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the hazard of allowing battered child syndrome testimony to prejudice the jury against a particular defendant. The court continues to require a complete chain of evidence showing that a defendant had exclusive control over the abused child during several episodes of abuse including the final injury. Thus, the court has controlled the use of a powerful form of circumstantial evidence—expert testimony identifying “battered child syndrome.”


The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability.¹

These words have been prophetic, particularly in the area of the law allowing recovery for emotional distress.² The movement toward recognition of the independent tort of intentional infliction of emotional distress³ has been slow but relentless.⁴ In light of this trend, the Minnesota Supreme Court finally joined the majority of jurisdictions recognizing the “new tort” of intentional infliction of emotional distress.⁵

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³. Hereinafter referred to as the “new tort.”

⁴. Numerous jurisdictions have adopted the Restatement formulation of the tort. See RESTATEMENT (SECOND) OF TORTS § 46 (1977); see also Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 COLUM. L. REV. 42, 43 n.9 (1982). See generally W. PROSSER, supra note 2, at 49-50 (“[T]he law is clearly in a process of growth, the ultimate limits of which cannot as yet be determined.”).

In *Hubbard v. United Press International, Inc.*, the court unanimously adopted the Restatement's formulation of the "new tort," but denied the plaintiff any recovery. The court's message to prospective plaintiffs is clear—recovery under the "new tort" will be an arduous task.

In the early development of the "new tort," an individual's interest in emotional tranquility received only incidental protection. Damages

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7. 330 N.W.2d at 438-39; *see also Restatement, supra* note 4, § 46(1).
8. 330 N.W.2d at 439.
10. Mental and emotional distress are generally treated as interchangeable terms.
11. Magruder, *supra* note 9, at 1055. Although a plaintiff's recovery depended upon
CASE NOTES

for emotional distress were parasitically attached\textsuperscript{12} to such independent actions as assault,\textsuperscript{13} trespass,\textsuperscript{14} seduction,\textsuperscript{15} malicious prosecution,\textsuperscript{16} breach of promise to marry,\textsuperscript{17} and mistreatment of a corpse.\textsuperscript{18} During this embryonic period, Minnesota considered itself in the vanguard.\textsuperscript{19} Subsequent Minnesota Supreme Court decisions belied this initial perception,\textsuperscript{20} as Minnesota relinquished its leadership role to other jurisdictions.\textsuperscript{21}

\begin{footnotes}
\footnotetext[12]{an actionable tort, it was "legal recognition, to a limited extent, of the interest in mental and emotional peace." \textit{Id.}}
\footnotetext[13]{The term "parasitic damages" was coined in 1906 by Professor Street in describing damages incidental to the underlying cause of action. \textit{See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY} 461 (1906). "Under this theory, damages for emotional harm are considered 'parasites' which cannot be recovered without being attached to some 'host.'" \textit{Goins, Intentional Infliction of Emotional Distress—Escaping the Impact Rule in Arkansas, 35 ARK. L. REV.} 533, 535 (1981).}
\footnotetext[14]{\textit{See, e.g.}, \textit{Johnson v. Sampson}, 167 Minn. 203, 208 N.W. 814 (1926) (although defendant's conduct arguably fell short of actual assault, court awarded damages for mental suffering); \textit{see also} \textit{Interstate Life & Acc. Co. v. Brewer}, 56 Ga. App. 599, 193 S.E. 458 (1937) (battery found where insurance adjuster deliberately tossed coin on bed of woman hospitalized for heart condition); \textit{Allen v. Hannaford}, 138 Wash. 423, 244 P. 700 (1926) (assault found where empty pistol was aimed at another and damages awarded for resulting nervous condition).}
\footnotetext[15]{\textit{Lesch v. Great N. Ry.}, 97 Minn. 503, 106 N.W. 955 (1906). The \textit{Lesch} court permitted damages to be attached to a legal wrong, regardless of whether impact occurred. In \textit{Lesch}, defendant's conduct constituted a trespass to the wife's "interest" in the homestead. This "interest" was fashioned because legal title was in her husband. \textit{Id.} at 506, 106 N.W. at 957; \textit{see also} \textit{Boyce v. Greeley Square Hotel}, 228 N.Y. 106, 126 N.E. 647 (1920) (damages awarded for emotional distress caused by hotel employees who forcibly entered room of married couple and accused them of immoral conduct).}
\footnotetext[16]{\textit{Haeissig v. Decker}, 139 Minn. 422, 166 N.W. 1085 (1918).}
\footnotetext[17]{\textit{Price v. Minnesota}, D. & W. Ry., 130 Minn. 229, 153 N.W. 532 (1915).}
\footnotetext[18]{\textit{See Kugling v. Williamson}, 231 Minn. 135, 42 N.W.2d 534 (1950); \textit{Bukowski v. Kuznia}, 151 Minn. 249, 186 N.W. 311 (1922). In \textit{Bukowski}, the Minnesota Supreme Court held that the trial court's jury instruction that plaintiff could recover for "anguish of mind, blighted affections or disappointed hopes" was proper. \textit{Id.} at 250, 186 N.W. at 312. While the action was based upon a contract, the award of damages was based on an underlying tort. \textit{See id.}}
\footnotetext[19]{\textit{Larson v. Chase}, 47 Minn. 307, 50 N.W. 238 (1891). In \textit{Larson}, the Minnesota Supreme Court allowed the plaintiff to recover damages for "mental suffering and nervous shock." \textit{Id.} at 312, 50 N.W. at 240.}
\footnotetext[20]{"Minnesota, in the well-reasoned case of \textit{Johnson v. Sampson}, [167 Minn. 203, 208 N.W. 814 (1926)] would allow a schoolgirl damages for mental suffering resulting from false accusations of unchastity and threats of imprisonment, and has taken the lead in this field." \textit{Note, supra} note 1, at 1038 (citations omitted); \textit{see also supra} note 13 (discussing \textit{Johnson}).}
\end{footnotes}
As Dean Prosser has noted, problems arise in applying the parasitic approach to specific fact situations.22 In many instances, courts are unable to locate a tortious peg "upon which to hang the mental damages."23 While Minnesota retained the parasitic theory,24 the majority of jurisdictions dispensed with this approach.25 Despite persuasive policy reasons for denying recovery absent an underlying tort, such as the threat of fabricated damages and the burden upon the courts,26 other jurisdic-


22. W. PROSSER, supra note 2, § 12, at 52 (parasitic rule would permit recovery for gesture that might frighten plaintiff momentarily and deny recovery for menacing words that terrorized him for lifetime).

23. For discussion of a case illustrating the extreme lengths courts have gone to create an underlying tort, see Magruder, supra note 9, at 1066 (discussing Koerber v. Patek, 125 Wis. 453, 102 N.W. 40 (1905) (mutilation of corpse considered interference with interests of survivors based on close relative's right of custody to corpse)).


25. See Givelber, supra note 4, at 43, 44 n.9; see also supra note 21 and accompanying text (list of jurisdictions which have recognized "new tort").

26. See W. PROSSER, supra note 2, § 12, at 50-51; see also Givelber, supra note 4, at 44-45. Givelber states:

[Maj or objections to the recognition of the tort [are]: (1) the difficulty of differentiating between genuine emotional injuries and fictitious ones as well as between those that are serious enough to warrant legal redress and those that are not, and (2) the inappropriateness of providing a judicial forum for every dispute that leaves someone feeling emotionally abused, particularly those that arise out of everyday stress.

Id. (citations omitted); see also State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (court permitted recovery under "new tort"); cf. Boyle v. Wenk, 378 Mass. 592, 392 N.E.2d 1053 (1979). In Boyle, the Supreme Court of Massachusetts stated:

We are mindful of the need for limits on recovery for intentional or reckless infliction of emotional distress: 'No pressing social need requires that every abusive outburst be converted into a tort; upon the contrary it would be unfortunate...
tions recognized that a more effective "guarantee of genuineness" was to adopt the Restatement elements and grant the tort an independent existence.27

Until Hubbard, courts applying Minnesota law continued to require an underlying tort28 or physical injury29 to provide a guarantee against fabricated damages.30 Notwithstanding the court's acceptance of the "new tort," the historical reluctance toward recovery for emotional distress31 pervades the Hubbard decision.32 The Hubbard court expressly stated that its decision "does not signal an appreciable expansion in the

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27. See W. Prosser, supra note 2, § 12, at 52. A number of commentators have encouraged recognition of the "new tort" as a guarantee against fabricated damages. See Borda, Ones Right to Enjoy Mental Peace and Tranquility, 28 GEO. L.J. 55 (1939); Prosser, Intentional Infliction Of Mental Suffering: A New Tort, 37 MICH. L. REV. 874 (1939); Seitz, Insults—Practical Jokes—Threats Of Future Harm—How New As Torts?, 28 KY. L.J. 411 (1940); Vold, Tort Recovery For Intentional Infliction Of Emotional Distress, 18 NEB. L. BULL. 222 (1939); Wade, Tort Liability For Abusive And Insulting Language, 4 VAND. L. REV. 63 (1950); see also Note, An Independent Tort Action For Mental Suffering And Emotional Distress, 7 DRAKE L. REV. 53 (1957) (importance of the tort in Iowa case law).

28. See, e.g., Schus v. Prudential Ins. Co., 96 F. Supp. 400 (D. Minn. 1950) (no recovery where, to avoid payment of benefits, employer terminated employee before physical condition could deteriorate into permanent disability); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926) (recovery permitted where false charge of unchastity made against schoolgirl); Beaulieu v. Great N. Ry., 103 Minn. 47, 114 N.W. 353 (1907) (no recovery for mental anguish damages under breach of contract action absent willful or malicious conduct by defendant); Lesch v. Great N. Ry., 97 Minn. 503, 106 N.W. 955 (1906) (recovery permitted where defendant's conduct frightened plaintiff); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892) (recovery permitted where defendant's negligence placed plaintiff in apparent danger, which was proximate cause of plaintiff's mental distress); Larson v. Chase, 47 Minn. 307, 50 N.W. 238 (1891) (recovery permitted where wife was not allowed to dispose of husband's corpse).


30. See supra note 26 and accompanying text.

31. See Langeland v. Farmers State Bank, 319 N.W.2d 26 (Minn. 1982); Bjordahl v. Bjordahl, 308 N.W.2d 817 (Minn. 1981); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Haagenson v. National Farmers Union Prop. & Cas., 277 N.W.2d 648 (Minn. 1977); Wild v. Rarig, 302 Minn. 419, 234 N.W.2d 775 (1975), cert. dismissed, 424 U.S. 902 (1976); Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 178 N.W. 582 (1920); Beaulieu v. Great N. Ry., 103 Minn. 47, 114 N.W. 353 (1907); Sanderson v. Northern Pac. Ry., 88
scope of conduct actionable under this theory of recovery.\textsuperscript{33}

The elements of intentional infliction of emotional distress under the Restatement's formulation of the "new tort" are: (1) extreme and outrageous conduct; (2) intentional or reckless conduct; (3) causation; and (4) severe emotional distress.\textsuperscript{34} Although difficulties of proof arise with each element,\textsuperscript{35} two are persistently troublesome for plaintiffs—the definition of outrageous conduct\textsuperscript{36} and proof of severe emotional distress.\textsuperscript{37}

Comments to the Restatement describe outrageous conduct as that which goes beyond all possible bounds of decency and is regarded as atrocious or utterly intolerable in a civilized community.\textsuperscript{38} Such conduct would lead an average member of the community to resent the actor and exclaim, "outrageous!"\textsuperscript{39}

The definition of severe emotional distress is equally unclear.\textsuperscript{40} Liability arises only when the distress inflicted is so severe that no reasonable person could be expected to endure it.\textsuperscript{41} Consequently, the severity of the distress is measured by the extent of the outrageous conduct. Although the Restatement emphasizes that bodily harm is not a prerequisite

\textsuperscript{32} See, e.g., 330 N.W.2d at 438-39.
\textsuperscript{33} Id. at 439.
\textsuperscript{34} RESTATEMENT, supra note 4, § 46(1).
\textsuperscript{35} See W. PROSSER, supra note 2, § 12, at 50.
\textsuperscript{36} See Givelber, supra note 4, at 43-52. "The term outrageous is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance to those who must evaluate that conduct." Id. at 51.
\textsuperscript{37} See Insult and Outrage, supra note 9, at 43. Prosser states that:
[Emotional distress] must of course be proved; and since it is easily feigned and difficult to deny, the courts have tended quite naturally to insist upon some guarantee of genuineness, either in the form of physical consequences which can be attested objectively, or in the nature of the defendant's conduct and the circumstances of the case.

Id. (citations omitted).

An alternative to direct proof of a nebulous psychic injury, is to shift the emphasis to the more visible element, outrageous conduct. "Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom." State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952).

\textsuperscript{38} See Restatement, supra note 4, § 46 comment d; see also id. comments e-g, j-k. See generally Givelber, supra note 4, at 46-47.
\textsuperscript{39} Restatement, supra note 4, § 46 comment d; see Magruder, supra note 9, at 1058. Magruder argues that the outrageous element is "as practicable to apply as the standard of reasonable care in ordinary negligence cases . . . ." Id.
\textsuperscript{40} See Restatement, supra note 4, § 46 comment j. "[Severe emotional distress] includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." Id.
\textsuperscript{41} Id. The severity of distress ensures against fictitiousness. Where there is a particularly susceptible victim, the Restatement appears to require that the defendant have knowledge of that condition and proceed in the face of it. See id. comment f.
to recovery, physical injury remains the best evidence of severe emotional distress. The defendant’s conduct must be considerably more outrageous when emotional distress alone is alleged than would be required for recovery if physical injury were also alleged.

Thus, the vaguely defined standard of outrageousness is used to establish the other—severe emotional distress. In Hubbard, the plaintiff failed to meet the burden of proof for these two elements of the cause of action.

In 1969, James Hubbard became a full-time employee for United Press International (UPI) under a collective bargaining agreement. From 1974 to 1980, Hubbard served as the news-picture bureau manager for Minnesota. During his first six years with UPI, Hubbard received recognition from others in his field for his fine work as a photojournalist. Early in 1976, Hubbard disclosed to his superiors that he was completing treatment for alcoholism. From that point on, Hubbard contended, UPI harassed him because of his alcoholism.

After Hubbard disclosed his treatment, he was pulled from an assignment to cover the Montreal Olympics. Hubbard’s supervisor, Ray Macchini, wrote to Hubbard, explaining that he had to “prove himself” to retain his job. As the court noted, “This letter was the first

42. Id. comment k.
43. See, e.g., 330 N.W.2d at 438. The court stated that Hubbard’s inability to prove some physical manifestation of his distress was fatal with regard to establishing this element of his cause of action. Id. at 440. Contra State Rubbish Collectors Ass’n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952) (“In cases where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant’s intentional misconduct fell short of producing some physical injury.”).
44. See RESTATEMENT, supra note 4, § 46 comment j; see also W. PROSSER, supra note 2, at 60. Prosser states:

In 1948 a section of the Restatement of Torts was amended to reject any absolute necessity for physical results. Probably the conclusion to be reached is that where physical harm is lacking the court will properly tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious but that if the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial, bodily harm is not required.

Id. (citations omitted) (emphasis added).
45. See 330 N.W.2d at 440.
46. Id. at 431.
47. See id.
48. Id.; see also Respondent’s Brief and Appendix at 8 (Hubbard named Nebraska newspaper photographer of the year for three consecutive years and received spot news award from National Press Photographers Association).
49. 330 N.W.2d at 432.
50. Id. at 431.
51. Id. at 432.
52. Ray Macchini, manager of UPI’s central division, was Hubbard’s immediate supervisor. Macchini reported directly to Bill Lyon, a vice president of UPI in New York.
53. Id. at 431.
54. Id. at 432. UPI contended that Hubbard “lacked news judgment and aggressive-
indication that Hubbard received from Macchini that his overall performance had been less than satisfactory and that his job was consequently threatened. In October 1976, Hubbard was assigned to cover President Ford's campaign visit to Iowa. Macchini became upset because Hubbard arrived in Des Moines the same morning as the President. These events led Hubbard to believe there was a "campaign against him."

In April 1977, Hubbard was suspended for three days without pay and given a final warning about his job performance. Six months later, Macchini's supervisor, Bill Lyon, felt that "UPI had just and sufficient cause to dismiss." Rather than fire Hubbard, UPI preferred to negotiate a resignation. The parties met, and as Hubbard later testified, Macchini stated at the meeting that UPI would "get him," even if it took five years.

Hubbard refused to resign, continuing to work for UPI without incident until 1979. In June of that year, Hubbard was asked to volunteer to cover the Nicaraguan civil war, and initially agreed to do so. Hubbard changed his mind after he learned of the dangers involved and the illegal bargaining necessary to move into and across Nicaragua. Hubbard later testified that he felt he was being "set up" by UPI. Determined to get Hubbard's resignation, Lyon wrote to another UPI official, stating

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54. 330 N.W.2d at 433. See Respondent's Brief and Appendix at 20.
55. 330 N.W.2d at 433.
56. 330 N.W.2d at 434.
57. After this incident Hubbard contacted his union. In his letter, Hubbard stated that "the negative file is building . . . since treatment for chemical dependency." Respondent's Brief and Appendix at 20.
58. 330 N.W.2d at 433. Hubbard was suspended because he had committed what UPI considered a cardinal sin—he could not be reached. Hubbard countered that he had called three times that weekend. In his letter, Hubbard stated that "the negative file is building . . . since treatment for chemical dependency." Respondent's Brief and Appendix at 20.
59. 330 N.W.2d at 434.
60. 330 N.W.2d at 434.
61. This meeting took place in a bar, at Macchini's request. In the opinion of a specialist in chemical dependency counseling, taking a chemically dependent employee to a bar and threatening his job was "debilitating and abusive"—like "kicking the crutches out from under a crippled person." 330 N.W.2d at 434.
62. 330 N.W.2d at 434.
63. 330 N.W.2d at 434.
64. Hubbard felt that UPI was being careless with his life in sending him on a suicide mission. Respondent's Brief and Appendix at 21.
65. 330 N.W.2d at 434. Hubbard made the decision after talking to several correspondents, whereupon the assignment appeared more dangerous than he had expected. See id.; Respondent's Brief and Appendix at 20-21. Hubbard felt that bribing people in Nicaragua with money and liquor was unprofessional and unnecessarily hazardous. 330 N.W.2d at 434; see Respondent's Brief and Appendix at 21.
66. 330 N.W.2d at 434.
that they were going to have to get rid of Hubbard. Lyon suggested that a file be built to support Hubbard’s dismissal, since UPI did not have a strong case against him.

The final conflict between Hubbard and UPI arose five months later, when Hubbard went to Thailand as a volunteer for the American Refugee Committee. UPI mistakenly assumed that Hubbard took company time and used UPI credentials to take his trip. When UPI learned that Hubbard sent pictures from Thailand over UPI wires, Macchini ordered a “mandatory kill” on the photographs. At trial, Hubbard alleged that when he learned of the “mandatory kill,” he was shocked, extremely embarrassed, and his physical health was affected. On June 28, 1980, UPI terminated Hubbard’s employment.

The Minnesota Supreme Court held that Hubbard did not meet his burden of proof for the two crucial elements of intentional infliction of emotional distress—the outrageousness of UPI’s conduct and severe emotional distress. In reversing the jury’s determination, the court focused on the Restatement’s “high threshold standard of proof required of a complainant before his case may be submitted to a jury.” The court found that UPI’s actions were neither extreme nor outrageous. With regard to UPI’s allegation that Hubbard had “chickened out” of an assignment, the court stated that the defendant’s conduct was unpleasant, but not outrageous. Even when UPI’s course of conduct was viewed on the whole, the court found, it did not rise to the level

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67. Id. at 435.
68. Id.
69. Id. The American Refugee Committee had sent medical personnel to Thailand and Hubbard accompanied them to photograph their efforts. Id.
70. See id. at 436.
71. A “mandatory kill” instructs the client not to use the photograph. It is rarely issued and usually sent only when a photo has the wrong caption or improper identification. Id.; see also Respondent’s Brief and Appendix at 33 (“mandatory kill” is used in industry only when there is reason to believe that news photo is fictitious or phony).
72. See 330 N.W.2d at 436. Hubbard complained of vomiting, stomach problems, skin rash, and high blood pressure. Id. at 440.
73. Id. at 437.
74. See id. at 439. The court stated:
   Examining the entire record, we find it doubtful that Hubbard met his burden of production with regard to any of the elements of his cause of action. We need not pass upon each element, however, for we find the lack of evidence of extreme and outrageous conduct and of the actual occurrence of severe emotional distress to be dispositive.

75. Id.
76. Id.
77. Id.
78. Macchini accused Hubbard of “chickening out” of the Nicaragua assignment. Id. at 435; see supra note 65 and accompanying text (discussing Nicaraguan assignment).
79. 330 N.W.2d at 439.
of outrage needed to impose liability.\textsuperscript{80}

Hubbard was a recovering alcoholic, making him particularly vulnerable to harassment.\textsuperscript{81} The \textit{Restatement} indicates that a plaintiff's peculiar vulnerability, particularly when a defendant has knowledge of the vulnerability, may mitigate the level of outrageousness required to impose liability.\textsuperscript{82} UPI knew of Hubbard's condition, yet proceeded against him in spite of it.\textsuperscript{83}

The court took the position that UPI had done no more than insist upon its legal rights in a permissible way,\textsuperscript{84} even though such insistence was certain to cause emotional distress.\textsuperscript{85} The court described UPI's conduct as "employment discipline" and "criticism of Hubbard's job performance."\textsuperscript{86} The question of when an employer's conduct exceeds permissible bounds can only be answered ad hoc, especially in the case of an employee's claim of intentional infliction of emotional distress.\textsuperscript{87} Even minor altercations with an employer can be traumatic for a vulnerable employee.\textsuperscript{88} Weighing the evidence to determine whether the employer's conduct was outrageous is a task best left to the jury.

\textsuperscript{80} Id. at 439-40. The court apparently believed that the proper level of outrage necessary to constitute outrageous conduct was reached in a Massachusetts decision, Boyle v. Wenk, 378 Mass. 592, 392 N.E.2d 1053 (1979). See 330 N.W.2d at 439-40. The court's reliance upon Boyle as a barometer of the proper level of outrage appears misplaced. In Boyle, a woman was repeatedly harassed over the telephone by a private investigator making inquiries of the woman's brother-in-law. 378 Mass. at 593-94, 392 N.E.2d at 1054-55. The investigator knew that the woman had just been released from the hospital, yet he persisted in contacting her. Id. at 594, 392 N.E.2d at 1055. The Boyle court had little difficulty in holding that the investigator's conduct was outrageous because the woman's emotional distress was physically manifested when she began to hemorrhage and required medical assistance. See id. Since physical manifestation of emotional distress is not a prerequisite to recovery under the "new tort," the Hubbard court's reliance on Boyle as a guide to determine an appropriate level of outrage was misplaced.

\textsuperscript{81} See supra note 62 and accompanying text (discussing Hubbard's alcoholism).

\textsuperscript{82} \textit{Restatement}, supra note 4, § 46 comment f.

\textsuperscript{83} 330 N.W.2d at 432.

\textsuperscript{84} The Hubbard court stated that the injury did not exceed that of any employee who experiences an employer's criticism or reproof concerning job performance." Id. at 440; see \textit{Restatement}, supra note 4, § 46 comment g.

\textsuperscript{85} In most situations in which intentional infliction of emotional distress is claimed, such as failure to pay a valid insurance claim, collection practices, or wrongful discharge, some distress is intended, in order to force the other party to acquiesce in some way. See \textit{Restatement}, supra note 4, § 46 comment i.

\textsuperscript{86} 330 N.W.2d at 439.

\textsuperscript{87} Assessing the legality of employer actions is a case-by-case process. See, e.g., Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) (policy provisions in employee handbook adopted after employee was hired binding on employer); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981) (damages awarded on promissory estoppel where employee had not yet begun new job, but had resigned prior position and turned down another offer); Bautch v. Red Owl Stores, 278 N.W.2d 328 (Minn. 1979) (damages awarded to employee discharged for committing expressly forbidden act where employer had previously condoned practice).

\textsuperscript{88} See supra note 72 and accompanying text.
Hubbard also failed to demonstrate severe emotional distress. The court emphasized that the record did not contain medical evidence regarding Hubbard’s condition. Rather, the primary evidence of injury was Hubbard’s own testimony. In the court’s words, Hubbard suffered no more than “any employee who experiences an employer’s criticism . . . .”

In addressing this second dispositive element, severe emotional distress, the court stressed the “conspicuous” absence of medical evidence in the record. The court commented that Hubbard “never missed work, never filed a claim for workers’ compensation and never saw a doctor . . . .” Apparently the court was searching for that which it had decided was no longer necessary—physical manifestation of the distress.

In fact, the court quoted a 1926 Minnesota case, stating that verdicts “based chiefly on proof of subjective symptoms, will not usually be allowed to stand.”

Proof of severe emotional distress does not require bodily harm under the rubric of the Restatement. While distress must be demonstrated, the outrageousness of the defendant’s conduct can provide important evidence that the distress occurred. Absent physical injury, the character of the defendant’s conduct becomes a reliable indicator of genuineness.

The Hubbard court artfully avoided scrutiny of UPI’s conduct having res-
rected the requirement of physical injury under the guise of proof of emotional distress.

The Minnesota Supreme Court held that the trial court had erred in submitting the case to the jury. In finding that Hubbard did not produce sufficient evidence to merit jury consideration of his claim, the Supreme Court relied on a Restatement comment. The comment provides, "It is for the court to determine whether on the evidence severe emotional distress and outrageous conduct can be found; it is for the jury to determine whether on the evidence, it has in fact existed." Ironically, the Hubbard court chose not to seek the further guidance of the Restatement with respect to the role of the court and jury. Another comment to the Restatement provides:

It is for the court to determine, in the first instance, whether the defendant's conduct may be reasonably regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

With the jury's determination available to the Hubbard court, hindsight demonstrated that indeed reasonable persons differed on the issues of outrageous conduct and severe distress. Therefore, on a complete reading of the Restatement's formulation, the trial court may not have erred in submitting the case to the jury.

Minnesota's past recalcitrance in this area may provide a partial explanation for the Hubbard court's unwillingness to permit the jury to participate in the recognition of the "new tort." Consideration of the strong policies against the "new tort," as well as the "new tort's" particular vulnerability to fictitious and speculative claims provides insight into the court's cautious approach to any definition of the cause of action. Prudence, however, should not preclude justifiable recoveries, nor prevent a

99. See 330 N.W.2d at 436.
100. Restatement, supra note 4, § 46 comment j; see 330 N.W.2d at 440.
101. Restatement, supra note 4, § 46 comment h (emphasis added). For courts adhering to the guidance of comment h, see State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Boyle v. Wenk, 378 Mass. 592, 392 N.E.2d 1053 (1979); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1947). The Siliznoff court stated: The jury is ordinarily in a better position . . . to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury . . . . Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therewith.

jury’s participation in the process. “The jury is ordinarily in a better position . . . to determine whether outrageous conduct results in mental distress . . . . From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant’s conduct.”

The Hubbard court discarded the jury’s determination of UPI’s outrageous conduct and Hubbard’s severe distress. The Restatement’s standard, the exclamation “outrageous!” by an average member of the community, supports substantial deference to a jury’s findings. Jurors are average members of the community, presumed to have knowledge of that which is deemed intolerable conduct in a civilized society.

The Minnesota Supreme Court has belatedly joined the ranks of the majority in recognizing the independent tort of intentional infliction of emotional distress. Regretably, the court’s application of the “new tort” fails to provide clear guidance. Yet, despite its rather inhospitable debut, Minnesota’s “new tort” offers protection against emotional distress in an increasingly pressure-packed society. Although not every injured feeling can be compensated, the societal requirement of a “toughened mental hide” is no longer a barrier to a claim of intentional infliction of emotional distress.


At common law, the tort liability of an employer to his employee was limited to certain minimum obligations. The fellow servant rule imposed liability when an employer’s own negligence injured his employee, but precluded employer liability when a fellow servant’s negligence in-


104. See supra notes 79-80 and accompanying text.

105. RESTATEMENT, supra note 4, § 46 comment d.

106. But see Appellant’s Brief at 136. “Tort liability cannot be pegged to notions of decency or morality which are subject to the same sort of vicissitudes as hemlines or hair length.” Id.

1. The common law duties of the master for the protection of his servants were as follows: 1) to provide a safe workplace; 2) to provide safe tools and equipment; 3) to give warnings of dangers probably unknown to the servant; 4) to provide sufficient numbers of suitable fellow servants; and 5) to issue and enforce rules for the conduct of employees to make the workplace safe. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 60 (4th ed. 1971). The injured worker’s recovery was further limited in cases of employer negligence by the defenses of contributory negligence, assumption of risk, and the fellow servant rule. Id.