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THE TORT OF “OUTRAGEOUS CONDUCT” IN NEW MEXICO: INTENTIONAL INFLICTION OF EMOTIONAL HARM WITHOUT PHYSICAL INJURY

X. E. “JAVIER” ACOSTA*

1. INTRODUCTION

The New Mexico Court of Appeal’s decision in Dominguez v. Stone,¹ in 1981 brought New Mexico into harmony with a majority of states² which now recognize the tort of outrageous conduct. Outrageous conduct, commonly referred to as intentional infliction of emotional distress or mental suffering,³ is derived from the common law theory known as the law of outrage.⁴ Ultimately, a plaintiff may recover for emotional distress regardless of the lack of evidence as to physical injury.⁵ Seven years have elapsed since the Dominguez decision and none of the feared results⁶ from recognition of this tort have materialized. In fact, there are few

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4. See, Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40 (1956); See also, RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965): “Emotional Distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.”

5. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

6. For criticism of the traditional reasons against recovery, *See* Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).
reported cases in New Mexico which have relied on this very real tort based on psychological injury. Those that have been reported have continued to recognize this cause of action as set forth in *Dominguez*.

This Article examines the history and application of the tort of outrageous conduct. Discussion includes the common law basis for intentional infliction of mental suffering and the position of the Restatement (Second) of Torts Section 46 regarding outrageous conduct. In addition, this Article examines the fears of recognition of this tort and the application of Section 46 in various other jurisdictions. Finally, the Article discusses New Mexico's recognition of this tort in *Mantz v. Follingstad*, and the state’s adoption of the Restatement in *Dominguez v. Stone*, and its progeny.

II. HISTORICAL BACKGROUND

New Mexico courts traditionally followed the common law rule that damages for emotional distress alone, absent physical harm, are not recoverable. They began to recognize exceptions to the rule, however, long before *Dominguez*. The New Mexico Court of Appeals in *Mantz* analyzed the language of the Restatement (Second) of Torts, along with case law from other jurisdictions, which recognized a cause of action for the intentional or reckless infliction of emotional distress through extreme and outrageous conduct. A successful plaintiff may recover for his emotional distress as well as for any accompanying physical injury. Emotional distress under the tort of outrageous conduct has emerged as an independent basis of liability, not just an element of damages recoverable for a separate wrong. The process of theoretical evolution of this unique theory culminated with the judicial acceptance, in *Dominguez*, of emotional injury as a separate ground of liability to be evaluated by the adoption of Section 46 of the Restatement (Second) of Torts. In so doing, New Mexico followed other jurisdictions who have adopted the Restatement and now recognize outrageous conduct.

Courts have traditionally allowed recovery for emotional distress associated with a physical injury, as a component of damages in actions based on that physical injury, or incident to a traditional tort. In the early development of "outrageous conduct" as a tort, an individual's interest

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9. *Mantz*, 84 N.M. at 480, 505 P.2d at 75.
11. See supra note 2.
in freedom from emotional distress\textsuperscript{13} received only incidental protection. Damages for emotional distress were parasitically attached\textsuperscript{14} to such independent actions as assault,\textsuperscript{15} trespass,\textsuperscript{16} seduction,\textsuperscript{17} malicious prosecution,\textsuperscript{18} breach of promise to marry,\textsuperscript{19} mistreatment of a corpse,\textsuperscript{20} and false imprisonment.\textsuperscript{21} Damages for emotional distress also have traditionally been recoverable in suits brought for an injury to property, provided the injury occurred under circumstances manifesting insult or contempt.

As Dean Prosser noted, problems arise in applying the parasitic approach to specific fact situations.\textsuperscript{22} In many instances, courts are unable to locate a tortious peg "upon which to hang the mental damages."\textsuperscript{23}

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

\textsuperscript{13} Mental and emotional distress are generally treated as interchangeable terms.

\textsuperscript{14} The term "parasitic damages" was coined in 1906 by Professor Thomas Street in describing damages incidental to the underlying cause of action. See 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 461 (1906). "Under this theory, damages for emotional harm are considered 'parasites' which cannot be recovered without being attached to some 'host.'" Goins, Intentional Infliction of Emotional Distress—Escaping the Impact Rule in Arkansas, 35 ARK. L. REV. 533, 535 (1981).

\textsuperscript{15} See, e.g., Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926) (although defendant's conduct arguably fell short of actual assault, court recognized a cause of action for mental suffering); Allen v. Hannaford, 138 Wash. 423, 244 P. 700 (1926) (assault found where empty pistol was aimed at another; damages awarded for resulting nervous condition).

\textsuperscript{16} Lesch v. Great N. Ry., 97 Minn. 503, 505, 106 N.W. 955, 957 (1906). Defendant's conduct constituted a trespass to the wife's "interest" in the homestead. This "interest" was fashioned because legal title was in her husband. See also Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920) (damages awarded for emotional distress caused by hotel employees who forcibly entered room of married couple and accused them of immoral conduct).

\textsuperscript{17} Haeissig v. Decker, 139 Minn. 422, 166 N.W. 1085 (1918).

\textsuperscript{18} Price v. Minnesota, D. & W. Ry., 130 Minn. 229, 153 N.W. 532 (1915).

\textsuperscript{19} See Kugling v. Williamson, 231 Minn. 135, 42 N.W.2d 534 (1950); Bukowski v. Kuznia, 151 Minn. 249, 186 N.W. 311 (1922). The court held that plaintiff could recover for "anguish of mind, blighted affections or disappointed hopes." Id. at 250, 186 N.W. at 312. While the action was based upon a contract, the award of damages was based on an underlying tort. See id.

\textsuperscript{20} Larson v. Chase, 47 Minn. 307, 50 N.W. 238 (1891). The Minnesota Supreme Court allowed the plaintiff to recover damages for mental suffering and nervous shock. Id. at 312, 50 N.W. at 240.

\textsuperscript{21} Salisbury v. Poulson, 51 Utah 552, 172 P. 315 (1918).

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

\textsuperscript{23} Prosser, supra note 4, at 43. For discussion of a case illustrating the extreme lengths courts have gone to create an underlying tort, See Magruder, supra note 12, at 1066 (discussing Koerber v. Patek, 123 Wis. 453, 102 N.W. 40 (1905) (mutilation of corpse considered interference with interests of survivors based on close relative's right of custody to corpse)).
as an independent basis of liability. It is merely a question of social, economic and industrial needs as reflected in the organic law.\textsuperscript{24}

In an 1861 English case that exemplified the nineteenth century judicial attitude, Lord Wensleydale flatly stated: “[M]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.”\textsuperscript{25} With few exceptions,\textsuperscript{26} the common law was in agreement.\textsuperscript{27} Emotional harm was regarded as too removed from the cause and too short lived for courts to contemplate.\textsuperscript{28} The reasons most frequently stated by courts for denying recovery upon first considering such claims include: (1) damages are too speculative;\textsuperscript{29} (2) fraud may be easily committed;\textsuperscript{30} (3) injury is outside the bounds of proximate cause;\textsuperscript{31} and (4) great increase in litigation would ensue.\textsuperscript{32}

Progress in the twentieth century has required courts to become more protective of a person’s emotional well-being. This concern is a logical reaction to the growing complexities of life. In the nineteenth century, people could not envision walking on the moon, existing day to day with an artificial heart, or any of the myriad of variables that influence their lives today. Because modern day life has become increasingly dependent upon technology as well as the actions of fellow men, control over one’s

\textsuperscript{24} 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 470 (9th ed. 1912); see also Handford, Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort, 8 ANGLO-AM. L. REV. 1 (1979) (“The tort of Intentional Infliction of Mental Distress now flourishes in the United States.”).


\textsuperscript{27} Bohlen, Right to Recover for Injury Resulting From Negligence Without Impact. 50 U. PA. L. REV. 141, 143 (1902) (suggesting that no damages could be recovered for mental distress partly because of the “practical impossibility of administering any other rule,” because at common law parties were incompetent to testify).

\textsuperscript{28} See T. COOLEY, A TREATISE ON THE LAW OF TORTS 94 (3d ed. 1906) (“mere mental pain and anguish are too vague for legal redress where no injury is done to person, property, health or reputation”); W. PROSSER, supra note 12, § 54, at 329.


own life has decreased, while the probability of human error has increased. Courts recognized that responsibility to others has increased, and therefore so has legal duty. Underlying policy considerations in extending liability influenced the evolution of emotional distress from parasitic attachment to injury, to applying the physical impact rule, the zone of danger rule, the physical injury rule and presently the abandonment of the physical injury requirement. 33

A. The Impact Rule

Historically, the majority view was that a plaintiff could not recover for negligent infliction of emotional distress absent contemporaneous physical injury or impact. 34 This view required that the plaintiff receive a direct physical injury from the defendant's negligent act. 35 A plaintiff could easily prove the existence or non-existence of an impact, and courts felt that severe emotional harm was more likely to occur when the plaintiff suffered a physical blow. The impact rule was practical 36 from a judicial view as fraud and speculation were reduced to a minimum.

Medical technology has now advanced to such an extent that there is less difficulty in establishing a causal relationship between emotional distress and injury. 37 Prior to these medical developments various methods were used to circumvent the rule, including a nuisance theory and a slight variation on the impact rule, the contemporaneous injury rule. 38 The contemporaneous injury rule was applied where fright alone caused the plaintiff to suffer a physical injury, not from within his body nor due to a defendant's impact, but as a result of an automatic, startled reaction,

32. See, Throckmorton, supra note 6, at 272-73.
34. J. Dooley, Modern Tort Law § 15.05, at 371 (1982).
38. See, e.g., Cameron v. New England Tel. & Tel. Co., 182 Mass. 310, 65 N.E. 385 (1902) (plaintiff, suffering injuries from fright caused by negligently exploded dynamite, started to rise and then fainted and fell); Muncy v. Levy Bros. Realty Co., 184 A.D. 467, 170 N.Y.S. 994 (1918) (plaintiff, frightened by the noise and vibration of a heavy door falling down an elevator shaft, fell and suffered a miscarriage); Ansteth v. Buffalo Ry. Co., 145 N.Y. 210, 39 N.E. 708 (1895) (child stealing a ride on defendant's streetcar was frightened when the conductor yelled "Hey!"; the child lost his grip, and fell under the streetcar, which crushed one of his legs).
such as jumping off a carriage negligently placed in the path of an oncoming train.  

B. The Zone of Danger Rule

The zone of danger rule, which originated in *Dulieu v. White & Sons*, attempted to provide an answer to judicial skepticism as emotional injury claims. By requiring a plaintiff to be situated where he would reasonably fear physical injury, courts abolished the actual impact requirement but felt they could still address fears of false or exaggerated claims. Since *Palsgraf v. Long Island Railroad*, this physical zone of danger test has been used to determine whether the plaintiff was sufficiently close to the defendant’s negligent conduct to impose a duty of care upon the defendant. Under this approach, the concept of a foreseeable zone of danger extended the duty owed only as far as the risk of physical harm.

The limitations of the foreseeability concept, the realm of physical injury rather than psychological injury in determining the scope of duty, allowed many valid claims of serious mental injury to go uncompensated. These occurred even though they were induced by a contemporaneous sensory perception of an injury to a third party. The *Amaya v. Home Ice* decision provoked a lengthy dissent that argued the lack of foundation of the policy considerations underlying the majority’s notion of duty. The historical dissent in this California case took an approach of duty based on foreseeability, and reasoned that an emotionally injured bystander is not an unforeseeable plaintiff. Five years later the Supreme Court of California adopted the position of Amaya’s dissent in *Dillon v. Legg*, the first case to reject the zone of danger rule in favor of the foreseeability standard. Today, proof of causation is no longer a major

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40. [1901] 2 K.B. 669. Interestingly, the Dulieu court never used the term “zone of danger.”
41. 248 N.Y. 339, 162 N.E. 99 (1928).
43. Id.
44. Id.
46. *Id.* at 313-17, 379 P.2d at 531-35, 29 Cal. Rptr. at 51-55.
47. *Id.* at 312, 379 P.2d at 530, 29 Cal Rptr. at 50.
49. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
problem since "mental traumatic causation can now be diagnosed almost as well as physical traumatic causation." 50

C. The Foreseeability Rule

*Dillon v. Legg* provided the Supreme Court of California with the ideal factual setting for abandoning the zone of danger rule. The case involved two plaintiffs, only one who was within the zone of danger. The plaintiffs, a mother and daughter, witnessed the death of another family member in an automobile accident. 51 The *Dillon* court held that it would be fundamentally unfair to allow a cause of action in one case but not in the other. 52 Assuming impact is not necessary, reasoned the court, the zone of danger rule must fail because its only justification is that one within the zone will fear the danger of impact. 53 The *Dillon* court relied on early English case law, principally *Hambrook v. Stokes Bros.*, 54 and rejected traditional arguments denying recovery due to their lack of precedent.

Despite its formulation of a reasonable foreseeability test as the sole criterion for liability, the *Dillon* court nevertheless added "factors" to be considered for recovery: (1) the plaintiff must be situated near the accident; (2) shock must result from a direct emotional impact upon the plaintiff from a contemporary observance of the accident; and (3) the plaintiff and the victim must be closely related. 55 Though the complete demise of the impact rule seems imminent after nearly 100 years, continued controversy exists between the *Dillon* approach of foreseeability and the zone of danger rule. 56

D. Damages Without Physical Injuries

In order to recover for emotional distress, a majority of American courts traditionally require that in addition to the requirements of the impact, zone of danger, and foreseeability rules, a plaintiff has to show a physical injury. The plaintiff's distress must be manifested by some physical in-


51. *Dillon*, 68 Cal. 2d at 731, 441 P.2d at 915, 69 Cal. Rptr. at 75.

52. Id. at 731, 441 P.2d at 915, 69 Cal. Rptr. at 75.

53. Id.

54. [1925] 1 K.B. 141.

55. 68 Cal. 2d 728, 740, 441 P.2d 908, 920, 69 Cal. Rptr. 68, 80. The *Dillon* court stated that the reasonable foreseeability test should be applied on a case-by-case basis.

The reasons most often cited for denial of recovery absent physical injury are that an emotional disturbance which does not physically manifest itself is likely to be so temporary that the task of allowing recovery would unduly burden the courts; or, in the absence of a "guarantee of genuineness" provided by such harm, the emotional disturbance would be difficult to prove; or, the defendant has merely been negligent and his culpability is not so great that he should be required to compensate the plaintiff for a purely mental disturbance. One authority has observed, "[t]he mere temporary emotion of fright not resulting in physical injury is, in contemplation of law, no injury at all, and hence no foundation of an action." 59

The physical injury rule, which requires manifestation of the emotional distress by physical injury, recently has come under attack. The leading decision advocating abolition of the rule is *Molien v. Kaiser Foundation Hospitals.* 60 In *Molien,* California abandoned the requirement of physical injury. The defendant physician negligently misdiagnosed the plaintiff's wife as having syphilis, and told her to inform her husband. Harmful results to their marriage followed resulting in the husband's suit.

The *Molien* court held that sufficient methods of proof other than physical injury exist to prove emotional distress. 61 To establish a new standard that would protect courts against a potential flood of spurious claims and shield defendants from unlimited liability, *Molien* relied upon the Hawaii Supreme Court decision in *Rodrigues v. State.* 62 There, the *Molien* court adopted Professor Prosser's standard of proof which required some "guarantee of genuineness" of serious mental injury from the circumstances of the case. 63

Hawaii, through its decision in *Rodrigues,* became the first court to

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57. "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." *Restatement (Second) of Torts* § 436A (1965).

58. See, e.g., *Payton v. Abbott Labs, Inc.*, 386 Mass. 540, 437 N.E.2d 171, 178-79 (1982) (adopting *Restatement (Second) of Torts* § 436A comment b (1965)). In *Payton,* the plaintiffs, who were daughters of mothers who had taken the drug D.E.S. during pregnancy, sued the manufacturers for emotional distress caused by apprehension of the significant possibility of future cancer. The plaintiffs did not allege any physical injuries. The Massachusetts Supreme Court denied the cause of action.

59. Throckmorton, *supra* note 6, at 266.


61. 27 Cal. 3d at 924, 616 P.2d at 821, 167 Cal. Rptr. at 839.


63. *See Molien,* 27 Cal. 3d at 924, 616 P.2d at 821, 167 Cal. Rptr. at 839.
allow recovery in the absence of proof of a physical injury. The Rodrigues court noted that if emotional distress is negligently inflicted it is entitled to independent legal protection. The court adopted the position in the Restatement (Second) of Torts Section 46 on intentional infliction of emotional distress. Rodrigues held that "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Other states justify the different treatments of intentional and negligent infliction of emotional distress by asserting that under intentional infliction, courts have the "tools" to ensure the validity of the claim, that is, "extreme and outrageous" conduct of the defendant. Although this requirement may provide added justification for imposing liability, it may not provide an accurate barometer of the degree of plaintiff's emotional distress. The inaccuracy is because the outrageous requirement, while measuring the defendant's culpability, does not focus on the plaintiff's reaction. Rather, it assumes a certain reaction to the defendant's conduct.

"[W]ith advancing techniques in psychiatry and clinical psychology, we concluded that triers of fact can make intelligent, evaluative judgments on a plaintiff's claim for damages arising out of the defendant's alleged intentional infliction of emotional distress." Today a majority of jurisdictions recognize that medical science can diagnose mental injury and have eliminated prophylactic barriers to recovery. This result is due to the adoption of Section 46 of the Restatement (Second) of Torts or similar rules based upon the usual tort principles which allow a cause of action, absent physical injury, for negligent and intentional infliction of emotional distress. If the plaintiff can establish duty, breach, causation, and severe emotional injuries, recovery is allowed. Similarly, if the defendant acted intentionally to cause emotional distress, recovery will be allowed where severe emotional distress was inflicted. The extreme and

64. 52 Haw. at 167, 472 P.2d at 520.
65. Restatement (Second) of Torts, § 46 comment j (1965), states in part:
The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, ... mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.
66. Rodrigues, 52 Haw. at 173, 472 P.2d at 520.
68. See, e.g., id.; see also Redepenning v. Dore, 56 Wis. 2d 129, 142-44, 201 N.W.2d 580, 586-87 (1972).
outrageous conduct of the defendant, if in fact it exists, justifies the imposition of punitive damages.

E. Restatement (Second) of Torts Section 46

In the 1948 revision of Restatement (Second) of Torts Section 46, there is no requirement that the intentional action of the defendant be “extreme or outrageous.” The emphasis was simply on the intentional infliction of mental suffering with prescribed liability for the resulting severe emotional distress and any bodily harm. The Restatement, having initially rejected infliction of emotional distress as a basis of liability, reversed itself fourteen years later and recognized the tort in broad, sweeping language.69 Finally, acknowledging the need for clear restrictions on the scope of such liability,70 the Second Restatement introduced the current version of Section 46(1) in 1965: “[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”71 Thus, defendant’s conduct is not actionable unless it (1) is intentional or reckless, (2) is extreme and outrageous, and (3) causes severe emotional distress.72

It is now approximately thirty years since the adoption of the revised Restatement (Second) of Torts Section 46. In spite of the fear that a flood of litigation would be generated, such has not been the case. A WESTLAW search of both state and federal cases indicates that since 1976, Section 46 of the Restatement (Second) of Torts has been cited in 728 reported cases. In the last ten years there have been 602 reported cases citing the section. Two hundred and seventy-two cases were reported in the last three years prior to 1988, and from January through September of 1988, Section 46 was cited in sixty-three reported cases. The ten-year figure

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69. RESTATEMENT (SECOND) OF TORTS § 46 (1965). “Outrageous Conduct Causing Severe Emotional Distress (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965) states: “The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.”

70. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

71. Except as stated in §§ 21-34 and 48, conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability for (a) emotional distress resulting therefrom, or (b) bodily harm unexpectedly resulting from such disturbance. RESTATEMENT (SECOND) OF TORTS § 46 (1934); see id. comment c.

72. For review of early cases, see, Magruder, supra note 12; Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 MICH. L. REV. 874 (1939); Prosser, supra note 4; Wade, Tort Liability for Abusive and Insulting Language, 4 VAND. L. REV. 63 (1951). See also L. ELDREDGE, Tort Liability for Mental Distress, in MODERN TORT PROBLEMS 71 (1941).
averages out to approximately sixty reported cases per year for the entire country, an average of slightly more than one reported case per state every year.

The state of mind requirement of Section 46(1) limits liability to instances of intentional or reckless conduct;\textsuperscript{73} negligent infliction of emotional distress falls outside the purview of the section.\textsuperscript{74} “Intent” includes both the desire that severe emotional distress flow from the objectionable act and the belief, regardless of desire, that such consequences are substantially certain to follow from the act.\textsuperscript{75} Plausibly, the extreme and outrageous conduct element can influence the determination of the state of mind element: The more extreme and outrageous defendant’s conduct, the greater the likelihood that defendant believed severe emotional distress would result. “Recklessness” contemplates acts taken in deliberate disregard of a high risk that severe emotional distress will ensue.\textsuperscript{76}

Related to the state of mind element of Section 46(1) is the requirement that defendant’s conduct be designed to encroach upon plaintiff’s specific interest in emotional tranquility.\textsuperscript{77} Emotional distress flowing from the intentional or reckless invasion of any other protected interest may serve as a parasitic element of damages in a suit brought to redress that invasion,\textsuperscript{78} but it will not subject the actor to liability under the Second Restatement’s formulation of the tort of outrageous conduct.\textsuperscript{79} The second, or quality, requirement of Section 46(1) limits liability to conduct “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.”\textsuperscript{80}

\textbf{F. Policy Considerations}

Proof of severe emotional distress as a prerequisite for bringing an action for outrageous conduct resulted from concern that a flood of unfounded claims would result. Personal injury litigation, which is costly in itself, is instituted by attorneys dependent on a contingent fee. Secondly, if the plaintiff has not suffered provable severe emotional distress, that fact will weigh heavily on the damage issue. Most importantly, as Section 46 points out, plaintiff’s attorneys will be unlikely to bring in-

\begin{itemize}
\item \textsuperscript{73} See \textit{Restatement (Second) of Torts} § 46(1) (1965).
\item \textsuperscript{74} See id. §46 comment a.
\item \textsuperscript{75} See id. comment i.
\item \textsuperscript{76} See id.
\item \textsuperscript{77} See id. § 47 comment a.
\item \textsuperscript{78} See id. comment b; \textit{supra} notes 19-24 and accompanying text.
\item \textsuperscript{79} See \textit{Restatement (Second) of Torts} § 47 comment a.
\end{itemize}
tentional infliction of mental suffering cases unless, in the absence of severe emotional distress to the particular plaintiff, the defendant’s extreme and outrageous misconduct is so shocking, so horrendous, as to support a prospect of a substantial award of damages on a dignitary hurt and punitive damages basis.

It is obviously difficult to translate emotional distress into money damages, whether suffered in fact by the plaintiff or simply threatened by the defendant’s extreme and outrageous misconduct. That problem, however, is not peculiar to Section 46 cases. There are several types of injuries for which money awards are not subject to very rational review on appeal; for example, pain and suffering and loss of consortium. The review standard for the amount of allowable damages is that which shocks the conscience of the court, either at the trial or the appellate level. That alone determines whether a particular damage award for hurt feelings, threats to one’s sense of security, or loss of consortium and companionship, is to be regarded as excessive. 81

On balance, the indeterminate nature of the damage assessment process for non-pecuniary injuries or losses can be defended on the ground that, after all, deterrence from intentional or reckless wrongdoing is one of the major objectives of damage awards which in itself lacks a certain exactness. This rationale acts to balance the concerns between large damage awards for non-pecuniary losses and no liability for damages which can not be equated in dollar figures. Thus, recognition of Section 46 claims, without proof of actual severe emotional distress, will not really aggravate the damage assessment problem.

Interestingly, the Restatement (Second) of Torts does not speak to the subject of punitive damage assessment in the context of a Section 46 claim. In cases where the defendant’s conduct is truly extreme and outrageous absent proof of severe emotional suffering, any actual damage award should be expectedly small. 82 The position advanced here is that in such a case at least nominal damages should be awarded for the dignitary hurt, with the added possibility of a punitive damage award. A somewhat analogous situation would be a case under the Civil Rights Act, 83 for which the United States Supreme Court in 1978 recognized that at least nominal damages should be awarded for deprivation of certain “absolute” rights. 84

82. See Blakeley v. Shortal’s Estate, 236 Iowa 787, 20 N.W.2d 28 (1945).
Such an objective standard is closely and obviously related to the objective standards employed in both nuisance and negligence law. The outrageous conduct standard is no more indefinite, no more unstructured than the negligence standard protecting against the failure to exercise the care and caution that a reasonable person ought to exercise under the same or similar circumstances. Nor is it less defined and structured than the prescription of nuisance law that a property owner shall not use his property in a way that would unreasonably interfere with the comfortable enjoyment of neighboring property by a person of ordinary sensibility. Again, the protection against intentional infliction of mental suffering by extreme and outrageous conduct is no more undefined than invasions of privacy through intrusion or unwanted publicity "highly offensive to a reasonable person."

These tort standards contemplate that a judge, a jury and, on occasion, an appellate court will measure the particular defendant's conduct in the particular setting against the standards of behavior acceptable in society. Under a broad formula the objective is: "Although there is little evidence that this tort will ever provide the basis for principled adjudication, it has provided and probably will continue to provide the basis for achieving situational justice."

III. ELEMENTS OF THE CAUSE OF ACTION

Although the law continues to develop, a cause of action for outrageous conduct requires proof of four elements: The defendant's conduct was: (1) intentional or reckless; (2) extreme and outrageous; (3) causally connected to plaintiff's mental distress; and (4) resulted in severe emotional distress to the plaintiff. Although difficulties of proof arise with each element, two are persistently troublesome for plaintiffs—the definition of outrageous conduct and proof of severe emotional distress.

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86. Id. at § 159 comments a-m.
87. Id. at § 652 B, D, and H, and accompanying text.
88. Givelber, supra note 12, at 75.
89. The law is still in a stage of development, and the ultimate limits of this tort are not yet determined. This section states the extent of the liability thus far accepted generally by the courts. The caveat is intended to leave fully open the possibility of further development of the law, and the recognition of other situations in which liability may be imposed. RESTATEMENT (SECOND) OF TORTS § 46 comment c (1965).
91. See Prosser, supra note 4, at 43.
92. See Givelber, supra note 13, at 43-52. "The term 'outrageous' is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather it represents an evaluation of behavior. The concept thus fails to provide clear guidance . . . to those who must evaluate that
Comments to the Restatement describe outrageous conduct as that which goes beyond all possible bounds of decency and is regarded as atrocious or utterly intolerable in a civilized community. An average member of the community, upon learning of such conduct would exclaim, “outrageous!” The definition of severe emotional distress is equally unclear. Liability arises only when the distress inflicted is so severe that no reasonable person could be expected to endure it. As a result, the severity of the distress is measured by the extent of the outrageous conduct. As is often the case, one is left with an objective standard to meet: “the reasonable person.”

A. Intent

The intent element of outrageous conduct is similar to that of tort actions generally, which requires neither malice nor intent to harm the plaintiff. In tort law, one is presumed to intend the natural consequences of one’s acts. Therefore, liability extends not only to consequences actually desired, but also to those which the defendant knew or should have known are substantially certain to follow from his conduct. Under the Restatement (Second) of Torts Section 46(1), liability arises not only when the defendant intended to cause plaintiff’s mental distress, but also when the defendant knew or should have known such distress was certain to result from his conduct.

A cause of action for the intentional infliction of mental distress due to outrageous conduct can also be based on acts directed at third persons.

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93. See RESTATEMENT (SECOND) OF TORTS §46 comments d, e-g, j-k (1965). See generally Givelber, supra note 13, at 46-47.
94. See Magruder, supra note 13, at 1058. Magruder argues that the outrageous element is “as practicable to apply as the standard of reasonable care in ordinary negligence cases . . . .” Id.
95. See RESTATEMENT (SECOND) OF TORTS §46 comment j (1965). “[Severe emotional distress] includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” Id.
96. Id. The severity of distress ensures against fictitiousness. Where there is a particularly susceptible victim, the Restatement appears to require that the defendant have knowledge of that condition and proceed in the face of it. See id. comment f.
100. RESTATEMENT (SECOND) OF TORTS §46 comment i (1965). The term “reckless” is defined in section 500.
Although the doctrine of transferred intent\footnote{101. See generally Prosser, Transferred Intent, 45 Tex. L. Rev. 650 (1967).} is usually avoided,\footnote{102. See W. Prosser, supra note 12, § 12, at 60-61. Prosser suggests that transferred intent probably is not applied because intentional infliction of mental distress did not evolve from the writ of trespass from which the doctrine arose. \textit{Id}.} liability is imposed in circumstances in which mental distress to the bystander is so substantially certain to follow that it is regarded as intentional.\footnote{103. See, e.g., Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920) (pistol drawn in presence of pregnant woman); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) (threat to murder plaintiff’s husband carried out); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924) (daughter recovered for miscarriage proximately caused by defendant’s striking her father). See generally W. Prosser, supra note 12, § 12, at 60-62.}  Generally, recovery requires that the plaintiff satisfy the \textit{Dillon} rule previously discussed in that they must actually witness the act, know of plaintiff’s presence, and be a close relative of the person against whom the act was directed.\footnote{104. See generally Restatement (Second) of Torts § 46 comment i (1965).}

**B. Outrageous Conduct**

Under the Restatement (Second) of Torts Section 46(1), liability “clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities,” but extends only to extreme and outrageous conduct a civilized society cannot tolerate.\footnote{105. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).} It is not enough the defendant intended to inflict mental distress,\footnote{106. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).} nor that his conduct could be characterized as malicious, nor that it would sustain punitive damages in an action for another tort. Liability extends only to conduct exceeding “all possible bounds of decency.”\footnote{107. RESTATEMENT (SECOND) OF TORTS §46 comment d (1965).} The policy for this stringent requirement is suggested in the statement: “No pressing social need requires that every abusive outburst be converted into a tort; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam.”\footnote{108. Magruder, supra note 13, at 1053.} To develop such a repressive atmosphere would in itself be outrageous! The safety device pointed out by the Restatement is the trial court’s power to initially make a three part determination whether defendant’s conduct was outrageous.\footnote{109. See Restatement (Second) of Torts § 46 comment h (1965) (court initially determines whether conduct is or is not outrageous as a matter of law, or whether the question is for the jury).}
The outrageous character of conduct often arises from abuse of a relationship between parties\(^1\) or due to defendant’s knowledge that the plaintiff is peculiarly susceptible to mental distress.\(^1\) Absent these two factors, the question arises, whether the conduct is sufficiently outrageous to allow recovery.

Clearly within the definition of extreme and outrageous conduct are the perverse practical joker situations. In our civilized society today, for a person to satisfy his sense of humor by playing upon another’s natural feelings of modesty or concern for loved ones can easily be considered atrocious and intolerable.\(^2\) Plaintiffs have recovered for mental distress resulting from a practical joker’s fictitious statements regarding a relative having sustained injury in an accident.\(^3\) Other practical joke cases permitted recovery for mental distress caused by spreading a rumor regarding the suicide of a plaintiff’s relative,\(^4\) and wrapping up a dead rat in a package of groceries.\(^5\)

Communications with illegitimate purposes and intentions have created liability, as when the defendant induced plaintiff into a bigamous marriage,\(^6\) gave plaintiff bad advice concerning a life insurance policy,\(^7\) wrote “taunting” letters to a former girlfriend after marrying another,\(^8\) or a male defendant sent a female plaintiff obscene photographs of himself for the purpose of solicitation.\(^9\) Liability has also been based on shouting

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10. “The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other...” Restatement (Second) Torts §46 comment e (1965).
11. “The extreme and outrageous character of the conduct may arise from the actor’s knowledge that the other is peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity.” Id. at §46 comment f.
12. See id. §46 comment d, illustration 3 (1965) (defendant has plaintiff wear bathing suit, which dissolves in front of new acquaintances) and illustration 1 (defendant tells plaintiff that plaintiff’s husband is seriously injured).
13. Wilkinson v. Downton, [1897] 2 Q.B. 57. This was the first case to permit recovery for intentional infliction of mental distress in the absence of traditional tort liability. See W. Prosser, supra note 12, §12, at 55.
TORT OF "OUTRAGEOUS CONDUCT"

racial slurs at plaintiff in the presence of others and showing plaintiff her dead fetus preserved for scientific studies. These cases admittedly involve a wide variety of conduct, but common among them is the policy that the law should protect, even in the absence of traditional tort liability, one's peace of mind from intentional invasions by extreme and outrageous conduct which society would not tolerate.

The recognition of an independently protected interest in freedom from emotional distress should not affect recovery for such harm from a physical injury. Neither should it alter the availability of damages for emotional injury accompanied by injury to property; the insult or contempt required in earlier situations roughly approximates the three requirements of Section 46(1). The section also should encompass, the parasitic damage cases, but without requiring as strict an interpretation of the traditional tort to which the emotional distress damages are added.

The tort of outrageous conduct, however, should not be used only when traditional tort remedies provide inadequate compensation. The invasion of a person's peace of mind is as real an injury as a battery to his person and equally worthy of protection. The average member of the community, as an expert on its standards and customs, is eminently qualified to determine whether defendant's actions in invading plaintiff's interest in emotional tranquility demand compensation. Courts therefore should be reluctant to substitute their judgment for that of the jury.

1. Abuse of a Position of Power

Extreme and outrageous conduct most often arises from abuse of a position of power over the plaintiff or some relationship between the parties. A high school principal was held liable for summoning a school girl into his office, accusing her of immoral conduct with various men and threatening her with prison and public disgrace unless she confessed. An attorney has been held liable to his client for refusing to settle a divorce action according to the client's wishes. Insurance ad-


122. For example, Engle v. Simmons, 148 Ala. 192, 41 So. 1023 (1906) (probable recovery, without showing a trespass, under the tort of outrageous conduct). On the other hand, Section 46(1) may not support plaintiff's recovery in Herman Saks & Son v. Ivey, 26 Ala. App. 240, 157 So. 265 (1935) (one objectionable collection letter may not suffice as extreme and outrageous conduct).

123. See generally RESTATEMENT (SECOND) OF TORTS § 46 comment e (1965). Public utilities are subject to a special standard of care. Id. § 48.

justers have been held liable for abuse of their position over the insured.126

The debtor-creditor relationship is a growing area for intentional infliction of mental distress litigation. Cases have imposed liability on creditors for collection tactics, but usually only after prolonged hounding by extreme methods.127 Similarly, landlords have been held liable for harassing unwanted tenants. Generally, cases allowing tenants' recovery for mental distress caused by landlords' conduct have involved an indirect physical consequence.128 The principle of allowing the outrageous character of conduct to be based on a relationship between the parties may be extended to other types of relationships and positions of power. For example, a police officer might be liable for the intentional infliction of mental distress based on abuse of his position.129

128. See Richardson v. Pridmore, 97 Cal. App. 2d 124, 217 P.2d 113 (1950) (misdemeanor suffered when tenant returned from three-day trip and found someone else living in apartment); Emden v. Vitz, 88 Cal. App. 2d 313, 198 P.2d 696 (1948) (glandular condition upset when tenant found her key would not operate door lock and upon inquiry was "screamed at"); Louisville & N. R.R. v. Roberts, 207 Ky. 310, 269 S.W. 333 (1925) (plaintiff suffered miscarriage resulting from railroad's attempt to dispossess her and her husband from their boxcar quarters); Preiser v. Wielandt, 48 A.D. 569, 62 N.Y.S. 890 (1900) (plaintiff's illness aggravated when landlord had building demolished); Duncan v. Donnell, 12 S.W.2d 811 (Tex. Civ. App. 1928) (tenant had miscarriage as result of violent language and landlord "boarding up" the premises); Nordgren v. Lawrence, 74 Wash. 305, 133 P. 436 (1913) (plaintiff's illness worsened as a result of landlord's climbing into second-story bedroom and imposing on plaintiff's undressed daughter). See also Villa, The Intentional Infliction of Emotional Harm: The Tort of Slumlordism in New York, 38 ALB. L. REV. 826 (1974); Annotation, Recovery by Tenant of Damages for Physical Injury or Mental Anguish Occasioned by Wrongful Eviction, 17 A.L.R.2d 936 (1951).
Otherwise tolerable words and actions may rise to the level of extreme and outrageous conduct if defendant misuses a position of actual or apparent authority over plaintiff, or if defendant knows plaintiff is particularly susceptible, for physical or mental reasons, to emotional distress. In sum, the comments and illustrations accompanying Section 46(1) suggest that conduct may be extreme and outrageous when the only result substantially certain to flow from it is the gratuitous and unprivileged infliction of emotional distress.

2. Plaintiff Peculiarly Susceptible to Mental Distress

The extreme and outrageous character of conduct may also arise from the actor’s knowledge the plaintiff is peculiarly susceptible to mental distress by reason of some physical or mental condition. It was held to be outrageous when a defendant, for a practical joke, rigged up a “pot of gold” filled with dirt for a plaintiff to open at a humiliating public ceremony knowing the plaintiff had previously been in an asylum. Although sick people, children, and pregnant women have usually recovered on the basis of defendant’s knowledge of their condition for conduct not otherwise outrageous, it is unclear the extent to which this doctrine may be extended.

Another limitation of Section 46(1) requires that plaintiff’s emotional distress weigh heavily in determining the existence and severity of plaintiff’s emotional distress, but a lack of physical harm must be offset by a more egregious outrage. The severity of the emotional distress also may be reflected in its intensity and duration. Plaintiff’s mental distress, in addition to being severe, must also be a reasonable reaction to defendant’s provocation.

3. Liability of Public Utilities for Insults

Public utilities are subject to special liability for an agent’s gross insults to patrons. Liability is based on the public interest in freedom from insult on the part of those who serve the public, and often is imposed

130. See RESTATEMENT (SECOND) OF TORTS § 46 comment c (1965).
131. See id. comment f.; See also W. PROSSER, supra note 12, § 12, at 58.
133. See id.
134. See RESTATEMENT (SECOND) OF TORTS § 46 comment k (1965).
135. See id. comment j.
136. See id. If defendant knows that plaintiff is unusually susceptible to unreasonably exaggerating his emotional ills, plaintiff’s distress need not be reasonable.
137. See generally RESTATEMENT (SECOND) OF TORTS § 48 (1965).
138. Id. at comment a. The primary policy is to provide an incentive for the utility to select agents who will refrain from such conduct. Id.
for conduct which would otherwise not be considered outrageous. Generally, only patrons using the facility for its intended purpose may recover on this basis.

4. Privileges

Extreme and outrageous conduct may be privileged under the circumstances. Based on a creditor’s privilege to pursue reasonable collection practices, contacting a debtor at her place of employment on a single occasion was held not outrageous. Similarly, an employer is privileged to direct the work load of employees even though it is to the financial detriment of a hospitalized commission salesman. In another instance a representative of a baker visited one of the baker’s distributors at a hospital after the distributor had suffered a heart attack. Relying on the parties’ business relationship and the resultant “economic interest privileges,” the court held that asking the distributor to write down a list of his customers during the hospital visit was not outrageous.

In addition to privileges created by the circumstances of a defendant’s conduct, an extraneous legal principle or policy may preclude recovery for outrage and in effect constitute a privilege. Relying on a woman’s constitutional right to terminate a pregnancy without her husband’s approval, courts have held that an abortion was not outrageous conduct in denying the husband’s claim for the mental distress of being denied fatherhood. Further, in New York, because marital differences cannot be the basis of an outrage action, a person may be “privileged” to inflict mental distress upon his spouse.


140. See Restatement (Second) of Torts § 48 comment a. Private possessors of premises held open to the public can, of course, still be held liable for outrageous conduct. See, e.g., Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938) (theater held liable for falsely accusing patron of immoral conduct).

141. See Restatement (Second) of Torts § 48 comment a (1965).


C. Causation

Recovery for the intentional infliction of mental distress requires a causal connection between defendant’s conduct and plaintiff’s mental distress.\(^\text{149}\) Because mental distress was generally considered a remote consequence of a defendant’s conduct, early cases used lack of proximate cause as a basis to refuse recovery for intended mental injuries except when they were accompanied by a physical consequence. This rule is inconsistent with affording emotional interests independent legal protection, and is therefore giving way as intentional infliction of mental distress becomes more widely recognized as a cause of action. The result is a conciliation of the causation element in intentional infliction of mental distress and in tort actions generally.\(^\text{150}\)

D. Severe Mental Distress

The fourth element of an intentional infliction of mental distress cause of action is that plaintiff’s mental distress must be severe.\(^\text{151}\) Although there is no requirement of a physical manifestation, an indirect bodily injury may afford evidence the distress exists and is severe. The degree of outrage attached to defendant’s conduct is itself evidence of plaintiff’s mental distress.

There is no clear test for the requisite severity of the mental distress,\(^\text{152}\) however, the intensity and duration of the distress should be considered in the determination.\(^\text{153}\) The distress must be justified under the circumstances, and the defendant is not liable if the distress is caused by the plaintiff’s peculiar susceptibility unless the defendant acted with knowledge of such susceptibility.\(^\text{154}\)

IV. DAMAGES

One reason for denying recovery for mental distress prior to courts’ recognition of outrage as a cause of action was the purported difficulty in assigning a compensatory value to plaintiff’s mental distress.\(^\text{155}\) An

\(^{149}\) The Restatement (Second) of Torts § 46 has no comments concerning proximate cause. Comment j states the mental distress must have “in fact resulted.” Restatement (Second) of Torts § 46 comment j (1965).

\(^{150}\) See generally Restatement (Second) of Torts §§ 46-47 (1965).

\(^{151}\) See Restatement (Second) of Torts § 46 comment j (1965); 38 Am. Jur. 2d Fright, Shock, and Mental Disturbance § 7 (1968). Subject to control of the court, it is for the jury to decide whether severe mental distress exists. See generally Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); Restatement (Second) of Torts § 46, comment j (1965).


\(^{153}\) See Restatement (Second) of Torts § 46 comment j (1965).

\(^{154}\) Id. See supra notes 130-32 and accompanying text.

\(^{155}\) See Prosser, supra note 4, at 50-51.
award of punitive damages in tort is based on the policies of punishing the defendant, deterring intolerable conduct on the part of the defendant and others, and providing additional compensation for the plaintiff.\textsuperscript{156} An assessment of punitive damages generally requires a finding of actual damages\textsuperscript{157} and aggravating circumstances.\textsuperscript{158} In some states punitive damages must be commensurate with plaintiff’s actual damages.\textsuperscript{159}

Conduct may sustain punitive damages in tort, yet be insufficiently aggravated to constitute the element of outrage in an intentional infliction of mental distress action.\textsuperscript{160} It therefore seems any conduct which satisfies the outrage requirement in an intentional infliction of mental distress action would be suitable for an assessment of punitive damages. Notwithstanding the reasoning, punitive damages are discussed in comparably few intentional infliction of mental distress cases.

The cases allowing recovery of punitive damages generally involve circumstances contributing to the outrage element of the cause of action, and apparently do not require that the punitive damages be commensurate with actual damages.\textsuperscript{161} The majority of courts seem to acknowledge, in accord with Restatement (Second), that a defendant’s conduct may be considered in determining plaintiff’s compensatory damages in intentional infliction of mental distress actions.\textsuperscript{162} Therefore, under the Restatement (Second), an award of damages based in part on the character of defendant’s conduct may have both a compensatory and punitive function. The Restatement (Second) of Torts does not, however, disallow additional punitive damages.\textsuperscript{163}

V. NEW MEXICO

New Mexico courts first addressed the intentional infliction of emotional harm as a tort in \textit{Mantz v. Follingstad}.\textsuperscript{164} The claim in \textit{Mantz} arose out of the medical treatment of the plaintiff by her attending physician

\begin{itemize}
  \item \textsuperscript{156} See 25 C.J.S. Damages § 117(1) (1966).
  \item \textsuperscript{157} \textit{Id.} § 119. “[S]uch as malice, wantonness, willfulness, oppression, gross negligence, or fraud and only when such aggravating circumstances accompany the wrongful act or conduct.” \textit{Id.} § 123(1).
  \item \textsuperscript{158} See D. DOBBS, REMEDIES, § 3.9, at 210 (1973).
  \item \textsuperscript{159} \textit{Id.}
  \item \textsuperscript{160} See, e.g., State Rubbish Collectors Ass’n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (abuse of a position of power to effect plaintiff’s interests); Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938) (defendant’s knowledge plaintiff was peculiarly susceptible to mental distress because of her young age); Burrus v. Nevada, Cal., Or. Ry., 38 Nev. 156, 145 P. 926 (1915) (where defendant was a public utility).
  \item \textsuperscript{161} See Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938).
  \item \textsuperscript{162} See \textit{RESTATEMENT (SECOND) OF TORTS} § 46 comment j (1965) (degree of outrage attached to defendant’s conduct is evidence of plaintiff’s mental distress).
  \item \textsuperscript{163} See \textit{id.} (no mention of punitive damages with respect to outrage actions).
  \item \textsuperscript{164} 84 N.M. 473, 505 P.2d 68 (1972).
\end{itemize}
of ten years. The plaintiff alleged that from September 1965, to February
1969, her physician was negligent and failed to obtain a proper informed
consent for surgery.\textsuperscript{165} Plaintiff underwent a mastectomy, but contended
she would not have consented to the operation and felt it was unnecessary.
In addition to intentional infliction of emotional harm based on extreme
and outrageous conduct,\textsuperscript{166} plaintiff alleged several other causes of action,
including medical malpractice and battery.\textsuperscript{167}

The New Mexico Court of Appeals held that the trial court correctly
dismissed all other counts except for the emotional harm, due to the
tolling of the statute of limitations.\textsuperscript{168} That court also held that the plain-
tiff’s case lacked sufficient facts to show that the defendant acted in an
extreme and outrageous manner.\textsuperscript{169} The court also stated that the actions
of the physician were not in disregard of the plaintiff and, in fact, the
operation, not unusual in itself, was conducted in the standard manner.

Although the Restatement’s position was not adopted in this case, the
court acknowledged that this cause of action constituted a new tort theory
in New Mexico.\textsuperscript{170} In weighing the trial court’s decision, the court con-
sidered Section 46 of the Restatement\textsuperscript{171} along with a leading case in the
country at that time, \textit{Rockhill v. Pollard}.\textsuperscript{172} In \textit{Rockhill}, the plaintiff sued
her doctor for outrageous conduct which caused her severe emotional
distress. The Oregon Supreme Court held that there was sufficient evi-
dence for the case to be submitted to a jury and that in so doing the
proper rule of law to be applied was the position taken by Section 46 of
the Restatement (Second) of Torts.\textsuperscript{173}

Almost nine years lapsed after \textit{Mantz} before the New Mexico Court
of Appeals again addressed the issue of outrageous conduct. The case of
\textit{Dominguez v. Stone}\textsuperscript{174} arose out of the conduct of the defendant as a
member of the board of trustees of a small village, toward the plaintiff,
who was a Mexican National having resided in the United States for
nineteen years. In addition to intentional infliction of emotional harm the
complaint also alleged defamation, violation of the Civil Rights Act,\textsuperscript{175}
and discriminatory practices contrary to the New Mexico Human Rights

\begin{itemize}
  \item 165. \textit{Id.} at 476, 505 P.2d at 71.
  \item 166. \textit{Id.} at 479, 505 P.2d at 74.
  \item 167. \textit{Id.} at 476, 505 P.2d at 71.
  \item 168. \textit{Id.} at 475, 505 P.2d at 70.
  \item 169. \textit{Id.} at 480, 505 P.2d at 75.
  \item 170. \textit{Id.} at 479, 505 P.2d at 74.
  \item 171. \textit{Id.}
  \item 173. \textit{Rockhill}, 259 Or. at 58-59, 485 P.2d at 32-33.
  \item 174. 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981).
\end{itemize}
Act.\textsuperscript{176} During a public, then closed, meeting of the trustees the defendant made certain statements concerning the plaintiff which referred to her alienage and ethnicity.\textsuperscript{177}

The statements by the defendant were to the effect that plaintiff was not suited for her employment with the village, as director of the senior citizens program, because she was a Mexican.\textsuperscript{178} The defendant stated that a person acting as director should not be a Mexican because the program was funded by American dollars. Defendant in conjunction with his verbal attack, went as far as checking with the county clerk to see if plaintiff was a registered voter.\textsuperscript{179} In \textit{Dominguez}, the court directly applied Section 46 of the Restatement (Second) of Torts\textsuperscript{180} in holding that plaintiff did have a cause of action based on outrageous conduct and that the trial court had erred in granting summary judgment and dismissing the claim. Likewise, the court held that a cause of action for defamation also existed. Finally, the court upheld the summary judgment ruling by the trial court for the deprivation of rights count.\textsuperscript{181}

Three years after \textit{Dominguez}, the court again addressed the issue of outrageous conduct in the case of \textit{Trujillo v. Puro}.\textsuperscript{182} This case resulted when action was taken against a doctor for malpractice, negligent misrepresentation, battery, and intentional infliction of emotional distress in connection with treatment by the defendant of an eye problem suffered by the plaintiff. The trial court denied summary judgment for the defendant who filed an interlocutory appeal.\textsuperscript{183}

The New Mexico Court of Appeals, in applying the standards set forth in \textit{Dominguez} and \textit{Mantz},\textsuperscript{184} held that the complaint sufficiently alleged a claim of intentional infliction of emotional distress as set out in Section 46 of the Restatement (Second) of Torts. The court further held that it was not necessary for the plaintiff to plead each element of his claim in order to allege a cause of action.\textsuperscript{185} The court pointed out that there was no requirement that the plaintiff suffer bodily harm in order to recover for intentional infliction of emotional distress (outrageous conduct).\textsuperscript{186}

\begin{itemize}
\item [176.] N.M. STAT. ANN. §28-1-1 et. seq. (Repl. Pamp. 1987).
\item [177.] \textit{Dominguez}, 97 N.M. at 212, 638 P.2d at 424.
\item [178.] \textit{Id}.
\item [179.] \textit{Id}.
\item [180.] \textit{Id}.
\item [181.] \textit{Id}. at 214-15, 638 P.2d at 426-27.
\item [182.] \textit{Id}.
\item [184.] \textit{Id}.
\item [185.] \textit{Id}.
\item [186.] Id.
\item [187.] Id.
\end{itemize}
VI. CONCLUSION

The tort of “outrageous conduct,” intentional infliction of emotional distress, or various other terms describing the injury, is a real psychological harm that is now recognized by jurists across the country. No longer is it necessary to prove a physical injury resulted from a particular event resulting in emotional harm. The Restatement (Second) of Torts Section 46 clearly provides guidelines from which to assess the outrageous conduct of a particular tort-feasor. While advances in medical knowledge and technology have only recently supported this cause of action, injured parties may now seek to recover damages for psychological injustices inflicted upon them.