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Intentional Infliction: Should Section 46 Be Revised?

WILLARD H. PEDRICK*

Historically, the courts have been nervous, skittish, about claims for nervous shock or even for physical injuries transmitted through nervous shock. But as particularly compelling cases were presented with factual settings that persuasively authenticated the genuineness of the injuries, the courts on an ad hoc basis were willing to entertain claims for injury through nervous shock, particularly when a physical injury resulted.¹ Even in cases where no physical injury resulted from nervous shock, the courts over a period of years exhibited increasing willingness to entertain claims for significant emotional distress when the injury was inflicted on the claimant intentionally and without justification by the defendant.²

Of course, it was never expected by judges, by lawyers, or even by potential clients that the law would intervene where the emotional distress was at the level of bruised feelings or even righteous indignation. Litigation for such hurts would simply not appear to be a fruitful use of the expensive judicial process. In addition, one might doubt whether such claims would often come to court, as the abra-

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1. A number of the leading cases are collected in L. GREEN, W. PEDRICK, J. RAHL, E.W. THODE, C. HAWKINS, A. SMITH & J. TREECE, *CASES ON THE LAW OF TORTS* 97-146 (2d ed. 1977). Discussion of the development of the law with respect to infliction of injury through nervous shock appears in *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 12, 54 (W. Keeton 5th ed. 1984) [hereinafter cited as *PROSSER AND KEETON*].

2. The classic cases include *Wilkinson v. Downton* [1897] 2 Q.B. 57 (defendant, as a practical joke, falsely represented to plaintiff that her husband had broken both legs in a serious accident); *Janvier v. Sweeney* [1919] 2 K.B. 316 (a private detective represented himself as a police officer and threatened plaintiff with a charge of espionage); *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926) (schoolgirl threatened with prison unless she confessed to sexual misconduct with male students); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952) ("Association" representatives threatened physical violence if plaintiff did not sign up).

sions from living in our rough-edged society are not commonly thought of in terms of legal rights and wrongs.³ Nevertheless, in extreme cases of intentional and outrageous infliction of mental suffering the courts began to redress such claims, and the academic commentators reviewing these decisions saw that they illustrated what might well be an integrating principle of law.⁴ These academic writings proved to be influential, though their influence was slow in bearing fruit.

THE EVOLUTION OF SECTION 46

In the first version of section 46 in the initial *Restatement of Torts* of 1934, the American Law Institute proclaimed that "conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress resulting therefrom"⁵ It must be said, however, that the illustrations given under that negative proposition may not have involved conduct that today would be

3. Comment d to section 46 of the *Restatement (Second) of Torts* observes that:

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. . . . It is only where there is a special relation between the parties, as stated in § 48, that there may be recovery for insults not amounting to extreme outrage.

RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965) (citation omitted).

In a landmark article, William Prosser used substantially the same language as was later used in the Restatement comment set out above. See Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 44 (1956). Since Professor Prosser was the Reporter for the *Restatement (Second) of Torts*, the coincidence is scarcely remarkable.

4. Reviewing the early cases were an impressive succession of scholarly articles. Those articles include Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Prosser, *supra* note 3; Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1951). See also L. ELDRIDGE, *Tort Liability for Mental Distress* in MODERN TORT PROBLEMS (1941). Mr. Eldredge's paper was originally delivered as a lecture for the Institute of the Cleveland Bar Association in 1940. The lecture and subsequent publication had special weight since Mr. Eldredge served thereafter for a period as the Reporter for the *Restatement of Torts* and in fact was the Reporter who proposed the 1957 revision of section 46 implementing recommendations made in his 1940 lecture.

5. RESTATEMENT OF TORTS § 46 (1934). The complete text of the section provides: § 46. Conduct Intended to Cause Emotional Distress Only. Except as stated in §§ 21 to 34 and § 48, conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability

- (a) for emotional distress resulting therefrom, or
- (b) for bodily harm unexpectedly resulting from such disturbance.

Id.

characterized "extreme and outrageous."⁶ Still, the reluctance on the part of the Reporter and the American Law Institute in the 'thirties to embrace a principle of liability for intentional infliction of mental suffering was reflected in the rule laid down in that first *Restatement*.

The impact of the scholarly writing on the subject over the years by Magruder, Prosser, Eldredge, Wade and others was finally persuasive. Those writings argued that the law should provide a remedy for abusive conduct in such settings as the practical joke, excessive collection methods, browbeating in connection with employee discharges and shocking failure to protect feelings by caretaking agencies such as morticians and telegraph companies among others.

In 1948 the Reporter for the torts *Restatement*, Mr. Lawrence Eldredge, recommended and the American Law Institute adopted as a revised section 46 the simple proposition that "[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress and (b) for bodily harm resulting from it."⁷ It is noteworthy that in this 1948 revision

6. The three illustrations following comment c to section 46 demonstrate the point:

1. *A*, as a joke, tells *B* that a dance to which he is invited is a fancy dress dance. *B*, in reliance upon this, goes to the dance in dress appropriate for a masquerade but utterly inappropriate for an ordinary dance. On going to the dance and realizing the situation, *B* faints and falls hurting herself. *A* is not liable to *B*.
2. *A* tells *B*, his enemy, that his neighbors believe him to be guilty of grossly immoral conduct. *B* so worries over this as to fall into an illness. *A* is not liable to *B*.
3. *A*, a professional rival, tells *B*, a violinist, that he has played a particular piece in an orchestra concern in an extremely bad manner. *B* worries over this so much as to make himself ill. *A* is not liable to *B*.

RESTATEMENT OF TORTS § 46 comment c, illustrations 1, 2, & 3 (1934).

7. The proceedings of the American Law Institute's 24th Annual Meeting, held in June, 1947, were not published though many of the annual proceedings were. Through the courtesy of the American Law Institute staff, I have been supplied with a photocopy of the transcript of the discussion of section 46 held during the June 5-7, 1947 meeting. In introducing the proposal to revise section 46 as it appeared in the 1948 revision, the then reporter, Mr. Lawrence H. Eldredge, stated:

The first important change is in Section 46 on page 7, and in Section 46 we are now stating the exact opposite of what presently appears in Section 46. We are saying that one who, without a privilege to do so, intentionally causes severe emotional distress to another, is liable for such emotional distress and for bodily harm resulting from it.

This is a field of tort law in which significant developments have occurred during the past twenty years, and the trend is continuing to afford an increasing degree of protection to the interest in freedom from emotional distress.

You will note that we have left open, by caveats, two problems, the problem as to whether there is any liability for recklessly causing a severe emotional

of section 46 there is no requirement that the intentional action of the defendant be "extreme or outrageous." Rather, the emphasis was simply on the intentional infliction of mental suffering with prescribed liability for the resulting severe emotional distress and any bodily harm. It is also noteworthy that two of the illustrations under the 1948 revision of section 46 later found their way as illustrations under the modern version of section 46, adopted in 1957 on the recommendation of the next Reporter, Professor William L. Prosser.⁸

The 1957 revision of section 46 of the *Restatement of Torts* put the section into its present form as it appears in the *Restatement (Second) of Torts*.⁹ The revision added one explicit condition to the proposition adopted in 1948. That new condition restricts the availability of this relatively new tort remedy to situations where the conduct of the defendant could be classed first by the judge and then by the jury as "extreme and outrageous" conduct. Continued is a second requirement that such conduct in fact cause "severe emotional distress" to the plaintiff.

From the explanations offered at the 1957 meeting of the American Law Institute, it is clear that Professor Prosser was concerned that liability not be imposed for simply petty annoyance. "All the way through we are trying to put in these words of limitation to keep the courts from running wild on this thing."¹⁰ Several speakers did

distress, and negligently causing it. At this time the authorities are not sufficiently developed to go beyond the statement which appears in black letter, but I am convinced, as are my advisers, that the black letter does represent the present state of the cases, and a distinct change from what was stated in about 1925 or '28 when the Section was originally drafted.

Transcript for proceedings of American Law Institute meeting (June 5-7, 1947). Beyond this brief statement there was, at the 1947 Annual Meeting, virtually no discussion of the new section 46 of the *Restatement of Torts*.

8. The present RESTATEMENT (SECOND) OF TORTS § 46 comment d, illustration 3 (1965) (the dissolving bathing suit case) appeared in the 1948 version in substantially the same form. The current comment f, illustration 13 (telling the sensitive overweight girl that she looks like a hippopotamus) was illustration 5 of the 1948 revision.

9. "Section 46. Outrageous Conduct Causing Severe Emotional Distress (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. . . ."

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

10. *Discussion of Restatement of Law, Second, Torts (Tentative Draft No. 1)*, 34 A.L.I. PROC. 291 (1957) (Professor Prosser, Reporter, speaking) [hereinafter cited as PROCEEDINGS].

Some of the flavor of the Reporter's presentation is reflected in the following statement:

Since 1948 nearly ten years have elapsed, and this so-called new torts [sic] has witnessed a deluge of cases in the courts. There are now upwards of one hundred cases dealing with the question of liability for the intentional infliction of mental or emotional distress. And what was once a fairly simple problem has now developed into something pretty elaborate.

For that reason the section has been redrawn and Comments rewritten at

address the extent to which third-party bystanders should be able to sue for severe emotional distress on witnessing acts of violence and other extreme and outrageous intentional acts on the part of a defendant. There was simply no discussion at all, however, of the requirement that the claimant claim and prove actual severe emotional distress as an element of the cause of action.¹¹ Doubtless it is implicit in the general tenor of the discussion that this condition was continued as a sensible and natural limitation on the right to sue for intentional infliction—to avoid a flood of cases which the courts and the American Law Institute feared might come if the gates were opened unduly wide.

The continuing insistence in section 46 that the particular plaintiff in fact have suffered severe emotional distress, indicates that the tort, even though based on the defendant's especially outrageous conduct, was nevertheless assimilated to negligence law in its requirement that actual damage be suffered to ground the action.¹² Thus, intentional infliction of mental suffering is not treated in section 46 as a dignitary hurt to the individual in the way that assault and battery, false imprisonment and invasion of privacy are treated. In those cases, there is no necessity for a showing of actual damage. It is enough that the defendant has intentionally violated the individual's legal right to be protected in one's sense of security.

length, in an attempt to spell out some boundaries, qualifications and limitations to this new torts [sic].

Id. at 289.

11. In his introductory statement explaining the revision of section 46 at the time of the 1957 proceedings, the only reference by Professor Prosser to the requirement that a claimant under section 46 have suffered "severe emotional distress" was simply an observation that "this [severe emotional distress] isn't merely a matter of hurt feelings, wounded dignity, minor or petty outrage. This has to be serious and severe." *Id.* at 291.

It may be noted that the requirement of resulting severe emotional distress appeared in the 1947 alteration of section 46 and thus was not in the nature of a new item for consideration at the 1957 meeting.

12. See PROSSER AND KEETON, *supra* note 1, § 10 at 43 (nominal damages are recoverable for a technical assault); *id.* § 11 at 48 (With respect to false imprisonment "[a]s in the case of other torts derived from the old action of trespass, the fact that there has been false imprisonment at all establishes a cause of action for at least nominal damages."). By way of contrast with respect to a negligence claim, Prosser and Keeton comment:

Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred.

Id. § 30 at 165 (footnote omitted).

The requirement in section 46 of proof of severe emotional distress thus sharply restricts the role of the law as an instrument for ordering conduct. In particular, outrageous misconduct on the part of such institutional defendants as mercantile establishments, creditors, employers and enterprises especially undertaking to protect the feelings of their customers and clients (such as morticians, telegraph companies and insurance companies) is not to be actionable unless the victim can establish resulting severe emotional distress in fact.

Provision of legal protection against outrageous dignitary hurts that do not quite match the common law requirements for assault, battery, false imprisonment or invasion of privacy has instinctive appeal. Using law as an instrument to secure more decent behavior on the part of institutional defendants seems desirable. But concerns over a feared avalanche of claims moved the American Law Institute to deny liability for extreme and outrageous conduct where the particular victim was strong enough to bear the intentional attack without succumbing to severe emotional distress.

Thus, the law as shaped by section 46 is intended to protect only those who by their nature could and did in fact suffer severe emotional distress as the result of the defendant's extreme and outrageous intentional misconduct. Left outside the law's protection are those individuals with resolution and resilience who can absorb an outrageous attack without actually suffering severe emotional distress. The tormenter in such cases is simply not held accountable. A comment on section 46 does waffle a bit. In comment j it is stated that "[s]evere distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."¹³ Nonetheless, severe emotional distress is either an element of the plaintiff's claim or it is not. And the language of the section as now stated requires resulting severe emotional distress for recognition of the plaintiff's claim.

It is now thirty-eight years since section 46 was adopted. Despite the fears of its proponents, it has not generated what could possibly be viewed as a "flood of litigation." In that thirty-eight-year period a LEXIS search indicates that section 46 has been cited in some 556 reported cases altogether.¹⁴ In the last ten years there have been 452 cases citing the section. The ten-year figure averages out to forty-five

13. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965). The comment continues as follows: "The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge." *Id.*

14. The LEXIS search was run by Mr. Richard Nash, Assistant Director of the Arizona State University College of Law Library. For his assistance to one unlettered as yet in use of the new tool, appreciation is expressed.

reported cases per year for the entire country, or an average of slightly less than one reported case every year per state; it is more like a trickle than a flood.

A LEXIS search over the past ten years reveals there have been some fifty cases where, although a jury has found extreme and outrageous conduct on the part of the defendant, a judgment for the plaintiff has been reversed on appeal on the ground that the plaintiff has failed to prove severe emotional distress in fact. A review of some of these cases will illustrate the importance of whether section 46 should retain its present requirement that the plaintiff prove severe emotional distress in fact as an essential to a claim under section 46.

CASES DENYING LIABILITY FOR LACK OF SEVERE EMOTIONAL DISTRESS

In 1977 the Maryland Court of Appeals had before it the case of *Harris v. Jones*.¹⁵ The plaintiff was afflicted with stuttering. His claim against his foreman and his employer was that the foreman, over an extended period of time, persisted in ridiculing the plaintiff because of his stuttering handicap, mimicking him and making fun of him before other employees. The plaintiff admitted that he was of "nervous" disposition but testified that his foreman's conduct heightened his nervousness, and his speech impediment worsened. During one five-month period while his foreman was harassing him, his physician prescribed "pills for his nerves." The jury awarded the plaintiff \$3,500 compensatory damages and \$15,000 punitive damages—but the intermediate appellate court reversed. Even though the appellate court recognized the foreman's action as extreme and outrageous, it found the plaintiff had failed to establish a causal connection between the foreman's conduct and the plaintiff's emotional distress, or even that his emotional distress was severe. In affirming that conclusion, the Maryland Court of Appeals stated,

Granting the cruel and insensitive nature of Jones' conduct towards Harris, and considering the position of authority which Jones held over Harris, we conclude that the humiliation suffered was not, as a matter of law, so intense as to constitute the "severe" emotional distress required to recover for the tort of intentional infliction of emotional distress.¹⁶

In 1979 the Supreme Court of Maine had before it *Vicnire v. Ford Motor Credit Co.*¹⁷ This case involved the repossession of a vehicle

15. 281 Md. 560, 380 A.2d 611 (1977).

16. *Id.* at 573, 380 A.2d at 617.

17. 401 A.2d 148 (Me. 1979).

sold to the plaintiff by the defendant. The plaintiff at the time of the vehicle purchase had also purchased an insurance policy to cover his installment payments in the event he should die or become disabled. In fact, he became totally disabled after the purchase but because of an injury suffered before the purchase of the vehicle. The seller and its related insurance company proceeded to repossess the car, wrongly denying any insurance coverage. The plaintiff claimed, among other things, intentional infliction of mental suffering. On the count for intentional infliction of mental suffering, the trial judge set aside the jury's verdict on the ground that "[t]here was no evidence of severe or substantial mental suffering, no evidence of objective symptomatology."¹⁸ On appeal the trial judge's action in setting aside the jury verdict was affirmed on the ground that the plaintiff's "alleged mental distress [did not rise] to that degree of severity that is required by the law to justify imposing liability upon defendant."¹⁹

The court made it clear under the principle of section 46 that, absent proof of resulting severe emotional distress, even a jury finding of extreme and outrageous conduct with intent to inflict mental distress on the plaintiff would not warrant imposition of liability. On the facts of the case, whether the action of the defendant was truly extreme and outrageous may well have been a debatable issue. The point here is that the court was willing to base its decision on the ground that proof of resulting truly severe emotional distress evidenced by some kind of physical symptoms was essential to such a claim.

Another case of mixed quality on its facts came before the Iowa Supreme Court in 1981. In *Poulsen v. Russell*,²⁰ the plaintiff claimed that the defendant, a former business partner, had abused their relationship to the financial detriment of the plaintiff with the result that the plaintiff was intentionally and outrageously subjected to mental suffering. The jury did find for the plaintiff on the intentional infliction count, but the trial court judgment for the plaintiff on that finding was reversed on appeal. The ground for the reversal was that the plaintiff had not demonstrated he had suffered severe emotional distress.

Whether there is some element of assumption of risk in the context of a business partnership, to the point where a breach of the fiduciary relationship between the partners may not rise to the level of extreme and outrageous misconduct, is probably a debatable question. The point is that the Iowa court did not have to face that issue

18. *Id.* at 155.

19. *Id.*

20. 300 N.W.2d 289 (Iowa 1981).

since it resolved the intentional infliction of mental suffering count by finding that the resulting emotional distress was not severe.

The year of 1980 in Arizona saw the final disposition of an interesting case.²¹ Into an Arizona retirement community, Youngtown, a father with two teenage sons settled. An active organization in town had as its object the preservation of Youngtown as a retirement community, meaning that a family with children was not welcome to permanently reside in the community. In fact, the "Save Youngtown for Retirees" organization sent "eviction notices" to families with children who bought or rented homes in the town. When the plaintiff, Venerias, and his two minor sons moved into Youngtown, the secretary of the Save Youngtown for Retirees organization walked into the house, told the father they could not live there and that they would be getting an eviction notice. There were subsequent telephone calls advising them that they were breaking the law by living in Youngtown and that they must leave. Later, an eviction notice was served upon him in the home. Other harassing tactics were claimed with respect to which there was some dispute in the testimony.

Following a trial on the merits, the jury found for the plaintiff in the amount of \$15,000 actual damages and \$40,000 punitive damages. On appeal, however, the Court of Appeals reversed on the ground that Venerias' testimony, that the actions of the defendants "caused him to become a nervous wreck," was insufficient. As the court put it, "[T]he alleged nervousness suffered by Venerias was not as a matter of law so intense as to constitute the severe emotional distress required to recover for the tort of intentional infliction of emotional distress."²²

More recently, the Nebraska Supreme Court was presented with a claim by the plaintiff that her ex-husband was attempting to torpedo her approaching marriage to another man.²³ His efforts consisted of: (1) haunting her neighborhood; (2) sending a Christmas letter to relatives charging that the plaintiff was pregnant when he married her and that he may not have been the father; (3) writing to the plaintiff's employment supervisor regarding her relationship with her prospective second husband; and (4) approaching school board members to terminate plaintiff's employment as a teacher. The plaintiff

21. *Venerias v. Johnson*, 127 Ariz. 496, 622 P.2d 55 (Ct. App. 1980).

22. *Id.* at 500, 622 P.2d at 59.

23. *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983).

claimed she was afraid of her former husband, that she had consulted a psychiatrist on two occasions, and that her former husband's actions "embarrassed and humiliated her, and caused her to worry and lose sleep."²⁴

The jury returned a verdict for the plaintiff in the amount of \$18,120 on which judgment was entered. On appeal, the Supreme Court of Nebraska reversed on the ground that the plaintiff, without any expert medical testimony in the case, had not proved that she had suffered the "extreme emotional distress for which recovery may be had in this type of action."²⁵ In dissent, Justice White essentially outlined the argument for revision of section 46 of the *Restatement (Second) of Torts*. As Justice White put it,

I reject outright the conclusion that the conduct here is not sufficiently horrid to be classified as outrageous. The law must and should provide protection from this absurd conduct and not be seen to stand helplessly by, wringing its hands. Often the most effective method of teaching good manners is the money judgment.

I also reject the implication that recovery cannot be had in the absence of expert testimony by mental health personnel. The ability to withstand outrageous conduct, that might in another person cause physical and mental collapse, ought not to be a reason to bar recovery. The conduct is the same; the mental and physical conditions of the victims may vary.²⁶

There are other modern cases in the course of the last decade indicating an increasing judicial concern over the requirement that actual severe emotional distress be continued as an element of the claim for intentional infliction of mental suffering. A California intermediate appellate court noted that the requirement of showing severe emotional distress in fact was being deemphasized, with less evidence required.²⁷

24. *Id.* at 156, 333 N.W.2d at 776.

25. *Id.* at 165, 333 N.W.2d at 771.

26. *Id.* at 166, 333 N.W.2d at 771.

27. *Newby v. Alto Riviera Apartments*, 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976). The court observed:

The recent trend has been to require less severe distress in pleadings and proof than is required in the Restatement. Therefore, in *Golden v. Dungan*, pleadings were held sufficient to state a cause of action where the "plaintiff became frightened, upset, nervous and humiliated, and suffered extreme and severe mental suffering and duress."

Id. at 298, 131 Cal. Rptr. at 554 (quoting *Golden v. Dungan*, 20 Cal. App. 3d 295, 299, 97 Cal. Rptr. 577, 579 (1971)).

The testimony in *Newby* was to the effect that the plaintiff was unable to sleep after the episode and was afraid. A witness testified that over the telephone the plaintiff's voice was "quavering." The witness further stated, "I never heard her ever speak in that tone of voice." On this evidence the court concluded a jury issue was presented as to whether the emotional distress was sufficiently severe. *Newby*, 60 Cal. App. 3d at 299-300, 131 Cal. Rptr. at 544.

For other cases of similar import, see *Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956 (Fla. Dist. Ct. App. 1979) (testimony that the plaintiff was "worried and upset" made a jury issue on the extent of emotional distress); *Hume v. Bayer*, 157 N.J. Super. 310, 428 A.2d 966 (1981) ("Extreme and outrageous conduct by its nature produces dis-

In a case dramatic on its facts, the Missouri Court of Appeals in 1978 affirmed a jury verdict for the reckless infliction of mental suffering without any significant evidence of severe emotional distress.²⁸ The facts were compelling that the reckless action of the defendants was truly extreme and outrageous. The defendants, operators of a funeral chapel and cemetery company, managed to bury the plaintiff's mother in a very shallow grave without the casket-enclosing concrete vault ordered by the plaintiffs. Consequently, the casket was exposed and broke open when heavy equipment went over the grave. As a result, two of the plaintiff family members saw their mother's corpse, then partially decomposed. It was clearly the "outrageousness" of this horrendous funeral service that moved the Missouri Court of Appeals to affirm a jury finding for the plaintiff—without any real discussion of any requirement that there be evidence of resulting severe emotional distress.²⁹

In the past decade, as evidenced by the foregoing review, there have been a number of cases reaching the appellate level where defendants have been immunized from liability on the ground that the particular victim did not really suffer intensely. This is true even though the defendant's conduct was intentionally or recklessly extreme and outrageous, and calculated to produce severe emotional distress in a person of ordinary sensibilities. Has the time come to consider whether insistence on evidence of actual severe emotional

trous in 'normally constituted' persons against whom it is directed."); *Bodewig v. K-Mart, Inc.*, 54 Or. App. 480, 635 P.2d 657 (1981) ("plaintiff who had two or three" sleepless nights, "cried a lot" and continued to be nervous and upset on recalling the experience presented question for the jury on the adequacy of the emotional distress); *Ruple v. Brooks*, 352 N.W.2d 652 (S.D. 1984) (obscene phone calls—enough that the defendant should have recognized that severe emotional distress was the likely consequence).

28. *Golston v. Lincoln Cemetery, Inc.*, 573 S.W.2d 700 (Mo. Ct. App. 1978).

29. *Id.* at 710. In responding to the defendant's argument on appeal that the plaintiff had failed to establish that she had sustained any damages, the court observed:

It is reasonable to believe under the evidence in this case that all three children sustained and shared bad experiences in the knowledge, however acquired, that their mother had been improperly buried. Counsel for Jones so conceded in closing argument. True, Reatha did not testify, but her brothers described their feelings and her aunt stated that all of the family was upset, up late at night, and could not sleep.

Id. at 706. *But cf.* *Tapia v. Zarb*, 70 S.W.2d 464 (Tex. Civ. App. 1934), where the trial court ruled a widow failed to make a submissible case on evidence by a third party that the widow "looked sick," which is explained to mean "she looked to him grieved." *Id.* at 465.

Plainly, in Missouri, the "show me state," it is not necessary to show much by way of concrete evidence of truly severe emotional distress resulting from the outrageous conduct of the defendant.

distress on the part of the particular plaintiff should be retained as a requisite to an action under section 46?

DISPENSING WITH PROOF OF SEVERE EMOTIONAL DISTRESS:
POLICY CONSIDERATIONS

The original ground for insisting on proof of severe emotional distress as a prerequisite for bringing an action for extreme and outrageous intentional infliction of mental suffering was largely a concern that a flood of flimsy claims would otherwise result. That fear, to put it bluntly, was ill conceived. Litigation is costly. Most personal injury litigation is instituted by attorneys dependent on a contingent fee. If the plaintiff has not suffered demonstrably severe emotional distress, that fact would in any case be highly relevant on the damage issue. Plaintiffs' attorneys will be unlikely to bring intentional infliction of mental suffering cases unless, in the absence of severe emotional distress to the particular plaintiff, the defendant's extreme and outrageous misconduct is so shocking, so horrendous, as to support a prospect of a substantial award of damages on a dignitary hurt and punitive damages basis.³⁰ In such a case it is submitted the law should extend its protection.

The intentional infliction of mental suffering by extreme and outrageous conduct on the part of the defendant needs to be recognized for what it is—a dignitary hurt appropriately classified with the old common law actions for assault, battery, false imprisonment and invasion of privacy. Section 46 enlarges the circle of protection for the individual's right to personal security from intentionally or recklessly inflicted nervous shock. This is surely good morals. It is, in addition, good social engineering. Is it not desirable that those individuals and those institutions whose employees may indulge in overreaching and harassing tactics be restrained by the law—without regard to whether their victims are persons of ordinary sensibility or of hardy, resilient nature?

It is true, of course, that to translate into money damages emo-

30. Of interest and illustrative of the fact that counsel's assessment of a prospective damage award is not unerring in accuracy is the decision in *Blakeley v. Shortal's Estate*, 236 Iowa 787, 20 N.W.2d 28 (1945). This case arose prior to imposition of liability for intentional infliction of mental suffering by the revision of section 46. The Iowa court held that a cause of action was stated where the defendant decedent committed suicide in the kitchen of the neighboring farm family with the result that when the family came home from church they were met with an appalling and gruesome sight. That case is now enshrined in RESTATEMENT (SECOND) OF TORTS § 46 comment i, illustration 15 (1965). In the A.L.I. discussion of section 46 in 1957, the decision was referred to with some pride by the Honorable Theodore G. Garfield, the author of the opinion. PROCEEDINGS, *supra* note 10, at 303. Since the case arose in the present author's home county, it may be of interest to report that on the trial of the case following the decision of the Supreme Court of Iowa, the jury returned a verdict of just \$50—apparently their estimate of the cost of cleaning up the plaintiff's kitchen!

tional distress, whether suffered in fact by the plaintiff or simply threatened by the defendant's extreme and outrageous misconduct, is difficult. That is not peculiar, however, to section 46 cases. There are several types of injuries for which money awards are not susceptible to very rational review on appeal: pain and suffering, emotional distress, loss of consortium, among others. On the amount of allowable damages, it is what shocks the conscience of the court, either at the trial or the appellate level, that determines whether a particular damage award for hurt feelings, for threats to one's sense of security or the loss of consortium and companionship, is to be regarded as excessive.³¹

The at large nature of damage awards for intentional torts and tort compensation generally for non-pecuniary losses is properly a matter of some concern. However, the problem is, in a sense, intractable. The alternative of no liability for damages not susceptible to arithmetic calculation is surely unacceptable. On balance, the indeterminate nature of the damage assessment process for non-pecuniary injuries or losses can be defended on the ground that, after all, deterrence from intentional or reckless wrongdoing is one of the major objectives of damage awards. Precision in damage assessment cannot be required if this function is to be performed. Thus, to recognize section 46 claims without proof of actual severe emotional distress will not really aggravate the damage assessment problem. In the infrequent case where the defendant's conduct is truly extreme and outrageous but there is no proof of severe emotional suffering in fact, it would properly be argued for the defense that any actual damage award should be small indeed.³²

The position advanced here is that in such a case at least nominal damages ought to be awarded for the dignitary hurt, with the added possibility of a punitive damage award. In somewhat analogous cases under section 1983 of the Civil Rights Act,³³ the Supreme Court in 1978 recognized that at least nominal damages should be awarded for

31. Cf. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 88 at 315 (1935). "The law has no standard by which to measure pain and suffering in money." *Id.* For studies on recovery for pain and suffering and attitudes on this subject, see O'Connell & Carpenter, *Payment for Pain and Suffering Through History*, 50 INS. COUNS. J. 411 (1983), updating a study originally published as O'Connell & Simon, *Payment for Pain & Suffering: Who Wants What, When and Why?*, 1972 U. ILL. L.F. 1. See also Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974).

32. See *supra* note 30.

33. 42 U.S.C. § 1983 (1978).

violation of constitutional rights under color of law to vindicate the legal right of the claimant to be free from such a legal wrong.³⁴ As the Court observed:

Common-law courts traditionally have vindicated deprivations of certain “absolute” rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.³⁵

It is time to recognize that the insistence that the plaintiff show actual severe emotional distress resulting from the defendant’s extreme and outrageous conduct was placed in section 46 because of concern over a “flood” of flimsy claims. The flood has not materialized, nor is it likely ever to do so. When a defendant intentionally or recklessly through extreme and outrageous misconduct inflicts mental suffering that would be severe in a person of ordinary sensibility, the resulting claim for redress is not flimsy. The proper instinct of a number of courts has been to deemphasize the requirement of proof to authenticate the severity and extent of the plaintiff’s emotional distress. It is time now to revise section 46 and eliminate the element requiring the plaintiff to establish that she actually suffered severe emotional distress.

The proposal is that the emphasis of section 46 be wholly on the defendant’s conduct. A defendant who intentionally or recklessly inflicts mental suffering on the plaintiff by misconduct of an extreme and outrageous nature, of a sort simply not tolerable in our society, should be liable for at least nominal damage. The test proposed would be objective. The standard to be employed would be whether the outrageous conduct is likely to inflict severe emotional distress on a person of ordinary sensibility. That objective standard is closely and obviously related to the objective standards employed in both nuisance and negligence law.

The extent of the plaintiff’s actual emotional distress would, of course, be relevant to the issue of the appropriate damage award. Further, whether the plaintiff did in fact suffer severe emotional distress would also be relevant to the question whether the defendant’s conduct was sufficiently “extreme and outrageous” to rise to the level of a section 46 tort. That point is made in reverse fashion in comment j of the present section 46: “[I]n many cases the extreme and outrageous character of the defendant’s conduct is in itself im-

34. *Carey v. Piphus*, 435 U.S. 247 (1978).

35. *Id.* at 266 (footnote omitted).

portant evidence that the distress has existed.”³⁶

This proposed revision of section 46 is modest; it shapes the section into a better tool for providing more adequate protection against dignitary hurts, which, after all, is the section’s function. The proposed section would discourage by financial sanction extreme and outrageous conduct not tolerable in our society. Other sections of the *Restatement of Torts* have long provided for damage awards to protect against particular invasions of the right to emotional security—without the requirement that the plaintiff prove severe emotional injury in fact.

For example, under section 700 of the *Restatement*,³⁷ a parent whose minor child is kidnapped has a cause of action against the kidnapper without any showing that the parent has in fact suffered severe emotional distress. A comment under section 700 on the allowable damage recovery in such a case begins by stating, “The parent can recover for the loss of society of his child and for his emotional distress resulting from its abduction or enticement.”³⁸ Plainly, the Reporter and the American Law Institute were satisfied that emotional distress normally would be suffered by a parent when a child has been abducted and would in its nature be severe. Thus

36. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965). In explaining the nature of the revised section 46 as submitted to and adopted by the 34th Annual Meeting of the American Law Institute in 1957, Professor Prosser is quoted as explaining:

The cases indicate that it is not essential that there should be physical consequences, that if the conduct is extreme enough, if the outrage is one that is utterly intolerable in civilized society, there can be recovery without any kind of physical consequences. We have endeavored to suggest in the Comment J . . . that there is something in the way of a proportion between the extreme outrage and the recovery for mental distress without physical consequences. In other words, if there are no physical consequences, your conduct has to be more extreme or more outrageous.

PROCEEDINGS, *supra* note 10, at 291.

The next step, plainly, is to dispense with the requirement of actual severe emotional distress to the particular plaintiff in favor of the objective standard of outrageous conduct of a nature that would be expected to inflict serious emotional distress on a person of ordinary sensibility.

37. RESTATEMENT (SECOND) OF TORTS § 700 (1977). The text of this section is as follows:

§ 700. Causing Minor Child to Leave or not to Return Home. One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.

Id. Comment d of this section indicates that “[t]he deprivation to the parent of the society of the child is itself an injury that the law redresses.” *Id.* comment d.

38. *Id.* comment g.

there was no need to require proof of severe pain and suffering as a condition for the plaintiff's claim.

In connection with the recognition the second *Restatement of Torts* gives to the right of privacy, it states in section 652B, "Intrusion upon Seclusion," that one who intrudes on the seclusion or private affairs of another is subject to liability "if the intrusion would be highly offensive to a reasonable person."³⁹ The test is an objective one. There is no requirement that the plaintiff, save by bringing suit, show that the intrusion was offensive to him. It is enough that the invasion is of a sort which would be highly offensive to a reasonable person.

On the subject of unwanted publicity, section 652D provides that publicizing the private life of another creates liability if the matter publicized is of a kind that "would be highly offensive to a reasonable person" and is not of legitimate concern to the public.⁴⁰ Again, the test is objective. The plaintiff is not required to prove that the publication was highly offensive to him to establish a claim; on the contrary, in section 652H on damages for invasion of privacy, the *Restatement* provides that invasion of privacy establishes a claim for at least nominal damages and for a further damage allowance if emotional distress is actually proved.⁴¹ Thus, on particular topics generically cut from the same cloth as section 46, the *Restatement* has already taken the position that proof of severe emotional distress on the part of the particular plaintiff is not a requisite for a legal claim in situations where the defendant's conduct would be highly offensive to a reasonable person or a person of ordinary sensibility.

But is a modest improvement in section 46 worth supporting? Is the basic principle stated in the section an acceptable rule of law?

In a 1982 study of the section,⁴² Professor Givelber expressed serious concern over the inability of the authors of the *Restatement* or the courts to define, with any satisfactory precision, what conduct is or is not to be classed as "extreme and outrageous."⁴³ He referred to "outrageousness" as a "standard in search of context; it is the hermit crab of the law of torts."⁴⁴ After reviewing the appellate court decisions, many of which arise out of such contractual relationships as debtor-creditor, merchant-customer, employer-employee, insured-insurer, he threw up his hands and opined that it was unlikely the courts could develop a principled approach to the definition or essen-

39. *Id.* § 652B.

40. *Id.* § 652D.

41. *Id.* § 652H.

42. Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982).

43. *Id.* at 51-54.

44. *Id.* at 69.

tial characteristics of conduct to be stigmatized as "extreme and outrageous."

Thus, "the analysis of a given case typically involves little more than a recitation of the various comments to section 46 of the *Restatement*, the citation of a few cases, and a decision."⁴⁵ Nonetheless, Professor Givelber concluded that "[a]lthough there is little evidence that this tort will ever provide the basis for principled adjudication, it has provided and probably will continue to provide the basis for achieving situational justice."⁴⁶ That may seem faint praise to some. But the achievement of "situational justice" is not a bad justification for continuation of the principle of liability set out in section 46.

Surely, the open-ended nature of the rule of law against intentional infliction of mental suffering through extreme and outrageous conduct is no more indefinite, no more unstructured than the negligence standard protecting against the failure to exercise the care and caution that a reasonable person ought to exercise under the same or similar circumstances.⁴⁷ Nor is it less defined and structured than the prescription of nuisance law that a property owner shall not use his property in a way that would unreasonably interfere with the comfortable enjoyment of neighboring property by a person of ordinary sensibility.⁴⁸ Again, the protection against intentional infliction of mental suffering by extreme and outrageous conduct is no more undefined than invasions of privacy through intrusion or unwanted publicity "highly offensive to a reasonable person."⁴⁹

These tort standards contemplate that a judge, a jury and, on occasion, an appellate court will measure the particular defendant's conduct in the particular setting against the standards of behavior acceptable in society. Situational justice under a broad formula is the objective. Thus, the standard formulated in section 46 with its reference to "extreme and outrageous" behavior is sensitive to the need for leeway in the social context but protective at the same time against shockingly reprehensible violation of social norms. It is only the egregious and recognizable departure from the norm that is to be sanctioned by civil liability. Accordingly, the risk of injustice is minimal (and further lessened by appellate review), while the opportunity to achieve situational justice is substantial. Surely to deny a

45. *Id.* at 74.

46. *Id.* at 75.

47. RESTATEMENT (SECOND) OF TORTS § 283 (1965).

48. *Id.* § 822.

49. *See supra* notes 39-41 and accompanying text.

remedy in such cases would license grossly antisocial conduct, and leave the law and society the poorer.

Further, on the narrow thesis here advanced, to eliminate as an element of the case the requirement that the plaintiff show actual severe emotional distress will not aggravate any uncertainties arising from the nature of the concept of "outrageousness." It will, rather, enlarge the opportunity for situational justice through somewhat improved protection for emotional security and deterrence of extremely antisocial behavior on the part of defendants. Institutional defendants such as credit agencies, merchants, insurance companies, landlords, employers and other authority figures have the capacity for mending their ways, for absorbing financial losses and correcting their institutional practices to reduce costs and operate more efficiently. Surely that is a desirable objective.

OTHER ISSUES CONCERNING SECTION 46

There are, it must be conceded, other concerns about the dimensions of section 46. There is a matter of the interrelationship between actual and punitive damages for the tort of intentional infliction of mental suffering by extreme and outrageous conduct. A few courts have even declined to allow punitive damages in section 46 cases—because of what is seen as a duplication.⁵⁰ In such cases, both actual and punitive damages are considered to be awarded because of the defendant's extreme and outrageous conduct. Other courts, however, do allow an award of punitive damages even though the test for punitive damages is essentially the same as the test defining the section 46 tort itself—outrageousness.⁵¹

50. Such a case was *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) (the defendant threatened to kill the plaintiff's husband and made good on the threat—punitive damages not allowable in the view of the Illinois court). Cf. *Hall v. May Stores Co.*, 292 Or. 131, 637 P.2d 126 (1981) (employee discharged with abusive language—claim for severe emotional distress sustained, but no punitive damages allowable under the freedom of expression provision of the Oregon Constitution).

51. For a list of these cases, see *Smith v. Wade*, 461 U.S. 30, 53 n.18 (1983) (Brennan, J., writing for majority). The opinions in *Smith*, both majority and dissenting opinions, provide an excellent review of the history and state of the common law on the subject of punitive damages. In *Smith*, the question was whether punitive damages should be allowable under 42 U.S.C. § 1983 civil rights action against reformatory guards where the same test of basic liability, callousness or gross recklessness, was also the standard used for the allowability of punitive damages by the jury. Thus, the question in the case was very much the same policy question as that under section 46 of the *Restatement* where the ground of liability is essentially the same as the ground for allowability of punitive damages. The Supreme Court in *Smith* allowed both compensatory and punitive damages, notwithstanding that the standard was the same for both. In rejecting the defendant's contention that a higher standard should be required for punitive damages than for compensatory damages, the Court explained:

Moreover, the rules of ordinary tort law are once more against Smith's argument. There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory

It can be argued that the fact finder, whether jury or judge, can consider one set of factors in determining the appropriate compensation for actual damages suffered by the plaintiff and another set of factors in finding the appropriate fine that will discourage the particular "extreme and outrageous" behavior. In addition, there may be instances, particularly those involving little actual emotional distress (where as it is argued there should be at least nominal damages) where punitive damages may serve a useful function. Nevertheless, a question that arises, not only in this context but generally, is whether the assessment of the amount of punitive damages is appropriately a function of the jury, when jury trial is used.⁵²

Punitive damages are in the nature of a fine payable to the claimant as a means of encouraging the institution of private suits to enforce essentially public sanctions. The whole subject of punitive damage awards is a much debated, controversial subject.⁵³ There is no lack of proposals for change in the system for awarding punitive damages. In light of the peculiar interrelationship between the ground of liability for intentional infliction of mental suffering (a requirement that the defendant's action be extreme and outrageous)

liability. On the contrary, both the First and Second Restatements of Torts have pointed out that "in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages." Accordingly, in situations where the standard for compensatory liability is as high as or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without requiring any extra showing. Several courts have so held expressly. Many other courts, not directly addressing the congruence of compensatory and punitive thresholds, have held that punitive damages are available on the same showing of fault as is required by the underlying tort in, for example, intentional infliction of emotional distress, defamation of a public official or public figure, and defamation covered by a common-law qualified immunity.

Id. at 53-54 (footnotes omitted).

52. *Cf.* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 (1973) (enumerating the main criticisms of the punitive award):

The punitive award is criminal in nature and the defendant ought at least to have all the safeguards associated with a criminal trial, such as the privilege against self-incrimination. Liability ought to be denied for punitive damages unless the defendant's culpability is proven beyond a reasonable doubt, and it ought not exceed the statutory criminal fine. Most of all, the defendant ought not be held in jeopardy twice for the same offense, first by a punitive award and then by genuine criminal punishment. However, none of these protections is routinely accorded the defendant in a case where punitive damages are sought, and that being so, punitive damages ought to be abolished altogether as unconstitutional.

Id. at 219-20 (footnotes omitted).

53. *See* *Smith v. Wade*, 461 U.S. 30, 56 (1983) (Rehnquist, J., dissenting) and authorities cited therein.

and the function of punitive damages (to impose a fine for “outrageous” conduct), I suggest that there is special reason for separating the function of actual damage assessment from assessment of the appropriate punitive damage “fine” to be levied. The proposal is that the judge perform the function of awarding punitive damages after a determination of liability for compensation or (as proposed) for nominal damages, and after a jury recommendation that punitive damages be awarded, if that is the jury’s finding. Further, the appellate court, giving proper weight to the trial court’s exercise of discretion, would consider whether the amount of the punitive damage award is functionally appropriate.

The assessment of fines in criminal proceedings almost universally is a matter for determination by the judge. In a special type of civil proceeding where there is legitimate concern that actual and punitive damages may overlap to produce an excessive award, court administration of the punitive damage assessment has particular appeal. The *Restatement (Second) of Torts* does not speak to the subject of punitive damage assessment in the context of a section 46 claim. It is submitted that the section ought to address the problem; the proposal here advanced is that the punitive damage assessment should be a separate, sequential function for the trial judge, subject to appellate review. Such a change in procedure ought to be seen as within the province of the courts or the legislature, not an impairment of any constitutional right to trial by jury in civil cases.⁵⁴ That this tort action is quite modern and still evolving should strengthen the power of the courts to shape the nature of the remedy without conflict with provisions protecting an historic right to jury trial.

In a very real sense section 46 has opened a wide field for possible application in the field of intentional and reckless torts. Other established tort principles have long addressed particular areas that could be described as intentional or reckless infliction of emotional distress. Assault, defamation and even many commercial torts could be en-

54. There are several grounds for doubt as to whether there is any “inviolable” right to have a jury not only determine whether punitive damages should be awarded, but also determine the precise amount of such an award. Historically, courts have exercised great control over punitive damage awards at both the trial and appellate court levels. See K. REDDEN, PUNITIVE DAMAGES § 3.6(D) (1980). Furthermore, the evolving law of punitive damages reviewed in *Smith* has reflected the controversial nature of this aspect of civil litigation and attests to the fact that the common law pot has been long at the boil on this subject. See *supra* notes 47, 49. Thus, it is difficult to associate any inviolable right with the allocation of function between judge and jury on the subject of the amount of punitive damages. Finally, there is a recognition that the safeguards and practices of criminal procedure ought to be applied to awards of punitive damages. See *supra* note 50. In sum, the courts should be able to remake their own creature at least to the extent of reserving to the judge the determination of the appropriate amount of punitive damages on the basis of a jury recommendation that punitive damages be awarded.

compassed by section 46. But this principle of modern creation was conceived to provide a civil remedy where the traditional common law remedies had been carefully weighed and found wanting. An American case known to every law student addressed the threat to "do in" the plaintiff, not today, but later—not an assault at common law, because of lack of immediacy in the threat, but nonetheless a wrong calling for a remedy.⁵⁵

The point is, however, that it was only after carefully weighing the older common law remedy and its limitation in terms of relevant factors that this new tort principle of liability for intentional infliction of mental suffering emerged. It should not occupy territory acceptably administered by other liability rules. Thus, malicious publication of defamatory material causing severe emotional distress to the individual could be viewed as an intentional infliction case, but the law of defamation, with its constitutional overlay, is an area where the nature and dimensions of the appropriate remedy for such wrongs has received recurring, recent and extended attention.⁵⁶

Thus, defamation is not a field of law where a new basis for liability is called for. Calling the wrong by a different name does not alter the nature of the relevant policy considerations.⁵⁷ On the other

55. *State Rubbish Collector's Ass'n v. Silznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952).

56. The landmark decisions of the Supreme Court concerning the law of defamation are *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). These decisions have prompted a flood of later cases on the subject of defamation and its legal contours, revision of the second *Restatement of Torts* on the subject of defamation and a vast outpouring of law review literature. Thus, the field is one which has received ongoing and intense study, a result not entirely accidental since the media of communication, so important in our society, are directly affected.

57. *Cf. Drechsel, Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339 (1985):

Such reasoning suggests a broader principle: whenever the same course of conduct leads to claims for intentional infliction plus libel and/or invasion of privacy, proof that the conduct is privileged under statute, common or constitutional law against either the libel or privacy claims should be considered proof that the conduct is also privileged against the intentional infliction claim. This principle should also apply where plaintiffs fail to state claims for relief on theories of libel or invasion of privacy but where, given the defendant's conduct, such claims are obviously appropriate. That is, an intentional infliction action under such circumstances should fail where a defendant can show that the plaintiff's claim is in reality one for libel or invasion of privacy and that the defendant's conduct would be privileged under such a theory of liability. Such a principle would help guarantee that intentional infliction be a truly independent cause of action and not merely a vehicle through which a plaintiff hopes to circumvent powerful defenses to other tort actions.

Id. at 359-60.

It is not intended to imply that the law of defamation or privacy is wholly satisfac-

hand, the claim for emotional distress in the contract breach context has already, in some jurisdictions, given way to section 46.⁵⁸ In some contract cases, particularly those involving contracts to provide protection against emotional distress, application of section 46 seems appropriate as a needed and appropriate sanction. For tort and contract to coalesce in given cases should not alarm.

CONCLUSION

Section 46 has come of age. It has not swamped the courts with specious claims. It ought now to be reexamined in terms of its adequacy. The principal proposal here advanced is that the section should be revised to impose at least nominal liability for intentional infliction of mental suffering through extreme and outrageous misconduct that would be likely to inflict severe emotional distress on a person of ordinary sensibility. There should be no requirement that the plaintiff must, as an element of the claim, establish suffering of severe emotional distress in fact. The extent of actual emotional distress would be relevant, of course, to the assessment of compensatory damages. In addition, it is suggested that awarding of punitive damages in section 46 cases should be exclusively a function of the trial judge, subject to appellate review. Section 46 so revised would, it is submitted, better serve the civilizing function of tort law.

tory. Rather, the view is that improvements should come by focusing on these remedies directly, rather than to shift to different doctrinal language. For creative proposals for defamation law, see Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1 (1983).

58. See Givelber, *supra* note 42, at 74; Bolla, *Contort: New Protector of Emotional Well-being in Contract?* 19 WAKE FOREST L. REV. 561 (1983); J. MCCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES (3d ed. 1983); Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F.L. REV. 187 (1982).