Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) §§ 45-47

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I. INTRODUCTION

Compensation for mental distress is the stepchild of tort law. Along with punitive damages, it offers a wildcard to litigants. Cases as renowned as the McDonald's coffee case have stimulated disdain and mockery. Yet since ancient England, with the recognition of the tort of assault, English and American common law, whether happily or not, have embraced compensation for mental distress.

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1 See generally John L. Diamond, Lawrence C. Levine & M. Stuart Madden, Understanding Torts (3d ed. 2007); Clarence Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1176-83 (1931).
2 See Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994), vacated, No. CV-93-02419, 1994 WL 16777704 (D.N.M. Nov 28, 1994) (initially awarding $160,000 in compensation (including pain and suffering) for burns she received from a cup of McDonald's coffee along with a staggering $2.7 million in punitive damages. The plaintiff spilled the coffee on herself, and the primary fault attributed to McDonald's was the temperature at which the coffee was served. Following a reduction in the verdict, the parties settled for an undisclosed amount.); Gerlin, A Matter of Degree: How a Jury Decided That a Coffee Spill is Worth 2.9 Million, Wall Street Journal, Sept. 1, 1994, at A1.
3 The tort of assault was recognized in England as early as 1348, in l. de S. v. W. de S., Y.B. Lib. Assis. 22 Edw. 3, f. 99, pl. 60 (1348) (awarding recovery when a drunken would-be customer of a tavern swung at the innkeeper's wife with a hatchet but did not strike her.
The American Law Institute in its Restatement (Third) of Torts: Liability for Physical and Emotional Harm,\(^4\) in Chapter 8 (Tentative Draft No. 5, April 4, 2007), although making many very significant and insightful contributions in the vast majority of its work, struggles in its reformulation of the law of tort liability for mental distress. While accurately reflecting much of the trends and mixture of the case law, the project risks merely ratifying the disorder that exists in this subject today. In this article, I attempt to look at the topics addressed by this section of the Restatement draft and suggest a different approach, to better effectuate the policy goals of tort law. The focus of my disagreement is not with the intentional infliction of emotional distress tort\(^6\) described in section 45, but with the far more troublesome rules of recovery for negligently inflicted mental distress.\(^7\)

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\(^4\) Under the **Restatement (Second) of Torts** § 21(1) (1965), "An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact and (b) the other is thereby put in such imminent apprehension."

\(^5\) See **Restatement (Third) of Torts** § 46 (Tentative Draft No. 5, 2007) [hereinafter **Restatement (Third) of Torts**].

\(^6\) **Restatement (Second) of Torts** § 46 (1965) articulates the law governing outrageous conduct causing severe emotional distress as such:

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
2. Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes emotional distress
   a. to a member of such person’s family immediate family who is present at the time, whether or not such distress results in bodily harm, or
   b. to any person who is present at the time, if such distress results in bodily harm

*See generally Diamond et al., supra* note 1, at § 1.06.

\(^7\) **Restatement (Third) of Torts** § 46 (2007) defines the tort of negligent conduct directly inflicting emotional distress on another as follows:

An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct:

a. places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; or
b. occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.
There is no American jurisdiction that fails to recognize the tort of assault.\(^8\) Assault, defined generally as the intent to create the apprehension of imminent harmful or offensive contact, provides compensation for mental distress without physical contact or injury.\(^9\) Similarly, every American jurisdiction recognizes compensation for mental distress caused by offensive contact resulting in no physical harm via the tort of battery.\(^10\) From the earliest of cases, the courts have had to struggle with questions of how to measure and validate such mental distress. Issues of compensation are obscured by the lack of any measurable market for pain, or any measurable remedy that has been accepted for such distress.\(^11\) In addition to compensation concerns however, there has also been concern focused on deterrence and retributive notions of justice that universally demand civil remedies.\(^12\) Indeed in this respect the tort of assault, as it is generally recognized and articulated by the Restatement of Torts, is problematic. It compensates only for imminent apprehension, leaving apprehension of future contact uncompensated, while at the same time compensating for mental distress caused by the mere apprehension of offensive and not harmful or even frightening contact.\(^13\) In part this limitation may reflect an early

\(^8\) See generally W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10 (5th ed. 1984) (discussing development of the tort of assault); DIAMOND ET AL., supra note 1, at § 1.03.

\(^9\) See Yale v. Town of Allenstown, 969 F. Supp. 798, 801 (D.N.H. 1997) (holding that a police officer in training stated a case of assault against another officer who, while standing behind her, drew his firearm and pointed it at her, leading her to fear that she was going to be shot). See generally DIAMOND ET AL., supra note 1, at § 1.03(A-B); DAN B. DOBBS, THE LAW OF TORTS §§ 33-35 (2000).

\(^10\) RESTATEMENT (SECOND) OF TORTS § 18 (1965) provides that:

(1) An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and

(b) an offensive contact with the person of the other directly or indirectly results.

See generally DIAMOND ET AL., supra note 1, at § 1.02 (discussing development and modern approach to the tort of battery); DOBBS, supra note 9, at §§ 28-31 (discussing development and modern approach to the tort of battery).

\(^11\) See DIAMOND ET AL., supra note 1, at § 14.03 (E).

\(^12\) See generally KEETON, supra note 8, at § 4 (discussing the factors affecting tort liability).

\(^13\) RESTATEMENT (SECOND) OF TORTS § 21 (1965). See generally Newman v. Gehl Corp., 731 F. Supp. 1048 (M.D. Fla. 1990) (holding that statements that anyone who was thinking of acting against the company should "think twice because he could make a phone call and that person could be taken care of" was not sufficient to state a claim for assault because the threat was insufficiently imminent).
uneasiness with compensating for mental distress except in cases of very specific and immediate acts of potential violence. Nevertheless, there is a potential inconsistency with compensating for the threat of the imminent impact of an apple pie without compensating for a threat of serious physical harm to occur even five minutes later. Clearly the courts seem most comfortable compensating for mental distress in very circumscribed and limited physical encounters typical of physical tort recovery. It is interesting also to note that the tort of assault coincides with the rules of self defense, which allow defensive action directed against the perpetrator only in the context of an imminent threat.\textsuperscript{14}

The much newer tort of intentional infliction of emotional distress emerged in the twentieth century to supplement glaring omissions in the tort of assault.\textsuperscript{15} The Restatements, following California precedents, ratified compensation for extreme and outrageous conduct intentionally causing extreme mental distress.\textsuperscript{16} Consequently, the threat to pummel an individual could potentially result in liability, although unrecognized in the tort of assault. While this tort originally required physical manifestation of the emotional distress, modern jurisdictions generally dispense with that requirement.\textsuperscript{17} Consequently, what was once a tort that had at least some basis in physical contact, albeit indirectly through the intensity of the emotional distress, now stands without any nexus with physical impact or injury. Unlike the traditional tort of assault, intentional infliction of mental distress is remarkably vague, leaving juries and judges to define what constitutes extreme and outrageous conduct in modern society.\textsuperscript{18} This vagueness has prompted First

\textsuperscript{14} \textit{RESTATEMENT (SECOND) OF TORTS} § 63 (1965) (articulating the privilege of self defense as such: (1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes another is about to inflict intentionally upon him.) \textit{See also} DIAMOND \textit{et al.}, \textit{supra} note 1, at § 2.02; KEETON, \textit{supra} note 8, at § 19.

\textsuperscript{15} \textit{See, e.g.}, Slocum v. Food Fair Stores of Florida, Inc., 100 So. 2d 396 (1958) (recognizing the tort of assault for the first time). In this case however, the court found that mere rude language not calculated to cause severe emotional distress was not sufficient to warrant liability; \textit{see also} DOBBS, \textit{supra} note 9, at §§ 303-307.

\textsuperscript{16} \textit{RESTATEMENT (SECOND) OF TORTS} § 46 (1965). \textit{See also} State Rubbish Collectors Ass’n v. Siliznoff, 38 Cal. 2d 330 (1952) (holding that recovery is allowed where physical injury results from intentionally subjecting the plaintiff to serious mental distress).

\textsuperscript{17} \textit{See} JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS 55 (3d ed. 2008); \textit{see also} RESTATEMENT (SECOND) OF TORTS § 46 (1965).

\textsuperscript{18} \textit{See} RESTATEMENT (SECOND) OF TORTS § 63 cmt. d (1965) (“liability has been found only where the conduct has been so outrageous in character, and so
Amendment concerns and required the intervention of the United States Supreme Court, in *Hustler v. Falwell*, to ensure that the tort does not chill protected speech that some find outrageous.\textsuperscript{19} Interestingly, however, the tort opens up a plethora of potential liability for intentionally inflicted mental distress. Both the Restatement and American courts accept relatively open ended invitations to assert mental distress claims when the culpability is intentional. Further expanding potential claims is the fact that intentionality is defined by many courts and the Restatement as either purposeful or substantial certainty.\textsuperscript{20} Finally, based on historical cases, the Restatement and most courts would also recognize reckless culpability as a basis for imposing liability under an otherwise intentional tort.\textsuperscript{21} As the next section will demonstrate the courts are much more confused over the parameters for negligently inflicted mental distress.

II. ZONE OF DANGER AND BYSTANDER RECOVERY

Negligent infliction of mental distress poses an enormous variety of instances where compensation could be conceivably awarded.\textsuperscript{22} Many of the parameters remain vague and undefined. Indeed, the most common types of negligently inflicted mental distress are rarely addressed by cases but remain lurking as potential directions for a new tort.

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19 Hustler v. Falwell, 485 U.S. 46 (1988) (holding that speech about a public figure is protected by the first amendment such that in the absence of New York Times malice, the printing of material that is false or with reckless disregard towards its veracity, there can be no liability for intentional infliction of mental distress. In this case, Hustler magazine printed a fictitious ad which depicted Minister Falwell engaging in sexual acts with his mother, but because the ad stated that it was fictitious and clearly didn’t hold itself out as true it did not constitute New York Times malice, and therefore was protected.).

20 See Restatement (Second) of Torts § 8a (1965) ("The word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."); see also Diamond et al., supra note 1, at § 1.01; Keeton, supra note 8, at § 24.

21 Boyle v. Chandler, 138 A. 273 (Del. 1927) (exemplifying a very early instance of a court recognizing recklessness as a sufficient basis of liability in a case of an improper burial.). See also Restatement (Second) of Torts § 46 cmt. i (1965).

22 See Keeton, supra note 8, at § 54 (establishing that there may be claims for mental disturbance with physical injury, mental disturbance alone, or mental disturbance by witnessing peril or harm to another).
explosion. Understandably, the Restatement (Third) attempts to severely restrain the contexts where such mental distress claims would be recognized as viable. Regretfully, the historical recognition of mental distress claims follow closely on the heels of classic physical tort claims and, as a result, fail to enhance any meaningful or comprehensive policy goals. Restatement (Third) § 47: “Negligent Infliction of Emotional Disturbance Resulting from Bodily Harm to a Third Person” reflects this historic trend.

Initially, negligent infliction of mental distress was restricted to parasitic pain resulting from a physical injury. In many ways, this was similar in form to the type of compensation awarded for an intentional battery claim. Just as in battery, the mental distress was secondary and supplemental to the wrongful physical impact. These early developments recognized that physical pain was a loss worthy of compensation, although the measurement of appropriate compensation would always remain problematic. As noted above, issues of deterrence and justice demanded that the pain not be ignored. Otherwise, there could be serious issues of under-deterrence and inadequate compensation for injury, a primary component of which was mental pain or distress.

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23 See infra note 115 & accompanying text.
24 Restatement (Third) Torts § 47 cmt. f (2007) provides that:

Some courts state that the actual test is foreseeability and that a person can recover even if the formal requirements are not satisfied. This approach is unsatisfactory because genuine emotional disturbance can occur and is foreseeable in many situations in which courts clearly would not permit recovery. For example, a negligent airline that causes the death of a beloved celebrity can foresee genuine emotional disturbance on the part of the celebrity’s fans but no court would permit recovery for emotional disturbance under these circumstances.

Id. at 82-107.
26 “The minute disturbance of the nerve centers caused by fear, shock or other emotions does not constitute bodily harm. It may, however, result in some appreciable illness or have some other effect upon the physical condition of the body which constitutes bodily harm.” Restatement (Second) Torts § 15 cmt. b (1965). See Diamond et al., supra note 1, at § 1.02[c].
27 “The mental distress recoverable was, in essence, the pain and suffering associated with a negligently caused physical injury, such as a broken leg.” See Diamond, supra note 17, at 324.
28 Impact has been defined broadly to even designate a slight electric shock and x-rays as sufficient “impact” for a claim of negligent infliction of mental distress. The artificiality of determining this impact has led to some jurisdictions to abolish the impact requirement. See Battalla v. State of New York, 176 N.E.2d 729, 731 (N.Y. 1961); see also Daley v. LaCroix, 179 N.W.2d 390, 395 (Mich. 1970).
Subsequently, courts began to allow compensation for negligently inflicted mental distress even when the impact was trivial, resulting in no physical injury. In such cases, the compensation was entirely for the mental distress. Nevertheless, the classic tort paradigm of an accident leading to physical contact remained.

Subsequently, a majority of American courts adopted the “zone of danger” rule reflected in the Restatement (Second) of Torts. Under this rule, a victim who suffers a near miss of a physical impact negligently caused by the defendant can be compensated for mental distress arising from the incident, at least when the distress causes physical manifestations, preferably a heart attack although severe stomach trouble could often suffice. Again this rule dovetails the classic physical tort cases and simply extends liability to a near impact victim who barely escapes direct physical injury but suffers indirect physical injury by the frightening scenario of the accident. It should be noted that the measurement of mental distress still remains problematic since the physical injury is only a prerequisite and not the measure of the mental injury.

The Restatement (Third) ratifies the rule first proposed in Dillon v. Legg, which for a long time represented a well-recognized minority alternative, as the new majority position. In Dillon v. Legg, the

29 See Christy Bros. Circus v. Turnage, 144 S.E. 680 (Ga. Ct. App. 1938) (holding that plaintiff, a spectator at the circus, could recover for mental distress with no physical injuries, since the plaintiff technically suffered an impact from horse droppings); DIAMOND, supra note 17, at 324.
30 Mitchell v. Rochester Ry. Co., 45 N.E. 354 (N.Y. 1896) (illustrating the injustice of the physical impact rule. The plaintiff suffered severe shock when she was nearly trampled by the defendant’s oncoming horses and she had a miscarriage. Unfortunately, the lack of any physical impact meant the denial of recovery.). See DIAMOND, supra note 17, at 324-325.
31 See Tobin v. Grossman, 249 N.E.2d 419 (1969) (illustrating a case, where a mother witnessed the immediate aftermath of an accident where her son was run over and injured. New York Court of Appeals dismissed the mother’s negligent infliction of mental distress claim and argued that she must have been in the zone of physical danger.). DIAMOND, supra note 17, at 325.
33 441 P.2d 912 (Cal. 1968).
34 “Most American courts have now adopted some version of this rule [of Dillon v. Legg].” RESTATEMENT (THIRD) OF TORTS § 47 (2007), at 116.
California Supreme Court rejected the then-majority rule and allowed a bystander who witnessed an accident outside the zone of danger to recover under certain circumstances.\textsuperscript{35} While the \textit{Dillon} case itself was potentially far more flexible in ascertaining when liability would exist, factors articulated in the decision quickly became fixed rules for many jurisdictions, including California.\textsuperscript{36} While those rules tend to vary slightly from jurisdiction to jurisdiction, two fundamental requirements remain generally fixed. As the Restatement (Third) characterizes the rules, the victim must perceive the event contemporaneously and be a close family member of the person suffering the bodily injury.\textsuperscript{37} Many jurisdictions also require physical manifestations although the Restatement (Third) does not, following the lead of California and some other states.\textsuperscript{38}

There are many policy questions raised by the Restatement (Third) and the majority’s current position on bystander recovery; it provides for both over and under-inclusion. For example, the close family member who comes upon the accident after the event will undoubtedly suffer severe mental distress. Some jurisdictions are more rigorous in limiting latecomers to the event. The current California position requires that the bystander be at the scene of the event, while other courts would allow

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Consequently, the requirements of contemporaneous perception and a close family relationship are pragmatic concessions to the need to draw lines, coupled with the judgment that the shock of contemporaneously perceiving bodily injury to a close family member is an especially traumatic experience. Both requirements must be satisfied; they are not merely factors to be considered in an ultimate judgment about whether liability can be imposed.
\end{quote}

\textit{Id.}

\textsuperscript{35} Dillon v. Legg, 441 P.2d 912 (Cal. 1968). \textit{See} DIAMOND \textit{ET AL.}, \textit{supra} note 1, at § 10.01[C][2].

\textsuperscript{36} A substantial minority of states expand liability to include the number of factors articulated by \textit{Dillon}. \textit{See}, e.g., Leong v. Takasaki, 520 P.2d 758 (Haw. 1974); D’Amico v. Alvarez Shipping Co., 326 A.2d 129 (Conn. Super. Ct. 1973); Miller v. Cook, 273 N.W.2d 567 (Mich. Ct. App. 1978); D’Ambra v. United States, 338 A.2d 524 (R.I. 1975); \textit{see} DIAMOND \textit{ET AL.}, \textit{supra} note 1, at §10.01[C][2]; KEETON, \textit{supra} note 8, at § 54; at 366 n.74.

\textsuperscript{37} \textit{RESTATEMENT (THIRD) OF TORTS} § 47 (2007), at 88, provides that:

\begin{quote}
Consequently, the requirements of contemporaneous perception and a close family relationship are pragmatic concessions to the need to draw lines, coupled with the judgment that the shock of contemporaneously perceiving bodily injury to a close family member is an especially traumatic experience. Both requirements must be satisfied; they are not merely factors to be considered in an ultimate judgment about whether liability can be imposed.
\end{quote}

\textit{Id.}

\textsuperscript{38} California and some other states have done away with the physical manifestation requirement in the bystander context. \textit{See} Hedlund v. Superior Court, 669 P.2d 41 (Cal. 1983). \textit{See} DIAMOND \textit{ET AL.}, \textit{supra} note 1, at § 10.01[C][2]. California also by legislation now allows registered “domestic partners” to qualify for recovery under negligent infliction of mental distress and wrongful death claims. \textit{See} CAL. [FAM.] CODE § 297; CAL. [CIV.] CODE § 1714.01.
bystanders who arrive at the immediate aftermath to recover. For example, a mother who arrived to see her child dying of electrocution moments after hearing an unexplained noise was excluded from recovery since the parent had not witnessed the accident. This limitation can be justified by the need to constrain liability, but it is harder (although not impossible) to claim that it represents more than an arbitrary limit. Is it truly likely that the close family member witnessing the accident as it takes place, as opposed to the family member who arrives later or hears about it later and then sees the victim, has suffered greater mental distress? In any event, it is clear that the close family member in the latter instance has suffered a real loss which may not be compensated by an actor who culpably caused that injury.

39 Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989) (holding that: [A] plaintiff may recovery damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.).

"Some courts permit recovery to a close family relative whose emotional injury follows closely on the heels of the accident." See Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 697 (Mass. 1980). One court recently broadened this factor to an "almost-contemporaneous" standard, holding that a "family member may recover for emotional distress caused by observing an injured relative at the scene of an accident after its occurrence and before there is substantial change in the relative's condition or location." See Hegel v. McMahon, 960 P.2d 424, 429 (Wash. 1998); see also DIAMOND ET AL., supra note 1, at § 10.01[C][2].

40 See Hathaway v. Superior Court, 169 Cal. Rptr. 435, 440-41 (Ct. App. 1980). In Hathaway, no duty was owed to plaintiff who rushed to the scene in time to see her child still suffering the effect of being electrocuted by a defective water cooler. See DIAMOND ET AL., supra note 1, at § 10.01[C][2].

41 See DIAMOND ET AL., supra note 1, at § 10.01[C][4]: While reasonable foreseeability is an effective limit on physical loss, it is a far less effective limit on liability for mental distress. Consequently, without special limits, reasonable foreseeable mental distress imposes a large burden of liability on defendants and ultimately the insured community. This increases the costs of legitimate and productive industries prone to unavoidable instances of negligence.
Bystander recovery can also be over-inclusive in potentially providing redundant or excessive compensation. A bystander who witnesses the death of a spouse as a result of a tortfeasor’s negligence already has a wrongful death claim. In addition to potential bystander claims, a spouse can maintain a loss of consortium and society action caused by the other spouse’s personal injuries. Furthermore, the injured spouse has a personal injury claim including potentially mental distress injuries, which will compensate the family unit. Finally, heirs of the deceased victim may have survival claims, including inheritance of the deceased’s pain and suffering while dying in the accident as well as punitive damages where appropriate in many but not all jurisdictions.

Consequently, there may be accidents where the mental distress claim is almost a redundant add-on to a massive family unit recovery, providing insignificant added deterrence or retributive justice. Other cases, as noted above, lack any real compensation for significant mental distress loss where wrongful death actions are not available, or limited by small pecuniary loss, and loss of consortium is not available. The excluded clearly include in most but not all jurisdictions non-close family members and, in the case of loss of consortium, parent-child relationships.

In essence, as I have argued previously, there is a feast-or-famine syllogism to bystander recovery as the majority and Restatement (Third) articulate. Some families qualify for wrongful death and personal injury via survival actions, loss of spousal consortium and punitive damages,

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43 Although recovery was originally granted only to husband who lost his wife’s services, virtually all states now allow either spouse to recovery for loss of consortium, which is grounded in such intangible harms as loss of companionship, affection, and society. See DIAMOND ET AL., supra note 1, at § 10.03[B]; see also 2 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 8.1(5), at 402 (2d ed. 1993) (requiring evidence of “reduced sexual companionship,” the inability to “engage in sports or social activities as they did before,” and evidence of new negative personality traits caused by the injury).

44 See DIAMOND ET AL., supra note 1, at § 14.03.

45 “Virtually all jurisdictions permit both survival actions and wrongful death actions by statute… . The survival action typically permits the estate to recover the decedent’s medical expenses, lost wages and, perhaps, her pain and suffering.” See DIAMOND ET AL., supra note 1, at § 10.03[D].

46 See Borer v. Am. Airlines, Inc., 19 Cal. 3d 441, 448-49 (1977) (citing concerns of multiple liability, the court held that children could not recover for loss of consortium and society).
while other families may recover very little for the accident even though they may suffer the same degree of mental distress. They are simply on the wrong side of the timeline in witnessing the accident. Even if, as argued by some, that delay mitigates the mental suffering (which I see no empirical evidence to document), there can be no doubt that a mental distress loss has occurred but is not being compensated by the culpable tortfeasor.

There are reasons for the current rule. Foremost, there is particular concern not to overburden the insured community with endless mental distress claims. This is particularly compelling since many would argue compensation for mental distress has limited functionality because money cannot replace the loss or ensure mental tranquility. Secondly, the current system is well within the tort comfort zone for accident compensation. It takes a classic accident scenario and simply includes those within the zone of danger or immediately beyond its parameters and treats the situation as it would the typical tort accident. The irony of this approach is increased compensation in this paradigm where compensation is already extensive but none or extremely limited compensation in the atypical tort scenario where the mental distress victim is not immediately at the scene. The justification for this is again the need to restrict overly burdensome liability in the context of mental distress which does not enjoy the limits that physics imposes on the physical injuries of an accident. In a previous article, I endorsed the proposal to limit recovery to special economic damages but to expand the potential plaintiffs. For example, a grandfather who suffers a heart attack hearing that his grandson has been negligently killed could recover the economic consequences of his distress, but no other bystander could recover more than the economic consequences of the distress. While by no means a perfect solution, the proposal I found persuasive attempts to allocate similar resources in a more equitable and functional way rather than merely dovetail classic tort recovery scenarios.

As the following sections illustrate, the real misfortune of endorsing this classic approach rather than seeking a more creative solution is the Restatement’s position on the destruction of chattel and distress over future illness and injury.

III. LIABILITY FOR PETS AND HEIRLOOMS

Courts are divided over whether to compensate for the emotional harm caused by the destruction or injury of a pet or family heirloom.

Many courts, endorsed by the proposed Restatement (Third), reject compensating for the anguish caused by such destruction. Carbasho v. Musulin is one such typical case decided by the Supreme Court of Appeals of West Virginia. In Carbasho, defendant motorist had negligently struck and killed plaintiff's dog, and the plaintiff argued that the loss of companionship meant that market value was an insufficient measure of damages. Although the state legislature had removed a key limiting phrase ("but in no case involving a dog can recovery be had in excess of the assessed value of such dog") from the West Virginia Code, the appellate court pointed out that state law still classifies dogs as personal property and that damages were the fair market value of the property at the time of destruction. Damages for sentimental value, mental suffering and emotional distress were thus not recoverable for the negligently inflicted death of a dog. While the Restatement (Second) has never expressly addressed the issue, the Restatement (Third) explicitly rejects recovery.

48 For a list of cases, see Restatement (Third) of Torts § 46 cmt. j, Reporters' Note (2007). See, e.g., Roman v. Carroll, 621 P.2d 307, 308 (Ariz. Ct. App. 1980) (holding that plaintiff could not recover for watching another dog attack her poodle because one may not recover for negligent infliction of emotional distress while witnessing injury to property); Lachenman v. Stice, 838 N.E.2d 451, 466-67 (Ind. Ct. App. 2005) (finding that the loss of a dog was only an economic one which did not allow for damages beyond fair market value); Allstate Ins. Co. v. Burger King Corp., 808 N.Y.S.2d 74, 74 (App. Div. 2006) (holding that plaintiffs had no cause of action for negligent infliction of emotional distress because the plaintiffs were never in any physical danger); Feger v. Warwick Animal Shelter, 814 N.Y.S.2d 700, 701-702 (App. Div. 2006) (refusing to allow recovery for emotional harm plaintiff allegedly suffered from the loss of her champion pure-bred Persian cat); Beaumont v. Basham, 205 S.W.3d 608, 615-18 (Tex. App. 2006) (upholding jury awards for mental anguish against sufficiency-of-the-evidence challenges).


50 Id. at 369-370.

51 Id. at 371.

52 Id. The court also notes that this is the general rule for the majority of jurisdictions and helpfully cites a number of other cases. Id.

53 Restatement (Third) of Torts § 46 cmt. j, Reporters Note (2007), provides that:

The Restatement (Second) of Torts §§ 436 and 436A, with its broad restriction on recovery for negligently inflicted emotional disturbance, implied omitted recovery for emotional harm resulting from property damage. Cases decided since the Second Restatement, despite the liberalization of recovery for emotional disturbance, have not expanded to encompass emotional harm due to damage to property.
On the other hand, there are ample cases supporting recovery. In *Campbell v. Animal Quarantine Station*, the family dog died from heat prostration while in the care of a quarantine station because the animal was left in a hot van without ventilation for at least an hour. The court held the owners of the dog could seek damages for serious emotional distress caused by the negligent destruction of their dog if the mental distress were reasonably foreseeable from the accident. Since the plaintiffs were neither eyewitnesses to their dog's death nor located within a reasonable distance of the accident, the Hawaii Supreme Court ruled that just witnessing the consequences, rather than the actual accident, was sufficient to recover for emotional distress. The court noted that Hawaii had allowed recovery for mental distress suffered from the negligent destruction of property for more than 10 years, without validating the fears of unlimited liability.

A variety of policy arguments have been advanced for denying non-economic recovery for destruction of chattels. Clearly, there has always been ambiguity over the advantages of compensating for losses that cannot be measured in economic terms; there is no mechanism for making the plaintiff whole in the way possible when compensating for market value losses. There is also concurrent concern over the cost that increased liability will impose on the insured community, making

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54 See, e.g., Peloquin v. Calcasieu Parish Police Jury, 367 So. 2d 1246 (3d Cir. 1979) (allowing "awards for mental anguish, humiliation, etc." for the wrongful trapping and destruction of plaintiffs' cat); Knowles Animal Hospital, Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (affirming the original jury trial verdict element of plaintiffs' mental pain and suffering for a defendant animal hospital's gross negligence by burning plaintiff's dog. The jury had awarded $13,000 against defendant animal hospital for placing the animal on a heating pad unattended for almost two days.) See W.E. Shipley, Annotation, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R.2d 1070 (2006).


56 *Campbell v. Animal Quarantine Station*, 632 P. 2d at 1067.

57 *Id.* at 1068-1069.

58 *Id.* at 1069.

59 *Id.* at 1071.


61 *Id.* at 249-50; see also United States v. Hatahley, 257 F.2d 920, 924-25 (10th Cir. 1958) (finding that $3,500 for Native Americans' mental suffering caused by the government's destruction of their horses, sheep, goats, and cattle was "wholly conjectural and picked out of thin air"). See generally W.E. Shipley, supra note 54.
productive activities more expensive and arguably less accessible for what is seen as a nebulous benefit for the additional compensation.\textsuperscript{62}

Finally, there is a lurking concern for exaggerated and fraudulent claims, unchecked by any empirical measurement of the emotional loss.\textsuperscript{63}

These arguments, of course, apply across the board for all mental distress liability cases. The issue really focuses on whether the benefits of providing emotional loss compensation, perceived in other contexts where emotional liability is allowed, apply with less or more intensity to injuries to pets and heirlooms. Alternatively, one could argue that deference to current practice and historical precedents justifies acquiescence to compensation for emotional distress in other contexts but should not be extended to any area where emotional liability is now not definitively recognized.\textsuperscript{64}

As numerous cases conclude, however, there are strong arguments for compensating emotional distress in general and in the context of beloved chattels, including pets. Compensating for the market value of the pet simply does not reflect the loss or value to the owner or even to society’s recognition of its value.\textsuperscript{65} It hardly appears satisfactory to run over a neighbor’s dog and then pay the neighbor $25, suggesting the neighbor keep the change. No one denies that emotional loss is real, nor is it so idiosyncratic that society could not estimate or assume certain minimal emotional consequences of the pet’s loss.\textsuperscript{66} Some courts

\textsuperscript{62} Schwartz & Laird, \textit{supra} note 60, at 260-67.

\textsuperscript{63} Id. at 232-233.

\textsuperscript{64} See, e.g., \textit{RESTATEMENT (THIRD) OF TORTS} § 46 cmt. j, Reporters’ Note (2007).

\textsuperscript{65} Indeed, some pet cases may involve dogs without any “ascertainable market value,” for example, if the dog was a gift and a mixed breed. See Brousseau v. Rosenthal, 443 N.Y.S.2d 285 (Civ. Ct. 1980) (noting that the dog was the plaintiff’s sole and constant companion since the death of her husband and that the loss of companionship was a proper element to consider in establishing the actual value of the dog); see also Corso v. Crawford Dog & Cat Hosp., 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979) (arguing that a pet is “not just a thing but occupies a special place somewhere in between a person and a piece of personal property,” the court expressly declined to follow earlier cases that had classified animals as property). But see Gluckman v. American Airlines, 844 F. Supp. 151, 1581 (S.D.N.Y. 1994) (criticizing the \textit{Corso} opinion and other similar opinions as “aberrations flying in the face of overwhelming authority to the contrary”).

\textsuperscript{66} Kondaurov v. Kerdasha, 629 S.E.2d 181, 186-87 (Va. 2006) (despite holding that Virginia law merely classifies animals as personal property, the court admitted that:

[i]t is beyond debate that animals, particularly dogs and cats, when kept as pets and companions occupy a position in human
recognize the horror of the intentional example above and allow recovery in certain malicious contexts for emotional loss. There are, of course, also potential punitive damages, although recent case law may limit substantially the amount by reference to the value of the chattel. Nevertheless, there are reasons why numerous courts allow recovery for destruction of pets even in the context of negligence.

Perhaps one of the strongest arguments for compensating for negligence is the deterrence against unreasonable careless actions. Unlike other accident compensation systems, negligence does more than compensate; in addition, it helps to avoid accidents by encouraging businesses and others to invest in the appropriate precautions. It has been strongly argued that imposing emotional loss liability on pets would cause substantially increased price expenses for veterinarian services. These price increases would be necessary to reflect increased malpractice liability, which has long been a contentious issue in the medical industry, where many tort reform statutes have attempted to place caps on liability for emotional loss. It has been further argued that these price increases will hurt pets by limiting access to veterinarian services, and that pets are better off with the cheaper pricing that reflects

affections far removed from livestock. Especially in the case of owners who are disabled, aged or lonely, an emotional bond may exist with a pet resembling that between parent and child, and the loss of such an animal may give rise to grief approaching that attending the loss of a family member."

See also RESTATEMENT (THIRD) OF TORTS § 46 cmt. j, Reporters’ Note (2007).

67 See La Porte v. Associated Independents, Inc., 163 So. 2d 267 (Fla. 1964) (upholding awarded compensatory damages of $2000 and punitive damages of $1000 in a case where the defendant, a sanitation worker, hurled a garbage can at the plaintiff’s miniatuur dachshund, Heidi, and killed her); Levine v. Knowles, 197 So. 2d 329 (Fla. Dist. Ct. App. 1967) (allowing recovery beyond market value for defendant veterinarian’s malicious and willful cremation of a pet’s body to avoid consequences of autopsy and probable malpractice, while barring recovery for mental pain and anguish without physical injury caused by simple negligence); Rebecca J. Huss, Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals, 86 MARQ. L. REV. 47 (2002). Such conduct could indeed constitute intentional infliction of mental distress. See supra notes 15-20 & accompanying text.

68 See Burgess v. Taylor, 44 S.W.3d 806, 812-13 (Ky. Ct. App. 2001) (supporting punitive damages and claims for intentional infliction of emotional distress for cases involving animals); Huss, supra note 67, at 91-92.


70 See Schwartz & Laird, supra note 60, at 260-63.

71 Schwartz and Laird further argue that such damage caps would be quickly challenged under state constitutional principles and eventually open the floodgates to more litigation. Id. at 268-72.
the extremely limited liability based on the very low market value of the
typical house pet. The argument is a serious one and appears to be
accepted by the proposed Restatement (Third) as one basis for expressly
opposing liability for emotional loss caused by injury to pets. The
difficulty with this argument is that in many ways it is a broad attack on
the tort of negligence rather than a specific response to a particular
industry's dilemma. Without compensating for a full loss, negligence
liability underdeters against wrongful conduct.

Wrongful death claims illustrate this dilemma. Historically,
wrongful death compensation was limited to the economic loss to the
survivor caused by the victim's death. While this worked well enough
for breadwinners, this compensation measurement provided inadequate
value to, among others, children, the destitute, and the elderly. In one
particularly striking wrongful death case, three children killed in an
automobile accident were valued at roughly $270 each, well less than the
value of the car radio. Consequently, the strong modern trend has been
to expand wrongful death compensation to include the intangible loss of
society or companionship value for survivors. In the context of
potential elder abuse in retirement homes, as well as medical procedures
for the elderly, this expansion provides an economic incentive to invest
in appropriate and reasonable precautions. While the image of a kindly
old family practitioner cavalierly taking risks to save money on an
economically low value patient such as a child or the elderly might
appear generally preposterous, it is far less preposterous to recognize
that national health care industries will allocate more resources to those

72 Id. at 266. See also Richard L. Cupp, Jr. & Amber E. Dean, Veterinarians in
43; Richard L. Cupp, Jr., Barking Up the Wrong Tree, L.A. TIMES, June 22,
1998, at B5. See RESTATEMENT (THIRD) OF TORTS § 46 cmt. j, Reporters' Note
(2007).
73 “The rule against liability for emotional harm due to injury to a pet, especially
in the case of veterinary malpractice, serves to make veterinary services more
readily available for pets.” RESTATEMENT (THIRD) OF TORTS § 46 cmt. j,
Reporters’ Note (2007).
74 See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 220 (5th ed. 1998)
(assuming that the economic purpose of negligence is “the deterrence of
inefficient accidents”); Livingston, supra note 69, at 814 & fn.188.
75 See Jane Goodman ET AL., Money, Sex, and Death: Gender Bias in Wrongful
76 Id.
77 Selders v. Armentroug, 220 N.W.2d 222 (Neb. 1974).
78 See DIAMOND ET AL., supra note 1, at § 10.03 [C][2].
sectors posing greater economic risks in order to maximize investor profits.\textsuperscript{79}

If the law of torts has value as a system to reduce accidents, massively undervaluing loss eliminates any meaningful deterrent role. In this context, the veterinarian industry would appear, despite its advocacy to the contrary, a particularly poor choice to be exempt from any non-economic liability. First, in the medical context, there is often massive economic loss absent in the pet service industries.\textsuperscript{80} While euthanasia is common and accepted for pets developing medical complications, it is not acceptable in most human contexts.\textsuperscript{81} Consequently, malpractice leading to further medical deterioration of a person can have substantial economic consequences while the veterinarian industry can simply euthanize a mistake. Furthermore, the medical industry has issues of rehabilitation and maintenance costs for injured patients that simply are not applicable for pets.\textsuperscript{82} In brief, unlike most other industries, the veterinarian industry benefits from substantial investment in a chattel that, in most cases, has only a nominal market value.\textsuperscript{83} Indeed, the entire cost of veterinarian services ordinarily exceeds the economic value of

\textsuperscript{79} "It is actually to veterinarians' and other service providers' advantage to support the establishment of a structured system in order to provide certainty and avoid any surprises from judicial decisions that may place a significant value on an animal." Huss, \textit{supra} note 67, at 104.

\textsuperscript{80} See Ammon v. Welty, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) (stating that "[i]t is undisputed that Hair Bear, an unregistered mixed breed with no particular training or skill other than as a companion, had no market value"); Brousseau, 443 N.Y.S.2d at 285; Morgan v. Kroupa, 702 A.2d 630, 632-33 (Vt. 1997) (stating that "[a] pet dog generally has no substantial market value as such ... [l]ike most pets, its worth is not primarily financial, but emotional").


\textsuperscript{83} This problem is compounded by the inability to recover for non-economic damages. "Without the prospect of recovering nonpecuniary damages, pet owners will have little incentive to sue for the destruction of their animals, knowing that attorneys' fees per se are not recoverable from the defendant." Livingston, \textit{supra} note 69, at 834.
the pet. Clearly, the love Americans have for their pets has created a lucrative market where demand for services creates high pricing.

In the context of pets, the proposed Restatement has eviscerated any meaningful deterrence for negligent conduct. Obviously, market competition, professional licensing, and humane impulses may encourage responsible veterinarian treatment. The question becomes whether the veterinarian industry in the case of the typical pet lacks a need for tort accountability. The market comparison appears particularly weak as a disincentive for negligent conduct. Veterinary skills, like medicine, are not accessible to the lay person, and the pet owner will consequently have difficulty recognizing a bad result and veterinary malpractice. Since pets do not talk, the nature of the ailment is even less accessible than for humans and a completely wrong diagnosis or treatment scenario is even likely to be totally unrecognized. This makes it difficult for other non-market systems such as licensing standards and professional sanctions to provide effective accountability as well. If the law of torts has a role in society, the veterinarian industry does not appear to be one where alternative systems of accountability are strong or effective.

The linchpin of the argument against meaningful tort accountability in the veterinarian industry appears to be based on primarily the cheaper accessibility of services that otherwise would be denied to pets. Again, the argument has some force. Many Americans go without adequate

84 See Jerry Gleeson, Dog-gone Expensive, J. NEWS (Westchester County, N.Y.), Dec. 26, 2001, at 1D. Gleeson cited an American Animal Hospital Association survey where more that one third of the respondents said they "would spend any amount of money to save the lives of their pets. Eighteen percent ... said they had spent more than $1,000 on veterinary care for their pets in the previous 12 months." Id. See also Huss, Valuation in Veterinary Malpractice, supra note 81, at fn.17; David J. Jefferson & Mary Carmichael, A Pampered Pet Nation, NEWSWEEK, May 30, 2007, http://web.archive.org/web/20070710180033/http://www.msnbc.msn.com/id/846816/site/newsweek (last visited Nov. 2, 2008).

85 According to the American Pet Products Manufacturers Association, pet owners will spend $40 billion on pet care and an estimated $50 billion by the end of the decade. Jefferson & Carmichael, supra note 84.

86 See Huss, Valuation in Veterinary Malpractice, supra note 81, at 488-490.

87 Veterinarians go through a minimum of six years of training, with two years of study in a pre-veterinary program and four years in a college of veterinary medicine. After obtaining a Doctor of Veterinary Medicine (D.V.M.) degree, individuals in most states apply for a license and must pass a national board examination. See Huss, Valuation in Veterinary Malpractice, supra note 81, at 488.

88 See Huss, Valuation in Veterinary Malpractice, supra note 81, at 504-505.

89 Schwartz & Laird, supra note 60, at 260-67.
health care and treatment for their own families.\textsuperscript{90} Yet, as noted above, veterinary services are, in many cases, already expensive and constitute a multi-billion industry.\textsuperscript{91} This can be justified by the high level of education required of veterinarians and the demand for their services.\textsuperscript{92} Nevertheless, there is an enormous difference between the astronomical liability imposed on medical practitioners in torts and the virtual immunity for the veterinarian industry. Imposing some loss of society or mental anguish compensation, where proven, hardly demands that the compensation equate with the anguish or loss of companionship of human loss as well as the enormous economic consequences simply not existing in the animal context.\textsuperscript{93} As endorsed by the Restatement (Third), there is simply an enormous disjunction between the charge for services and the compensation for any losses.\textsuperscript{94} Indeed, some would argue that compensation for emotional loss or loss of companionship can not be provided because the companionship value may equate or exceed the loss of human companionship.\textsuperscript{95} Still, to deny any compensation hardly seems an appropriate response to the significance of the loss, especially in the absence of other effective deterrent mechanisms.\textsuperscript{96}

It is true that liability insurance would add to costs just as it does for all industries. Nevertheless, this liability would not in any way equate


\textsuperscript{91} See Gleeson, supra note 84; Livingston, supra note 69, at 834; Jefferson & Carmichael, supra note 84.

\textsuperscript{92} See Huss, Valuation in Veterinary Malpractice, supra note 81, at 488-490.

\textsuperscript{93} Such arguments make sense especially with the imposition of a cap. See Livingston, supra note 69, at 826-829.

\textsuperscript{94} See supra note 84 & accompanying text.

\textsuperscript{95} See Nichols v. Sukaro Kennels, 555 N.W.2d 689, 690 (Iowa 1996) (noting the testimony of plaintiff's expert that a pet who is regarded as a family member "could be [valued] as high as the national debt"). See Livingston, supra note 69, at fn.202.


The veterinary profession's public embrace of the bond between humans and companion animals as a method of enticing clients should alone estop them from trying to prevent claims by the human companions of companion animals whom they have killed. Damages sought for emotional distress and loss of companionship explicitly derive from that bond.
with medical liability, and the potential of statutory caps would remain a very viable protection. Indeed, current statutory proposals with caps have been introduced in a variety of states. For instance, the Tennessee state legislature passed the “T-Bo Act,” which allows up to $4,000 in non-economic damages in the negligent and intentional killing of animal. Additionally, unlike the medical industry, there are major veterinary chains which are in a strong position to amortize reasonable liability costs. The veterinary industry is not a charitable industry, and it does not appear necessary to subsidize it by providing liability immunity. Nor is there any demonstrated reason to conclude that this lack of accountability has not increased negligent conduct. Indeed, negligent conduct as discussed above can simply lead to increased veterinary expenses and profits to the industry if euthanasia is not immediately applied. The cost of the distrust towards the torts system in this context can result in a less safe industry. There is thus no real evidence that moderate liability would hurt the industry or prevent reasonable access.

Beyond the veterinarian industry, the recent pet food poison cases illustrate in another context the lack of tort accountability in the protection of pets. Indeed, the serial assurances that the pet food was

97 Similar legislation to Tennessee’s T-Bo Act of 2000 has been introduced in the state legislatures of New Jersey, New York, Massachusetts, Rhode Island, California, Colorado, Mississippi, and Michigan. Schwartz & Laird, supra note 60, at 248-49. Most legislative attempts have failed, but proponents of expanded damages in pet lawsuits will likely redouble their efforts to enact legislation in other states. Id. at 249-50.

98 TENN. CODE ANN. 44-17-403 (2000). Interestingly, this law excludes, among others, licensed veterinarians and rural areas. Id. at 44-17-403(e), (f). Additionally, although it does not allow non-economic damages for acts of negligence, an Illinois statute allows recovery when the animal is subjected to aggravated cruelty or torture, or is injured or killed in bad faith when seized or impounded. Livingston, supra note 69, at n.235.

99 The increasing consolidation of the veterinary industry is apparent. For instance, Veterinary Centers of America (VCA) now owns 375 animal hospitals in 37 states, as well as a clinical laboratory system that provides diagnostic services to more than 14,000 veterinary clinics. VCA also employs 7,500 people and had gross revenues of $613.8 million in 2005. Another company, Banfield: The Pet Hospital, has opened more than 540 animal hospitals in conjunction with PetSmart, the world’s largest retailer of pet products. Healthy Pet and National Veterinary Associates own 86 veterinary clinics in 28 states.


100 See Huss, Valuation in Veterinary Malpractice, supra note 81, at 531.

101 Measuring the tainted food’s impact on animal health has proved an elusive goal. Previous estimates have ranged from the FDA’s admittedly low tally of
safe, followed by several incremental recalls, raises the question of how motivated the industry was to avoid additional pet deaths. The danger of contaminated animal food can also impact the human food chain as well. It has been argued that market reputation of the pet food industry remains a sufficient deterrence. The same argument could be made for human food, particularly since humans get more feedback on the impact of their food on their health. Indeed, the Restatements (First) and (Second) endorsed strict products liability based initially on cases that first recognized this heightened liability in the context of food. Somewhat ironically, the Restatement (Third) rejects virtually any tort protection for food in the context of animals by limiting liability to roughly 16 confirmed deaths to the more than 3,000 unconfirmed cases logged by one Web site.” Thousands of Pets Probably Sickened by Food: Veterinary Chain’s Data Estimates 39,000 Animals Were Affected ASSOCIATED PRESS, Apr. 9, 2007, http://www.msnbc.msn.com/id/18029173/ (last visited Nov. 2, 2008).

economic loss. For most pets, of course, this would be nominal. It is not clear, however, that market forces can provide adequate deterrence when in fact many pet deaths may not even be diagnosed as being caused by food and there is little economic incentive for plaintiff lawyer investigation.

A number of cases also impose liability for family heirlooms, wedding films, and other pictures of special family events. In Mieske v. Bartell Drug Co., a retail store negligently lost or destroyed the plaintiffs' movie film, which contained scenes of the plaintiffs' wedding, honeymoon, vacations, Christmas gatherings, birthdays, Little League participation by their son, family pets, the building of their home, and irreplaceable footage of members of their family. The alternative approach would have imposed liability simply for the undeveloped film or other market value of the chattel, but there can be little debate that the loss far exceeds the value of the film. As the court in Mieske stated:

107 For provision on general applicability of recovery for economic loss, see Restatement (Third) of Law, Products Liability, § 21 (1998).
108 See supra note 101 & accompanying text.
109 See Rodrigues v. State, 472 P.2d 509 (Haw. 1970) (allowing recovery of mental distress for negligence in the destruction of a family's house); Green v. Boston & Lowell R.R., 128 Mass. 221, 226-227 (Mass. 1880) (holding that "[t]he just rule of damages is the actual value to him who owns it, taking into the account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner"); Brown v. Frontier Theatres, Inc., 369 S.W.2d 299 (Tex. 1963) (stating that the concept of adequate and reasonable compensation requires that one should recover more than market value for the loss of items in an electrical fire which had their primary value in sentiment); Bond v. A.H. Bolo Corp., 602 S.W.2d 105 (Tex. Civ. App. 1980) (distinguishing from "used household goods, clothing, and personal effects" that did not have any "sentimental" value, the court held that one could take into consideration the feelings of the plaintiff owner for an envelope filled with birth certificates, newspaper clippings, and photographs negligently lost by defendant newspaper); Harvey v. Wheeler Transfer & Storage Co., 277 N.W. 627, 629 (Wis. 1938) (holding that factors such as "the description of the article, its original cost, and facts relative to its association with the owner or his family, as well as the opinion of the owner as to its value" matter in determining the sentimental value of keepsakes). But see Furlan v. Rayan Photo Works, Inc., 12 N.Y.S.2d 921 (1939) (holding that photograph to the owner does not include the element of sentimental value, the court limited the plaintiff's recovery to nominal damages in the sum of five dollars).
111 Mieske, 593 P.2d at 1309.
112 Certain types of property—such as family photographs or heirlooms—"have no market value, simply because they are not salable" (quoting VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 548 (10th ed. 2000)).
Plaintiffs lost not merely film able to capture images by exposure but rather film upon which was recorded a multitude of frames depicting many significant events in their lives. Awarding plaintiffs the funds to purchase 32 rolls of blank film is hardly a replacement of the 32 rolls of images which they had recorded over the years.¹¹³

In such special cases, consumers would likely be more willing to pay the premium that increased liability would impose in order to better insure the safety of their heirlooms and memories. Again, there appears little policy compulsion for the Restatement (Third) to effectively eliminate tort accountability in this context. Even the analogy to excessive costs in the medical context evaporates in the case of heirlooms.

IV. FEAR OF FUTURE INJURY AND DISEASE

Outside of the classic physical accident scenario such as an automobile collision, the Restatement (Third) squelches most actions for negligently inflicted mental distress. Section 46(b) does provide for recovery “in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.”¹¹⁴ This section refers primarily to scenarios long recognized by tort law: the delivering of a telegram erroneously announcing death or illness, or the mishandling of a corpse or bodily remains.¹¹⁵ Unfortunately, the proposed Restatement (Third), specifically in section 46, comment “h,” rejects compensation for fear of future injury arising from toxic exposure. It must be noted that mental distress can be negligently created in a variety of contexts; for example, a law professor could misstate a grade or the requirements for an examination, and even strangers can create considerable apprehension through misinformation. It is clear that limits are necessary to avoid excessive liability to the insured community. Nevertheless, to preclude recovery for mental distress over the potential of future injury derived from exposure to toxic substances posing risks of disease such as asbestosis or lung cancer raises serious issues. The Restatement (Third) section 46, comment “h” explains its rational for this limitation:¹¹⁶

One reason for this limitation is a concern that multiple lawsuits—one when the person is exposed and another when bodily injury occurs—would be required. On the other hand, exposure to some substances, such as

¹¹³ Mieske, 593 P.2d at 1310-11.
¹¹⁴ See cases cited in Restatement (Third) of Torts § 46b (2007).
¹¹⁵ Id. at § 46, cmt. d.
¹¹⁶ Id. at § 46, cmt. h.
HIV, that create a risk of contracting a dreaded disease, might create emotional harm in a way that does not raise the issue of multiple lawsuits because the person can determine relatively quickly whether the exposure actually did cause actual physical injury. These cases are more akin to those in which a person is put in danger of being hit by an automobile and thereby suffers emotional disturbance. In both the automobile and the HIV-exposure cases, the period during which the person is subject to risk and suffers emotional disturbance is (unlike the cancerphobia cases) relatively confined. Thus, Subsection (a) applies to cases in which the period between exposure and the termination of disease is sufficiently short.

The irony in the Restatement’s analysis is foremost that mental distress, covering a short period of time, for fear of future injury is compensable, but more onerous mental distress covering a longer period is not. Thus, the greater the harm, the less likely the Restatement would permit recovery. The explanation of avoiding issues of multiple lawsuits appears to be a red herring. Injury in the form of fear of future disease is sufficiently real and independent of the actual disease. For example, no one would question that drinking from a negligently contaminated well, would cause real distress to the victims whose risk of cancer had been dramatically increased. Furthermore, the problems of causation which often preclude recovery are most significant for injuries that may occur in the distant future, increasing the likelihood that there would be no compensation at all. On the other hand allowing recovery for distress for injuries that are likely to occur in the near future will often ensure multiple recoveries for those victims who do develop the disease and can more easily prove the causation due to temporal proximity. In addition, compensating for fear of future disease provides an important deterrent against negligent exposure to toxins, where otherwise the likelihood of accountability would be very limited. In the end, lurking behind the Restatement’s analysis is likely the unstated practical concern that compensating for short-term distress is not economically burdensome while compensating for long-term distress would be. The concern about excessive liability on the insured community is not by any means an unimportant issue. It is, however, essential to determine whether that concern can be addressed without creating the anomaly of compensating for lesser but not greater injuries. This is particularly true, as when noted above, the mental distress claim may be the primary basis for deterring wrongful conduct by ensuring accountability.
A. LIABILITY FOR FEAR OF FUTURE DISEASE WITHOUT PHYSICAL INJURY

Several cases, some acknowledged by the Restatement, have imposed liability for distress over toxic exposure increasing significantly the risk of disease. In Potter v. Firestone Tire & Rubber Co., the California Supreme Court considered whether the plaintiffs' exposure to toxic chemicals could support a cause of action for negligent infliction of emotional distress arising from their fear of cancer. Firestone repeatedly dumped liquid waste at a facility classified for solid waste only despite numerous warnings from their own engineer that such practices were contrary both to company policy and California law. The Court rejected the idea that recovery for negligent infliction of emotional distress is restricted in California to only cases involving physical injury or bystander recovery. The physical injury requirement urged by the defendants was seen as both "overinclusive and underinclusive when viewed in the light of its purported purpose of screening false claims [and also as a requirement that] encourages extravagant pleading and distorted testimony." While "meaningful limits on the class of potential plaintiffs and clear guidelines for resolving disputes in advance of trial are necessary, imposing a physical injury requirement represents an inherently flawed and inferior means of attempting to achieve these goals." The court noted the necessary limitation that fear of cancer claims must be objectively reasonable. While admitting that it "would be very hard pressed to find that, as a matter of law, a plaintiff faced with a 20 or 30 percent chance of developing cancer cannot genuinely, seriously and reasonably fear the prospect of cancer," the court nonetheless concluded "for the public policy reasons identified below, that emotional distress caused by the fear of a cancer that is not probable should generally not be compensable in a negligence action." Policy concerns included the cost of a potentially unlimited plaintiff class on the legal system, a potential negative impact on the healthcare system fearful of liability arising from prescription drugs with potentially harmful effects, potential further impact on the medical malpractice crisis, and the fact that "allowing recovery to all victims who have a fear of cancer may work to the detriment of those who sustain actual physical injury and those who ultimately develop cancer as a result of toxic exposure" by using up the resources of defendants, leaving them unable to pay future judgments against them. "A [further] reason supporting the imposition of a more likely than not limitation is to establish a

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118 Id. at 987.
119 Id. at 988.
120 Id. at 990.
121 Id. at 990.
122 Id. at 993.
sufficiently definite and predictable threshold for recovery to permit consistent application from case to case.\textsuperscript{123}

The Potter case imposes a significant minimum threshold by requiring that mental distress be based on the likelihood (over 50\%) that the victim will in fact suffer the disease. Other jurisdictions have been more generous. In Hagerty \textit{v. L & L Marine Services, Inc.},\textsuperscript{124} the Court of Appeals for the Fifth Circuit considered the claims of a seaman who was drenched with the toxic chemicals benzene, toluene, and xyolene in the course of employment, due to an alleged defect in the equipment being used. Although the court held that the plaintiff's brief period of dizziness, and leg cramps suffered immediately after his exposure constituted a physical injury, this was not a necessary element of his mental distress claim arising out of his fear of contracting cancer.

\textit{I}t is doubtful that the trier of fact is any less able to decide the factor extent of mental suffering in the event of a physical injury or impact. With or without physical injury or impact, a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence. The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness. It is for the jury to decide questions such as the existence, severity, and reasonableness of fear.\textsuperscript{125}

Consequently the Fifth Circuit merely requires reasonable fear, a far more generous standard than the California Supreme Court in Potter. The decision in Hagerty that mental distress damages for fear of cancer are recoverable even in the absence of physical injury was reaffirmed by Smith \textit{v. A.C. & S. Inc.}\textsuperscript{126} This case, however, applied the limitation that the fear be genuine and specific, denying recovery because the plaintiff testified only to a general concern for his future health and not to a specific fear of cancer.

\textsuperscript{123} Id. at 993.
\textsuperscript{124} 788 F.2d 315 (5th Cir. 1986).
\textsuperscript{125} Id. at 318.
\textsuperscript{126} 843 F.2d 854 (5th Cir. 1988). In a diversity case applying Louisiana law, the court followed the rule in Hagerty \textit{v. L & L Marine Services Inc.}, 788 F.2d 315 (5th Cir. 1986), that mental distress damages for fear of cancer are recoverable even in the absence of physical injury. However in this case because the plaintiff had testified only to a general concern for his future health, and not specifically to a fear of cancer, the court held that evidence relating to an increased risk of contracting cancer was inadmissible.
In *Bonnette v. Cononco, Inc.*, the Louisiana Supreme Court considered the claims of numerous plaintiffs suing because they were sold soil containing asbestos fibers that had been removed from Conoco’s construction site facility in Calcasieu Parish, alleging that Conoco was negligent in failing to test the soil before allowing it to be transported off the premises, and in failing to warn the excavator that it contained asbestos. The trial court’s finding that compensation for increased risk could be premised on a “slight” increase in the chance of contracting an asbestos related disease was overturned as was an award for mental anguish arising from the plaintiffs’ fears of future injury. The court quoted the Texas Supreme Court, noting that “most Americans are daily subjected to toxic substances in the air they breathe and the food they eat. Suits for mental anguish damages caused by exposure that has not resulted in disease would compete with suits for manifest diseases for the legal system’s limited resources.”

*Bonnette* required that “in order for plaintiffs to recover emotional distress damages in the absence of a manifest physical injury, they must prove their claim is not spurious by showing a particular likelihood of genuine and serious mental distress arising from special circumstances.” That the fear of future injury was reasonable was insufficient to support recovery. Nevertheless, the decision does not preclude imposing liability when the showing of genuine and serious mental distress is sufficient.

The *In re Moorenovich* court held that Maine would recognize a claim for damages based on present anxiety and fear that the plaintiffs will contract cancer arising out of exposure to asbestos, even in the absence of any physical injury. The court acknowledged that many states have been very hesitant to expand the scope of negligent infliction of emotional distress beyond recovery parasitic to a physical injury. However, with the acceptance of a bystander recovery for negligent infliction of mental distress “the Maine Supreme Judicial Court has shifted its focus from a requirement of physical injury to defendants’ duty not to create the potential for such harm in analyzing emotional distress cases.” Potential liability was limited in this case by the fact that “[f]irst, that any anxiety must have been proximately caused by plaintiff’s exposure to asbestos. Moreover, the anxiety must be reasonable. Finally, defendants must be legally responsible for the plaintiff’s exposure to asbestos.” The *Moorenovich* court appears to side with *Hagerty* in allowing reasonable claims of emotional distress.

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127 837 So. 2d 1219 (La., 2003).
128 Id. at 1235.
129 Id. at 1235.
131 Id. at 637.
132 Id. at 637.
without imposing artificial limitations based on a specific likelihood of contracting the feared disease.

The Court of Appeals for the Sixth Circuit in *Sterling v. Velsicol Chemical Corp.*,\(^{133}\) considered the claims of a number of residents exposed to toxic chemicals in their well water as a result of their improper disposal. Under Tennessee law "mental distress which results from the fear that an already existent injury will lead to the future onset of an as yet unrealized disease, constitutes an element of recovery only where such distress is either foreseeable or is a natural consequence of, or reasonably expected to flow."\(^{134}\) The central inquiry for mental distress damages flowing from fear of future injury in *Sterling* was not merely the percentage chance that disease would materialize; although the plaintiffs suffered physical injury, the Sixth Circuit appeared to affirm the principal that so long as "each plaintiff produced evidence that they personally suffered from a reasonable fear of contracting cancer or some other disease in the future as a result of ingesting [toxic] chemicals" their fears were compensable.\(^{135}\) The foregoing cases demonstrate that at least a handful of courts have been willing to entertain claims for negligently inflicted mental distress arising out of fear of future injury without imposing artificial limitations on recovery based on the existence of physical impact or injury.

**B. LIABILITY OF FEAR OF FUTURE DISEASE WITH PHYSICAL INJURY.**

Most courts would grant recovery for mental distress for the risk of future disease if the distress is parasitic to a physical injury. Indeed, this appears to be a reaffirmation of classic tort law principal derived from the original impact rule.\(^{136}\) However, a number of jurisdictions have been extremely flexible in defining what constitutes a physical injury. For example, in *Bryson v. Pillsbury Co.*,\(^{137}\) the court considered whether asymptomatic chromosomal damage constituted a physical injury that could support parasitic recovery for negligent infliction of emotional distress. The plaintiff’s and defendant’s experts disputed whether the chromosomal damage Bryson received as a result of entering a pond contaminated with the pesticide Captan was a present physical injury. Simply because the plaintiff’s injuries were subcellular, the *Bryson* court was unwilling to say that they were not real, and the conflicting testimony made the case ultimately a question for the jury to decide.

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\(^{133}\) 855 F.2d 1188 (6th Cir. 1988).
\(^{134}\) Id. at 1205-06.
\(^{135}\) Id. at 1206.
\(^{136}\) See *supra* note 27 & accompanying text.
\(^{137}\) 573 N.W.2d 718 (Minn. Ct. App. 1997).
whether the chromosomal breakage constituted a present physical injury.\textsuperscript{138}

The Tennessee Supreme Court in \textit{Laxton v. Orkin Exterminating Co., Inc.},\textsuperscript{139} held that exposure to the toxin chlordane was a sufficient "physical injury" to support recovery for mental anguish despite the fact that blood tests showed no abnormalities. For months after the plaintiffs' home was sprayed for termites, they noticed a foul smell and taste to their water supply. The court sustained a jury instruction stating "if [the plaintiffs] ingested any amount of the toxic substance, it is the judgment of the Court that that is at least a technical physical injury ... where there is any physical injury at all—any attendant mental pain and suffering is compensable.\textsuperscript{140}

The Court of Appeals for the Third Circuit, applying New Jersey law in \textit{Herber v. Johns-Manville Corp.},\textsuperscript{141} held that pleural thickening resulting from asbestos exposure constituted a physical impact which could support recovery for negligent infliction of emotional distress, in the form of fear of contracting cancer. This case was distinguished from those where plaintiff had suffered no physical impact or injury, where physical manifestation of emotional distress is required for recovery. "Because the jury in this case found that exposure to the defendants' asbestos had caused pleural thickening, we are confident that the Supreme Court of New Jersey would treat Mr. Herber's emotional distress claim no differently than a pain and suffering claim in a slip and fall case."\textsuperscript{142} And "while appellees' intimate that the infiltration of Mr. Herber's lungs may be characterized as involving little impact and the pleural thickening as involving insubstantial injury, only slight impact and injury have been found by the New Jersey courts to warrant recovery for emotional distress caused by fear."\textsuperscript{143}

Employees allegedly exposed to high doses of radiation in the course of their work at a nuclear weapons facility in \textit{Day v. NLO},\textsuperscript{144} were allowed to recover for their negligently inflicted mental distress without the requirement that it be "severe and debilitating because "the severe and debilitating requirement does not apply to emotional distress cases which are accompanied by physical injury."\textsuperscript{145} Although the court held that low doses of radiation alone do not constitute a physical injury, "if

\textsuperscript{138} \textit{Id.} at 721.
\textsuperscript{139} 639 S.W.2d 431, 434 (Tenn. 1982).
\textsuperscript{140} \textit{Id.} at 434.
\textsuperscript{141} 785 F.2d 79, 85 (3rd Cir. 1986).
\textsuperscript{142} \textit{Id.} at 85.
\textsuperscript{143} \textit{Id.} at 85.
\textsuperscript{144} 851 F. Supp. 869 (S.D. Ohio, 1994).
\textsuperscript{145} \textit{Id.} at 878.
the plaintiffs could prove that they were exposed to sufficiently high dose of radiation, this in itself would constitute a physical injury, sufficient to bring their action for emotional distress based on their exposure.\textsuperscript{146} Even in the event of impact the plaintiffs were also required to show that they have actually suffered emotional distress from fear of cancer, and that such fears are reasonable. The court also recognized that in the absence of physical injury a plaintiff could still bring a claim for emotional distress if such distress was “severe and debilitating.”\textsuperscript{147} “Just like a physical injury, the severe and debilitating requirement ensures that liability probably will not be affixed for emotional distress claims which are speculative or even fraudulent.”\textsuperscript{148}

The above decisions suggest that even a number of courts that do not appear to subscribe to allowing mental distress without physical injury in fact so define physical injury to virtually equate it with toxic contact.\textsuperscript{149} However, it is true that a number of other courts also cited by the Restatement (Third) are more stringent in requiring a physical impact or injury. For example, the Pennsylvania Supreme Court supports a stricter view of physical injury as prerequisite to mental distress recovery for fear of future disease. In \textit{Simmons v. Pacor, Inc.},\textsuperscript{150} it held that asymptomatic pleural thickening is not a compensable injury, and could

\textsuperscript{146} \textit{Id.} at 878.
\textsuperscript{147} \textit{Id.} at 879.
\textsuperscript{148} \textit{Id.} at 879.
\textsuperscript{149} \textit{See also} \textit{Mauro v. Owens-Corning Fiberglas Corp.}, 225 N.J. Super. 196 (N.J. Super. Ct. App. Div. 1988), where the court considered the claims of a plumber occupationally exposed to asbestos. The court upheld a jury verdict giving damages for fear of cancer to the plaintiff who had pleural thickening, but had no clinical symptoms of asbestos exposure and no physical manifestations of his emotional distress.

The trial judge charged the jury that in order for the plaintiff to recover for emotional distress related to his enhanced risk of cancer, the jury must find plaintiff was currently suffering from serious fear or emotional distress, his fear was proximately caused by his exposure to asbestos, and the fear was reasonable.

\textit{Id.} at 208. The court noted that “our Supreme Court abandoned the concept that physical impact was a predicate to a recovery for fright or emotional distress. However, in such cases, plaintiff must demonstrate that the fright or emotional distress resulted in ‘substantial bodily injury or sickness.’” \textit{Id.} at 209 (citation omitted). The court also noted that “proof that emotional distress has resulted in ‘substantial bodily injury or sickness’ is not required when plaintiff suffers from a present physical disease attributable to defendant’s tortious conduct.” \textit{Id.} at 209. The court in this case noted that the third circuit, in applying New Jersey law, had already allowed recovery of emotional distress damages by a plaintiff with pleural thickening. \textit{Id.} at 210.

\textsuperscript{150} 674 A.2d 232 (Pa. 1996).
not support a claim for mental anguish. The plaintiffs in this case sought recovery for their mental distress on the theory that pleural thickening, visible on a chest x-ray, constituted a physical injury. Because in Pennsylvania, the presence of "nonmalignant, asbestos related lung pathology, whether or not accompanied by clinical symptoms" did not trigger the statute of limitations for a later occurring disease, the court reasoned that the "natural extension ... is to preclude an action for asymptomatic pleural thickening since [a]ppellants are permitted to commence an action when the symptoms and physical impairment actually develop."\(^ {151} \) Absent physical injury, recovery for negligent infliction of emotional distress in Pennsylvania is restricted to specific exception to which this case does not belong. According to the court in Pacor, "damages for fear of cancer are speculative ... [t]he actual compensation due to the plaintiff can be more accurately assessed when the disease has manifested."\(^ {152} \)

\(^{151}\) Id. at 237.

\(^{152}\) Id. at 238. See also Temple-Inland Prods. Corp. v. Carter, 993 S.W.2d 88 (Tex. 1999), where the Texas Supreme Court rejected emotional distress claims of electrical workers negligently exposed to asbestos but not suffering from asbestos related disease. The court overturned the ruling of the court of appeals which had held that "a plaintiff may recover for mental anguish based upon fear of cancer even though the evidence shows the plaintiff does not have, and in reasonable medical probability, will not have cancer, so long as there has been exposure to the causative agent and the fear is reasonable." \(^{154} \) Id. at 90. The general rule, the court noted, is that plaintiffs not suffering physical injury may not recover for emotional distress, and the exposure in this case did not fall into any of the exceptions. However, in this summary judgment proceeding the court accepted the plaintiffs’ claims that their exposure constituted a physical injury, but still denied their claim for damages. "While the existence of physical injury is ordinarily necessary for recovery of mental anguish damages except in those instances already mentioned, such injury may not be sufficient for recovery of mental anguish damages when the injury has not produced disease, despite a reasonable fear that such disease will develop." \(^{152} \) Id. at 92. The court grounded its decision on the policy concerns that the long latency period of asbestos related harm makes it very difficult to evaluate whether exposure claims are truly meritorious, which in turn makes liability difficult to predict. "The question is not, of course, whether Carter and Wilson have themselves suffered genuine distress over their own exposure. We assume they have, and that their anxiety is reasonable. The question, rather, is whether this type of claim—for fear of an increased risk of developing an asbestos-related disease when no disease is presently manifest—should be permitted ...." \(^{152} \) Id. at 93. To this the court answers in the negative. The court did however caution that "[t]he principles we have used to deny recovery of mental anguish damages for fear of the possibility of developing a disease as a result of an exposure to asbestos may not yield the same result when the exposure is to some other dangerous or toxic element." \(^{152} \) Id. at 94.
In *Metro-North Commuter Railroad Co. v. Buckley*, the Supreme Court reversed the ruling of the Second Circuit, and held that a pipe fitter exposed daily to considerable amounts of asbestos could not recover for negligently inflicted emotional distress in the absence of a physical injury under the Federal Employers' Liability Act (FELA). Physical contact with insulation dust containing asbestos did not amount "to a 'physical impact', as this Court used that term in *Gottshall*" such that it could sustain a recovery for emotional distress:

Taken together, the language and cited precedent indicate that the words "physical impact" do not encompass every form of physical contact. And, in particular, they do not include a contact that amounts to no more than an exposure—an exposure, such as that before us, to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time.

The Court also noted that common law courts have restricted recovery for damages for negligent infliction of emotional distress to narrowly defined categories for policy reasons cited in *Gottshall* that militate against an expansive definition of "physical impact." 

"Those reasons include: (a) special difficulty for judges and juries in separating valid, important claims from those that are invalid or trivial; (b) a threat of unlimited and unpredictable liability and (c) the potential for a flood of comparatively unimportant or trivial claims (internal quotation marks omitted)." Because some degree of contact with carcinogenic substances is extremely common in modern society, the Court observed that such a rule would open the courts to a large number of claims without providing a meaningful analysis to separate meritorious from unmeritorious claims. The Court also expressed concern that allowing claims for emotional distress caused by fear of cancer might exhaust the resources of potential defendants so that they could not pay later claims by those who had actually contracted cancer.

Justice Ginsburg in her partially concurring and dissenting opinion argued, "Buckley's extensive contact with asbestos particles in Grand Central's tunnels, as I comprehend his situation, constituted physical

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154 Id. at 429.
155 Id. at 432.
156 Id. at 433.
157 Id. at 434 (citation omitted).
158 Id. at 434-36.
impact as that term was used in *Gottshall*.” While the majority in *Metro-North* are candid in their concern about unlimited and unpredictable liability and a flood of trivial claims, Justice Ginsburg’s opinion indicates concern that the tortfeasors should be held accountable and supports the argument that there can be strict evidence of authentic mental distress. On the facts, Justice Ginsburg found that the plaintiff failed “to present objective evidence of severe emotional distress.” Nevertheless, Justice Ginsburg’s analysis seems to side with those cases that would hold that toxic contact, itself, in fact constitutes physical impact sufficient to warrant liability for fear of future disease from exposure when properly documented. As noted above, the Ginsburg opinion, along with other similar court decisions, while ostensibly adhering to the requirement that there be adequate impact or physical injury to award emotional damages are, in fact, so expansive that the decisions in essence essentially endorse liability without physical injury. It is important in evaluating judicial support for emotional liability in this context not to allocate these decisions inappropriately on the side against liability for fear of future injury in the event of toxic exposure. If such decisions are properly classified it is clear that judicial opinion on this topic, including important courts such as the California Supreme Court, is far more unsettled than some courts may assert.

**C. THE POLICY DEBATE**

Professors Henderson and Twerski, in *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring,* acknowledge that claims based on negligent infliction of emotional distress are at least superficially plausible but reject them on policy grounds. They note at the outset that courts have traditionally restricted negligent infliction of emotional distress claims out of “concern that allowing recovery for mental upset based on inadvertent conduct is an invitation to open-ended and uncontrollable litigation.” They argue that tort “was never designed to allow compensation for general malaise that follows upon the heels of negligent conduct. Rather, it allows recovery for serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature.” The risk of injury in asbestos cases, according to

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159 *Id.* at 445.
160 See Potter v. Firestone Tire Rubber Co., 863 P.2d 795 (1993); *supra* note 118 & accompanying text.
162 *Id.* at 824.
163 *Id.* at 827.
the authors, is too remote to justify any award for mental distress.\textsuperscript{164} These cases also present serious challenges to separating meritorious from non-meritorious claims.\textsuperscript{165} The authors also express concern that allowing such claims gives precedence to those less seriously injured and that negligent infliction of emotional distress claims might exhaust the resources of defendants, leaving them unable to compensate those who do eventually develop serious diseases.\textsuperscript{166}

While these arguments have great appeal, it is not general malaise that is being compensated, but reasonable mental distress arising from a specific wrongdoing that otherwise is not likely to be deterred. Instead of banning mental distress, it would appear more desirable to follow the lead of \textit{Potter, Hagerty,} and Justice Ginsburg's dissent in \textit{Metro-North} and allow at least some restricted compensation. Professors Henderson and Twerski's argument that mental distress compensation is limited to reactions to immediate, violent events appears to focus on important lines of cases, but ignores the full depth of current non-economic compensation. Twerski and Henderson themselves cite to California cases, including \textit{Ochoa v. Superior Court}\textsuperscript{167} and \textit{Molien v. Kaiser}\textsuperscript{168} that demonstrate the willingness of courts to compensate in situations going beyond immediate violent events. In \textit{Ochoa}, the parents' distress in viewing their child's deterioration for failure to be transferred into a hospital facility leads to mental distress.\textsuperscript{169} In \textit{Molien}, the misdiagnosis for syphilis in one spouse leads to recriminations by the other and ultimately a divorce.\textsuperscript{170} It also seems appropriate to consider the tort of loss of consortium and society and compensation for loss of companionship in many wrongful death cases. While not technically emotional distress this non-economic emotional compensation is hardly associated with sudden accidents, but pervades tortious injuries. Furthermore, rather than try to encapsulate the present scattering of cases it seems far more useful to seek a comprehensive policy analysis of when emotional compensation should be awarded. The Twerski, Henderson approach of isolating the majority line of cases and ignoring substantial development in other areas should be replaced by the kind of functional analysis Twerski and Henderson themselves advanced for products liability.\textsuperscript{171} In short, the cases on this subject remain, and the real question is when does functionality justify compensating for

\textsuperscript{164} \textit{Id.} at 832.
\textsuperscript{165} \textit{Id.} at 833.
\textsuperscript{166} \textit{Id.} at 834.
\textsuperscript{167} \textit{Ochoa}, 703 P.2d 1 (Cal. 1985).
\textsuperscript{168} \textit{Molien}, 616 P.2d 813 (Cal. 1980).
\textsuperscript{169} \textit{Ochoa}, 703 P.2d at 5.
\textsuperscript{170} \textit{Molien}, 616 P.2d at 821.
\textsuperscript{171} See \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY}, § 1, cmt.
intangible losses whether characterized as mental distress or loss of society.

V. CONCLUSION

Tort law has historically compensated for mental distress in a variety of contexts. In the intentional torts such as assault and battery, courts have long awarded victims payments for injuries that were exclusively or primarily affronts to their mental tranquility. Negligent liability has been more circumspect in imposing liability for emotional loss. Nevertheless, negligent infliction of mental distress has long been accepted when parasitic to physical injury. Subsequent development has expanded it to near miss cases and in the majority of jurisdictions now to bystanders witnessing physical injury to a family member.174 Also, as discussed above, special categories including negligent telegrams misinforming about death and negligent handling of bodies have routinely supported liability for anguish. Wrongful death and loss of consortium also provide for intangible mental damages, albeit not pain and suffering per se. The early Restatements have been innovative in expanding liability for mental distress. By contrast the Restatement (Third) has ratified current development but clearly enunciated opposition to recovery even where case law is décidedly mixed. Two notable illustrations include mental distress for destruction of pets and heirlooms as well as mental distress for fear of increased likelihood of future disease. In both these areas important jurisdictions are divided. But comments “h” and “j” in section 46 of Restatement

172 In Leichtman v. WLW Jacor Communications, Inc., 634 N.E.2d 697, 699 (Ohio Ct. App. 1994), the court allowed recovery by an anti-smoking advocate noting that “[n]o matter how trivial the incident, a battery is actionable, even if damages are only one dollar.”
173 See KEETON, supra note 8, at § 57; see also DOBBS, supra note 9, at §§ 308-309.
174 Dillon v. Legg, 441 P.2d 912 (1968) (formulating a test whereby bystanders who were present and witnessed an accident could recover for negligently inflicted emotional distress if they have a close relationship with the victim and their mental distress was caused by direct sensory perception of the accident).
175 The proposed Restatement (Third) of Torts § 46 cmt. d notes that in addition to the traditional categories of mishandling a body or negligently informing a relative about death that this exception has also been used in cases involving consumption of food which has then been found to contain a “repulsive foreign object[ ] such as a condom or a rodent.”
176 See DIAMOND, supra note 1, at § 10.03.
177 For example the Supreme Court of California, arguably the nation’s most important state court, in Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 810 (Cal. 1993), recognized claims for negligent infliction of mental distress arising out of fear of future injury from toxic exposure, albeit with limitations. In Bond v. A.H. Belo Corp., 602 S.W.2d 105, 105 (Tex. Civ. App. 1980), a
(Third) presume that the unsettled area should be cleansed of any potential liability development. This approach ignores the fact that what is lacking in current case law development and the proposed Restatement is a comprehensive organizing principle that can help to define in a principled way when emotional distress should be compensated, particularly in the context of negligence.

It is well accepted that emotional distress constitutes a significant loss. The debate focuses on when culpable conduct should or should not lead to liability. As a general principle, I would argue that mental distress should at a minimum be compensated when the business activity being held accountable would otherwise escape significant tort liability. Otherwise the industry is simply immunized from the utilitarian functions provided by tort law, including most notably deterrence. The tort of negligent misrepresentation for example,\textsuperscript{178} which allows under circumscribed situations recovery for pure economic loss, focuses on

Texas court recognized that the jury could consider the emotional value of certain chattels which the court distinguished from ordinary personal effects.\textsuperscript{178} The Restatement (Second) of Torts provides this definition of negligent misrepresentation:

\begin{quote}
(1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on the information, if he fails to exercise reasonable care or competence in obtaining and communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.
\end{quote}

\textit{Restatement (Second) of Torts} § 552 (1965). Other courts have taken both more restrictive and more permissive views of liability. In Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931), the New York Court of Appeals denied recovery to third parties except to those in a relationship to the auditor “akin to privity.” One the other side of the issue the New Jersey Supreme Court in H. Rosenblum, Inc. v. Adler, 461 A.2d 138, 153 (N.J. 1983) imposed a duty to all foreseeable users of information in cases of negligent misrepresentation.
professional information providers such as accountants where the absence of physical injuries would otherwise preclude negligence accountability. Only in other very limited circumstances is pure economic loss, which is not parasitic to personal injury or property damage, recoverable. The negligent misrepresentation tort has undoubtedly imposed liability costs on access to professional services as well as prompting judicial effort to limit recovery to proportional amounts, but yet is still viewed as necessary to provide accountability in tort where otherwise negligence would go undeterred. The Restatement (Third) by limiting recovery for negligent destruction of pets and heirlooms has essentially barred recovery for professional conduct in related industries.

At the May 2007 American Law Institute\textsuperscript{179} annual meeting, Professor Powers, co-reporter for the Restatement, responded to an inquiry that tort liability for negligent infliction of mental distress consistently under deters wrongful conduct. This is certainly true in pet and heirloom categories. In contrast, the expansion to the bystander rule is an area where the physical injuries and parasitic pain and suffering to the primary victim usually dwarfs the ancillary recovery for bystanders. In fact, with loss of consortium as well as negligent infliction of emotional distress available to supplement personal injury and wrongful death claims, a multitude of liabilities can, depending on the circumstances, provide almost redundant deterrence for a single negligent act. The arguments against imposing liability in the case of pets and heirlooms really repeat the arguments against imposing tort liability at all. Unfortunately, negligent infliction of mental distress has not been viewed in the context of all potential liability and has been exploited and recognized as a compensable loss most particularly where other loses do not provide adequate accountability. As I have argued previously,\textsuperscript{180} in many cases such as bystander liability, emotional loss could most efficiently be limited to economic consequences of that loss such as medical expenses for heart attacks and lost wages. Tort law currently compensates mental distress most frequently where it compensates other losses and, in the contexts of accidents, where tort law routinely is litigated. Instead, there should be an emphasis on exploiting accountability for mental distress where the protection of tort law is absent, and otherwise negligence could go undeterred and losses of victims not vindicated. The current approach to negligent infliction of mental distress appears to treat it as a wayward stepchild to be tolerated out of historical, if not family loyalty, but constrained, where not entrenched, to avoid further embarrassment. In some ways, this approach


\textsuperscript{180} See DIAMOND, supra note 47, at 501-94.
to liability for mental distress represents a questioning of the basic function and desirability of tort law. While other systems such as market accountability, regulatory supervisions, and first party compensation systems exist, the Restatement (Third)’s approach to mental distress, unlike previous Restatements may be an unintentional acknowledgement that tort law can better be substituted by other systems. In the specific context of mental distress and the general context of negligence, there is I think instead much that these torts can contribute.