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Garland v. Herrin: Surviving Parents' Remedies for a Child's Wrongful Death - The Pecuniary-Loss Rule and Reckless Infliction of Emotional Distress

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GARLAND V. HERRIN: SURVIVING PARENTS' REMEDIES FOR A CHILD'S WRONGFUL DEATH—THE PECUNIARY- LOSS RULE AND RECKLESS INFLICTION OF EMOTIONAL DISTRESS

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I. PROLOGUE

[T]he proper function of this Court is to ascertain what [the] law is, and not to speculate about what it will be, or in Learned Hand's felicitous phrase, "to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."¹

On the basis that a federal court sitting in diversity must apply the state law as it exists, on December 8, 1983, the United States Court of Appeals for the Second Circuit reversed the judgment of the district court in the matter of *Garland v. Herrin*² which had permitted the parents of Bonnie Garland to recover damages for emotional distress recklessly caused by the defendant's extreme and outrageous conduct of murdering their daughter.³ The court held that the district court had erred by allowing recovery where no state precedent supported the action.⁴

The appellate court did not attack the substance of the theory promulgated by the district court. While the law as proposed by the district

¹ *Garland v. Herrin*, 724 F.2d 16, 17 (2d Cir. 1983) (citing *Hausman v. Buckley*, 299 F.2d 696, 704-05 (2d Cir.), *cert. denied*, 369 U.S. 885 (1962)).

² 554 F. Supp. 308 (S.D.N.Y.), *rev'd*, 724 F.2d 16 (2d Cir. 1983).

³ *Id.*

⁴ 724 F.2d at 17.

court may encompass a theory whose time has not yet come, the analysis of the lower court is based on sound principles of tort law and should portend the future recovery of a limited class of plaintiffs. The facts of the Garland murder are important in providing a basis for analyzing the anomalies and anachronisms in the law dealing with psychic harms, both in the statutory wrongful-death action and in common-law tort actions.

II. INTRODUCTION

Bonnie Garland was fatally assaulted in her family home in the summer of 1977. The parents of Bonnie Garland became third-party victims of their child's murder. A description of the murder is necessary to assess the emotional injuries suffered by the parents as a result of the fatal attack on their daughter.

Bonnie Garland and Richard Herrin met at Yale University in the fall of 1974.⁶ Herrin was Bonnie Garland's suitor for the next three years. On the night of July 6, 1977, while Herrin was a guest in the Garland home, Richard and Bonnie had "an intense discussion of their future relationship."⁶ After Bonnie had fallen asleep, and while her parents slept in another room in the house, Herrin went to the basement of the Garland home, chose a hammer, wrapped it in a towel, and brought it back to Bonnie's bedroom. Having ascertained that Bonnie was asleep, he proceeded to bludgeon her with repeated hammer blows to her skull.⁷

After Richard left the blood-splattered room, he took the Garland's automobile and drove around the city contemplating his own death before he ultimately surrendered himself to a priest.⁸ At 8:00 a.m. that morning Mrs. Garland answered her door to find several uniformed policemen inquiring as to her daughter's whereabouts.

Mrs. Garland rushed to her daughter's room and found a scene of indescribable horror. She saw her daughter's hideously battered

⁶ The murder of Bonnie Garland in the summer of 1977 provoked a great deal of publicity. Bonnie Garland was described as a young vivacious woman at the threshold of life. She was the daughter of an affluent New York attorney and was following in her father's footsteps in attending his alma mater, Yale.

Richard Herrin, a poor Mexican-American, was valedictorian of his Los Angeles high school class and was attending Yale on a full-tuition scholarship. Despite their different backgrounds, Bonnie, a freshman, and Herrin, a junior, became attracted to one another in the fall of 1974.

The murder itself did not take place at Yale, yet it became known in the media as the "Yale Murder." For two different viewpoints on the murder and its aftermath, see W. GAYLIN, *THE KILLING OF BONNIE GARLAND* (1982) (written from the perspective of a psychiatrist); P. MEYER, *THE YALE MURDER* (1982) (written from the perspective of a journalist).

⁶ 554 F. Supp. 308, 311 (S.D.N.Y.), *rev'd*, 724 F.2d 16 (2d Cir. 1983).

⁷ *Id.*

⁸ W. GAYLIN, *supra* note 5, at 99.

body and the blood and brain matter, which had been splattered about the room by the force of Herrin's hammer blows. Bonnie, although in the most grievous condition, was still alive, gasping for breath.⁹

Although Bonnie underwent surgery she died of the massive head injuries later the same evening, with her parents in attendance.

The parents of Bonnie Garland, the third-party victims of this crime, derived no satisfaction from the prosecution of their daughter's murderer. Our criminal justice system rigorously protects the rights of the accused; little or nothing is done for the accuser.¹⁰ The prosecution for murder is not instituted on behalf of the slain individual or the survivors; it is for a public wrong and brought in the name of the state.¹¹ The accused is constitutionally protected during the criminal process. Furthermore, a skilled defense attorney employing appropriate psychiatric evidence may succeed in mitigating the offense by raising the insanity defense.¹²

⁹ 554 F. Supp. at 311-12.

¹⁰ Carrington, *Victim's Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447, 448 (1977).

¹¹ Note, *Compensating Victims of Crime: Evolving Concept or Dying Theory?*, 82 W. VA. L. REV. 89, 95 (1979).

The one victim not heard from in either the criminal prosecution of Herrin or in the later civil trial was Bonnie Garland.

Bonnie was never present at her own trial . . . But, she was diminished, and, in suggesting that she was somewhat responsible for her own fate, made an accomplice to her own killing. She was on trial, and was given no voice, no presence. No real attempt was made by the prosecution to bring her to life.

W. GAYLIN, *supra* note 5, at 107.

When the victim is implicated in the trial of the murderer, the third-party victims suffer further emotional trauma by their knowledge that the actual victim cannot take the stand in his or her own defense. The third-party victim is forced to relive the heinous act of the defendant and generally has no voice in the proceedings.

¹² At the criminal trial for the murder of Bonnie Garland, much psychiatric testimony was introduced into evidence by the defense to explain and mitigate Herrin's "mental state" at the time of the murder. The defense was centered around the sociological notion of "victimization" by dramatizing Herrin's "underprivileged" childhood and his failure to assimilate at Yale.

The relationship between Bonnie Garland and Richard Herrin, which had lasted close to three years, was a key factor in the defense of Richard Herrin. The relationship had been intense. However, as Richard became ever more dependent upon Bonnie, Bonnie's interest began to wane.

Just prior to the murder, Bonnie, a gifted singer, had been on a European tour with the Yale Glee Club. Bonnie had always been a prolific correspondent with Richard during the times they had been separated. As she was in her own way attempting to sever the bonds, she quit corresponding. Richard grew more despondent and yet clung to the hope that the relationship would remain the same.

When Bonnie returned from the tour, Richard immediately attempted to visit her. However, he was informed that she was being visited by another friend. His psychological dependence on Bonnie and his total dependence on maintaining the relationship as the one stable element in his life were used to explain the defendant's feelings that he could no longer cope

The only remedy afforded to the third-party victim by a criminal proceeding is the catharsis brought about by the adjudication of the defendant's guilt and appropriate sentencing.¹³ In the matter of Bonnie Garland, there was no catharsis; the parents perceived that Herrin, having been convicted of manslaughter rather than murder, literally "got away with murder."¹⁴ A minimum sentence of eight years did not expiate the permanent loss of their child. The criminal justice system is not equipped to alleviate the Garlands' injury arising from the loss of their daughter; they and other third-party victims are left to seek recompense for their harms through the civil system.

The harms suffered by the Garlands by the murder of their daughter fall into two categories: tangible harms derivative of the wrongful death, and intangible harms inflicted upon the psyches of the parents as a result of the assault on the daughter and her ensuing death. The tangible harms included the hospital, doctor, and funeral expenses for Bonnie's medical care and burial. The intangible harms directly inflicted upon the parents fall within the range of what the courts broadly term "emotional distress." An analysis of the factual events following the grievous assault on the daughter will indicate the broad effect of the assault on the psyches of the parents.

From the moment that Bonnie's mother opened the door early in the morning to find several uniformed policemen asking for her daughter,¹⁵ she was assaulted by a range of emotions: shock, surprise, and fear. Upon viewing the aftermath of the assault in her daughter's room, it is reasonable to assume that the mother was overcome with revulsion, shock, fear, anger, horror, and sorrow. During the vigil in the hospital, the same emotional reactions would be multiplied as the parents "relived" in their minds the grisly scene in Bonnie's room following the attack, as well as envisioned the actual attack as it might have occurred while they were asleep nearby. Upon the death of their daughter, the grieving process would begin.

The parents of Bonnie Garland are only two of the innumerable third-party victims who have suffered from the wrongful death of a child. Because the "emotional distress" suffered by the Garlands was comprised of

with the thought of losing Bonnie to other men. W. GAYLIN, *supra* note 5, at 206-41.

¹³ Carrington, *supra* note 10, at 458-59. One appropriate means of affording third-party victims a catharsis would be to allow the surviving relatives a voice in the courtroom. Were the judge to allow a survivor to make a statement before the court at the time of sentencing, the surviving parent would at least feel as though he or she had had a part in the proceedings.

¹⁴ W. GAYLIN, *supra* note 5, at 12. Similarly, cases in which the defendant's sentence is plea-bargained or in which the defendant "escapes" on what a victim would consider a technicality, although constitutionally correct, leave parent-victims feeling less-than-adequately recompensed for the permanent loss of their child.

¹⁵ 554 F. Supp. at 311.

so many elements, the wrongful death of their child provides a framework for analyzing all the harms engendered within the term "emotional distress" and the availability of civil remedies for each of those "separable" harms.¹⁶

The tragedy of the Garlands will be used as a vehicle to assess the success of legislatures and courts in enacting and interpreting wrongful death statutes. The important question becomes whether the courts and legislatures have adequately addressed the problem of parental psychic injuries resulting from the death of a child. The analysis will focus on the attempts in the common law, through the recognition of the torts of intentional and negligent infliction of emotional distress, to remedy other elements of psychic harm arising from the wrongful death of a child.

The three difficulties that the courts have had in both stages of the process will be examined: 1) the barrier of recognizing psychic harm as a compensable injury; 2) the elusiveness of the definitional standards employed by the courts; and 3) the strictures the courts have placed on victims in order to constrain the cause of action. Finally, the Note will analyze tort liability for the intentional infliction of emotional distress to third-party victims based on recklessness: the rationale for liability and the scope of the action.

III. WRONGFUL DEATH AND PSYCHIC HARM

The reluctance of the courts to compensate third-party victims of a wrongful death for their emotional distress arises from the disparities between the disciplines of law and science in dealing with psychic harm. Law is governed by *rules*.¹⁷ Psychology and psychiatry are imprecise sciences.¹⁸ Psychiatric and psychological evaluations of intangible emotional harms do not coalesce with the law's requirement of quantitatively measurable harms.

Damages for psychic harm are attacked for several reasons: 1) psychic

¹⁶ A new area of relief afforded to victims of crime is unavailable to the Garlands or others similarly situated whose major injury is emotional. Victims' compensation plans have been adopted in a majority of jurisdictions to compensate both direct and indirect victims of crime. However, the programs compensate for tangible harms suffered by the individual. Property damage compensation is generally barred, but recompense for medical or hospital expenses is allowed.

The victims' compensation plans are an outgrowth of the public's awareness of the growing crime problem and the further recognition of the number of victims who have suffered and for whom no avenue of recovery is available. See generally Carrington, *supra* note 10; Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203 (1978); Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 483 (1980); Note, *supra* note 11.

¹⁷ E. POLLACK, JURISPRUDENCE (1979). "By rules I mean precepts attaching a definite detailed legal consequence to a definite detailed state of facts or situation of fact." *Id.* at 639.

¹⁸ Wasmuth, *Psychosomatic Disease and the Law*, 7 CLEV.-MAR. L. REV. 34 (1958).

harm is intangible and therefore difficult to measure as compared to other, tangible personal injuries; 2) the assessment of psychic harm is speculative; and 3) psychic harm claims are susceptible to fraud.¹⁹ The law recognized psychic harm as a compensable injury only when the medical sciences were able to present clear evidence to substantiate the injury.²⁰

The civil courts have defined psychic harm generally as "emotional distress" and specifically through such terms as "a shock upon the sensibilities,"²¹ "fright,"²² "mental anguish,"²³ and "grief."²⁴ The element of emotional distress most commonly associated with the wrongful death of a child is "grief" or "mental anguish."

Grief is an assault upon the sensibilities.²⁵ As it is an assault suffered by most at the loss of a loved one, it is generally not compensable under the law. However, when grief follows a death intentionally or negligently caused, liability should follow.

The wrongful death of a child at the hands of an intentional or negligent wrongdoer will generally cause an emotional reaction different in kind from that occasioned by a child's death from disease or other "natural" causes.²⁶ The severity of the emotional distress in general, and the grief reaction in particular, aroused by a child's death are associated with individual expectations.²⁷ Prior to advances in the medical sciences, parents often did not expect their children to survive infancy, much less grow to adulthood. As medical science progressed and the infant-mortality rate declined, expectations altered. Correspondingly, it is rare for a child not to outlive its parents. The loss of a child is ranked as one of the most emotionally trying experiences in the life of a parent.²⁸

¹⁹ Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1033-35 (1936).

²⁰ Wasmuth, *supra* note 18, at 34.

²¹ *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

²² *Watson v. Dilts*, 116 Iowa 249, 89 N.W. 1068 (1902).

²³ *Kelley v. Ohio R.R. Co.*, 58 W. Va. 216, 52 S.E. 520 (1905).

²⁴ *Wilson v. Lund*, 80 Wash. 2d 91, 491 P.2d 1287 (1971).

²⁵ The mental suffering or grief occasioned by the loss of a loved one has forever been a subject of poets and philosophers. As suggested by Henry David Thoreau, each individual loses a part of himself when a beloved dies. "I have touched a body which was flexible and warm, yet tenantless—and warmed by what fire? . . . I perceive that we partially die ourselves through sympathy at the death of each of our friends or near relatives. Each such experience is an assault on our vital force." H.D. THOREAU, JOURNAL (XII, 420, Feb. 3, 1859), *quoted in* MURRAY, HENRY DAVID THOREAU (1973).

²⁶ See, e.g., M. SIMPSON, *THE FACTS OF DEATH* (1979). To have a child die from a disease such as cancer is tragic, but eventually reconcilable when a parent weighs the alternative of having the child suffer the ravages of the disease with its attendant pain and suffering. But to have a child brutally die from the intentional act of another is totally irreconcilable and incomprehensible and, therefore, could well exacerbate the emotional reaction.

²⁷ C.M. PARKES, *BEREAVEMENT STUDIES OF GRIEF IN ADULT LIFE* 123 (1972).

²⁸ *Id.*

Grief is also experienced and suffered in correlation to the relationship between the parties.

Most of the richness and beauty of life is derived from the close relationship that each individual has with a small number of other human beings—mother, father, brother, sister, husband, wife, son, daughter and a small cadre of close friends. With each person in this small group, the individual has a uniquely close attachment or bond. Much of the joy and sorrow of life revolves around attachments or affectional relationships—making them, breaking them, preparing for them and adjusting to their loss caused by death.²⁹

Grief is the one common denominator involving all parents who have suffered the wrongful death of a child, and the statutory action is the general avenue of relief available. Therefore, the ability of the legislatures through the promulgation of wrongful-death statutes and of the courts through the interpretation of those statutes to remedy the emotional harm will be analyzed. The disinclination of both the courts and the legislatures to deal appropriately with emotional distress is particularly apparent in the evolution of the statutory action.

The American courts adopted the English common-law rules and have been struggling ever since to rid themselves of the bondage of the precedents. The rule of law fashioned by Lord Ellenborough in 1808 that "in a civil court the death of a human being could not be complained of as an injury"³⁰ effectively barred survivors from a common-law action for wrongful death. Claims for psychic injuries were barred by Lord Wensleydale's pronouncement that "mental pain or anxiety, the law cannot value and does not pretend to redress, when the unlawful act causes that alone."³¹

Lord Ellenborough's decision in *Baker v. Bolton*,³² having met with great disfavor, was overturned in England with the passage of Lord Campbell's Act in 1846.³³ Parents and aggrieved survivors were thereafter provided with a statutory basis for recovery which did not include or exclude any particular element of damages.³⁴ As there had been no com-

²⁹ M. KLAUS & J. KENNEL, *MATERNAL-INFANT BONDING* 1 (1976). See, e.g., Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injuries to Another*, 15 J. FAM. L. 163 (1976).

³⁰ *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808).

³¹ *Lynch v. Knight*, 9 H.L.C. 577, 11 Eng. Rep. 854 (1861).

³² 170 Eng. Rep. 1033 (K.B. 1808).

³³ Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93.

³⁴

And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to

mon-law action for wrongful death, it is not surprising that American statutes modeled after the English act were generally narrowly interpreted under the premise that statutes in derogation of the common law were to be construed strictly.³⁵

The first English case to interpret the new wrongful death act, *Blake v. Midland R. Co.*,³⁶ advanced the rule that while the widow could maintain an action in her own name for the loss of her husband, the action was to be governed by the pecuniary losses suffered by the wife, disallowing recovery for "wounded feelings."³⁷

The pecuniary-loss rule is particularly outmoded when applied to actions brought for the wrongful death of children. Children today no longer contribute to the wealth of the family as had been the case in the agrarian, or newly industrialized, nineteenth century. The loss suffered by the family in the twentieth century is much more the loss of the child than the loss of the contribution.³⁸

The judges so ruling . . . were merely interpreting the statute in accordance with the social conditions of the day, which, presumably, the legislative body had in mind in the enactment of the legislation then under consideration. The rulings reflect the philosophy of the times, its ideals and its social conditions. It was the generation of the debtor's prisons, of some 200 or more capital offenses and of the public flogging of women. It was an era when ample work could be found for the agile bodies and nimble fingers of small children. . . . This, then, was the day from which our precedents come, a day when employment of children of tender years was the accepted practice and their pecuniary contributions to the family both substantial and provable.³⁹

Generally, societal changes have not been reflected within amended

the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the Defendant, shall be divided amongst the beforementioned Parties in such Shares as the Jury by their Verdict shall find and direct.

Id. (emphasis added).

³⁵ S. SPEISER, 1 RECOVERY FOR WRONGFUL DEATH 2d § 1.12 (1975).

³⁶ Q.B. 93, 118 Eng. Rep. 35 (1852).

³⁷ See Speiser & Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions*, 51 TUL. L. REV. 1, 7 (1976) (the authors discuss the arguments raised concerning the construction to be given the statutes).

³⁸ *Wycko v. Gnodtke*, 361 Mich. 331, 335, 105 N.W.2d 118, 121-22 (1960), *overruled*, *Breckon v. Franklin Fuel Co.*, 383 Mich. 251, 174 N.W.2d 836 (1970). Although *Wycko* was subsequently overruled, it remains important both for its reasoning and for the fact that the legislature in Michigan reaffirmed the *Wycko* decision by amending its wrongful-death statute. See *infra* note 56.

³⁹ *Wycko v. Gnodtke*, 361 Mich. 331, 335, 105 N.W.2d 118, 120-21 (1960), *overruled*, *Breckon v. Franklin Fuel Co.*, 383 Mich. 251, 174 N.W.2d 836 (1970).

wrongful-death statutes. The courts have felt compelled to adhere to the principle of stare decisis, thereby deciding new cases based upon eighty-year-old precedents.⁴⁰

Actions for wrongful death of an adult may be seen as rather mercenary propositions, since lawyers and the bereaved attempt to place a monetary value on such items as loss of consortium, loss of companionship, and loss of future earnings. However, the real tragedy arises in the wrongful death of children.⁴¹ The vast majority of jurisdictions fail to recognize the parents' actual though intangible harm arising from the loss of a child's life.⁴² These jurisdictions utilize the pecuniary-loss rule, which focuses on computation of the amounts that the parents would have spent on necessities for the child as subtracted from the "worth" of the child. Worth is measured solely by what he might have earned or contributed to the family until the age of majority. "That formula applies double-entry bookkeeping to children as if they were profit-making machines: enter the child's expectable contributions to the family exchequer and deduct the cost of his upkeep and maintenance."⁴³

Arguably, had the action for wrongful death evolved through the common law, it would have adapted to societal changes as have other tort actions. Straitjacketed by the strictures of the language and the initial interpretations of the statutory enactments, the courts have generally confined damages to quantitatively measurable elements. "The restriction of death damages to pecuniary loss is an anachronism, held over from the time when the rules of civil litigation were framed to give property rights priority over human life."⁴⁴

Herbertson v. Russell,⁴⁵ in which an award of \$25,000 for the wrongful death of a six-year-old was found to be excessive, is evidence of the inequities which arise when the damages awarded for the wrongful death of a child are defined in terms of pecuniary loss as prescribed by statute and interpreted by the court. The court in *Herbertson* would not "rewrite" the legislation.

⁴⁰ *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 442 (1962).

⁴¹ See Strong & Jacobson, *Such Damages as Are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases*, 43 MONT. L. REV. 55 (1982).

⁴² Speiser & Malawer, *supra* note 37.

The injustice of the pecuniary loss concept had unreasonable effects on the decedent's family. Having just suffered a grievous personal loss, the bereaved relative is then told by his lawyer that the decedent is "to be considered merely as if he had been a part of the goods in his shop," and that the law recognizes only the injury based upon the decedent's financial production, despite judicial condemnation of the immorality of this position more than a century and a half ago.

Id. at 19.

⁴³ Lambert, Joost & Rheingold, *Recent Important Tort Cases*, N.A.C.C.A. L.J. 48, 197 (1964).

⁴⁴ Speiser & Malawer, *supra* note 37, at 7-8.

⁴⁵ 150 Colo. 110, 371 P.2d 422 (1962).

The suggestion that this Court should depart from its prior announcements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly re-enacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction.⁴⁶

The special concurring opinion in *Herbertson* took exception to the premise that the damages to be awarded in a wrongful death were solely for the "benefits lost" through the death, and were not to be an award for the *solatium* or grief of the living occasioned by the death of their relative, no matter "how dear."⁴⁷ "I would from this day forward write 'finis' to such doctrine as being a debasing and melancholy chapter in the jurisprudence of this state."⁴⁸ The concurrence further noted the anomalous situation existing in Colorado in the denial of recovery for the "real" injury, that is the mental anguish suffered by the survivors, yet the recognition of a cause of action for the psychic harm suffered by a parent if a child's body has been molested after death.⁴⁹ Had the six-year-old's body in *Herbertson* been mishandled after a natural death, the court would have allowed recovery for the ensuing mental anguish caused to the parents.⁵⁰ When the emotional distress arises from the wrongful killing of the

⁴⁶ *Id.* at 117, 371 P.2d at 426.

⁴⁷ *Id.* at 118, 371 P.2d at 427.

⁴⁸ *Id.*

⁴⁹ *Id.* at 126, 371 P.2d at 430 (Frantz, J., concurring).

⁵⁰ The anomalous situation noted by the concurrence in *Herbertson* occurs in a majority of jurisdictions throughout the country. The courts have long recognized that a parent or loved one is in an extremely susceptible state following the death of a relative, whether the relative's death arose from natural causes or was caused by another.

Because of the relative's emotional state at the time of the death, the courts have allowed recovery for emotional distress if the body of the deceased is in some manner molested. The courts clearly recognize the mishandling of bodies as a cause of emotional distress while failing to recognize that the death itself, when caused by the negligent or intentional act of another, would cause a similar psychic injury. *See, e.g.,* Papieves v. Lawrence, 435 Pa. 373, 263 A.2d 118 (1970) (mental anguish and emotional disturbance stated a cause of action arising from the defendant's intentional acts in withholding the body of the plaintiff's son and burying the body without authorization); *Johnson v. Woman's Hosp.*, 527 S.W.2d 133 (Tenn. Ct. App. 1975) (action brought against a hospital and physician for breach of contract to bury and for outrageous conduct in connection with display to the mother of the body of her premature infant who had expired shortly after birth and had been placed in a gallon jar of formaldehyde); *Corrigal v. Ball & Dodd Funeral Home*, 89 Wash. 2d 959, 577 P.2d 580 (1978) (complaint sustained against a funeral home which had agreed to cremate son's body, place his remains in a urn, and deliver the urn to the plaintiff, but which failed to place the remains in the urn and caused the plaintiff to handsift through what she

child, the injury to the survivor under a wrongful-death act remains unremedied.

Legislatures have not been totally unresponsive to the inequities presented in wrongful-death actions where a defendant may be exonerated from liability in damages for the death of a child but accountable if the child is merely injured.⁵¹ A number of legislatures have amended statutes to include recovery for all damages, tangible and intangible, associated with the death.⁵² The judiciary has also on occasion refused to construe the statutes strictly. Rather than defining pecuniary loss as the loss of contribution, the court redefines the term to include the worth of the life lost.

In *Wycko v. Gnodtke*,⁵³ a fourteen-year-old boy was killed by a negligent driver. The Michigan court asked and answered its own rhetorical question: "What then, is the pecuniary loss suffered because of the taking of a child's life? It is the pecuniary value of the life."⁵⁴ Had the court adhered to the pecuniary-loss rule, it would have been forced to calculate in terms of dollars and cents the future contributions that a fourteen-year-old boy would have made to the family. "We are dealing with a fiction, the fiction, that under today's conditions, not those of 1846, the minor child is a breadwinner. He is not. He is an expense. A blessed expense, it is true, but nonetheless an expense."⁵⁵

The court defined the pecuniary value of the life of the child in terms of companionship.⁵⁶ Nevertheless, the court barred recovery for the "real"

thought was "packing material" only to discover that she was physically handling her son's remains).

⁵¹ W. PROSSER, LAW OF TORTS 902 (4th ed. 1971).

⁵² See S. SPEISER, *supra* note 35, at 336. See also *Waldrup v. McGarity*, 270 Ark. 305, 605 S.W.2d 5 (1980) (compensation for mental anguish allowed under the statute for more than 20 years).

⁵³ 361 Mich. 331, 105 N.W.2d 118 (1960), *overruled*, *Breckon v. Franklin Fuel Co.*, 313 Mich. 251, 174 N.W.2d 836 (1970).

⁵⁴ 361 Mich. at 338, 105 N.W.2d at 122.

That this barbarous concept of pecuniary loss to a parent from the death of his child should control our decisions today is a reproach to justice. We are still turning, actually, for guidance in decision, to "one of the darkest chapters in the history of childhood." Yet in other areas of the law the legal and social standards of 1846 are as dead as the coachman and his postilions who guided the coaches of its society through the dark and muddy streets, past the gibbets where still hung the toll of the day's executions. In most areas the development of the law has paralleled the enlightened conscience of our people. Examples abound. We no longer tolerate the intentional infliction of mental suffering. Illness from such cause is not, we now recognize, imaginary.

Id. at 337, 105 N.W.2d at 121.

⁵⁵ *Id.* at 341, 105 N.W.2d at 123.

⁵⁶ *Id.* at 340, 105 N.W.2d at 122. As previously indicated, *Wycko* was overturned and the Michigan legislature responded by amending the wrongful-death statute to include "loss of companionship" as a compensable injury. See *supra* note 38. The action by the legislature is indicative of the manner in which courts and legislatures can implicitly communicate with

injury: the sorrow and anguish of the parents caused by the death.

*Green v. Bittner*⁵⁷ involved the death of a high-school student who had been described as "everybody's daughter."⁵⁸ The jury had found no pecuniary loss and awarded no damages. The trial judge concluded:

[I]t would be reasonable for this jury to come to [the] conclusion that the value of her services to babysit or to dry dishes was far exceeded by the cost to the family of feeding, clothing and educating her. The jury in this particular case followed literally the language of the statute and came to the conclusion that they reached.⁵⁹

The Supreme Court of New Jersey held that the marketplace value of companionship which would have aided the parents as they aged was a measurable and therefore compensable element of damages. The court suggested that such damages could be calculated by analogy to the services rendered by hired companions, nurses, or counselors.⁶⁰ However, the court felt compelled by the statute to exclude damages for emotional distress.

[W]e know of no public policy which would prohibit awarding damages that fully compensate for the loss of emotional pleasure in this situation, or indeed for the emotional suffering caused by the death. We recognize that our prohibition against such damages deprives the surviving parent of compensation for the real loss. That prohibition is not a matter of our choice, rather it is fundamental to the legislation.⁶¹

Green is not atypical. Courts and juries have been straitjacketed by legislation which defines pecuniary loss narrowly, limiting awards to tangible harms. Juries are left to measure the loss of the love and the life of a young child or teenager by the value of babysitting fees and dishwashing services. Even in jurisdictions which have expanded pecuniary loss to in-

each other. The courts observe first-hand the individuals affected by the laws. Legislatures, on the other hand, are not faced on a day-to-day basis with individual plaintiffs. The political body is most responsive to political issues. The grief and anguish suffered by an individual at the wrongful death of a child is not a politically attractive issue.

The *Wycko* court had obviously become well-aware of the inequities apparent in wrongful-death actions in which damages are restricted to pecuniary losses and had attempted to rectify the wrong. In responding to the perceived need, the court left itself open to the charge of acting as a "superlegislature." However, in this instance, the legislature itself, cognizant through *Wycko* of the need to amend the statute, rewrote the law and reaffirmed the *Wycko* judgment.

⁵⁷ 85 N.J. 1, 424 A.2d 210 (1980).

⁵⁸ *Id.* at 4, 424 A.2d at 211.

⁵⁹ *Id.* at 6, 424 A.2d at 212.

⁶⁰ *Id.* at 1, 424 A.2d at 210.

⁶¹ *Id.* at 13, 424 A.2d at 216 (footnote omitted).

clude the loss of companionship of the child, the parent must support the damage with evidence of the pecuniary loss of benefits.⁶²

The most-frequently-voiced opposition to allowing damages for emotional distress arises from the speculative nature of the injury.⁶³ However, when the courts determine that the loss of companionship, society, or advice of a child is compensable, while barring recovery for grief and mental anguish because of the intangible nature of the injury, the reasoning is open to criticism.⁶⁴ First, it is difficult to justify loss of companionship as a purely pecuniary loss. Companionship is inextricably intertwined with the relationship of the parent and the child. When companionship has been lost because of the wrongful death of a child, it is an emotional loss caused by the premature severing of the parental bond to the child. While "companionship" might have evolved into "advice" in later years, at the time of the death it is undoubtedly an element of emotional distress. What has been lost by the parent is the love and affection of the child.

The services that a child *might* render in the future in the way of nursing care or advice to an aged parent are more speculative than the psychic injury flowing immediately from the wrongful death that the parent *has* suffered. Psychic harm is measurable through evidence rendered by psychiatric testimony.⁶⁵ In categorizing "companionship" as a pecuniary loss, the courts are attempting to address the inequities with which they are faced.

The Supreme Court of Washington in *Wilson v. Lund*⁶⁶ refused to adhere to a strict pecuniary-loss rule. The court reviewed an action for the wrongful death of a five-year-old in a riding mishap. The action was

⁶² *Id.* at 1, 424 A.2d at 210.

⁶³ See, e.g., *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962).

⁶⁴

It is obvious that in most death cases the emotional impact of the loss of a beloved person is the most significant damage suffered by surviving relatives. The stricture of pecuniary loss has gradually deteriorated in American law so that it now stands as an impious fiction which rubs salt into the wounds of bereaved families, and serves as an obstacle to the evenhanded administration of justice in wrongful death cases. . . . The addition of mental anguish as an element of damages would allow judges and juries to make awards in the proper categories for the proper reasons, after careful consideration of the real damages that experience has taught us usually flow from the death of a human being.

Speiser & Malawer, *supra* note 37, at 17-18 (footnote omitted).

⁶⁵

Our brethren in the law have for many decades been seeking redress for mental pain and suffering in tort actions. Inasmuch as they had no objective tests with which to verify psychic trauma, damages were frequently denied. In recent years, however, medicine has taken a greater interest in the field of mental pain and suffering. It is recognized today as a distinct clinical entity.

Wasmuth, *supra* note 18, at 35.

⁶⁶ 80 Wash. 2d 91, 491 P.2d 1287 (1971).

brought under an amended wrongful-death statute which included "loss of love and companionship of the child and for injury to or destruction of the parent-child relationship." The court then rejected the argument that the mental anguish of the parents was non-compensable under the statute.

We could not conclude that recovery for "injury to or destruction of the parent-child relationship" differs from recovery for mental anguish, without applying a totally unrealistic and conceptually indefensible surgical scalpel technique to distinguish or separate damage to the parent-child relationship from emotional damages. To attempt to do so would be to treat this case as it it concerned so many pounds of potatoes, other lowly vegetables or material substances of some kind—rather than human feelings, responses and emotions.⁶⁷

Inroads have been made through broader interpretations of statutes which allow a jury to award damages "as it deems fair and just."⁶⁸ These statutes have been read expansively to incorporate all damages, including mental anguish.⁶⁹ However, evolution in wrongful-death actions will continue to be a slow process because of the necessity for legislation as well as the tension between legislative enactments and judicial interpretations of those enactments.

Most jurisdictions have recognized a protected interest in mental tranquility as evidenced in the action for intentional infliction of emotional distress.⁷⁰ In such jurisdictions it may be assumed that mental distress will eventually be a compensable injury in a wrongful-death action. However, in most jurisdictions the survivors of a child's wrongful death will be barred from recovery for the real injury suffered.

There is absolutely no reason why this element of damage should be considered in millions of personal injury cases . . . while on the other hand a majority of our states force juries to disregard the most humanly significant item of damages in death cases: the emotional impact of the loss of a beloved human being.⁷¹

⁶⁷ *Id.* at 100, 491 P.2d at 1292.

⁶⁸ S. SPEISER, *supra* note 35, at 327.

⁶⁹ *Id.*

⁷⁰ See *infra* note 72 and accompanying text.

⁷¹ S. SPEISER, *supra* note 35, at 345. As a subsidiary issue to the award of damages for emotional harms, it has been argued that allowing juries to consider such injuries will tend to escalate awards and correspondingly raise insurance premiums. Two answers to the charge have been set forth: first, jury verdicts are procedural matters which are governed by the court hearing the matter and which are subject to *remittitur*; second, the states which have amended wrongful-death acts to encompass psychic injuries have also produced awards lower than those in states which bar recovery. Juries are not unaware of the injuries which have been suffered and have in their discretion made awards which would far surpass the

The parents of Bonnie Garland and others similarly situated will continue to be forced to adhere to the fiction of computing the future worth of the child on which they might have depended. While Bonnie Garland might have contributed to the family exchequer upon employment after graduation from Yale, it is totally unclear in what form that contribution might have been made. However, under the anachronistic pecuniary-loss rule those purported future support contributions are the basis of the parents' claim for damages rather than the real emotional injury suffered.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Grief or mental anguish arising from a child's wrongful death may be intertwined with other emotional-distress elements when the child's wrongful death is caused by intentional or negligent conduct and where the parents have become involved either as witnesses or as "participants" in the action. The Garlands and other third-party victims may seek relief through an action for intentional or negligent infliction of emotional distress for such specific elements as shock, horror, or fear.

The majority of jurisdictions recognize a legally protected interest in emotional tranquility.⁷² The common-law action has grown and evolved more readily than the statutory wrongful-death action.

The landmark case of *Wilkinson v. Downtown*⁷³ recognized intentional infliction of emotional distress as a separate cause of action. The defendant-practical joker had informed the plaintiff that her husband was lying in the street with two broken legs, thereby causing severe emotional distress to the wife. Prior to *Wilkinson*, any claim for the mental anguish a plaintiff suffered was derived from a specific wrong, such as an assault or battery. The claim for mental distress had merely been a parasitic element of damages.⁷⁴ Based on the same distrust of intangible psychic harm

accounting computations under the pecuniary-loss rule. Speiser & Malawer, *supra* note 37, at 19.

⁷² See, e.g., *Womach v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974); *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961). See also *Harris v. Jones*, 281 Md. 550, 564, 380 A.2d 611, 613 (1977) (plaintiff failed to meet the burden of proof but the court made an extensive compilation of the jurisdictions recognizing the cause of action). See generally Handford, *Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort*, 8 ANGLO-AM. L. REV. 1 (1979); Langhenry, *Personal Injury Law and Emotional Distress*, 1981 J. PSYCHIATRY & L. 91; Millard, *Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation*, 15 IND. L. REV. 617 (1982); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Note, *Torts—Outrage: Liability for the Intentional Infliction of Mental and Emotional Harm*, 14 WAKE FOREST L. REV. 305 (1978).

⁷³ 2 Q.B. 57 (1897).

⁷⁴ See, e.g., *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948), *overruled*, *Yeager v. Local Union 20*, 6 Ohio St. 3d 374, 453 N.E.2d 666 (1983) (until August 1983, Ohio was the only jurisdiction in the country that refused to recognize the independent tort of intentional infliction of emotional distress absent a separate cause of action such as assault).

as noted in wrongful-death actions with regard to grief,⁷⁵ the American courts, over the last eighty years, have slowly and carefully evolved bases of liability to protect the emotional tranquility of plaintiffs while attempting to confine the liability of defendants.

The courts have developed criteria necessary to sustain the cause of action.⁷⁶ The conduct by the defendant must be of such a nature as to be considered outrageous.⁷⁷ The outrageous conduct directed at the plaintiff must be greater than the daily insults one is subjected to when merely living in normal society.⁷⁸

Liability for outrageous conduct is directly related to the concept of moral blameworthiness. Generally, tort law concerns itself with social fault, as exemplified in negligence actions, where the defendant is liable if he fails to conform his conduct to a standard of care prescribed by society.⁷⁹ When the actor's conduct is of such a nature as to be termed "outrageous," the conduct is more closely and clearly judged by standards of moral irresponsibility and moral fault.⁸⁰ The visceral reaction of the ordinary person is the measure of the character of the act.⁸¹

A comparison may be drawn between the concept of outrage as the ba-

⁷⁵ See *supra* notes 17-19 and accompanying text.

⁷⁶ See W. PROSSER, *supra* note 51, at 49-62; see also Handford, *supra* note 72.

⁷⁷ The RESTATEMENT definition of "outrageousness" has been criticized as being circular because of the use of the conclusory term "outrage" to define outrageousness. While such criticism is valid, it becomes apparent that attempting to define by other terms conduct which evokes a visceral reaction will ultimately result in the use of even more imprecise terms such as "reprehensible" or "revolting." For criticism of the RESTATEMENT see Theis, *The Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 28 DE PAUL L. REV. 275 (1977).

⁷⁸ Prosser, *supra* note 72, at 887.

⁷⁹ Bauer, *The Degree of Moral Fault As Affecting Defendant's Liability*, 81 U. PA. L. REV. 586 (1933). "It would shock the feelings of a court to be as lenient with the intentional or even reckless wrongdoer as with the person merely failing, perhaps by very little, to live up to the standard of care required." *Id.* at 588.

⁸⁰ RESTATEMENT (SECOND) OF TORTS (1977). "Liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* § 46 comment d.

⁸¹ *Id.* "Generally the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'outrageous.'" *Id.*

The concept of outrage is based on human reactions. "Knee-jerk" emotional reactions occur in everyday situations. The brakes of a car squeal around a corner, causing the person standing on the corner to grit his teeth or suck in a gasp of breath or back away from the curb. A mother working in one room of the home hears a loud crash in another room, closely followed by a child's cry. The mother immediately responds mentally, emotionally, and physically. However, these normal occurrences and reactions are different in kind from the reactions envisioned by the RESTATEMENT in its "circular" definition. The RESTATEMENT is attempting to define conduct which evokes not only an immediate "knee-jerk" response, but one which goes to the heart of social morality. The conduct elicits not merely a momentary reaction, but a response which continues unabated.

sis of a tort and the rationale for punitive damages in tort. Punitive, or exemplary, damages have been a viable part of actions in which the defendant's conduct was deemed to be "wanton" and "willful."⁸² The theory supporting the concept is that the award of exemplary damages punishes the defendant for the reprehensible character of his act. The award is justified as a specific deterrent to the defendant and a general deterrent to others.⁸³ When punitive damages arise out of an action in tort for trespass, assault, or battery, the punitive-damage award serves as "public justice" for an act of the defendant which did not fall within the perimeters of culpability under the criminal law.⁸⁴ The plaintiff's compensable injury for an assault or a trespass may have been nominal, but the defendant's conduct was egregious enough for a jury to "punish" in tort.⁸⁵ The defendant's conduct in both instances is outrageous. In one instance the conduct forms the basis for an award of exemplary damages; in the other, it forms the basis of liability for emotional distress.

The actor's intentional and outrageous conduct must have caused extreme distress to the plaintiff.⁸⁶ Initially, the plaintiff was required to substantiate the emotional harm with physical injury. The emotional harm would be corroborated by physical evidence of insomnia, nausea, vomiting, or miscarriage.⁸⁷ Physical manifestation became the benchmark of psychic harm. For example, had Richard Herrin repeatedly threatened Bonnie Garland over the telephone to the point that she could not study, eat, or sleep, he would not have *assaulted* her in that she would not have been put in fear of an immediate offensive contact. However, her insomnia would have affirmed the emotional distress she suffered. Similarly, had Herrin harassed the parents with threats of killing Bonnie, thereby causing the parents emotional distress, Herrin would have been liable in tort.⁸⁸

⁸² Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, 688 Ins. L.J. 257 (1980).

⁸³ Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 U.M.K.C. L. REV. 1 (1980). See also Note, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117 (1980) (the author advocates justifying the award of punitive damages in actions involving drunken driving on both the specific and the general deterrent values).

Another justification for punitive damages is the prevention of self-help, that is self-styled revenge. Belli, *supra* note 83, at 5. As the criminal law was designed to extract a public punishment to avoid private revenge, tort law imposed punitive damages for those actions which escaped prosecution under criminal law.

⁸⁴ Richard Herrin's act was not punishable under the criminal law for the harm it imposed on the Garlands as it failed to meet the requisites of intentionally caused harm. See *infra* notes 139-40 and accompanying text.

⁸⁵ Belli, *supra* note 83, at 5.

⁸⁶ W. PROSSER, *supra* note 51, at 56.

⁸⁷ See, e.g., *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 19 (1890) (plaintiff's emotional distress "verified" by miscarriage).

⁸⁸ See *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) (action was sustained for emotional distress when the defendant threatened to murder plaintiff's husband and then

One of the key elements in the action for intentional infliction of emotional distress is the relationship of the parties. Relationship is determined by focusing on the duty owed by the defendant, as exemplified in actions involving common carriers.⁸⁹ Similarly, in actions involving the outrageous conduct of over-zealous debt collectors,⁹⁰ insurance agents,⁹¹ practical jokers⁹² and funeral directors,⁹³ the relationship was founded both on the intent of the defendant and the susceptibility of the plaintiff. A prime example is *Meyer v. Nottger*.⁹⁴ The court was particularly aware of the "delicate" emotional state of a bereaved relative at the time of the death of a loved one. Among other reprehensible acts and omissions of the funeral director hired by the plaintiff was his refusal to produce the body of the deceased for viewing. The defendant insinuated that the deceased was in a condition which would horrify the relative.⁹⁵ After repeated pleas and refusals, the director finally relented. The wrongful "withholding" of the body, coupled with other egregious acts and omissions of the funeral director taken in conjunction with the plaintiff's dependence on the defendant, sustained the cause of action for intentional infliction of emotional distress.⁹⁶

The tort has been "legitimized" through its recognition in an overwhelming majority of jurisdictions.⁹⁷ The perimeters of the emotional integrity to be protected have become definitionally more precise due in large part to the evidence made available through the advances in psychi-

fulfilled the threat). *McKissick v. Schroeder*, 70 Wis. 825, 235 N.W.2d 686 (1975). *Schroeder* involved an action in which the plaintiff's son had been shot when fleeing from police at the rear of his home. After the shooting the police refused to allow the plaintiff to call for medical assistance for her dying son and continued to question the plaintiff at length.

⁸⁹ *St. Louis A. & T. R.R. v. Mackie*, 71 Tex. 491, 9 S.W. 451 (1888). *See also* Handford, *supra* note 72, at 9. Tracing the history of the growth of the action from its early recognition, the author notes the foundation of liability upon the relationship of the parties.

Following on the carrier cases, they also developed a similar liability in other situations where there was a special relationship necessitating respectful treatment—in respect of innkeepers and telegraph companies. These forms of liability were, of course, dependent on the special relationship between the parties, and in the light of later developments were seen as involving conduct which was insufficiently serious to give rise to liability apart from this relationship. . . .

Id.

⁹⁰ *See, e.g., Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932) (repeated threats).

⁹¹ *See, e.g., Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1 (7th Cir. 1972) (withholding life-insurance proceeds with knowledge of the adequacy of the claim and the need of the plaintiff).

⁹² *See, e.g., Great A. & P. Tea Co. v. Roch*, 160 Md. 189, A. 22 (1930) (wrapping up a dead rat like a loaf of bread).

⁹³ *See, e.g., Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976).

⁹⁴ *Id.*

⁹⁵ *Id.* at 915.

⁹⁶ *Id.* at 913.

⁹⁷ *See supra* note 72.

atry and psychology. As the cause of action has evolved the plaintiff's evidentiary burden concerning *physically* manifested emotional harm has been mitigated.⁹⁸ The burden of proof has not shifted; however, increasingly the focus is on the intentional and outrageous nature of the defendant's conduct as the measure of the emotional harm that would reasonably follow.⁹⁹

Until very recently, even when the bounds of human decency had seemingly been crossed by outrageous conduct, a few jurisdictions continued to dismiss the cause of action when physical injury had not resulted from the emotional distress.¹⁰⁰ Adherence to this physical requirement indicated that the psychic injury did not stand alone as a compensable harm.

The elements of emotional distress occasioned by the actions of debt collectors, funeral directors, and practical jokers differ markedly from those which arise from the wrongful death of a child. The former actions trigger elements of fear, embarrassment, and anxiety specific to the individual. The latter encompasses the elements of fear for the child, anguish at the loss of the child, horror at the circumstances of the event, and shock at both the act and the consequences of the act. However, an action for intentional infliction of emotional distress will not lie where a child has been murdered, because the act was not directed at the parents. The action by the parents will proceed under a theory of recklessness or negligence.

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The evolution of a cause of action for intentional infliction of mental distress has centered on only the two immediately affected parties. In each instance, an actor directed his conduct specifically at the complaining injured party. Third-party victims of the wrongful death of a child have sought relief from the courts under principles of negligence as bystanders to the wrongful death.¹⁰¹ The growth and evolution of the third-party action for emotional distress sounding in negligence provides hindsight reconstruction of the gradual recognition of the remedy, as well as a basis for analysis of the artificiality of the strictures the courts have placed on plaintiffs wanting to bring themselves within the range of

⁹⁸ Texas was one of the earliest jurisdictions to recognize a legally protected interest in emotional tranquility and to award damages for its invasion. However, Texas is one of the few jurisdictions which continues to adhere to the requirement of physical manifestation of injury. *See, e.g.,* *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954).

⁹⁹ *Wilson v. Wilkins*, 181 Ark. 137, 255 S.W.2d 428 (1930) (the court considered it reasonable to expect the plaintiff to suffer severe emotional distress when a mob threatened to lynch him unless he left town).

¹⁰⁰ *See supra* note 74.

¹⁰¹ *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (mother and sister witnessed child being negligently struck by an automobile).

recovery.

As a plaintiff must sue "in her own right for a wrong personal to her and not as the vicarious beneficiary of a breach of a duty to another,"¹⁰² the courts initially barred all recovery for emotional distress negligently caused. From the general rule, the courts began to carve exceptions, beginning with the doctrine of impact,¹⁰³ progressing to a rather artificially designed concept of "zone of danger,"¹⁰⁴ and in a minority of jurisdictions resting on general negligence principles.¹⁰⁵

A. Impact

The initial expansion of liability came with the implementation of the impact doctrine, which required that the plaintiff be physically touched by the defendant's negligent act. The court in *Mitchell v. Rochester Railway*¹⁰⁶ barred recovery when a negligently driven team of horses came dangerously close to the plaintiff, causing her to experience great emotional distress. The *Mitchell* court refused to award damages since no physical impact occurred between the plaintiff and the tortfeasor.¹⁰⁷

Fearing fraudulent claims, the courts required impact to legitimize the emotional distress. However, the courts failed to acknowledge the artificial nature of the benchmark; that is, the "impact" of a trivial jolt or shock plays no part in causing the real harm.¹⁰⁸ Instead of guarding against spurious claims, the courts were effectively barring seriously injured plaintiffs who had not been "touched" by the defendant's negligence.¹⁰⁹

The arbitrariness of the impact rule eventually led the majority of courts to reject the rule and draw a wider net of psychic protection

¹⁰² *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). See also Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

¹⁰³ *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 345 (1896), *overruled*, *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *Burroughs v. Jordan*, 456 S.W.2d 652 (Tenn. 1970) (plaintiff-wife denied recovery for emotional distress caused by injuries to her husband and children where the plaintiff was actually in the vehicle involved in the accident but did not receive any direct injuries).

¹⁰⁴ *Hopper v. United States*, 244 F. Supp. 314 (D. Colo. 1965) (sibling witnessed the negligent killing of her sister but was not endangered herself); *Niederman v. Brodsky*, 261 A.2d 84 (Pa. 1970); *contra* *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935) (recovery barred when mother watched from house as defendant's vehicle ran child down).

¹⁰⁵ *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980) (helpless mother watched her son suffer and die when he became trapped in an elevator).

¹⁰⁶ 151 N.Y. 107, 45 N.E. 354 (1896), *overruled*, *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

¹⁰⁷ *Id.* at 108, 45 N.E. at 355.

¹⁰⁸ W. PROSSER, *supra* note 51, at 331.

¹⁰⁹ 2 F. HARPER & F. JAMES, *LAW OF TORTS* 1034 (1956).

around plaintiffs.¹¹⁰ The courts, in carving a larger exception to the general rule barring recovery, progressed from requiring evidence of impact to requiring evidence of the plaintiffs' fear for their own safety.¹¹¹

B. Zone of Physical Danger

The zone-of-danger modification of the impact rule, as applied to bystanders, requires that complainants suffer severe emotional distress with physical manifestations arising from fear for their own safety as opposed to fear for that of another.¹¹² If a parent witnessed the wrongful death of her child in the street while she was looking through the window or standing on the sidewalk, she was barred from recovery as she was in no danger of being injured herself.¹¹³

When the courts had required impact, they were still treating the psychic injury as an element flowing from the negligent touching and, therefore, still a parasitic element of the negligent act. While the zone-of-danger rule indicates a final break from viewing the emotional distress merely as a parasitic element of damages, the courts have substituted one artificial barrier for another, as typified in *Whetham v. Bismarck Hospital*.¹¹⁴

In *Whetham*, a mother of a newborn infant was denied recovery for emotional distress because she was not within the zone of physical danger when she witnessed a nurse drop her infant onto a tile floor.¹¹⁵ Similar artificiality was present in *Vaillancourt v. Medical Center Hospital*.¹¹⁶ A husband was in the delivery room with his wife as she was giving birth. Since the negligence which allegedly caused the death of the infant was not alleged to have threatened the personal safety of the husband, he was barred from recovery for the emotional distress arising from witnessing the event. However, the wife's claim was sustained because she was within the zone of danger by delivering the child and thus subject to reasonable fear for her own safety.¹¹⁷

Limiting the claim to fear for personal safety ignores both the psychological and the common-sense appraisal that, in most instances involving

¹¹⁰ See, e.g., *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163 (1978) (court abolished the impact test and allowed a child's cause of action for negligent infliction of emotional distress when he witnessed a gas explosion which lifted his house from its foundation while his sister was inside).

¹¹¹ *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled*, *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

¹¹² See *Tobin v. Grossman*, 24 N.Y.2d, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Guilmette v. Alexander*, 128 Vt. 116, 259 A.2d 12 (1969).

¹¹³ See *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935).

¹¹⁴ 197 N.W.2d 678 (N.D. 1972).

¹¹⁵ *Id.* at 684.

¹¹⁶ 139 Vt. 138, 425 A.2d 92 (1980).

¹¹⁷ *Id.* at 143, 425 A.2d at 95.

parents and children, a fear for the child injured or about-to-be injured outweighs a parent's personal concerns.¹¹⁸

Once accepting the view that a plaintiff threatened with an injurious impact may recover for bodily harm resulting from shock without impact, it is easy to agree that to hinge recovery on the speculative issue whether the parent was shocked through fear for herself or for her children "would be discreditable to any system of jurisprudence."¹¹⁹

C. Zone of Psychic Danger—The General Negligence Minority

The artificiality of the zone-of-danger requirement was exemplified in *Dillon v. Legg*,¹²⁰ in which a mother and daughter witnessed the death of another daughter, who was struck by a vehicle negligently driven by the defendant. The mother was initially barred from recovery because she had been safely on the sidewalk. The witnessing daughter was recompensed for emotional distress because she might have been within the zone of danger. The court considered and discarded each of the rules that had been historically applied: the initial position of disallowing recovery for emotional distress as a separate tort; the imposition of the arbitrary impact rule; and finally, the constraints of the zone-of-danger requirement.¹²¹ "The successive abandonment of these positions exposes the weakness of artificial abstractions which bar recovery contrary to the general rules."¹²² The court adopted a general negligence analysis.¹²³ By defining the limits of the action with a set of criteria including relationship of the parties, proximity of the third-party plaintiff to the accident, and degrees of emotional distress suffered directly from the impact of the sensory and contemporaneous observation of the accident, the court drew perimeters around the scope of foreseeability.¹²⁴

¹¹⁸ In both *Whetham*, in which the nurse negligently dropped a newborn on the floor, and *Vaillancourt*, in which the father was not in any danger when the doctors negligently failed to deliver the fetus alive, neither parent would ever suffer fear for his or her own health or safety. The children in both instances were uppermost in the parents' concerns. Yet the healthy parental fear and concern is, according to the courts' analysis, subrogated to fear for each parent's own personal safety.

¹¹⁹ Magruder, *supra* note 19, at 1039.

¹²⁰ 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

¹²¹ *Id.* at 746-47, 441 P.2d at 924-25, 69 Cal. Rptr. at 84-85.

¹²² *Id.* at 747, 441 P.2d at 925, Cal. Rptr. at 85.

¹²³ *Id.* at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80.

¹²⁴ See, e.g., *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979) (daughter witnessed automobile accident involving her mother); *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981) (son witnessed peril to mother); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982) (mother became emotionally distressed as result of seeing her infant gag and choke on a foreign substance contained in jar of baby food); *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980) (mother watched her seven-year-old son suffer and die when he became trapped in

Dillon has been adopted by a minority of jurisdictions. The forecast of unlimited liability has not been fulfilled. Courts which have adopted the rationale have dismissed actions which failed to meet the guidelines. A parent who observed the progressive decline of a child's health as a result of malpractice was barred from recovery because the event was "continuously unfolding" rather than an immediate assault.¹²⁵ Similarly, the proximity requirement was not met when a parent learned by telephone of the negligently caused deaths of a child and grandchild.¹²⁶ Plaintiffs who have failed to demonstrate evidence corroborative of severe emotional distress have also been denied a remedy.¹²⁷

The evolution of the negligence action has not halted with *Dillon*. The courts which have adopted the *Dillon* reasoning have not felt compelled to construe strictly the language of "sensory contemporaneous observance" of the accident.¹²⁸ Actions have been sustained where the close relative neither contemporaneously nor perceptually witnessed the actual negligence, but where the relative was determined to be an active participant. In *Lafferty v. Manhasset Medical Center*,¹²⁹ the daughter-in-law who watched and tried to comfort her mother-in-law who was dying from a mismatched blood transfusion was deemed to be an active participant in the event.

The courts have also expanded the requirement of "contemporaneous observation," as demonstrated in *Archibald v. Braverman*.¹³⁰ The court sustained an action even though the mother came upon the scene moments after the explosion which caused the death of her child. Recovery has also been allowed when the injury to the victim was so severe that the

an elevator); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979) (observation of automobile accident); *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978) (drowning death of infant witnessed by sibling).

¹²⁵ *Owens v. Children's Mem. Hosp.*, 480 F.2d 465 (8th Cir. 1973).

¹²⁶ *Kelley v. Kokua Sales and Supply, Ltd.*, 56 Hawaii 204, 532 P.2d 673 (1975).

¹²⁷ See *Hair v. County of Monterey*, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975). See also *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982) (action brought by DES daughters for emotional distress alleged to have resulted from increased statistical likelihood that they would suffer serious disease in the future; action not recognized absent physical harm from the emotional distress).

¹²⁸ See, e.g., *Campbell v. Animal Quarantine Station*, 63 Hawaii 557, 632 P.2d 1066 (1981) (negligent mishandling of the family dog by the defendant resulted in the dog's death and caused the plaintiff severe emotional distress even though the plaintiff neither saw the defendant's negligence nor suffered physical manifestations of the emotional distress).

¹²⁹ 103 Misc.2d 98, 425 N.Y.S.2d 244 (Sup. Ct. 1980), *aff'd*, *Lafferty v. Manhasset Med. Center Hosp.*, 54 N.Y.2d 277, 429 N.E.2d 789, 445 N.Y.S.2d 111 (1981).

¹³⁰ 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969). See also *Dzionkinsky v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978) (adopts reasonably-foreseeable standard and allows recovery where the parent either witnessed the accident or soon came on the scene while the child was still there); *Mercado v. Transport of New Jersey*, 176 N.J. Super. 134, 422 A.2d 800 (1980) (mother was told of accident and rushed to the scene within minutes to observe her son in the street severely injured and unconscious).

shock suffered by the family upon viewing the injuries was considered by the court to be of greater significance than actual presence at the scene of the accident.¹³¹

The majority rule requires physical manifestation of emotional distress arising from negligence.¹³² A few jurisdictions have departed from the requirement of physical manifestation of harm. California has modified its stance in *Dillon* by allowing recovery to a complainant who had neither witnessed the negligence between the primary parties nor demonstrated physical manifestation of his emotional distress.¹³³

In eighty years, the tort as it relates to bystanders has gradually progressed from a general bar to recovery to a willingness to carve out exceptions. Only in a minority of jurisdictions does the action rest on general principles of negligence.

VI. INTENTIONAL ACTS CAUSING RECKLESS INFLICTION OF EMOTIONAL DISTRESS

Actions in emotional distress generally fall into two categories. The action for intentional infliction of emotional distress encompasses two parties; the action for third-party victims falls within the category of negligence. However, a different analysis should be employed when the defendant intentionally injures a party and in turn recklessly causes emotional distress to the third-party victim.

Garland v. Herrin,¹³⁴ a civil action instituted by the parents of Bonnie Garland, was heard in the Federal District Court for the Southern District of New York. The action was brought for the intentional infliction of emotional distress caused by Herrin's intentional murder of the Garlands' daughter.¹³⁵

The *Garland* matter is distinctive for three reasons: third parties were claiming *intentional* infliction of emotional distress when the intentional act was directed at another; liability was based upon the theory of recklessness as promulgated in the RESTATEMENT (SECOND) OF TORTS; and neither Mr. nor Mrs. Garland was literally present at the time of the event.

The RESTATEMENT equates recklessness with intentional conduct.

One who by extreme and outrageous conduct *intentionally* or

¹³¹ *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980) (husband/father paralyzed below the neck following industrial accident).

¹³² *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

¹³³ *Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 616 P.2d 813, 127 Cal. Rptr. 831 (1980) (plaintiff stated a cause of action for negligent infliction of severe emotional distress by alleging that defendant negligently diagnosed plaintiff's wife as having syphilis, instructed wife to advise plaintiff of her diagnosis, and requested plaintiff to submit to a blood test).

¹³⁴ 554 F. Supp. 308 (S.D.N.Y.), *rev'd*, 724 F.2d 16 (2d Cir. 1983).

¹³⁵ *Id.* at 309.

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.¹³⁶

The crux of an action for emotional distress with liability founded upon recklessness centers on the intent of the actor. Tortious intent has been found when the actor desires to cause the consequences of his act¹³⁷ or when the actor is substantially certain that the consequences will come about as a result of his act.¹³⁸ While Richard Herrin faced criminal charges for the murder of Bonnie Garland as both his act and the death of Bonnie were intended, the criminal law would not prosecute Herrin for the emotional "assault" upon the parents. Herrin's act is indicative of the difference between criminal and tortious intent and the *consequences* of either intent.

For the civil law to impose liability for invasions of protected interests, the law imputes to the defendant knowledge of the consequences of his actions and attaches liability thereto, even if the harm which follows was unintended.¹³⁹ In this regard, tort law differs from criminal law. The distinction between the two is that in tort the probability, or substantial certainty, that certain consequences will follow from an act is sufficient for liability; the knowledge of the probability plus the wish for *those consequences* working as a motive which induces the act are necessary for conviction of more serious offenses under the criminal law.¹⁴⁰ Thus, the criminal law requires a concurrence of act and mental state and requires that the perpetrator, under certain statutorily defined crimes such as murder, intend the specific consequences of the act. Unlike civil law, criminal sanctions will not follow where an intended harm towards one causes a different and unintended harm towards another.¹⁴¹ Therefore, while the criminal law would punish Herrin's intentional murder of Bonnie Garland, it would not in turn hold Herrin criminally responsible for the "unintended" emotional distress inflicted on her parents. Criminal assault does prosecute defendants for intentionally caused fright. However, the assault must cause fear of bodily injury.¹⁴² As the Garlands' emotional distress did not encompass fear for their own safety, criminal assault charges would not issue against Herrin. The criminal law leaves it to the civil law to redress the injury.¹⁴³

¹³⁶ RESTATEMENT (SECOND) OF TORTS § 46(1) (1977) (emphasis added).

¹³⁷ *Id.* § 8A.

¹³⁸ See *Garratt v. Dailey*, 46 Wash. 2d 97, 297 P.2d 1091 (1955), *second appeal*, 49 Wash. 2d 499, 304 P.2d 681 (1956); RESTATEMENT (SECOND) OF TORTS § 8A.

¹³⁹ W. PROSSER, *supra* note 51, at 32; RESTATEMENT (SECOND) OF TORTS § 8A.

¹⁴⁰ O.W. HOLMES, *THE COMMON LAW* 53 (1881).

¹⁴¹ W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 196 (1972).

¹⁴² *Id.* at 603-13.

¹⁴³ *Id.* The jurisdictions are not in accord regarding the criminal culpability of assault with intent to frighten.

The elements required to substantiate intent in the criminal law and in tort law diverge because of the price society extracts from a perpetrator of crime, as opposed to that demanded of a civil defendant. The civil defendant is liable for money damages, while the criminal defendant may face incarceration or death for the consequences of his act. To ensure his culpability, the law requires both an "evil mind" and an "evil act."¹⁴⁴

While tort law does not seek to analyze the defendant's motive, tortious intent converges with that of criminal law in the sphere of recklessness. In criminal law "a reckless act may be treated as if it resulted from a malicious purpose."¹⁴⁵ The RESTATEMENT places recklessness in the same category as intent for the purpose of establishing infliction of emotional distress. It treats the act as if it were intentional because of the substantial certainty that specific consequences will follow.¹⁴⁶

Such a result arises from the nature of the act involved and is justified on the ground that one who acts outrageously and recklessly with substantial certainty of the consequences should be held liable to the same degree as one who acts with purposeful design.¹⁴⁷ While recklessness is theoretically separable from intentional conduct, for purposes of liability they are held to be equivalent.

Therefore, if an actor proceeds to cause harm either with his own knowledge or with knowledge legally imputed to him because of the character of his act, the law will treat him as though he intended the harm.¹⁴⁸

One who fires at another with intent to hit him though he misses is, of course, a far more dangerous person than his milder counterpart who goes about intending only to frighten and not to injure Therefore, the criminal law properly first singles out for punishment the man of violence who attempts a battery. Of course, the person who successfully frightens others, though not so bad a person as the unsuccessful attacker, is not altogether admirable—so that the view of the majority of the states, which include him in the net comprising the crime of assault, is not necessarily wrong, though the minority view is to leave such minor bad conduct to the civil law to discourage

Id. at 612 (citations omitted).

¹⁴⁴ J. MARSHALL, *INTENTION—IN LAW AND SOCIETY* 10 (1968).

¹⁴⁵ *Id.* at 6.

¹⁴⁶ See FITZGERALD, *SALMOND ON JURISPRUDENCE* (12th ed. 1966):

A statement much nearer the truth is that the law frequently—though by no means invariably—treats as intentional all consequences due to that form of negligence which is distinguished as *recklessness*—all consequences, that is to say, which the actor foresees as the probable results of his wrongful act.

Id. at 368-69 (emphasis added).

¹⁴⁷ Recklessness may be equivalent to intentional conduct in criminal law, according to the *Model Penal Code*, which states that the degree of intent sufficient for criminal homicide includes acting purposely, knowingly, or *recklessly* under circumstances manifesting extreme indifference to the value of human life. MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962) (emphasis added).

¹⁴⁸ O.W. HOLMES, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS (1920). "If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great but still considerable, we say that the harm is

Where the conduct towards the victim is both intentional and by its nature so reprehensible as to shock the common sensibilities, as in the brutal assault on Bonnie Garland, it may be said that the same act was substantially certain to have emotional repercussions upon third-party victims. As substantial certainty supports the theory of recklessness,¹⁴⁹ and recklessness supports the cause of action for emotional distress as an equivalent of intentional conduct,¹⁵⁰ third-party victims should be afforded a remedy for the reckless misconduct of the defendant towards themselves.

In the civil action of *Garland v. Herrin*,¹⁵¹ the defendant conceded at trial that his actions constituted "extreme and outrageous conduct."¹⁵² It was conceded by the plaintiffs that defendant Herrin had not intended to cause the parents emotional distress. The parents argued that the defendant's substantially certain knowledge that murdering their daughter would cause them emotional distress brought the action within the RESTATEMENT formulation of recklessness as a basis for imposing liability for the tort of intentional infliction of emotional distress.¹⁵³

The federal district court, sitting in diversity, was bound to apply New York law to the critical facts of the case. Prior to *Garland*, New York had recognized intentional infliction of emotional distress¹⁵⁴ and negligent infliction of emotional distress.¹⁵⁵ However, *Tobin v. Grossman*¹⁵⁶ had barred recovery to a parent in an action in which a negligent driver had struck the plaintiff's child and thereby negligently caused emotional distress to the mother. In order to avoid the *Tobin* rule as to bystanders, the Garlands had to bring the action within the sphere of intentionally caused distress. The district court determined that under the New York

done negligently; if there is no apparent danger, we call it mischance." *Id.* at 117. See also RESTATEMENT (SECOND) OF TORTS (1977).

While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.

Id. § 500.

¹⁴⁹ That substantial certainty supports the theory of recklessness is derived from reading § 8A in conjunction with § 500 of the RESTATEMENT.

¹⁵⁰ RESTATEMENT (SECOND) OF TORTS § 46 (1977).

¹⁵¹ 554 F. Supp. 308 (S.D.N.Y.), *rev'd*, 724 F.2d 16 (2d Cir. 1983).

¹⁵² *Id.* at 4.

¹⁵³ *Id.*

¹⁵⁴ *Halio v. Laurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961) (communications which the defendant sent to the plaintiff were intended to cause and did cause the plaintiff severe emotional distress).

¹⁵⁵ *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (child was negligently secured in a chairlift at a ski resort and the plaintiff suffered severe emotional and neurological disturbances with residual physical manifestations).

¹⁵⁶ 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

precedents,¹⁵⁷ state courts had accepted the RESTATEMENT formulation of liability for emotional distress intentionally caused. However, the court cited no opinions where an action had based liability on recklessness.

The court reasoned that the New York Court of Appeals in *Fischer v. Maloney*¹⁵⁸ adopted section 46 as well as the underlying rationale of substantially certain consequences. Thus, *Fischer* stated the law of New York for the tort of infliction of emotional distress and imposed liability for both intentional and reckless misconduct.

As Herrin's act had been admittedly outrageous and emotional distress had followed, the court was then faced with the qualifications stated in section 46(2), wherein the conduct is directed at a third party rather than the complainant.

[W]here 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.¹⁵⁹

The court was then faced with the critical requirement of "present at the time."¹⁶⁰ While not bound by the constraints of bystander recovery under negligence theories, the court recognized the newer boundaries of the negligence action as evidenced in *Archibald v. Braverman*,¹⁶¹ where recovery was allowed for a mother's emotional distress when she arrived on the scene moments after her son had been fatally injured in an explosion. The mother was not literally present at the time of the event. Her "contemporaneous" witnessing of the accident was sustained as sufficient for the negligent infliction of emotional distress.¹⁶²

Judge Griesa in *Garland* also relied on Dean Prosser, who had suggested that literal observation at the scene of the act should not be required.

As an additional safeguard, it *might* be required that the plaintiff be present at the time of the accident or peril, or at least that the

¹⁵⁷ *Dinger v. Anchor Motor Freight Co.*, 501 F. Supp. 64 (S.D.N.Y. 1980); *Fischer v. Mahoney*, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978).

¹⁵⁸ 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978). Although the *Fischer* matter was dismissed for insufficient pleadings, the *Garland* court stated that "[t]he necessary meaning of the Court of Appeals' adoption of § 46 is that recklessness is one ground, under the law of New York, for imposing liability for infliction of severe emotional distress, when it is accompanied by extreme and outrageous conduct." 554 F. Supp. at 313. The district court's reliance on *Fischer* was misplaced and became the basis for reversal on appeal. 725 F.2d at 18.

¹⁵⁹ RESTATEMENT (SECOND) OF TORTS § 46(2)(a).

¹⁶⁰ 554 F. Supp. at 313-14.

¹⁶¹ 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

¹⁶² *Id.* at 256, 79 Cal. Rptr. at 725.

shock be fairly contemporaneous with it, rather than follow when the plaintiff is informed of the whole matter at a later date.¹⁶³

Further authority for the proposition that literal presence should not be required in all circumstances was found in the "Caveat" to section 46.¹⁶⁴

Noting specifically that the defendant in this instance had designed the circumstances to avoid the parents' literal presence on the scene, the court concluded that judgment should be awarded to the parents for their claim.

The crime committed by Herrin was carried out against their daughter in their own home. It was committed at night when they were present in the home, a few feet away from the scene, although they were asleep at the time. Herrin procured the murder weapon in their home and has admitted that he was concerned about being detected by Mr. and Mrs. Garland and thus took steps to mask what he was doing. He took full advantage of the helplessness of Bonnie while she was asleep, to commit this act of incredible savagery. Thus Herrin violated in the worst manner the sanctity of the Garland home, not only as to Bonnie, but as to her parents.¹⁶⁵

Mr. and Mrs. Garland were nearby at the time of the assault and the mother became involved in the tragedy the moment the policemen arrived at her doorstep. The whole set of circumstances is remote from the "typical" third-party-victim action for emotional distress sounding in negligence. The action toward the first victim was intentional. The unintended harm to the parents was not merely negligent as falling below a standard of reasonable care, but was rather in reckless disregard of the parents and by its very nature substantially certain to cause them harm. Therefore, the strictures that generally bind third-party victims whose actions sound in negligence were not applied. Requiring physical presence at the scene of the murder would have produced the anomalous result of barring the parents from recovery for not literally being present, when,

¹⁶³ 554 F. Supp. at 314.

¹⁶⁴ "The institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress." RESTATEMENT (SECOND) OF TORTS § 46 (1977). As early as 1936, it was suggested in a hypothetical situation which is analogous to *Garland* that literal presence in all circumstances should not be required.

Yet from the standpoint of foreseeability of harm through shock, there seems little to choose between the case where the plaintiff sees a murderous attack upon her aged father, and a case where, after the attack, the daughter comes home and stumbles upon his bloody remains. . . . When a murderer kills his victim, he knows that an acute shock will inevitably be caused to the near relatives, though of course he is not acting for that purpose.

Magruder, *supra* note 19, at 1044-45.

¹⁶⁵ 554 F. Supp. at 314.

had they been present, the murder might not have occurred and correspondingly they would not have been harmed.

Two of the grounds upon which the Second Circuit Court of Appeals reversed the district court were: 1) New York has not permitted recovery for emotional distress inflicted recklessly but not intentionally; and 2) New York does not permit a "bystander" to recovery for psychic injury resulting from harm inflicted on another.¹⁶⁶ As previously discussed,¹⁶⁷ *Tobin v. Grossman*¹⁶⁸ barred bystanders from the action for negligently inflicted emotional distress; therefore, the appellate court's second ground for reversal was accurate, although unnecessary, as the action was not brought in negligence. The major point of contention between the courts arose because of the district court's reading of *Fischer v. Maloney*¹⁶⁹ as stating that the law of New York encompasses both intentionally and recklessly caused emotional distress. The court of appeals noted that while the *Fischer* court referred to RESTATEMENT section 46, the question of the distinction between reckless and intentional conduct was not before the court.¹⁷⁰ The court of appeals read *Fischer* as holding merely that "bringing an unsuccessful defamation action was not 'conduct exceeding all bounds usually tolerated by decent society.'"¹⁷¹

The appellate court was correct in that the district court, in essence, was asked to write new law. The plaintiffs, aside from reliance on *Fischer*, could cite no New York authority for the proposition that a cause of action will lie for recklessly caused emotional distress.

The appellate court did recognize that a state court of appeals "might assess differently the delicate policy considerations if it were presented, as here, with severe emotional distress recklessly caused by extreme and outrageous conduct."¹⁷² Therefore, the issue as resolved by the appellate court leaves to the state courts the responsibility of policy-making for future emotionally distressed victims. The Garlands themselves have suffered another reversal.

Neither the RESTATEMENT formulation nor the lower court's substantive analysis was attacked by the appellate court. Therefore, although the lower court's decision will have no precedential value, the analysis should merit attention and lead to the further evolution of the common-law actions for infliction of emotional distress.

Prior to *Garland*, similar cases were heard under negligence theories where the defendant, in outrageously assaulting another, had caused emo-

¹⁶⁶ 724 F.2d at 21.

¹⁶⁷ See *supra* note 156 and accompanying text.

¹⁶⁸ 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

¹⁶⁹ 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978).

¹⁷⁰ 724 F.2d at 18-19.

¹⁷¹ *Id.*

¹⁷² *Id.* at 19.

tional distress to a witnessing third party.¹⁷³ In *Hill v. Kimball*,¹⁷⁴ Mrs. Hill "sustained a fright" which ultimately resulted in a miscarriage after she witnessed the defendant's brutal assault upon two people on her premises. The court, as early as 1890, recognized that a severe emotional disturbance could result from the nature of the defendant's act. The court reasoned that the defendant should be held liable if a "reasonably prudent man would have anticipated the danger to her."¹⁷⁵ The existence of several critical facts would have achieved the same result under a recklessness analysis. The defendant's "willful" assault carried forth with knowledge that the plaintiff was present and in an advanced state of pregnancy would have removed the action from a "standard-of-care analysis" to the realm of reckless misconduct which was substantially certain to cause the plaintiff severe emotional distress.

A similar result was reached in *Watson v. Dilts*,¹⁷⁶ where a wife suffered severe emotional distress and anxiety as a result of the defendant's assault upon her husband. While the court recognized the interest in emotional tranquility, it is unclear whether the court allowed the action to stand on its own merits or whether the action was merely considered a parasitic element of damages because of the defendant's trespass upon the husband's home.

Trespass also was an element in *Young v. Western & A.R. Co.*¹⁷⁷ In *Young*, a railroad agent entered the home of the plaintiff and while pointing a pistol at the bed, dragged plaintiff's husband from the bed, causing the wife severe emotional distress. The action was not for a mere negligent tort, but was for a "positive and willful wrong."¹⁷⁸ Both *Watson* and *Young* were heard in the early part of the twentieth century, prior to both the general recognition of intentional infliction of emotional distress and to the RESTATEMENT formulation of the basis of the cause of action. Both cases were tied to trespass actions; however, even in the trespass action, the court was "stretching" to achieve an equitable result as neither wife owned the property upon which the individual defendants trespassed. These early cases were part of the evolving recognition of the action. If brought in the 1980's both actions would survive the analysis of the district court in *Garland* and the RESTATEMENT. Both involved outrageous, unprivileged acts by defendants who knew with substantial certainty that the assaults on the husbands would cause the wives emotional distress. Unlike *Garland*, though, the plaintiffs in *Young* and *Watson* witnessed

¹⁷³ See, e.g., *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* However, unresolved in *Hill* and in other "miscarriage" cases is the causal, that is, medical link between emotional distress and miscarriage. More than likely, the miscarriage was merely the courts' evidentiary crutch to validate the intangible emotional injury.

¹⁷⁶ 116 Iowa 249, 89 N.W. 1068 (1902).

¹⁷⁷ 39 Ga. App. 761, 148 S.E. 414 (1929).

¹⁷⁸ *Id.*

the brutality.

A two-party action in which the court analyzed the "willfulness" of conduct was *Blakeley v. Shortal's Estate*.¹⁷⁹ Noting that a plaintiff was barred from recovery for the disturbance of mental tranquility when caused by a negligent act, the court would not adopt the negligence rule when it was shown that the plaintiffs' fright was due to a willful act. The defendant guest of the plaintiffs had committed suicide in the kitchen of their home while they were away for the day. When the plaintiffs returned, they found the defendant, his throat slit, lying in a pool of blood on their kitchen floor. While remanding the case to the trial court for a determination of whether the defendant's actions were willful, the court indicated that there was sufficient evidence to support the conclusion that the intentional act of suicide caused the willful injury to the plaintiffs.¹⁸⁰ It was not necessary for the defendant to intend the specific harm to the plaintiffs; it was sufficient that the defendant acted with reckless disregard of the plaintiffs.¹⁸¹ The court explained that to constitute a willful injury, the act which produced it must have been intentional, or it must have been done under such circumstances as evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of.¹⁸² The fact that the plaintiffs had failed to witness the actual suicide did not deter the court. Witnessing the aftermath was sufficient.

Facts more closely analogous to the tragedy in *Garland*, in that the acts were intentional and outrageous as to the intended victim, were raised on demurrer in *Mahnke v. Moore*.¹⁸³ The child, as plaintiff, brought an action against the estate of her deceased father for having murdered her mother in her presence and then one week later having committed suicide in her presence. While the court was chiefly concerned with the issue of parental immunity, it allowed the matter to proceed on the merits under a negligence theory.¹⁸⁴

Blakeley and *Mahnke* would both survive scrutiny under the RESTATEMENT. In each instance the actions of the defendants were outrageous and were substantially certain to have caused the victims emotional distress. While these early cases achieved the same result, the analysis was not clear. Had *Blakeley* been analyzed under zone-of-danger negligence rules as applied to bystanders, the action would have been unsuccessful.

As a general rule, the complaining third party's action is heard in negligence because of the element of "unintended" harm. Because the majority of jurisdictions bar recovery for the "unintended" harm absent the zone-of-danger requirement, most third-party victims remain

¹⁷⁹ 236 Iowa 787, 20 N.W.2d 28 (1945).

¹⁸⁰ *Id.* at 791, 20 N.W.2d at 31.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ 197 Md. 61, 77 A.2d 923 (1951).

¹⁸⁴ *Id.* at 69, 77 A.2d at 927.

unrecompensed.

The theory of recklessness in the district court opinion in *Garland* expands the scope of intentional infliction of emotional distress to third-party victims. As the basis of the defendant's liability arose from an intentional tort rather than from negligence, the theory does not rely on the artificial zones of recovery that have constrained the action and recovery in negligence. Rather than being constricted by foreseeable-duty analysis in negligence, the reckless and outrageous nature of the act resulted in an analysis of act, intent, and causation. Literal presence at the scene of the incident was not required because of the particular facts and circumstances of the tragedy.

Liability for reckless and outrageous behavior to third-party victims may well be a circumscribed action by its very nature. However, it should nonetheless be an option available to those third-party victims who have suffered the wrongful death of a child at the hands of one who was not merely negligent, but was in reckless disregard of the substantial certainty of the consequences of his act, both as to the child and the surviving victims.

The action should not be limited to horrible murder scenes as present in *Garland*. It should also be applicable to acts by defendants which fit into a category where had another tort been present, punitive damages would have been available because of the wanton and willful character of the act.¹⁸⁵ The "easy" cases would be those similar to actions in which intentional infliction of emotional distress was first recognized, that is, in those cases where there is already established a special relationship or duty to the plaintiff. Such an action has been sustained for a death caused by an outrageous failure to act, in *Grimsby v. Samson*.¹⁸⁶ In *Grimsby*, the defendant hospital and doctors were found liable for "pas-

¹⁸⁵ Many bystander actions have been heard under the negligence theory when a negligent driver has struck a child. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). However, if the driver were not merely negligent but were recklessly disregardful, the district court's analysis in *Garland* could be employed. As an example, punitive damages have been suggested as a deterrent for drunken driving and would be attached to a common-law action because of the wanton and willful character of the defendant's act. Similarly, if a parent suffered severe emotional distress as a result of the wrongful death of a child arising from the outrageous conduct of a defendant driving while intoxicated, the action for the parent who either witnessed the accident or who came upon the scene fairly contemporaneously should lie under the *Garland* and RESTATEMENT analyses.

Other actions, outrageous toward the child and correspondingly reckless to the third-party victim, would lie where a defendant ignored school crossings or school-bus warnings and struck a child. Similarly, a policeman or fireman who recklessly drove through a neighborhood at a high rate of speed without emergency flashers and siren should be liable both to the injured child and the emotionally distraught parent. In each instance, the action should lie if the defendant's conduct was sufficiently wanton and willful to meet the RESTATEMENT definition and a parent correspondingly suffered severe emotional distress as a result of witnessing the actual event or the aftermath as evidenced by the child's injuries.

¹⁸⁶ 85 Wash. 2d 52, 530 P.2d 291 (1975).

sively" outrageous acts in failing to treat the plaintiff's wife. The husband looked on while his wife "proceeded to die right in front of his eyes."¹⁸⁷

While the focus of this Note has been the wrongful deaths of children and the resulting emotional distress suffered by the surviving parents, the reckless infliction of emotional distress to third-party victims should not be confined to actions for wrongful death. A case exemplifying an intentional and outrageous act by the defendant resulting in emotional distress to the plaintiff was heard by the Supreme Court of Washington in *Schurk v. Christensen*.¹⁸⁸ The court denied recovery for mental distress suffered by the mother of a five-year-old who was not near the scene of the child's sexual molestations by a babysitter. The mother was barred from recovery because she failed to observe the actual sodomization of her daughter. The majority of the court invoked the "zone of danger" requirement. The vigorous dissent noted:

It means nothing to consider whether the rape of the daughter actually invaded the security of the mother. It is meaningless to talk about the zone of danger of a rape; if the mother had been present or within the zone of danger, there would have been no rape.¹⁸⁹

Even though the dissent based its opinions on a breach of contract by the babysitter's mother who had vouched for the reliability of her son, while having knowledge of his propensities,¹⁹⁰ the facts are analogous to those in *Garland*. Unquestionably, the babysitter's conduct was outrageous. He clearly designed the circumstances so as to forestall the parent's literal presence on the scene. He furthermore could be charged with imputed knowledge that once the mother was apprised of the molestations she would suffer emotional distress. Both the mother and the child were forced to undergo psychiatric care as a result of the defendant's outrageous conduct. Breach of contract aside, the defendant's outrageous conduct would have made him liable under RESTATEMENT section 46: it proximately caused harm to both the mother and child and the harm was substantially certain to result from his reprehensible behavior.

Reckless infliction of emotional distress involving outrageous acts substantially certain to cause third-party distress is an action involving aberrant conduct. Presumptively, parents of children should be allowed to bring an action if they can substantiate the egregious nature of the defendant's conduct and satisfy the element of causation. Whether or not actions would be sustained with other family members as plaintiffs would depend on a determination by the trier of fact as to whether a sufficiently

¹⁸⁷ *Id.* at 53, 530 P.2d at 295 (emphasis omitted).

¹⁸⁸ 80 Wash. 2d 652, 497 P.2d 937 (1972).

¹⁸⁹ *Id.* at 665, 497 P.2d at 945 (Finley, J., dissenting).

¹⁹⁰ *Id.* at 666, 497 P.2d at 938.

close relationship existed between the victim and the relatives to substantiate the alleged emotional distress.¹⁹¹

As with intentional infliction of emotional distress in which the act is directed at the plaintiff, for third-party victim relief the act will need to meet the requirements of "outrageous conduct."¹⁹² The plaintiff will correspondingly need to produce evidence of psychic harm. It is impossible to predict how the courts will react when faced with instances of literal presence as opposed to functional presence; however, the bright lines do not have to appear until the facts and circumstances are brought before the court and examined for causation.¹⁹³ That this extension of intentional infliction of emotional distress based on recklessness will have to evolve slowly as cases are brought forward is probably foreordained. However, it is not clear that the courts must follow the same evolutionary process as in the recognition of negligent infliction of emotional distress to third-party victims. Courts with the hindsight value of the whole progression of bystander recovery are free to reject the artificial restraints which bound the action in negligence and to determine the scope of the

¹⁹¹ The emotional attachments of siblings should be sufficient to sustain the relationship requirement. *Koontz v. Keller*, 52 Ohio App. 265, 3 N.E.2d 694 (1936), was an action in which the plaintiff's sister was intentionally brutalized by the defendant in an outbuilding upon the plaintiff's premises. The court refused to allow the action for the plaintiff's emotional distress caused when she came upon her sister's lifeless and brutally beaten body because the defendant had not directed the assault at the plaintiff.

Under *Garland*, the *Koontz* attack was not only clearly outrageous, but also carried out on the premises of the plaintiff, where the defendant knew or should have known that any relative discovering the body would suffer severe emotional distress.

However, a better decision, which illustrates that a "relationship" should be required to limit the action, was *Calliari v. Sugar*, 280 N.J. Super. 423, 435 A.2d 139 (1980). A husband and wife who were neither present at the time of the alleged murder nor members of the family of the victim could not recover for emotional distress after the body of the victim was found buried in the back yard of the house which they had contracted to purchase. Any person discovering a body buried on his premises would suffer some form of emotional reaction. However, the relationship of the plaintiffs to the deceased was nonexistent and the act by the defendant was not designed either intentionally or with substantial certainty to cause the plaintiffs' emotional distress.

The action should certainly lie for nuclear-family members who can substantiate both the relationship and causation. To sustain an action for non-nuclear family members, the court would need to be convinced of a substantial link between the intentionally aggrieved party and the third-party victim. For example, the fiance of an intentionally injured party might well meet the requisites of relationship.

¹⁹² See *supra* notes 77-85 and accompanying text.

¹⁹³ If the defendant's conduct met the element of outrageousness and the parent correspondingly satisfied the requisite severity of emotional distress, then literal presence at the scene should not be required. While learning of the accident over the telephone would probably not meet the requirements of emotional impact, the scope of the action would encompass parents who witnessed the aftermath of the defendant's conduct. In determining the scope of the action and the requirement of literal presence of the complainant, the courts could use the newer boundaries of the negligence actions as guideposts. See *supra* notes 128-31 and accompanying text.

liability to be imposed.

Intentional infliction of emotional distress has progressed to the point where the majority of jurisdictions allow the psychic harm to stand alone as compensable.¹⁹⁴ Thus, the harm to third-party victims should not require the corroborative proof of physical manifestations of emotional distress which is demanded in the negligence action. As the outrageous conduct in the two-party action substantiates psychic harm, so should it substantiate the harm of the third-party victim. Invariably though, given the nature of acts termed to be outrageous which have resulted in the wrongful death of a child, physical manifestations of psychic harm will probably follow.

VII. PSYCHIC HARM AND THE COURTS—SUMMARY

As noted initially,¹⁹⁵ the courts had grave difficulty merely recognizing that intangible harms should be able to stand alone as meritorious claims. Part of the courts' difficulty lies in their inability to define the terms with which they are dealing. The courts use the generic phrase "emotional distress" as a catchall for a myriad of emotions triggered by the wrongful death of a child. Instead of defining the terms, the courts have used symptoms to describe such elements of emotional distress as grief and mental anguish. For instance, both "grief" under wrongful-death actions and "emotional distress" under a common-law action for intentional infliction of emotional distress are used as conclusory terms to include such symptoms as nausea, vomiting, and insomnia. While courts are not charged with the job of being amateur psychologists or psychiatrists, the definition of harms by symptoms leads to confusion.

The difficulty is illustrated in *Krouse v. Graham*,¹⁹⁶ a California case brought under both the wrongful-death statute and as an action for negligent infliction of emotional distress. The California wrongful-death statute precluded recovery for grief and anguish occasioned by the wrongful death of another.¹⁹⁷ However, California, in the forefront of the expansion of recovery for negligent infliction of emotional distress, does allow bystander, that is, third-party victim, relief for the "emotional distress" occasioned by the "witnessing" of the accident. Relief was afforded in *Krouse* even though the plaintiff did not visually witness the accident, but knew where his wife was, heard the approach of the vehicle driven by the defendant, and knew immediately upon the crash that his wife had been struck. The difficulty arose when the court determined that the jury had awarded damages for the grief and anguish the husband had suffered as a result of his wife's death.

¹⁹⁴ See, e.g., *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932).

¹⁹⁵ See *supra* notes 17-20 and accompanying text.

¹⁹⁶ 19 Cal. 3d 272, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

¹⁹⁷ *Id.* at 67, 562 P.2d at 1026, 137 Cal. Rptr. at 866.

The problem arose in *Krouse* partly because of the conflicting testimony by the experts as to whether the gastric problem suffered by the plaintiff arose from "witnessing" the accident or from his grief at the loss of his wife.¹⁹⁸ There may well be different emotional onslaughts in the time extending from the contemporaneous witnessing of the impact to the beginning of the actual grieving process, but the court failed to recognize that it was using a generic term in allowing recovery for "emotional distress" but then limiting recovery to the specific aspect of "witnessing the accident."¹⁹⁹ The court thereby limited the cause of action to the emotional assault caused solely by the "shock upon the sensibilities" even though the plaintiff had failed to witness the event visually. If the psychiatrists as expert witnesses have difficulty excising one element of emotional distress from others which have followed in series from a traumatic event, it is inconceivable that a court can so neatly separate the converging and coextensive facets of the distress.²⁰⁰

Similarly, a third ground for reversal by the Second Circuit in the matter of Bonnie Garland was that "even if New York law permitted both . . . [bystander recovery for negligent infliction of emotional distress, or reckless infliction of emotional distress], when the harm causes death, the plaintiffs' recovery is limited to those pecuniary injuries authorized by New York's wrongful death statute."²⁰¹ The plaintiffs in *Garland* brought two separate causes of action: one for the wrongful death of their daughter under the wrongful-death statute²⁰² and the second for their own emotional distress for the assault upon the child.²⁰³ Just as the *Krouse*²⁰⁴ plaintiff was caught in the morass of separating emotional harms, the plaintiffs in *Garland* at the district court level failed to take exception to the jury instructions which confused the issues by asking the jury to as-

¹⁹⁸ The states which recognize bystander recovery for negligent infliction of emotional distress generally require substantiation of emotional distress with physical consequences. See, e.g., *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979). However, since the *Krouse* decision, California has modified its stance. See *supra* note 133 and accompanying text.

¹⁹⁹ 19 Cal. 3d 212, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

²⁰⁰ In criticizing the near-surgical division into categories of the elements of emotional distress encompassed within an action for wrongful death, the court in *Wilson v. Lund*, 80 Wash. 2d 91, 491 P.2d 1287 (1971), noted:

Definition and application of elements of damage defined in this manner, if possible at all, is a task for theologians or metaphysical seers of former years—who could determine, it is reported, how many angels could dance on the point of a pin. Such metaphysical speculation is, in our judgment, not a habit, failing, or function of modern, well-trained and experienced psychiatrists or of finders of legal fact.

Id. at 101, 491 P.2d at 1293.

²⁰¹ 724 F.2d at 21.

²⁰² 554 F. Supp. at 309.

²⁰³ *Id.*

²⁰⁴ 19 Cal. 3d 272, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

sess the emotional distress arising from the death of Bonnie.²⁰⁵ As the court of appeals explained, any damages arising from the wrongful death are limited by the statute.²⁰⁶ On appeal the plaintiffs argued that their personal claim for emotional distress arose from the outrageous assault upon their daughter and "does not even depend on their daughter's death."²⁰⁷ However, as the issue was not preserved at the trial level, the plaintiffs were precluded from raising it on appeal.²⁰⁸

*Dillon*²⁰⁹ severely criticized the artificiality of distinguishing a mother's fear for herself from the fear for her child. *Dillon* was a step towards recognizing the problem that all of these assaults converge and flow from the defendant's act. The effect of *Krouse* is to force a plaintiff to choose his cause of action carefully and to pigeonhole exactly which particular component of his emotional distress arises from which cause of action. He must put his grief and mental anguish into the statutory action for wrongful death and must excise from that his trauma from witnessing the accident. However, whichever cause of action Krouse chose, he would be barred from recovery for the grief and mental anguish. When an action is not merely for the wrongful death, that is, when the plaintiff has also witnessed or been a participant in the tragedy, then to simplify matters all damages relative to that action should be encompassed within one action.

In future actions involving outrageous and intentional acts toward primary victims which recklessly cause emotional distress to surviving loved ones, the courts will be presented with an opportunity to examine the theory postulated in the *Garland* district court opinion based on the RE-STATEMENT, as well as to take the opportunity to elucidate the protections afforded. If emotional distress is generically a compensable harm, then both legislatures and courts should recognize it as such and not try to separate surgically some harms from others, declaring on the one hand that "shock" is compensable but "depression" or "grief over the death" is not. To allow recovery for "shock" at the gore and not to allow recovery for grief or anguish that flows therefrom is unrealistic and obfuscates the true cause of the emotional distress: fear for the child and anguish over the child's injuries and resulting death. The only restriction placed on the elements that make up the "emotional distress" category of harm should be the requirement that plaintiff sufficiently demonstrate causation and proof of the psychic harm. If the plaintiff has demonstrated evidence of

²⁰⁵ 724 F.2d at 20. Special verdicts had been submitted to the jury requesting it to determine: "What amount of damages do you find that [plaintiffs] sustained as a result of emotional distress following the death of Bonnie Garland?" *Id.* The jury instructions also limited the question to the psychic harm from the death of the child. *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

psychic harm, then all of the elements of that harm should be compensable.

VIII. CONCLUSION

Two major conclusions arise from the analysis of the remedies available to the third-party victims of the wrongful death of a child. First, the action for wrongful death under the statute, after eighty years of evolution, has generally stagnated under the anachronistic pecuniary-loss rule barring parents from recourse for their real injuries—their emotional harms. Second, the common-law actions for intentional and negligent infliction of emotional distress have developed more rapidly than has the statutory action. However, in a majority of jurisdictions, parents seeking recovery for the emotional injuries suffered as a result of the wrongful death of a child must still exhibit fear for their own lives or limbs. Both remedies in the majority of jurisdictions fail to recompense third-party victims for actual psychic injuries. The wrongful-death action continues to demand a computation of a child's monetary worth; the common-law action demands that the law ignore the parents' emotional trauma resulting from the child's injury or death in favor of the parents' *personal* fear.

A mere recitation of the facts in *Garland* evokes visceral reactions. However, as a result of the state of the law in New York, the parents of Bonnie Garland recover only the pecuniary losses arising from their daughter's death. The wrongful-death statute is limited to pecuniary loss; the action in negligence lies only for direct wrongs, not for wrongs suffered by bystanders; and finally, under present law no action lies for intentional wrongs recklessly causing emotional distress to the surviving parents.

The legislatures are charged with the task of rectifying the inequities presented by wrongful-death statutes. Damages for grief and mental anguish should be encompassed within the statutes. Most deaths of children, wrongfully caused, are not of the outrageous nature of *Garland*; nor do the parents normally find themselves within the "zone of danger." Since most such victims thus remain outside the realm of common-law recovery, their psychic injuries will remain unredressed until the various legislatures respond.

Intentional acts causing reckless infliction of emotional distress to third-party victims will produce only a limited amount of litigation. However, when faced with facts and circumstances which bring the action within the RESTATEMENT formula courts should consider the district court's analysis in *Garland*. The rationale, resting on long-recognized tort principles, is sound and should in the future provide relief to parents who have been barred by the action sounding in negligence.

The recognition by both courts and legislatures that a child's wrongful death causes severe emotional trauma to surviving parents is long overdue. The grievous assault upon the sensibilities of parents when wrong-

fully caused by another should no longer remain unrecompensed. The fictions of the pecuniary-loss rule as applied to children and the “zone of danger” limitation should be replaced by the reality that the psychic harm of the loss of the child is the palpable injury.

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