award, concluding that the decedent "regularly contributed money, advice, comfort and companionship" to her mother, children and grandchildren.

Other Minnesota decisions confirm that some elements of emotional damages are recoverable for wrongful death. For example, in *Jones v. Fisher*, the Minnesota Supreme Court said that damages under the wrongful death act are measured by "'pecuniary loss resulting from the death' and include advice, counsel, and loss of companionship." In another decision, *Johnson v. Consolidated Freightways, Inc.* the supreme court held that damages for wrongful death include "companionship, care and advice."

In *Steinbrecher v. McLeod Cooperative Power Ass'n*, the Minnesota Court of Appeals discussed the recoverable elements in a wrongful death case involving extraordinary psychological harm to the decedent's surviving spouse:

> All the evidence indicates that Michael was the glue that held her together. He provided Mary advice, comfort, assistance and protection. He enabled her to lead a normal life.

*Fussner* explicitly distinguished between advice and comfort and mental anguish. Later cases refine the distinction.

Existing case law subsumes the idea of "comfort" into the definition of pecuniary loss.

The lack of clarity in these cases indicates that the distinction between the elements of damage in wrongful death cases is blurred. Furthermore, the cases imply recoverable damages may justifiably include not only the elements specifically set out in the current model JIG 180 but also loss of companionship.

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433. *Id.* at 734.
434. *Id.* at 735.
435. 309 N.W.2d 726 (Minn. 1981).
436. *Id.* at 730.
437. 420 N.W.2d 608 (Minn. 1988).
438. *Id.* at 611 (citing Gray v. Goodson, 378 P.2d 413, 419 (Wash. 1963)).
440. *Id.* at 714-15 (citations omitted).
441. MINNESOTA PRACTICE, CIVIL JURY INSTRUCTION GUIDE 180 (3d. ed. 1986) provides for recovery of, inter alia, counsel, guidance, advice and comfort.
V. Conclusion

The law of emotional distress in Minnesota has not changed significantly in the last century. Older concepts have been reconsidered in modern explanations, but the approaches have remained essentially the same. A plaintiff who seeks to recover for the negligent infliction of emotional distress must meet the requirements of Purcell, as recycled in Okrina and Stadler. The plaintiff must be in the zone of danger and suffer emotional distress as a result of fear for her own safety, and the distress must be manifested by physical injury. The zone of danger standard can be abandoned only if the plaintiff either suffers physical injury as a result of the defendant's negligence, or proves that the defendant committed a separate tortious act.

There are unanswered questions concerning the right to recover for negligently inflicted emotional distress. Will the supreme court abandon the zone of danger requirement and if not, the physical injury requirement? Will the court adopt some version of the "direct victim" recovery rule that has been adopted by the California Supreme Court?

The law concerning intentional infliction of emotional distress is also limited. The supreme court, historically cautious in determining whether recovery should be allowed in cases involving claims for emotional injury in absence of preceding physical harm, adopted the tort of intentional infliction of emotional distress in Hubbard. However, the court, although concerned about the possibility that independent claims of mental anguish may be speculative and therefore likely to lead to fictitious allegations, imposed significant limitations on the right to recover, limitations that the lower courts have followed stringently.

There is some confusion concerning the application of the standards, leaving the courts open to criticism that the guidelines for the recovery of damages for emotional harm have been administered too rigidly, particularly in the case of intentional infliction of emotional distress, a problem that is resolvable by a return to the basics established in Hubbard and Pikop.

Given the limitations on the right to recover for emotional distress, it is important to determine whether there are alternative avenues of recovery that avoid those limitations. The distinctions between cases where intentional infliction of emotional cases have been unsuccessful and cases where the
same sort of emotional injury has been compensable by connecting it to some other underlying tort, highlight the importance of scouring the law to determine whether there are other theories that will support recovery of damages for emotional harm. Those alternatives do exist and in fact will provide a superior basis for obtaining compensation for emotional injury, unless the Minnesota law with respect to intentional infliction of emotional distress is significantly liberalized.