BALANCING CORRECTIVE JUSTICE AND DETERRENCE: INJURY REQUIREMENTS AND THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

INTRODUCTION

The jurisprudence of emotional injury is fluid and continuously evolving. Limitations on the right of recovery for emotional disturbance have historically been, and continue to be, a prominent feature of American tort law. But great efforts have been made both to recognize the validity of emotional distress as legally cognizable injury and to liberalize recovery for the victims of emotional distress.

One of the principal limitations on recovery for negligently inflicted emotional distress over the past century has been common-law-imposed evidentiary or pleading obligations for the tort's injury element. The plaintiff must demonstrate a connection between the defendant's conduct and

the injury to prove the genuineness of the claims.[1] Shifts from principal reliance on the impact rule to the physical manifestation requirement and, in some jurisdictions, away from any requirement of objective proof of injury on the part of the plaintiff demonstrate courts' willingness to liberalize recovery for emotional injury.[2] Generalizing about the state of negligent infliction of emotional distress jurisprudence, however, ignores the great intricacies motivating these changes.

Part I of this Note analyzes the injury requirement that is necessary to state a claim for emotional distress as it is framed by the tort system's underlying goals of corrective justice and deterrence. Concluding that injury requirements serve to achieve the proper balance of compensation and social maintenance, Part II will analyze how courts have recently justified removal of the physical manifestation requirement from the tort of negligent infliction of emotional distress. In light of these decisions, Part III evaluates the approaches used by the courts to change the injury requirements and concludes that the alteration of injury requirements in the negligence tort causes an imbalance in the corrective justice and deterrent outcomes. Finally, Part IV suggests that another judicially introduced injury requirement—medical diagnosability—may serve to remedy this imbalance and properly balance individuals' interests in compensation against social interests in the regulation of conduct.

I. TORT THEORY IN EMOTIONAL DISTRESS ACTIONS

Popular tort theory can offer insight into the purposes of torts that allow recovery for emotional distress. Scholars debate about whether the tort system serves corrective justice or deterrent theories—this Note assumes that emotional distress torts can serve both in varying degrees. First, a construction of emotional distress torts shows a correlation between the degree of injury required for recovery and the balance of corrective justice and deterrent purposes that the tort serves. Second, a historical analysis of the development of the negligent infliction tort reaffirms the view that injury requirements, like the physical manifestation rule, function as distributors of corrective justice and deterrence.

A. Overview of Injury Requirements

Recovery for emotional distress depends largely on the interaction between the amount of injury suffered by the plaintiff and the degree of cul-

1. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 581 (3d ed. 2005); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS 452 (10th ed. 2000).

2. *See, e.g.*, Paugh v. Hanks, 451 N.E.2d 759, 765 (Ohio 1983) (holding that such requirements ignore the scientific veracity of emotional injury); JOHNSON & GUNN, *supra* note 1, at 582.

pability displayed by the defendant. The lesser the injury, the greater the defendant's culpability must be to allow recovery. Conversely, the greater the injury, the lesser the defendant's culpability need be to allow recovery.

1. Negligent Infliction of Emotional Distress

Courts have historically required plaintiffs to satisfy the injury requirement of the tort of negligent infliction of emotional distress in one of two ways. First, the "impact requirement" obligated plaintiffs to show some sort of physical injury, however slight, as an incident to their emotional distress.[3] Most courts have abandoned this requirement,[4] though it is still followed in a few states.[5] Second, the "physical manifestation requirement"—the modern alternative to the impact requirement—merely requires plaintiffs to show that the claimed emotional distress has in some way manifested itself as an observable physical symptom.[6] The Restatement (Second) of Torts Section 436A formally accepted this requirement in 1965.[7]

Actions for negligent infliction of emotional distress require evidence of physical manifestations in response to several concerns: first, that emotional distress without accompanying physical injury is harmless, fleeting, and all-too frequent to be the business of courts; second, that physical manifestations guarantee the genuineness of the emotional distress claim; and third, that where the defendant's act was only negligent, he should not have to compensate for purely mental distress.[8] Additionally, courts have recognized the difficult questions regarding the foreseeability of mental distress as another justification for the physical-injury rule.[9]

Plaintiffs must demonstrate physical manifestations of injury by more than "transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like."[10] Objective symptoms such as headaches or nausea continuing in time, or even "repeated hysterical attacks," suffice as physical manifestations of emotional injury.[11] Because of the difficulty in discerning real from feigned emotional distress, "[t]he underlying policy in most jurisdictions seems to be that of compen-

3. *See* JOHNSON & GUNN, *supra* note 1, at 581.
4. *Id.*
5. *See, e.g.*, Lee v. State Farm Mut. Ins. Co., 533 S.E.2d 82, 84–85 (Ga. 2000).
6. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 364 (5th ed. 1984) [hereinafter PROSSER & KEETON].
7. RESTATEMENT (SECOND) OF TORTS § 436A (1965).
8. *See* Payton v. Abbott Labs, 437 N.E.2d 171, 178–79 (Mass. 1982) (citing RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965)).
9. *See, e.g.*, Leong v. Takasaki, 520 P.2d 758, 761 (Haw. 1974) ("The considerations underlying [the physical manifestation rule include] . . . unforeseeability of the injury . . . .").
10. RESTATEMENT (SECOND) OF TORTS § 436A cmt. c (1965).
11. *Id.*

sating plaintiffs with clearly recognizable serious injuries, while not burdening either the judicial system or individual defendants with [trivial, evanescent, feigned, or imagined] claims."[12] A significant but decreasing number of states still retain the physical manifestation requirement for emotional distress claims.[13]

2. Intentional Torts

Intentional infliction of emotional distress, a precursor to actions for negligent infliction of emotional distress, allows recovery for mental injury caused by "extreme and outrageous" conduct.[14] Like its counterpart sounding in negligence, recovery for intentional infliction of emotional distress was once generally limited by a physical manifestation requirement.[15] However, the common practice of contemporary courts has been to lift this requirement from intentional infliction of emotional distress actions.[16] Lightening the evidentiary burden on plaintiffs has allowed jurors to more intently focus on the nature of the defendant's conduct at issue.[17]

Finally, some forms of conduct have long given rise to actions, like assault, defamation, and false imprisonment, which compensate for purely non-physical, non-economic injury.[18] For example, a plaintiff pursuing a cause of action for assault need not claim physical injury, or even a degree of emotional distress, in order to recover.[19] Note, however, that recovery for emotional distress through these causes of action was the exception and ran counter to the general disapproval of emotional distress as a compens-

12. *Payton*, 437 N.E.2d at 179.

13. *See, e.g.*, Towns v. Anderson, 579 P.2d 1163, 1164 (Colo. 1978) (adopting RESTATEMENT (SECOND) OF TORTS § 436A (1965)); Hoard v. Shawnee Mission Med. Ctr., 662 P.2d 1214, 1219–20 (Kan. 1983); Daley v. LaCroix, 179 N.W.2d 390, 395 (Mich. 1970); Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764, 767 (Minn. 2005); Barmettler v. Reno Air, Inc., 956 P.2d 1382, 1387 (Nev. 1998) (holding that in negligent infliction of emotional distress cases, "in the absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness must be presented"); Johnson v. State, 334 N.E.2d 590, 592 (N.Y. 1975) (noting that courts in the state have been reluctant to award damages for mental suffering not accompanied by physical injury).

14. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

15. *See* JOHNSON & GUNN, *supra* note 1, at 71.

16. *See, e.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 286 (Cal. 1952); Agis v. Howard Johnson Co., 355 N.E.2d 315, 317 (Mass. 1976); *see also* JOHNSON & GUNN, *supra* note 1, at 71.

17. *See Siliznoff*, 240 P.2d at 286 ("Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom."); *see also* RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965).

18. *See* David Crump, *Evaluating Independent Torts Based upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 458 (1992); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 126 (1990).

19. *See* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 790 (2007).

able injury, which persisted through the first half of the twentieth century.[20]

B. Deterrence and Corrective Justice in Emotional Distress Torts

1. The Corrective Justice and Deterrence Framework

Since Oliver Wendell Holmes penned *The Common Law*, legal scholars have been seeking a comprehensive theory of tort law to explain and unify its objectives.[21] Two significant theories of justification for tort law have emerged: deterrence and corrective justice. The modern deterrent model is based on the notion that accurate judgments about the social cost and utility of conduct in the tort system will produce an economically efficient social system of conduct.[22] By contrast, the corrective justice model emphasizes the inherent wrongfulness of injurious conduct by assigning liability and seeking to remedy disparities between parties caused by culpable conduct.[23]

History suggests that tort law developed primarily out of the corrective-justice rationale.[24] However, recent innovations in tort jurisprudence—such as the development of strict liability—have been popularly attributed to deterrent motives.[25] Scholars on both sides of the debate have insisted that their respective theories, existing individually, comprehensively explain the development and existence of tort law as a whole.[26] Exhibiting little moderation in their positions, the debate has taken on a binary complexion.[27]

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20. *See, e.g.*, RESTATEMENT OF TORTS § 47 cmt. a (1934); Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort; "Outrage,"* 38 A.L.R. 4th 998, 1003 § 2 (1985).

21. *See, e.g.*, Christopher J. Robinette, *Can There be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 370 (2005); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

22. *See, e.g.*, Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33–34 (1972).

23. *See, e.g.*, Robinette, *supra* note 21, at 370.

24. *See* Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 791 (1990) ("Historically, moral judgment was the core of tort law."); Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1233 (1990) (arguing that tort liability has primarily served to punish violations of personal autonomy).

25. *See generally* Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Posner, *supra* note 22.

26. *See* Robinette, *supra* note 21, at 370.

27. *See* Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 139 (1999); Schwartz, *supra* note 21, at 1809 ("In short, corrective justice scholars display a lack of appreciation for the work of efficiency scholars, and the latter return the (dis)favor.").

Not to be excluded from the discussion, compensation is yet another rationale underpinning tort law.[28] While mainstream scholars have essentially derided the notion that compensation can be a useful justification for tort law, it is nonetheless a universally recognized outcome, if not outright goal, of existing tort jurisprudence.[29] At the individualized level, compensation is generally the primary goal of tort litigation.[30] Moreover, compensation is the primary instrument by which corrective justice is accomplished.[31]

The division of tort theory into these two camps is rather simplistic, but for years this division has characterized choice of law jurisprudence and scholarship.[32] Some choice of law approaches have historically divided tort rules into two groups: those that serve to promote loss allocation and those that serve to promote conduct regulation.[33] This framework informs us about the preconditions to recovery for emotional distress. The physical manifestation rule, as a precondition to recovery, allocates loss rather than regulates conduct. The wide array of injury specifications for plaintiffs suffering emotional distress reflects significant effort to find the appropriate allocation of loss caused by mental distress.

Loss allocation is concerned with compensation and, therefore, with corrective justice.[34] Conduct regulation, on the other hand, reflects social interest in the deterrence of injurious conduct.[35] The terms "loss allocation" and "conduct regulation" are appealing in this context because the injury requirement is a tort *rule*, rather than a tort in and of itself. The utilization of a loss-allocating rule makes the cause of action reflect compensatory concerns, while the elimination of the same loss-allocating rule makes the cause of action reflect interests in conduct regulation.

The physical manifestation rule is unquestionably a limitation on the plaintiff's right to recover. As variations of the negligent infliction of emotional distress tort have surfaced, other limitations have supplemented—or replaced—the physical manifestation rule. For example, some states permit bystander recovery only under very specific circumstances.[36] Likewise, many states allow recovery for plaintiffs within the zone of danger

28. *See generally* O'Connell & Robinette, *supra* note 27.

29. *See* John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1203 (1984).

30. *See* Abel, *supra* note 24, at 796.

31. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 14–15 (1997); Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013, 3013 (2007); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449 (1992).

32. For example, *Babcock v. Jackson*, 191 N.E.2d 279, 283–84 (N.Y. 1963), introduced the distinction between tort rules that allocate losses and those that regulate conduct.

33. *See, e.g.*, Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679 (N.Y. 1985).

34. *See* Wendy Collins Perdue, *A Reexamination of the Distinction between "Loss-Allocating" and "Conduct-Regulating Rules,"* 60 LA. L. REV. 1251, 1251–52 (2000).

35. *See id.*

36. *See, e.g.*, Kircher, *supra* note 19, at 819–31.

of tortious conduct.[37] These spatial requirements, sometimes replacing the physical manifestation requirement altogether, themselves serve a loss-allocating function.

2. Applying the Framework

Ultimately, no one theory of tort can be used in all circumstances to the exclusion of others. While an ideological world may desire a contrary result, some scholars recognize that each theory can coexist with the others.[38] Moreover, the general development of tort law, from fault-based ebbing toward no-fault liability, suggests an overall shift in the prevailing theory of recovery in a heterogeneous array of tort jurisprudence.[39]

At the same time, choice of law rules do suggest that certain tort rules—like the physical manifestation requirement—have a primary characterization. Although there is no consensus on how to identify a singular foundational theory underlying any particular cause of action, the application of loss-allocation rules to particular causes of action produces an outcome that is consistent with a corrective-justice rationale. Similarly, the rejection of loss-allocation rules for particular torts produces results that are more deterrent than compensatory.

At a broader level, the recent evolution of tort jurisprudence regarding actions for emotional injury has represented a significant effort to balance the individual interest in compensation through corrective justice with the social interest in deterrence.[40] The rules governing recovery for emotional distress are illustrative of the inherent tension between personal and social interests. After the American Law Institute's adoption of the tort of intentional infliction of emotional distress,[41] and at the insistence of the academic community,[42] state courts began to recognize emotional distress as a legally compensable injury.

The liberalization of recovery for emotional distress coincided with a growing consensus about the legal compensability of emotional distress.

37. *See id.* at 821.

38. *See, e.g.*, Schwartz, *supra* note 21.

39. *See id.* at 1834 ("Possibly, as tort law has developed over time, it has drawn on deterrence and corrective justice in a rather haphazard and eclectic way.").

40. Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 3 (1992). Distributive justice is concerned with "the basic organization of all things, good and bad, in setting up society," while corrective justice responds to "the problem of temporary dislocations" in the social organization. GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 80 (1996).

41. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

42. *See, e.g.*, Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982) ("Academics, rather than courts, were the prime movers in the development of the tort of intentional infliction of severe emotional distress . . . ."); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

This fact says a great deal about the objectives of the negligence tort as it exists. The exceptions allowing recovery for emotional injury inflicted as a result of torts such as assault during a time period where emotional distress recovery was severely restricted suggest that social interest in regulating conduct, rather than individual interest in compensation, was responsible for the recognition of a few select causes of action.[43] The subsequent growth in recovery for emotional distress injuries reflects a greater value assigned to the individual interest in mental tranquility than to the social interest in preserving freedom to engage in conduct that may create a risk of emotional injury.[44]

Comparing tort rules involving emotional distress to their counterparts involving physical injury is instructive. Intentional infliction of emotional distress straddles a unique chasm between the law of negligence and that of intentional tort. While the plaintiff's burden of proof for the injury element in intentional infliction of emotional distress actions has recently been less than that required for comparable negligence claims, a requirement of injury nonetheless still exists.[45] Traditional intentional torts like assault and battery have no such injury requirement.[46] Rather, both assault and battery can be committed without direct contact to the plaintiff,[47] and without causing any actual loss.[48] Thus, it stands to reason that the primary function of the law of intentional tort is not loss allocation.[49] Rather, its objectives reflect judgments about the social value of the injurious activity; its goal is to regulate conduct.[50]

When considering emotional distress torts, recovery is dependent on a unique interaction of culpability and injury—not all emotional injury caused by culpable conduct is compensable. Recovery for emotional distress is not universally available, but is often intertwined with the culpability of the conduct that produced it. There exists an indisputable current legal interest in protecting against emotional injury. However, that interest has consistently been balanced against the social desirability of the defendant's conduct in order to determine liability. Reflecting this balancing approach, general tort law governing physical injury has traditionally as-

43. *Cf.* Davies, *supra* note 40, at 5 ("In general, courts have manifested hostility toward claims for damages for mental distress for as long as those claims have been presented by litigants.").

44. *See* Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 FLA. L. REV. 333, 346 (1984).

45. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

46. *See* Willard H. Pedrick, *Intentional Infliction: Should Section 46 Be Revised?*, 13 PEPP. L. REV. 1, 13 (1985).

47. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 18 cmt. c, § 21 cmt. c (1965).

48. *See, e.g.*, Vitale v. Henchey, 24 S.W.3d 651, 659 (Ky. 2000) ("A plaintiff need not prove actual damages in a claim for battery because a showing of actual damages is not an element of battery . . . .").

49. *See* JOHNSON & GUNN, *supra* note 1, at 57 (noting that the goals of the assault tort are deterrent in nature).

50. *See id.*

signed liability based upon the quality of the injurious conduct.[51] Moving from negligence, the law adds gross negligence, recklessness, and intentional conduct.[52] These gradations reflect judicial judgment about the social value of each type of conduct.[53] In the case of emotional injury, these distinctions between the culpability of conduct also depend on the type of injury caused to determine the existence and quantity of liability.[54]

These gradations sit along a continuum that represents the balance between competing interests—individual interests in mental tranquility and social interests in conduct that threatens that tranquility. In light of the assumption that the individual torts can be justified by reference to both corrective justice and deterrence rationales, the continuum of culpability is anchored by corrective justice on one end and deterrence on the other. The imposition of liability for any particular tort can be justified with reference to these goals in proportion to each other.[55]

Toward the corrective justice end of the spectrum, the tort of negligent infliction of emotional distress assigns liability for unreasonable conduct that produces significant emotional distress, generally physical manifestations of emotional distress.[56] Moving toward the middle, the tort of intentional infliction of emotional distress represents greater recognition of emotional distress in light of the lesser social value of the conduct which causes it.[57] Finally, torts like assault, which allows recovery for presumptive mental distress, reflect judicial judgments about the lack of social value in the injury producing conduct and reflect comparatively less concern about the actual injury sustained by the plaintiff.[58]

51. *See* Abel, *supra* note 24, at 788 (noting that as a historical matter, "nineteenth-century judges consciously adopted a highly moralistic rhetoric, allowing victims to recover only if they were free from fault and those they sued were morally culpable").

52. *See* Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 15 (1996); Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1088 (2006).

53. *See* Simons, *supra* note 52, at 1088.

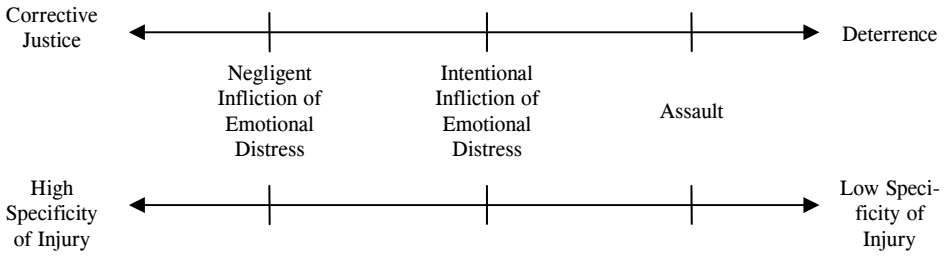
54. This is because all physical harms caused by tortious conduct are recoverable, though not all mental harms are. *See* Givelber, *supra* note 42, at 50.

55. This is, of course, an imperfect schematic that cannot fully explain all impositions of liability. As will be discussed, however, it is particularly helpful in explaining the imposition of liability for the perpetration of emotional harms.

56. *See* PROSSER & KEETON, *supra* note 6, at 364.

57. *See* Pedrick, *supra* note 46, at 5 (stating that the intentional infliction action is "based on the defendant's especially outrageous conduct" but also requires "that actual damage be suffered to ground the action").

58. *See* Simons, *supra* note 52, at 1088 (stating that "an intentional actor commits the most serious type of wrong").



Recovery for emotional distress is dependent on both the culpability of the conduct in question and the type of emotional injury that it caused.[59] For example, the injury requirement within the tort of intentional infliction of emotional distress serves a dual role. On the one hand, if intentional infliction of emotional distress can truly be characterized as an intentional tort, then the severity of the plaintiff's injury is per se irrelevant.[60] Therefore, if the injury requirement serves no compensatory purpose, then it can be inferred that it exists only as an assurance that the defendant's conduct has fallen outside the applicable standard.[61] On the other hand, however, substantiating the quality of the defendant's conduct is not the only purpose of the injury requirement in the tort. As the intentional infliction tort has grown out of negligence law, the injury requirement serves to guarantee that the plaintiff has sustained more than a dignitary hurt but rather a legally cognizable injury worthy of compensation.[62]

The injury requirement of negligence law is not, however, concerned with substantiating the wrongful nature of the defendant's conduct.[63] The injury requirement serves to ensure compensability and the fulfillment of a negligence cause of action.[64] The shift of focus from the existence of injury toward the defendant's conduct causes the analysis to take on the characteristics of an intentional, and not a negligence-based tort. Although

59. This is of course generally true for recovery in traditional physical injury torts. *See* Givelber, *supra* note 42, at 50.

60. *See* Pedrick, *supra* note 46, at 6.

61. *Cf.* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (stating that culpable conduct does not include "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities").

62. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965); Pedrick, *supra* note 46, at 5.

63. This can be done simply with a breach of duty analysis. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

64. *See* PROSSER & KEETON, *supra* note 6, at 165.

intentional and negligent torts often overlap in their social objectives, the two frequently serve very distinct functions in compensation.[65]

Across the continuum, the more specific injury that is required, the greater the weight given to the individual interest in corrective justice will be. On the other hand, where injury is non-specific or presumptive, social interests are elevated over individualized interests—as the Supreme Court has observed, damage awards lacking foundation in actual injury lose their justification as compensatory devices.[66] What exists then is a direct relationship between the evidentiary burdens on the plaintiff and the social utility of the injurious conduct. The less socially valuable the injurious conduct, the less injury that the plaintiff must prove in order to demonstrate liability.

This significant focus on the type and severity of injury sustained in emotional distress actions reflects a judicial concern about the balance of individual and social interests. Typically, there is no hesitance to punish intentionally tortious conduct because of its lack of social value.[67] However, where emotional distress is the result of the intentional conduct, greater balancing between individual and social interests must be undertaken to ensure that socially desirable conduct is not overdeterred, because conduct intended to cause emotional distress may also sometimes be socially desirable.[68] Moreover, the significant injury requirement in negligent infliction actions also reflects awareness that, in order to impose liability, the severity of the claimed emotional injury must be great in comparison to the social costs of restricting the injurious activity.[69]

One obvious—and logical—objection to this formulation is the proposition that injury requirements in emotional distress actions serve only one function: to separate the genuine from the fraudulent claims. Case law is fraught with dismissals of the physical manifestation requirement in negligence actions because of judicial dissatisfaction with its precision in claim-screening.[70] But the injury requirements for emotional distress actions also

65. For example, the wide availability of punitive damages in emotional distress claims, *see* Simons, *supra* note 52, at 1088, presents the possibility of a windfall to the plaintiff above his actual losses. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 356–57 (2003) (identifying plaintiff's windfall gains as primarily motivated by the social goals of retribution and deterrence).

66. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (stating that the presumption of injury employed in common law defamation claims gives juries too much flexibility to award damages based on factors other than compensation).

67. *See* Simons, *supra* note 52, at 1085.

68. *See* Crump, *supra* note 18, at 448 ("In fact, there are many socially desirable human activities of which the causing of intentional emotional distress is an essential part."). Professor Crump uses examples like a "fire-and-brimstone preacher" and a lawyer conducting cross examination to illustrate instances of socially necessary, yet intentional, infliction of emotional distress. *Id.* at 448–49.

69. *See id.* at 484 ("The recognition of the negligent-infliction theory generally, then, would deter people from engaging in activities as diverse as business management, commercial lending and the legal profession.").

70. See discussion *infra* Part II.B.

serve to provide a basis for balancing individual and social interests. Whether to substantiate the tortious character of the defendant's conduct,[71] or to provide a basis for determining the appropriate ratio of liability to fault,[72] injury requirements have historically done more than simply attempt to sift through valid and invalid claims for recovery. The variation of injury requirements across the torts—from highly specific to none at all—through the adaptation of compensable injury criteria to correspond to different levels of culpability further suggests the balanced relationship between individual interest in emotional tranquility against the social interest in unrestricted conduct.

3. The Framework's Historical Foundation

A historical analysis of situations where courts have traditionally refused to apply the physical manifestation rule also suggests that its absence serves deterrence, not corrective justice. Easing the plaintiff's burden of showing injury does have its roots in well-established jurisprudence.[73] Courts in approval or disapproval of the physical manifestation requirement are in agreement that, in some particularized instances, exceptions to the physical manifestation rule are both proper and necessary.[74] In cases

71. *See supra* note 61 and accompanying text.

72. *See* Payton v. Abbott Labs, 437 N.E.2d 171, 178–79 (Mass. 1982) (citing RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965)); PROSSER & KEETON, *supra* note 6, at 362; Davies, *supra* note 40, at 3.

73. Certainly one of the key assumptions that must be made in determining the significance of the physical manifestation rule is its tendency to increase the burden on the plaintiff. While many of these cases do come to the courts at the pleading stage, *see, e.g.*, Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980), there are also indications that in some instances a jury verdict has been reached based solely on the testimony of the plaintiff about her own personal trauma. *See, e.g.*, Montinieri v. S. New Eng. Tel. Co., 398 A.2d 1180, 1181 (Conn. 1978). *But see* Taylor v. Baptist Med. Ctr., Inc., 400 So. 2d 369, 371 (Ala. 1981). Requiring a plaintiff to demonstrate objective evidence of injury through physical manifestation allows rebuttal of these claims with other objective evidence. On the contrary, rebuttal of a plaintiff's testimony about her own mental process is not similarly amenable to rebuttal by objective evidence (or any evidence other than simple cross-examination). Moreover, inferential support for the idea that plaintiff's burden will be lightened can be gleaned from the well-documented fear that courts will be flooded with emotional distress claims in the absence of the physical manifestation requirement. *See, e.g.*, *Payton*, 437 N.E.2d at 178–79.

74. *See, e.g.*, Rodrigues v. State, 472 P.2d 509, 519 (Haw. 1970) ("[T]he principle to be extracted from the exceptions is that they involve circumstances which guarantee the genuineness and seriousness of the claim."); Hoard v. Shawnee Mission Med. Ctr., 662 P.2d 1214, 1220 (Kan. 1983) (identifying the physical manifestation rule as employed in Kansas and the limited exception to this rule where a corpse is mishandled); Johnson v. State, 334 N.E.2d 590, 591–92 (N.Y. 1975) (holding that, despite the physical manifestation rule in the state, two categories of emotional distress cases are compensable despite the lack of physical consequences: a negligent announcement of death and the negligent mishandling of a corpse); Muchow v. Lindblad, 435 N.W.2d 918, 922 (N.D. 1989) (recognizing the majority exception "for a telegraph company's negligent mishandling of a message concerning the death or serious illness of next-of-kin and a funeral home's negligent mishandling of the corpse of next-of-kin" to the bodily harm rule); *see also* JOHNSON & GUNN, *supra* note 1, at 583; PROSSER & KEETON, *supra* note 6, at 362 ("A number of courts have allowed recovery against a telegraph company for the negligent transmission of a message, especially one announcing death, which indicates upon its face that there is an especial likelihood that such mental distress will result. The other group

where the underlying wrong is the negligent handling of a corpse or the negligent delivery of a notice of death, numerous courts have rejected the physical manifestation requirement.[75] This presumption has less to do with appropriate levels of compensation and reflects a greater concern about conduct regulation.

Actions for damages based upon the negligent mishandling of a corpse do not have their roots in negligent infliction of emotional distress jurisprudence. On the contrary, many courts recognize an independent tort for such a wrong.[76] Common-law protections for the right to burial evince a strong public policy toward rights in burial as well as obligations on those who undertake the task.[77] The imposition of liability on persons who fail to respect those rights through negligent misconduct acts as a deterrent to such future misconduct.[78] Moreover, there is no clear consensus among courts that negligent, as opposed to intentional, acts on the part of a tortfeasor justify dispensing with the physical manifestation requirement.[79]

The genesis of recovery for negligently delivered death notices also has its roots apart from negligent infliction of emotional distress jurisprudence. Actions for damages in these cases originally sounded in contract.[80] In fact, courts were willing only to stretch the contract theory to cover plaintiffs who either entered into the contract with the telegraph company or who were the intended recipient (third-party beneficiary).[81] Where a plaintiff was mistakenly delivered a notice of death that caused him to believe that a family member had died, he had no right of recovery if he was not connected to the contract between the telegraph company and sender.[82] Although mental anguish was a significant component of damages in such

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of cases has involved the negligent mishandling of corpses.").

75. *See infra* note 137 and accompanying text.

76. RESTATEMENT (SECOND) OF TORTS § 868 (1965); *see also* Quesada v. Oak Hill Improvement Co., 261 Cal. Rptr. 769, 773 n.3 (Cal. Ct. App. 1989) ("The fact that the expected, and often sole, injury flowing from [the negligent handling of a corpse] is that of mental trauma does not transform the cause of action into one for the negligent infliction of emotional distress."); *Muchow*, 435 N.W.2d at 923 (acknowledging that the historical justification for recovery in tort for the negligent mishandling of a corpse is based "upon the common law rule that any unwarranted interference with the right to burial constitutes an actionable wrong"); Robert A. Brazener, Annotation, *Liability in Damages for Withholding Corpse from Relatives*, 48 A.L.R. 3D 240, § 2[a] (1973). *But see* 22A AM. JUR. 2D *Dead Bodies* § 114 (2003) (noting that some cases are based in breach of contract).

77. *See* Brazener, *supra* note 76, § 2[a].

78. *See Quesada*, 261 Cal. Rptr. at 778 ("As a society we want those who are entrusted with the bodies of our dead to exercise the greatest of care.").

79. *See* 22A AM. JUR. 2D *Dead Bodies* § 118 (2003).

80. *See, e.g.*, Gardner v. Cumberland Tel. Co., 268 S.W. 1108, 1109 (Ky. 1925); Stuart v. W. Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885).

81. *See* H.R., Annotation, *Right of One Neither Sender Nor Addressee to Recover Against Telegraph Company Because of Delay or Mistake*, 72 A.L.R. 1198, § III.a. (1931).

82. *See Gardner*, 268 S.W. at 1109; H.R., *supra* note 81, § III.b.

cases,[83] the courts clearly used contract rules to establish the realm of recovery.[84]

An early twentieth century state law allowing recovery for damages caused by negligently delivered telegrams highlights the public policy implications.[85] The action of the legislature to clear the way for recovery in this limited circumstance illustrates the social consensus about the regulation of the conduct at issue. Had the state legislature valued the individual interests in compensation for mental distress more than the social interest in regulating telegram carriers, its laws would have opened recovery for all sufferers of emotional distress. Instead, the specification of the type of conduct that gives rise to damages points to the law's emphasis on deterrence, rather that corrective justice.

The development of these two torts demonstrates that their rules were not solely (or even predominantly) aimed at ensuring appropriate levels of compensation for those who suffer emotional distress.[86] Some authors have even categorized actions falling under these categories as intentional torts.[87] Recognition of the fact that the abrogation of the physical manifestation requirement serves tort goals other than compensation ought to guide courts' emotional injury jurisprudence. Deterrence and conduct regulation are certainly a significant part of the landscape of tort law,[88] but the growth of judicial recognition of compensable emotional injury in balance with these goals has been the primary catalyst in the tort's growth.[89]

II. REJECTION OF THE PHYSICAL MANIFESTATION RULE

Rejection of the injury requirements in emotional distress torts is best viewed with an understanding of its role in promoting tort objectives. Courts have dispensed with the physical manifestation rule for a variety of reasons. Some of those reasons are ideological, while others are functional. Their contrast highlights the utility of the physical manifestation rule in corrective justice and its absence in promoting deterrence.

83. *See, e.g.*, *Stuart*, 18 S.W. at 353.
84. *See* H.R., *supra* note 81, §§ III.a–b.
85. *See* W. Union Tel. Co. v. Griffin, 122 S.W. 489 (Ark. 1909).
86. *See* JOHNSON & GUNN, *supra* note 1, at 583–84.
87. *See, e.g.*, Kircher, *supra* note 19, at 795–96.
88. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 76–78 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881); SPECIAL COMM. ON THE TORT LIAB. SYS., AM. BAR ASS'N, TOWARDS A JURISPRUDENCE OF INJURY 4-3, 4-170 (1984); Calabresi, *supra* note 25, at 713; *see also* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 187–88 (1981).
89. *See* Bell, *supra* note 44, at 334–35.

A. Molien v. Kaiser Foundation Hospitals

Dissatisfaction with the arbitrary requirement of physical manifestation of injury was inevitable.[90] Beginning in the 1970s, state courts began to reject the physical manifestation requirement for emotional distress claims.[91] The approval of advances in sciences emboldened courts to cast off their concerns about the validity of emotional injury.[92] But it was not until California addressed the issue in *Molien v. Kaiser Foundation Hospitals*[93] that the battle cry against the physical manifestation requirement was ultimately formed.

In *Molien*, the California Supreme Court held that emotional distress claimants need not demonstrate physical manifestations of injury to be compensable.[94] The court examined the physical manifestation requirement and determined that the requirement was both overinclusive, allowing for claims involving little emotional injury with physical consequences, and underinclusive, barring claims where serious emotional injury was sustained without any resulting physical consequences.[95] This analysis has often been emphasized by courts evaluating the viability of their own physical manifestation requirements.[96]

There is no question that the court in *Molien* was well aware of the relationship of the physical manifestation requirement to concerns about claim validity. But the court reasoned that the genuineness of a plaintiff's claim was a determination to be made by the fact finder and not the judge.[97] Moreover, jurors need not be presented with any evidence of physical harm to the plaintiff as a result of her emotional injury—they could simply evaluate the defendant's conduct and refer "to their own experience" to determine the existence of injury.[98]

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90. *See, e.g.*, Camper v. Minor, 915 S.W.2d 437, 442 (Tenn. 1996) ("For this reason, the physical manifestation rule, like the physical impact rule, is open to criticism as an arbitrary and underinclusive approach."); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 651 (Tex. 1987), *overruled by* Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993) (stating that the physical manifestation requirement "serves as nothing more than an arbitrary restraint on the right of individuals to seek redress for wrongs committed against them").

91. *See, e.g.*, Leong v. Takasaki, 520 P.2d 758, 766–67 (Haw. 1974).

92. For example, the *Leong* court analyzed the "primary" and "secondary" responses to traumatic events and determined that, although secondary responses are more likely to result in physical manifestations and thus be compensable, primary responses, though short in duration and lacking physical manifestations, should be compensable as well. *See id.*

93. 616 P.2d 813 (Cal. 1980).

94. *Id.* at 820.

95. *Id.*

96. *See, e.g.*, Chizmar v. Mackie, 896 P.2d 196, 202 (Alaska 1995); Corgan v. Muehling, 574 N.E.2d 602, 608 (Ill. 1991); Folz v. State, 797 P.2d 246, 259 (N.M. 1990).

97. *Molien*, 616 P.2d at 821 ("The screening of claims on this basis at the pleading stage is a usurpation of the jury's function.").

98. *Id.* (citing State Rubbish Collector's Ass'n v. Siliznoff, 240 P.2d 282, 286 (Cal. 1952)).

Molien prompted many courts to evaluate their own negligent infliction of emotional distress jurisprudence. It quickly became popular to discard the physical manifestation requirement for a variety of reasons: adoption of a broader foreseeability analysis, clarity of evidentiary rules, professed belief in science to obviate the need for injury requirements, or generalized notions of fairness. These reasons have allowed courts to sweep in all forms of the negligence action based on the ideological approach. In other circumstances, courts have adapted their injury requirements to specific factual circumstances. These fact-specific criteria represent a functional approach to dispensing with the physical manifestation requirement.

B. The Ideological Approaches

The notion that all psychic injury should be fully compensable has been a visible belief since *Molien*.[99] Some courts have been plainly dogmatic about the inequity of emotional distress jurisprudence. Others have appealed to science to clarify the existence of mental injury, and some have simply cast that burden upon the jury.

1. Foreseeability

In some cases, courts have sought to replace their physical manifestation requirement with a foreseeability standard.[100] Such a standard allows the courts to specifically designate the parties who are eligible for recovery and those who are potentially liable.[101] Alternatively, courts may also potentially broaden liability. Some formulations of the foreseeability test establish that where the risk of emotional injury resulting in physical illness or harm is foreseeable to a party, that party may be liable for consequent emotional distress even if no physical manifestations of injury are demonstrated by the plaintiff.[102]

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99. *See* Bell, *supra* note 44, at 335, 337 n.19.

100. *See, e.g.*, Montinieri v. S. New Eng. Tel. Co., 398 A.2d 1180, 1184 (Conn. 1978) (affirming a jury charge requiring that the defendant foresee the possibility of emotional distress resulting in bodily harm); Gammon v. Osteopathic Hosp. of Me., Inc., 534 A.2d 1282, 1285 (Me. 1987); *see also* AALAR, Ltd. v. Francis, 716 So. 2d 1141, 1147 (Ala. 1998) (noting that the Alabama Supreme Court's prior rejection of the physical manifestation requirement "contemplated a limited right of recovery in those whose emotional distress was reasonably foreseeable").

101. For example, the Maine Supreme Court has found requisite foreseeability only where a physician–patient, hospital/mortuary–family of deceased, or psychotherapist–patient relationship existed. Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839, 848 (Me. 1999); *see also* Angelica v. Drummond, Woodsum & Macmahon, P.A., CV-02-15, 2003 WL 22250354, at *7–8 (Me. Super. Sept. 9, 2003).

102. *See, e.g.*, Scanlon v. Conn. Light & Power Co., 782 A.2d 87 (Conn. 2001).

In *Montinieri v. Southern New England Telephone Co.*[103] the Connecticut Supreme Court considered recovery for emotional damages in an action for breach of contract and invasion of privacy. Customers sued the defendant telephone company over the wrongful disclosure of their address, and the jury returned a verdict in favor of the customers based on defendant's negligence. At issue was whether the customers could recover in the absence of physical injury. Holding that the basis of the breach of contract count was negligence,[104] the court stated that "recovery for unintentionally-caused emotional distress does not depend on proof of either an ensuing physical injury or a risk of harm from physical impact."[105] The *Montinieri* court reasoned that emotional distress without accompanying physical injury could be just as severe as that with physical manifestations, and that such requirements actually incentivized disingenuous pleading.[106] The court instead adopted the trial court's instructions, instituting liability when the defendant could foresee that his actions might cause emotional harm resulting in physical injury.[107]

2. Special Cases

In another vein, courts have historically carved out exceptions to the physical manifestation rule as special cases have presented themselves.[108] The different rules, standards, and exceptions to injury requirements in emotional distress claims can be dizzying, sometimes so much so that courts eliminate them altogether.[109]

The Tennessee Supreme Court's decision in *Camper v. Minor*[110] is a good illustration of desire for simplification leading to revision. In *Camper*, the court reviewed its negligent infliction of emotional distress jurisprudence and identified the numerous exceptions that it had created to the physical manifestation requirement. The court concluded that its "practice of creating *ad hoc* exceptions has made our law of negligent infliction of

103. 398 A.2d 1180 (Conn. 1978).
104. *Id.* at 1182.
105. *Id.* at 1184.
106. *Id.*; *see also* Magruder, *supra* note 42, at 1059.
107. *Montinieri*, 398 A.2d at 1184.
108. *See* discussion *supra* Part I.B.3. For example, at the time of *Camper*, Tennessee courts had created exceptions to the physical manifestation rule for actions based on the negligent handling of a corpse and negligent delivery of a death notice, bystander liability, and a curious line of cases permitting recovery in the absence of physical manifestations for "ingesting disgusting matter." Camper v. Minor, 915 S.W.2d 437, 444–45 (Tenn. 1996); *see also* Hill v. Traveler's Ins. Co., 294 S.W. 1097 (Tenn. 1927); Wadsworth v. W. Union Tel. Co., 8 S.W. 574 (Tenn. 1888).
109. *See, e.g.*, Taylor v. Baptist Med. Ctr., Inc., 400 So. 2d 369, 373 (Ala. 1981) (rejecting the physical manifestation requirement because the court's "decisions and authorities reveal[ed] a remedial situation hypocritical in nature"); Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 395 S.E.2d 85, 97 (N.C. 1990); Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996).
110. 915 S.W.2d 437 (Tenn. 1996).

emotional distress confusing and unpredictable."[111] This inconsistency prompted the court to abandon the physical manifestation requirement in all claims for negligent infliction of emotional distress.[112]

3. Scientific and Logical Reasoning

Many courts have been simply dogmatic about the reality of legally compensable emotional injury without the presence of physical manifestations.[113] Sometimes these propositions are derived from the court's interpretation of scientific understanding,[114] while some courts seem driven to the result by abstract notions of common sense and equity.[115]

The Hawaii Supreme Court was the first to apply its understanding of psychological sciences to claims for emotional distress.[116] The court categorized mental reactions to external trauma as two types: primary and secondary.[117] The primary response is purely mental, while secondary responses may include physical symptoms.[118] Because, in the court's view, primary and secondary responses are equally injurious, no physical manifestations of injury should be required when emotional distress is experienced only through a primary response.[119]

In rather conclusory fashion, the Ohio Supreme Court also rejected the physical manifestation requirement in *Paugh v. Hanks*.[120] Relying on both *Molien* and *Leong*, the court stated that the physical manifestation rule "completely ignores the advances made in modern medical and psychiatric science."[121] Serious emotional distress, according to the court, is just as significant as any physical injury.[122]

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111. *Id.* at 445.

112. *Id.* at 446 ("Although our seemingly disparate cases in this area are thus reconcilable on a functional level, we nevertheless agree with the plaintiff here and with many other jurisdictions that the time has come to abandon the rigid and overly formulaic 'physical manifestation' or 'injury' rule.").

113. *See, e.g.*, *Taylor*, 400 So. 2d at 374 (referring to limitations on recovery as "procrustean principles"); Montinieri v. S. New Eng. Tel. Co., 398 A.2d 1180, 1184 (Conn. 1978) (stating that there exists "no logical reason" for distinguishing between forms of emotional distress); Corgan v. Muehling, 574 N.E.2d 602, 609 (Ill. 1991).

114. *See, e.g.*, *Corgan*, 574 N.E.2d at 608–09 (relying on a scientific analysis of emotional responses to determine compensability of emotional injury).

115. *See, e.g.*, *Montinieri*, 398 A.2d at 1184 (appealing to logic); *see also* Magruder, *supra* note 42, at 1059 (positing a hypothetical of emotional injury without physical manifestations and reasoning that "[a] man from Mars would find it difficult to understand the denial of recovery for mental anguish in such a case").

116. *See* Leong v. Takasaki, 520 P.2d 758 (Haw. 1974).

117. *See id.* at 766.

118. *See id.* at 766–67.

119. *See id.*

120. 451 N.E.2d 759 (Ohio 1983).

121. *Id.* at 765.

122. *Id.* Note that by the time of *Paugh*, the contention that emotional distress was compensable was a well-established legal principle. Relying on the reality of emotional distress in order to justify the removal of claim-screening mechanisms is a sleight of hand that implies that the requirement was

Similarly, in *Corgan v. Muehling*, the Illinois Supreme Court held that a patient may recover damages for emotional distress in the absence of physical manifestations when the defendant psychologist breached his duty of care to the patient by engaging in sexual relations with that patient.[123] The court in *Corgan* relied significantly on its understanding of the science of emotional injury in rejecting the physical manifestation requirement.[124] The court readily accepted the proposition that emotional distress sustained with or without resulting physical manifestations can be equally harmful to a recipient.[125] Despite acknowledging the role of the physical manifestation requirement in screening claims, the court readily rejected this function in favor of jury determination.[126]

Scholars and judges frequently cite *Taylor v. Baptist Medical Center, Inc.*[127] among the seminal cases advocating the removal of the physical manifestations requirement.[128] The case presents another conclusory statement about emotional distress. At issue in *Taylor* was the recovery for mental anguish by the plaintiff patient who delivered a stillborn child. The attending physician did not arrive at the hospital until ten minutes after the plaintiff had given birth, and no physician was present during delivery. The court considered the availability of emotional distress damages where no physical injury had been demonstrated. The court considered several of its prior decisions and, recognizing its prior rule requiring consequent physical injury, ultimately held that denial of recovery to plaintiffs who lacked physical manifestations of injury ignored the "medical realities" that made no distinction between emotional distress with and without physical result.[129]

Finally, the Wisconsin Supreme Court proffered four reasons for its rejection of the physical manifestation rule in *Bowen v. Lumbermens Mutual Casualty Co.*[130] First, the court repeated the notion that emotional distress without physical manifestation could be as serious and severe as that with physical manifestation.[131] Second, the court pointed toward science as a more reliable method of proof than the physical manifestation

designed to prevent, rather than screen, claims for emotional distress.

123. 574 N.E.2d 602, 609 (Ill. 1991).

124. *Id.* at 608–09 (discussing "primary" and "secondary" responses to emotional trauma).

125. *Id.* at 609.

126. *Compare id.* at 607–08, *with id.* at 609.

127. 400 So. 2d 369 (Ala. 1981).

128. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS § 46(b) Reporter's Note cmt. g (Tentative Draft No. 5, 2007).

129. *Taylor*, 400 So. 2d at 374. Despite the court's reference to the "medical realities" that failed to provide a basis for distinction between types of emotional distress, the bulk of the court's opinion in *Taylor* was directed toward illuminating the lack of a coherent legal distinction between compensable emotional distress claims. *See id.* at 372–74.

130. 517 N.W.2d 432 (Wis. 1994).

131. *Id.* at 443.

requirement.[132] Third, the court argued that the requirement encouraged false claims through disingenuous pleading.[133] Finally, the court rejected the notion that lifting limitations would result in a flood of litigation.[134]

These cases all share the common notion that some reason—either internal or external to the legal system—allows courts to readily recognize emotional distress as a compensable injury. As some courts have pointed to the advancements in psychological sciences, others have simply appealed to inherent notions of fairness and equity. Under either approach, the liberalization of recovery for negligently inflicted emotional distress declines to account specifically for either the claim-screening or compensation-measuring function of the physical manifestation requirement.

C. Functional Approaches

Many efforts to revise the injury requirements for emotional distress claims, however, have been based on the special relationships of the parties at issue in the case.[135] Where there are unique associations between the parties in the case that indicate a significant likelihood of real and genuine emotional injury, many courts are willing to waive the injury requirement of physical manifestations.[136] As discussed above, there exist two special circumstances where courts are almost universally willing to infer seriousness of injury: the negligent handling of a corpse and the negligent delivery of a death notice.[137] Much of the impetus to abandon the physical manifestation requirement has been based on the notion that there exist some circumstances under which emotional injury is certain to occur.[138] The existence of a doctor–patient relationship has emerged as one of those circumstances.

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132. *Id.*

133. *Id.*; *see also* Magruder, *supra* note 42, at 1059.

134. *Bowen*, 517 N.W.2d at 443.

135. More precisely, these efforts are based on the *special* special relationships at issue. RESTATEMENT (THIRD) OF TORTS § 46(b) (Tentative Draft No. 5, 2007) provides for potential liability where negligent conduct "occurs in the course of specified categories of activities, undertakings, or relationships." This delineation is not quite as narrow as it might seem at first glance, however. *See* RESTATEMENT (THIRD) OF TORTS § 46 Reporter's Note cmt. d (Tentative Draft No. 5, 2007) (noting cases involving doctor–patient, contractual relationships, insurance claims, customer relations); *see also* Barmettler v. Reno Air, Inc., 956 P.2d 1382 (Nev. 1998) (employer–employee); Crump, *supra* note 18, at 443–44 (noting the diverse relationships forming the basis of negligent infliction of emotional distress actions). Certainly there is a subset of these relationships that gives rise to greater scrutiny of behavior.

136. *See* PROSSER & KEETON, *supra* note 6, at 362.

137. *See supra* note 74.

138. *See* PROSSER & KEETON, *supra* note 6, at 362 ("What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. *There may perhaps be other such cases*." (emphasis added)).

One very significant similarity among these first-impression cases is their factual context. Given the importance of health care in our modern society, it is not difficult to understand both the frequency of emotional injuries incurred through medical relationships and the particular foreseeability of emotional distress when these relationships are mishandled. Medical malpractice cases present the perfect formula for the obviation of relevant injury requirements for recovery of emotional distress damages. Not only do the cases present defendants with a pre-existing duty of care toward plaintiffs independent of a duty not to negligently inflict emotional distress, but the foreseeability of injury is logically consistent with the foreseeability of traditionally recognized exceptions to the physical manifestation requirement.

In *Gammon v. Osteopathic Hospital of Maine, Inc.*,[139] the Maine Supreme Court considered the application of its physical manifestation requirement. The facts in *Gammon* involved the delivery of a severed human leg to a grieving family amidst the deceased's personal effects. While acknowledging that the court's precedents supported denial of emotional distress damages where there were no physical manifestations of injury or no underlying independent tort, the court also identified its exception to the physical manifestation requirement where a corpse has been negligently mishandled.[140] Declining to extend the exception, the court instead "look[ed] to the rationale supporting the exception."[141] Recognizing the exceeding vulnerability of a grieving family, the court held that emotional distress was highly likely in the situation at hand and that injury was reasonably foreseeable.[142]

The Iowa Supreme Court, in *Oswald v. LeGrand*,[143] considered the viability of a claim for emotional distress in the context of a medical malpractice action.[144] The court first noted that without a claim of physical injury, the plaintiffs would typically be denied recovery.[145] However, the court noted that exceptions to this rule existed, consistent with those historical exceptions recognized around the country.[146] The court, considering

139. 534 A.2d 1282 (Me. 1987).

140. *Id.* at 1284–85 ("We have previously recognized that courts in other jurisdictions have allowed recovery for mental distress alone for negligent mishandling of corpses.").

141. *Id.* at 1285.

142. *Id.*

143. 453 N.W.2d 634 (Iowa 1990).

144. The details of *Oswald* would prompt almost any court to allow recovery, whatever the state of its negligence law. The plaintiff, whose doctor had left early for his vacation while she was in labor, gave birth to what nurses thought to be a stillborn child. Thirty minutes after the child was wrapped and placed on an instrument device table, the plaintiff father returned to the room, after calling relatives, and touched the child's finger. "Much to his surprise, his grasp was returned." *Id.* at 637. Despite being rushed to the intensive care unit, the child passed away twelve hours later.

145. *Id.* at 639.

146. *Id.* ("Such claims have been recognized in the negligent performance of contractual services that carry with them deeply emotional responses in the event of breach as, for example, in the trans-

the exception to the physical manifestation rule for death notices and handling of corpses, reasoned that "comparable circumstances" existed and that "liability for emotional injury should attach to the delivery of medical services."[147]

Likewise, the North Carolina Supreme Court attempted to clarify its emotional distress jurisprudence in *Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.*[148] *Johnson* involved the recovery of emotional distress damages in a medical malpractice action arising from the delivery of a stillborn fetus. The North Carolina Supreme Court eliminated the physical injury and manifestation requirements from the tort,[149] and instead relied on the relationship of the parties to provide the basis for the negligence claim.[150]

Finally, the Alaska Supreme Court, in a detailed opinion, announced its rejection of the physical manifestation requirement in *Chizmar v. Mackie*.[151] In *Chizmar*, the court considered the recovery of emotional distress damages arising from the defendant doctor's false positive HIV diagnosis of the plaintiff's husband.[152] Relying heavily on the California Supreme Court's analysis in *Molien*, the court concluded that the physical manifestation requirement was "an ineffective screening mechanism."[153] Although *Chizmar* seems to be an indictment of the physical manifestation requirement, the court was careful to cabin its holding:

> [W]henever a defendant stands in a contractual or fiduciary relationship with the plaintiff and the nature of this relationship imposes on the defendant a duty to refrain from conduct that would foreseeably result in emotional harm to the plaintiff, the plaintiff need not establish a physical injury in order to recover for the negligent infliction of emotional distress.[154]

Chizmar succinctly expresses an emerging strand of jurisprudence on the tort of negligent infliction of emotional distress. The court aptly recognized that two significant elements must be present before the physical manifestation requirement ought to be rejected. First, there must be a rela-

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mission and delivery of telegrams announcing the death of a close relative, and services incident to a funeral and burial." (citation omitted)).

147. *Id.*

148. 395 S.E.2d 85 (N.C. 1990).

149. *Id.* at 97.

150. *Id.* at 93.

151. 896 P.2d 196 (Alaska 1995).

152. The false positive diagnosis was allegedly a catalyst for a subsequent divorce between the plaintiff and her husband, leaving the plaintiff with the couple's two children, both of whom asserted claims arising from their father's absence.

153. *Chizmar*, 896 P.2d at 202 (citing Molien v. Kaiser Found. Hosps., 616 P.2d 813, 814 (Cal. 1980)).

154. *Id.* at 203.

tionship between the parties that provides the defendant with a preexisting duty of care toward the plaintiff. Second, the relationship between the parties must be of such a nature that emotional harm is a particularly likely consequence of a wrong between the parties.[155]

Some additional revisionist jurisprudence also supports the holding in *Chizmar*. The Supreme Court of California, eleven years after its decision in *Molien*, decided another case involving recovery for emotional distress in *Burgess v. Superior Court*.[156] *Burgess* significantly narrows the decision in *Molien*, which had ostensibly rejected the physical manifestation requirement where emotional distress formed an element of damages. In *Burgess*, the plaintiff claimed damages for emotional distress inflicted by her doctor during childbirth. First, the court held that, notwithstanding the state's bystander recovery rules, a cause of action for negligently inflicted emotional distress arises "in cases where a duty arising from a preexisting relationship is negligently breached."[157] As a corollary, consequent physical injury was not required where the emotional distress was serious, especially where "there exists a 'guarantee of genuineness in the circumstances of the case.'"[158]

These two prongs of interpretation seriously restrict the applicability of the rule applied in *Molien*. Under *Burgess*, the presence of a relationship giving rise to an independent duty is essential to a cause of action for emotional distress damages.[159] Additionally, the particular likelihood of emotional injury in the physician–patient context, particularly in childbirth, is exceedingly high.[160]

These cases demonstrate the modern consensus among courts that some relationships exist that, if negligently mishandled, definitively give rise to compensable emotional distress.[161] While the reasons for eliminating the physical manifestation requirement satisfy concerns over claim validity, any presumption of injury reflected in the cases lacks a firm

155. *See* Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 395 S.E.2d 85, 93 (N.C. 1990) ("[T]he correct rule was and is that the contractual relationship provides a strong factual basis to support either a claim for emotional distress based upon a breach of the contract or a finding of proximate causation and foreseeability of injury sufficient to establish a tort claim for emotional distress." (emphasis omitted)).

156. 831 P.2d 1197 (Cal. 1992).

157. *Id.* at 1201.

158. *Id.* at 1205 (quoting Molien v. Kaiser Found. Hosps., 616 P.2d 813, 818 (Cal. 1980)).

159. *Id.* at 1203 ("[O]nce the scope of the duty of care assumed by [defendant] to [plaintiff] is understood, [plaintiff's] claim for emotional distress damages may simply be viewed as an ordinary professional malpractice claim, which seeks as an element of damage compensation for her serious emotional distress.").

160. This collection of cases demonstrates, at least, the relative emotional fragility of parties during childbirth.

161. *See* PROSSER & KEETON, *supra* note 6, at 362; *cf.* Rodrigues v. State, 472 P.2d 509, 519 (Haw. 1970) ("The principle to be extracted from the exceptions is that they involve circumstances which guarantee the genuineness and seriousness of the claim.").

foundation in compensatory purposes.[162] On the whole, however, the courts have been demonstrably restrictive in recognizing such situations.

III. THE PRACTICAL EFFECT OF REJECTION

A. The Demise of Judicial Screening

For those cases that espouse views on the validity of emotional injury, rejection of the physical manifestation requirement in favor of jury determination fails to account for its claim-screening functions. It is certainly true that the legal community views emotional injuries as legally cognizable as physical injuries.[163] The physical manifestation requirement has never run contrary to this idea. It has, however, been a device for assessing claim validity, however blunt. None of the courts rejecting the physical manifestation requirement has indicated that its concerns about claim validity have been allayed by external forces. When courts reject this screening mechanism and substitute in its place only factual determinations to be made by the jury,[164] defendants are deprived of one of their great protections in judicial determination.[165] Indeed, the vagueness of such an abstract standard for intangible damage awards would almost entirely preclude dismissal or summary judgment.[166]

For all of the opposition to devices designed to measure the validity of the plaintiff's claim since *Molien*, the decisions rejecting the physical manifestation requirement in special cases have expressed anything but a disregard for the concerns about the genuineness of the plaintiff's claim. In fact, all of the attention to foreseeability suggests quite the opposite. Insisting that consequent emotional injury be a foreseeable result of some breach of duty can be viewed as a safeguard on the breadth of negligent infliction of emotional distress actions. Foreseeability, to the degree that it disposes of the physical manifestation requirement, has been additionally extended only to the medical context, suggesting that courts are not truly willing to let go of their concerns about the validity of claims of emotional distress.

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162. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (stating that the presumption of injury employed in common law defamation claims gives juries too much flexibility to award damages based on factors other than compensation).

163. *See, e.g.*, Bell, *supra* note 44, at 334.

164. *See* Chizmar v. Mackie, 896 P.2d 196, 204 (Alaska 1995); Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (Tex. 1987), *overruled by* Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993); *see also* RESTATEMENT (THIRD) OF TORTS § 46 Reporter's Note cmt. g (Tentative Draft No. 5, 2007).

165. *See, e.g.*, Garner v. Hickman, 733 So. 2d 191, 194 (Miss. 1999) ("Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

166. *See* Crump, *supra* note 18, at 471.

B. Imbalance of Corrective Justice and Deterrence

Moreover, the void left in the absence of injury requirements affects an imbalance in the individual and social objectives served by the claims. Instantly, claims for injury arising under negligence actions are recoverable in the same form as those in intentional actions, or even with a lesser showing of injury.[167] Again, however, there is no argument that these two causes of action serve the same basic objectives. To the extent that the focus on plaintiff's injury has been lessened, the outcomes of the action are more deterrent than corrective.

This does not compel the conclusion that the reduction of plaintiff's burden to show injury is a wrong turn in emotional distress jurisprudence. Indeed, there is certainly some argument that negligence and intent distinctions should be withdrawn from the field.[168] But as insight into the history of the negligence action and its parallel shape as an intentional tort indicates, the reduction of burdens on the plaintiff to prove his emotional distress can have more to do with regulating conduct than with compensating the plaintiff.[169] Society demands that those who handle the deceased, deliver sensitive information, and provide medical services exercise extreme caution in their relationships with the recipients of their services.[170] Relationships identified as those that circumstantially give rise to guarantees of genuine emotional distress are implicitly intertwined with moral and public policy judgments about the great degree of care that should be exercised in their maintenance.

On the whole, however, not all relationships or situations giving rise to emotional distress require or demand that sort of public regulation.[171] Moreover, the role of deterrence as a social byproduct of these actions is somewhat attenuated. The assumption that tort law can accomplish the diminution of negligent activity through deterrence and cost avoidance fails to account for an inherent attribute of negligent activity: its lack of purpose.[172] Additionally, negligence liability might be insufficient to deter risky conduct because of the existence of liability insurance.[173] While potential liability might caution persons to carefully evaluate activities that

167. *See, e.g.*, Rodrigues v. State, 472 P.2d 509, 519–20 (Haw. 1970) (instituting a requirement of "serious mental distress" in place of the physical manifestation requirement).

168. *See, e.g.*, Ver Hagen v. Gibbons, 177 N.W.2d 83, 87 (Wis. 1970) (Wilkie, J., dissenting).

169. *See* discussion *supra* Part I.B.3.

170. *Cf.* Corgan v. Muehling, 574 N.E.2d 602, 607 (Ill. 1991) (discussing a state law, passed during the pendency of the case, that would have provided for a cause of action by a patient against a psychotherapist who had sexually exploited that patient).

171. *See* discussion of bases of cause of action *supra* note 135.

172. *See* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 796 (1985); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 383 (1994) ("Moreover, much of negligent conduct is inadvertent conduct . . . .").

173. *See* Schwartz, *supra* note 172, at 382–83.

they undertake, the notion that people will avoid interacting in any of the relationships that give rise to negligent infliction of emotional distress claims unfortunately lacks some common-sense appeal.[174]

In summary, the rejection of the physical manifestation requirement where circumstantial guarantees of claim validity exist is supported in the annals of tort law. This shift in injury requirement is the product of judicial judgments about the social value of conduct and less about the compensability of individual injury. While courts may cast off the physical manifestation requirement consistent with deterrent justifications, they must be aware that those justifications are only valid for discrete forms of conduct and relationships. Where social interests in careful conduct are not as heavily implicated, compensation, rather than social utility, ought to be appealed to in order to justify liability. This necessarily requires some type of injury requirement to ensure the appropriate balance between individual and social interests.

IV. THE SOLUTION?

After rejection of the physical manifestation requirement, some courts and commentators, including the drafters of the Restatement (Third) of Torts, have favored leaving the void in the injury requirement.[175] As noted, some problems arise when the physical manifestation requirement is removed in favor of jury determination. The shift in focus away from the plaintiff's injury fails to properly screen claims at the pretrial stage and weakens the compensatory justifications for the negligence cause of action.[176]

Refusal to impose such a requirement can, again, be traced back to the California Supreme Court's opinion in *Molien*. Relying on dicta from Justice Traynor in *State Rubbish Collector's Ass'n v. Siliznoff*,[177] the court stated that "jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience."[178] This reliance on the experience of jurors appears to form the foundation of the rejection of expert testimony as a prerequisite to establish injury.[179]

174. A number of common (and sometimes immutable) relationships can give rise to liability for negligently inflicted emotional distress. *See supra* note 135 and accompanying text.

175. *See* Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980) (recognizing that some but not all cases will be susceptible to medical diagnosis); *see also* Chizmar v. Mackie, 896 P.2d 196, 205 (Alaska 1995) (explicitly rejecting requirement of medical diagnosability); RESTATEMENT (THIRD) OF TORTS § 46 Reporter's Note cmt. g (Tentative Draft No. 5, 2007) (same). More often, the rejection of the medical diagnosability requirement is implicit. *See, e.g.*, *Corgan*, 574 N.E.2d at 609.

176. See discussion *supra* Part I.B.

177. 240 P.2d 282 (Cal. 1952).

178. *Molien*, 616 P.2d at 821.

179. *See, e.g.*, *Chizmar*, 896 P.2d at 205 (stating that "[w]hile some jurisdictions have required

The *Molien* court's citation to Justice Traynor's venerable language in *Siliznoff* is exceedingly misleading about the legal proposition for which it is asserted. At issue in *Siliznoff* was the requirement of physical manifestations in intentional infliction of emotional distress cases. Justice Traynor believed that jurors could make assessments of injury by referring to their own experiences more accurately than by relying on physical manifestations because the defendant's conduct would be of greater evidentiary weight.[180] The transferability of this notion to negligent infliction of emotional distress actions is dubious because negligence actions are concerned less with punishing the defendant's conduct and more with compensating the plaintiff's injury.[181] Again, encouraging the jury to focus on the quality of the defendant's conduct rather than the extent of the plaintiff's injury subverts the basic goal of compensation in tort law.[182]

However, many courts have responded by filling that gap with other evidentiary obligations. By returning the focus of tort rules back to the plaintiff's injuries, concerns about the validity of the allegations, as well as the compensatory objectives of the cause of action, can be remedied. More recently, courts rejecting the physical manifestation requirement have replaced it with a requirement that plaintiff's injuries be medically or objectively diagnosable.[183]

Confidence in the advancement of psychiatric sciences has prompted many of the courts applying both the general and functional approaches to dispense with the physical manifestation requirement.[184] To the extent that modern advancements in science have changed courts' views about the

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claims of emotional distress to be 'medically diagnosable or objectifiable,' we do not believe that such a limitation is necessary or desirable," and quoting the relevant language from *Molien* regarding the juror's use of his own experience to determine injury); *cf. Corgan*, 574 N.E.2d at 609 ("In addition, jurors from their own experience will be able to determine whether . . . conduct results in severe emotional disturbance." (quoting Knierim v. Izzo, 174 N.E.2d 157, 164 (Ill. 1961))).

180. *See Siliznoff*, 240 P.2d at 286 ("Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom.").

181. *Cf.* Johnson v. Supersave Markets, Inc., 686 P.2d 209, 213 (Mont. 1984) ("Damages for emotional distress are compensatory, not punitive. Thus, the quality of the conduct is per se irrelevant . . . ." (quoting Meyer v. 4-D Insulation Co., 652 P.2d 852, 854 (Or. Ct. App. 1982))).

182. *See* discussion *supra* note 62 and accompanying text.

183. *See, e.g.*, Asuncion v. Columbia Hosp. for Women, 514 A.2d 1187, 1189 (D.C. 1986); Faya v. Almaraz, 620 A.2d 327, 338 (Md. 1993); Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 4 (Miss. 2007); Bass v. Nooney Co., 646 S.W.2d 765, 772–73 (Mo. 1983) (en banc); Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 395 S.E.2d 85, 97 (N.C. 1990); Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996); Hegel v. McMahon, 960 P.2d 424, 431 (Wash. 1998) (en banc).

184. *See, e.g.*, *Corgan*, 574 N.E.2d at 608 ("Scientific research has provided modern society with a detailed and scientific understanding of the human mind."); Paugh v. Hanks, 451 N.E.2d 759, 765 (Ohio 1983) (stating that the physical manifestation rule "completely ignores the advances made in modern medical and psychiatric science"); Molien v. Kaiser Found. Hosps., 616 P.2d 813, 817 (Cal. 1980) ("That medical science and particularly the field of mental health have made much progress in the 20th century is manifest . . . ."); Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974) ("From a medical perspective, negligently-inflicted mental distress may be characterized as a reaction to a traumatic stimulus, which may be physical or purely psychic.").

appropriateness of the physical manifestation requirement, relying on those advancements in place of the physical manifestation requirement is the most logically coherent solution. If science is capable of determining emotional injury more reliably than any other legal test, then science ought to be the standard by which judges and juries are to evaluate those claims. Somewhat paradoxically, however, imposition of requirements for expert medical evidence or testimony may actually serve to limit, rather than liberalize, recovery for emotional distress damages. While it may be in the interest of intellectual honesty to utilize science in assessing injury when science is the catalyst for change, there is no clear indication from the cases that it serves to better recognize emotional distress.

The significance of this fact is not to denigrate the medical diagnosability requirement but to illustrate that there is likely no silver bullet by which to solve the problems of assessing emotional injury. To the extent that the medical diagnosability requirement places greater burdens on the plaintiff, compensation is elevated over deterrence. This is probably the correct result in these cases because ultimately the courts are considering a negligence cause of action. The greater effort put into appropriately identifying and quantifying the injury at issue, the more corrective justice will be accomplished.

More broadly, courts must recognize that the specification of injury requirements on plaintiffs affects the balance of goals served by the negligent infliction of emotional distress cause of action. As the cases applying the functional approach indicate, this change can often be justified even if not purposeful. Where regulation of conduct is not a primary goal of the cause of action, however, courts must be aware of the side effects of alterations to the injury requirement. Preservation of the physical manifestation requirement or the adoption of the medical diagnosability requirement is the best way to preserve the essential attributes of the negligence cause of action. Choosing between the two requires an evaluation of the objectives sought by the court in both screening claims and promoting effective compensation.

CONCLUSION

The physical manifestation requirement is often decried as an arbitrary limitation on the right to recovery for emotional distress. However, a closer examination about the relationship between the quality of injurious conduct and the quantity of injury required demonstrates keen judicial sensitivity to individual and social interests. The fact that the physical manifestation requirement serves its most public function poorly does not justify its obviation without reference to its service in achieving a balance between individual and social interests.

Unfortunately, most courts rejecting the physical manifestation requirement have done so only because of its inability to screen claims with appropriate precision. In the absence of a remedy, this necessarily causes the tort to reflect greater social objectives while lessening its compensatory goals. While this change is defensible in a small set of circumstances, it is not universally justifiable.

The emergence of new injury requirements in the negligent infliction tort holds the promise of restoring the balance between concerns for compensation and regulation of conduct. The requirement of medical diagnosability serves to refocus courts and juries on the actual injuries sustained by the plaintiff in order to encourage an award that accurately reflects the loss sustained by the plaintiff. Preserving compensation as a chief component of the tort's calculus serves to ensure the proper balance of the law's objectives.

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