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# Negligent Infliction of Emotional Distress: New Tort Problem for the Mass Media

Robert E. Drechsel\*

*Negligent infliction of emotional distress is becoming an increasingly popular cause of action to be utilized against media defendants. This article begins by tracing the development of the tort and explaining its central elements through cases involving mass media defendants. It studies the relationship between negligent infliction and the torts of libel, invasion of privacy, and intentional infliction of emotional distress. After considering the appropriate balance between expression and emotional tranquility, it is concluded that negligent infliction actions present an ominous threat to the free flow of expression. Sound policy considerations, flowing in part from the first amendment, dictate that such actions be limited. Finally, appropriate limits are suggested.*

On August 20, 1980, the *Daily Tribune* newspaper in Columbia, Missouri published a story which began as follows:

A 24-year-old Columbia woman told police she was abducted at gunpoint early this morning, but escaped from her kidnapper's car a few blocks away. Sandra Kay Hyde, 4334 Bethany Drive, told police the man who forced her into his car told her: "You will do what I want you to do, or I will blow your brains out."<sup>1</sup>

The Columbia Police Department had released the victim's identity to the newspaper, but the assailant was still at large when the newspaper published it. Subsequently, the assailant terrorized Ms. Hyde on several occasions with confrontation and death threats. When Ms. Hyde sued the city and the newspaper for negligence resulting in emotional harm, the trial court dismissed the action. However, the Missouri Court of Appeals reversed the dismissal, a decision ultimately left undisturbed by the United States Supreme Court.<sup>2</sup>

Ms. Hyde's suit illustrates a theory of tort liability being advanced

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1. *Hyde v. City of Columbia*, 637 S.W.2d 251, 271 n.26 (Mo. Ct. App. 1982), cert. denied, 459 U.S. 1226 (1983).

2. *Id.*

against the mass media by a small but increasing number of plaintiffs—negligent infliction of emotional distress [hereinafter negligent infliction]. Although such actions have been utilized since at least 1921,<sup>3</sup> nearly two-thirds of them have arisen within the past five years.<sup>4</sup> One reason for the recent popularity of such actions may well be that after a century of sluggish and cautious development, the tort is becoming increasingly attractive as courts liberalize the rules for recovery.<sup>5</sup> The Supreme Court itself may have provided further impetus for negligent infliction actions against the media by finding recovery based on negligence consistent with the first amendment, at least in libel suits brought by private figures.<sup>6</sup> Meanwhile, juries have proved to be antagonistic toward media defendants.<sup>7</sup>

Conceivably, a negligent infliction theory of liability could expand to cover an almost limitless range of media conduct. Possibly, it could provide a loophole through which plaintiffs—including public officials and public figures—could circumvent barriers precluding them from recovery for defamation or invasion of privacy. But perhaps most significant, expansion of liability for negligent infliction could “legalize” what heretofore have essentially been questions of journalistic ethics.

This paper, therefore, examines media liability for negligent infliction of emotional distress. The study is confined to cases in which negligent infliction is advanced as an independent cause of action; cases in which emotional distress is merely alleged as harm flowing from another tort such as libel or invasion of privacy are specifically excluded. The relevant cases are those in which media conduct, even though without intent to harm, allegedly caused the emotional distress which was either the only resulting harm or which in turn resulted in some physical manifestation. Cases in which plaintiffs allege that media negligence led someone to do something dangerous are not covered by this paper.<sup>8</sup>

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3. *Herrick v. Evening Express Pub. Co.*, 120 Me. 138, 113 A. 16 (1921).

4. See *infra* notes 63-74 and accompanying text.

5. See *infra* notes 9-41 and accompanying text.

6. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 n.10 (1974). The Court has also made it clear that recovery in libel suits may be based on emotional harm. *Id.* at 350.

7. Libel plaintiffs are winning about 80 percent of their trial verdicts. *Study Shows Media Loses Most Jury Libel Rulings*, EDITOR & PUBLISHER, April 16, 1983, at 12. Plaintiffs suing for intentional infliction of emotional distress are even more successful with juries. Drechsel, *Mass Media and Intentional Infliction of Emotional Distress* (1984) (unpublished paper, School of Journalism & Mass Communication, University of Wisconsin-Madison).

8. Thus, such cases as *Olivia N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), are excluded. In that case, plaintiff argued that NBC negligently broadcast a movie showing a rape scene that subsequently triggered an imitative real crime against plaintiff. *Id.* at 491-92, 178 Cal. Rptr. at 890-91.

## I. DEVELOPMENT OF THE TORT

Little more than a century ago, English and American courts refused to recognize mental distress as a recoverable damage except where such harm was parasitic—that is, where it was part of the harm caused by a separate, recognizable tort. There could be no suit either for emotional distress as an independent cause of action, or where the only alleged harm was emotional distress. This principle was clearly stated in the English case of *Lynch v. Knight*, a slander case:

Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.<sup>9</sup>

Even when an emotional shock had seemingly obvious and serious physical consequences, there could be no recovery unless the emotional shock had itself been caused by actual physical impact on the plaintiff.<sup>10</sup>

Some courts gradually began to relax these rules. In *Bell v. Great Northern Railway Co.*, an Irish case, it was held that a plaintiff could maintain a negligence action where her fright as a passenger on a runaway train had physical manifestations, even though there had

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9. 11 Eng. Rep. 854, 863, IX H.L. 577, 598 (1861). The principle that damages for emotional suffering can be parasitic on other causes of action strongly survives, as the *Gertz* libel case well illustrates. See *supra* note 6. For overviews of the development of tort recovery for emotional distress, see J. DOOLEY, 1 MODERN TORT LAW: LIABILITY AND LITIGATION 361-87 (1982); W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 54-66, 359-67 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON]; Handford, *Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort*, 8 ANGLO-AM. L. REV. 1 (1979); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Millard, *Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation*, 15 IND. L. REV. 617 (1982); Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAWAII L. REV. 1 (1979); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1982); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944); and Comment, *Negligent Infliction of Emotional Distress: Liability to the Bystander*, 11 GONZAGA L. REV. 203 (1975).

10. The decision generally credited for this "impact rule" is Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (1888), a case in which the plaintiff became ill after a train nearly struck her buggy when a gatekeeper negligently allowed the buggy to cross the tracks. Technically, however, the case was decided not by application of the impact rule but on grounds that the illness was too remote in the chain of causation for recovery to be allowed. *Id.* at 225-26.

been no physical impact.<sup>11</sup> And in *Wilkinson v. Downton*, an English court allowed recovery where a practical joker had intentionally inflicted emotional distress on the plaintiff which led to serious physical consequences.<sup>12</sup> Finally, in *Dulieu v. White & Sons*, an English court repudiated the impact rule, allowing recovery for damages where nervous shock alone had physical consequences.<sup>13</sup> But there the court also added what was to become an enormously influential qualification: the nervous shock must arise from the plaintiff's reasonable fear of immediate personal injury to himself or herself.<sup>14</sup> This qualification has come to be called the "zone-of-physical-danger" rule.<sup>15</sup> This rule was further expanded in another English case, *Hambrook v. Stokes Brothers*, where the court allowed recovery in a negligence case where the plaintiff was not personally in physical danger, but feared for the safety of her children because of an accident she actually witnessed.<sup>16</sup>

Although a few late 19th Century American cases allowed recovery where severe emotional distress was inflicted without impact, but which led to physical consequences,<sup>17</sup> the courts in general remained reluctant to allow recovery for emotional distress alone or for physical harm triggered by the distress. This reluctance received perhaps its ultimate statement in an 1896 New York decision. Fright alone could not form the basis of an action the state court of appeals concluded, and therefore a plaintiff could not recover even for injuries resulting from such fright: "That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle."<sup>18</sup> The court, however, hinted that the rigidity of the im-

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11. 26 L.R. Ir. 428 (1890).

12. [1897] 2 Q.B. 57.

13. [1901] 2 K.B. 669.

14. *Id.* at 675. The plaintiff in *Dulieu v. White & Sons* was able to satisfy that qualification. The defendant's servant had negligently driven a van into a public house where plaintiff, who was pregnant, was behind the bar. The shock caused her to give birth prematurely and the child was mentally defective. *Id.* at 676.

15. See PROSSER & KEETON, *supra* note 9, at 365-66; see also *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), for a thorough discussion of the rule.

16. [1925] 1 K.B. 141. Plaintiff, who was pregnant, began hemorrhaging and ultimately died after perceiving that her children were in the path of a runaway lorry. *Id.* at 141-43.

17. *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N.W. 1034 (1892) (fright suffered as result of streetcar mishap led to convulsions, illness and miscarriage); *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890) (recovery allowed where woman suffered miscarriage after observing violent assault).

18. *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 109-10, 45 N.E. 354, 354 (1896), *overruled by* *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729 (1961). In *Mitchell*, the plaintiff was on a public street when she was nearly struck by a negligently run team of horses. She was actually standing with her head between the horses' heads when the team stopped, and she became unconscious, ill and suffered a miscarriage. A year later, the Massachusetts Supreme Court reached the same conclusion. *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897).

impact rule—that is, the requirement that the emotional distress itself be caused by physical contact—might be relaxed if a defendant's conduct were intentional.<sup>19</sup> While a state supreme court relaxed the impact rule as early as 1902,<sup>20</sup> as late as 1916 the United States Supreme Court noted that, at least under federal common law, there could be no recovery for mental suffering alone.<sup>21</sup> The impact rule saw its most absurd expression in 1928 when the Georgia Court of Appeals, in order to justify an award for mental suffering, found the requisite impact to have occurred when a dancing circus horse emptied its bowels onto plaintiff's lap.<sup>22</sup>

By the 1930's, the principle that plaintiffs could recover for mental distress without impact or even subsequent physical manifestation, when defendants intentionally inflicted the distress, was spreading<sup>23</sup>—so much so that by 1939 Dean William Prosser felt confident in declaring that “[i]t is time to recognize that the courts have created a new tort. . . . It is something very like assault. It consists of the intentional, outrageous infliction of mental suffering in an extreme form.”<sup>24</sup> Most jurisdictions now recognize an independent cause of action for intentional infliction of emotional distress.<sup>25</sup>

Although the impact rule began to fall into disuse,<sup>26</sup> most courts remained unwilling to significantly broaden liability for harm resulting from negligently inflicted emotional distress. Some jurisdictions allowed recovery where the emotional distress obviously caused serious physical consequences and where the plaintiff had been within the zone of physical danger.<sup>27</sup> Those concessions, however, hardly

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19. 45 N.E. at 354.

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

21. *Southern Express Co. v. Byers*, 240 U.S. 612, 615 (1916).

22. *Christy Bros. Circus v. Turnage*, 38 Ga. App. 58, 144 S.E. 680 (1928).

23. See, e.g., *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930) (recovery allowed where defendants threatened to hang plaintiff if he did not move); *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932) (recovery allowable for mental suffering caused by pressure tactics of debt collection agency).

24. Prosser, *Intentional Infliction*, *supra* note 9, at 874. The Restatement, however, still refused to recognize the tort of intentional infliction of emotional distress. RESTATEMENT OF TORTS § 46 (1934).

25. In 1982, Millard counted 38 jurisdictions. Millard, *supra* note 9, at 631-32. The Restatement also now recognizes the tort, and favors recovery for intentionally caused emotional distress even without impact or subsequent physical consequences so long as the conduct causing the distress is outrageous and the emotional suffering is severe. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

26. A 1982 study found only five jurisdictions still following the impact rule in negligence cases. Millard, *supra* note 9, at 618.

27. See *supra* note 17; Dooley, *supra* note 9, at 375-76.

made recovery easy.<sup>28</sup>

Most jurisdictions still refuse to recognize a cause of action specifically for negligent infliction of emotional distress.<sup>29</sup> But where the tort has been recognized, the rules for recovery appear to be becoming increasingly more liberal. Developments in California and Hawaii have been particularly influential. In 1968, in *Dillon v. Legg*, California relaxed the "zone-of-physical-danger" rule, although it still required some physical manifestation of the emotional distress.<sup>30</sup> That decision involved a suit brought by a mother who had witnessed the death of her child at the hands of a negligent motorist, and substituted a foreseeability test: "'recovery should be had . . . if defendant should foresee fright or shock severe enough to cause substantial injury in a person normally constituted.'"<sup>31</sup> Apparently realizing the potential expansiveness of this rule, the court specified that plaintiffs in such "bystander" cases would have to witness a tragedy first-hand and be closely related to the victim of the tragedy.<sup>32</sup>

Two years later, in *Rodrigues v. State*, the Hawaii Supreme Court applied a foreseeability test in a case brought by a couple for mental suffering allegedly resulting from the highway department's failure to keep a culvert unclogged causing their house to be flooded during a heavy rain.<sup>33</sup> Neither impact nor physical consequence was required to be shown. Perhaps the most dramatic and influential extension came from the California Supreme Court in 1980. In *Molien v. Kaiser Foundation Hospitals*, the court held that where a plaintiff was the direct victim of allegedly negligent conduct resulting in emotional distress, the plaintiff could maintain an action for the emotional distress alone, without impact and without any physical consequence.<sup>34</sup> Foreseeability of harm was held to be the test, even

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28. The rigidity of these rules is well illustrated by *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935), where, because the victim of the emotional distress was not within the zone of physical danger herself, there could be no recovery. The suit was brought by the estate of a woman who died after the emotional shock of looking out her window just as the defendant struck and killed her daughter as she crossed a highway.

29. Millard, *supra* note 9, at 631-32. Unfortunately, not all authorities agree on just how many jurisdictions do recognize the tort. See generally, Dooley, *supra* note 9, at 375-76; 38 AM. JUR. 2D *Fright, Shock, & Mental Disturbance* §§ 1, 25 (1968).

30. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

31. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80 (quoting 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1035-36 (1956)).

32. *Id.*

33. 52 Hawaii 156, 472 P.2d 509 (1970). The same court, however, somewhat stifled development of the tort in *Kelley v. Kokua Sales & Supply, Ltd.*, 56 Hawaii 204, 532 P.2d 673 (1975), by refusing to allow recovery by the estate of a plaintiff who died of a heart attack after being informed by telephone that his daughter and granddaughter had been killed in an accident. The court concluded that since he was in California when the accident occurred, he was not sufficiently close to allow recovery.

34. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

though not in a bystander context.<sup>35</sup>

The plaintiff in *Molien* was a man whose wife was misdiagnosed as having syphilis. The misdiagnosis made his wife suspect him of infidelity, and their marriage consequently dissolved. *Molien's* expansive principle has subsequently been reflected in decisions in at least five other states in varying factual contexts—emotional distress suffered by a motor vehicle accident victim who escaped physical injury,<sup>36</sup> by a passenger trapped in a stalled elevator,<sup>37</sup> by a mother who saw her infant son choking on a foreign substance contained in a jar of baby food,<sup>38</sup> by a woman whose doctor failed to attend her labor and delivery,<sup>39</sup> and by a man driving behind a truck from which a large plate of glass fell.<sup>40</sup>

If these cases do signal a trend toward significantly relaxed rules for recovery in negligent infliction actions, it would seem to be because the most fundamental concerns about such relaxation are being overcome. Historically, courts have advanced four fundamental arguments against easing the rules for negligent infliction plaintiffs: 1) the connection between emotional distress and physical consequence is too indirect; 2) most emotional distress is trivial harm anyway; 3) the intangible nature of emotional distress creates serious problems of proof; and 4) easing the rules for recovery will lead to a flood of litigation, including many fraudulent claims.<sup>41</sup>

These concerns seem to have been dismissed by a combination of scholarship, logic, counter-argument and the careful testing of new principles. Perhaps the easiest arguments to overcome were those regarding the alleged triviality of emotional harm, its susceptibility to

35. *Id.* at 921-31, 616 P.2d at 816-21, 167 Cal. Rptr. at 834-39. For critical analysis of the case, see Comment, *Negligent Infliction of Emotional Distress: New Horizons after Molien v. Kaiser Foundation Hospitals*, 13 PAC. L.J. 179 (1981); Comment, *Negligent Infliction of Emotional Distress as an Independent Cause of Action in California: Do Defendants Face Unlimited Liability?*, 22 SANTA CLARA L. REV. 181 (1982).

36. *Chappetta v. Bowman Transp., Inc.*, 415 So. 2d 1019 (La. Ct. App. 1982).

37. *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983).

38. *Culbert v. Sampson's Supermks., Inc.*, 444 A.2d 433 (Me. 1982). Technically, however, this was a bystander case.

39. *Taylor v. Baptist Medical Center, Inc.*, 400 So. 2d 369 (Ala. 1981).

40. *Shultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

41. Several authorities and case law decisions have summarized these arguments. See, e.g., *Spade*, 168 Mass. at 288-90, 47 N.E. at 89; *Mitchell*, 151 N.Y. at 110, 45 N.E. at 354-55; *Waube*, 216 Wis. at 612-15, 258 N.W. at 501; *Victorian Rys. Comm'rs*, 13 App. Cas. at 225-26; PROSSER & KEETON, *supra* note 9, at 359-67; Bohlen, *Right to Recover for Injury Resulting from Negligence without Impact*, 50 U. PA. L. REV. 141 (1902); 38 AM. JUR. 2D *Fright, Shock, & Mental Disturbance* §§ 8-12 (1968); Annot., 64 A.L.R.2d 100 (1959).



proof, and its operation as a proximate cause of physical harm. To all of these assertions, medical evidence and expertise plus common sense could provide answers. Not only can the physical impact of excitement or fear be felt, but medical and psychological research has long provided evidence of a connection between emotional and physical responses.<sup>42</sup> As medical and psychological expertise increases, problems of proof become more manageable.<sup>43</sup> Further, cases involving the impact rule and the requirement that emotional distress be manifested by physical consequences have helped the courts learn to distinguish spurious from legitimate claims, provided some proof of the seriousness of the harm, and provided some evidence of proximate cause.

The concern about runaway litigation, however, remains real. Certainly, the impact rule, the requirement of physical manifestation of emotional harm, the zone-of-physical-danger test, and even the foreseeability rule are all intended to effect some sort of compromise between justice and the pragmatic need to avoid uncontrolled litigation. The conscience of the judiciary has also been prodded by such authorities as Dean Prosser, who, in discussing legal remedies for emotional distress, reminded readers that "[i]t is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied, and by this time there is precedent enough, and no such increase in litigation is to be observed."<sup>44</sup>

Before discussing negligent infliction suits against mass media defendants, one must summarize the relevant legal principles, outline the basic elements of the tort, and consider the meaning of two crucial concepts—negligence and duty.

## II. CENTRAL ELEMENTS OF NEGLIGENT INFLECTION

A statement attempting to synthesize the common law might define the tort of negligent infliction of emotional distress as negligent conduct that is the proximate cause of emotional distress, from which physical harm may result, in a person to whom the actor owes a legal duty of care not to be negligent.<sup>45</sup>

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42. See Bohlen, *supra* note 41; Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Selzer, *Psychological Stress and Legal Concepts of Disease Causation*, 56 CORNELL L. REV. 951 (1971); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971).

43. See *supra* note 42.

44. PROSSER & KEETON, *supra* note 9, at 359-61.

45. The Restatement takes a generally cautious approach to negligent infliction. It does not recognize a cause of action for negligence resulting only in emotional distress. RESTATEMENT (SECOND) OF TORTS § 436A (1965). It also suggests a fairly restrictive principle of recovery for illness or bodily harm resulting from unintentionally inflicted emotional distress. Recovery for such illness or harm may be had if the de-

Negligent infliction cases appear to fall into two broad categories—those where the plaintiff is the direct victim of the defendant's conduct (generally some type of accident), and those where the plaintiff has been a "bystander" or indirect victim claiming to have been harmed because of what the defendant did to a third party. In the direct victim cases, recovery will be allowed in some jurisdictions, provided the defendant's conduct has indeed been negligent and there has been physical impact on the plaintiff, physical harm proximately caused by the defendant's conduct, or foreseeable emotional distress without impact or physical harm.<sup>46</sup> In bystander cases, again depending on the jurisdiction, recovery will be allowed in two situations. If the plaintiff was in the zone of physical danger, observed a close relative's tragedy, and suffered emotional distress manifested in physical symptoms, he may recover. Alternatively, if the plaintiff was not in the zone of physical danger, but contemporaneously observed an accident involving a close relative, and suffered severe and foreseeable emotional distress that may or may not have been manifested physically, a court will allow recovery.<sup>47</sup>

A related principle, which allows recovery for conduct that is less than reckless and perhaps even less than negligent, allows recovery for insults to patrons by employees of public utilities.<sup>48</sup> This rule is based on the law's recognition of a few special relationships between parties where one party is expected to be especially considerate. These relationships commonly include those between creditor and debtor, carrier and passenger, innkeeper and guest, and place of amusement and patron.<sup>49</sup>

These principles alone are not helpful without an understanding of

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defendant should have realized that his conduct involved an unreasonable risk of causing the emotional distress and should have realized that the distress might result in physical harm. *Id.* § 313. The Restatement favors recovery for bodily harm resulting where emotional distress was inflicted intentionally and unreasonably, but such circumstances are beyond the scope of this paper. *Id.* §§ 312, 436. In general, courts will not allow emotional distress damages for mere inconvenience, annoyance or mental suspense. The discomfort must be more severe and intense. 38 AM. JUR. 2D *Fright, Shock, & Mental Disturbance* §§ 7, 45 (1968).

46. See *supra* notes 9-44 and accompanying text for a discussion of approaches taken by various jurisdictions.

47. *Id.* These rules are a result of a long process of evaluation in the common law.

48. The Restatement states the principle as follows: "A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment." RESTATEMENT (SECOND) OF TORTS § 48 (1965).

49. 38 AM. JUR. 2D *Fright, Shock, & Mental Disturbance* §§ 43-44 (1968). See also RESTATEMENT (SECOND) OF TORTS § 48 comments a, b and c (1965).

negligence and, concomitantly, duty. The Restatement of the Law of Torts [hereinafter cited as Restatement], defines negligent conduct as either:

an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.<sup>50</sup>

Negligence thus involves the concepts of the reasonable person and unreasonable risk. A person's conduct is negligent when, measured against the standard of a hypothetical reasonable person's conduct under the same circumstances, it involves an unreasonable risk of harm to another such that the magnitude of the risk outweighs what the law regards as the utility of the conduct. If a reasonable person would have done precisely what the defendant did, or if the risk is not unreasonable, the conduct is not negligent.

A reasonable person is one who exercises "those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others."<sup>51</sup> The crucial inquiry is not how a defendant in fact assessed a given situation at the time of his or her relevant action, but rather how a hypothetical reasonable person would have assessed that same situation. Thus the standard is objectively, not subjectively, established.<sup>52</sup> Consequently, no matter how innocent or harmless a defendant might have believed his conduct to be, it might still fall short of the conduct of a reasonable person.

A risk becomes unreasonable when it outweighs the utility of a defendant's action.<sup>53</sup> Utility itself may depend on such factors as the social value the law attaches to the interest being advanced or protected by a defendant's conduct, the likelihood that this interest will in fact be advanced or protected by the defendant's conduct, and the likelihood that the interest can be adequately advanced or protected by a less dangerous course of conduct.<sup>54</sup> On the other side of the balance, the magnitude of a risk depends on such factors as the social value the law attaches to the imperiled interests, the likelihood that the defendant's conduct will invade another interest, the extent of the harm likely to be caused, and the number of people likely to be affected.<sup>55</sup> The greater the social value of the threatened interest, the less risk is justifiable.<sup>56</sup>

What this suggests, of course, is that the concepts of reasonable

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50. RESTATEMENT (SECOND) OF TORTS § 284 (1965).

51. *Id.* § 283 comment b.

52. *Id.* § 283 comment c.

53. *Id.* § 291.

54. *Id.* § 292.

55. *Id.* § 293.

56. *Id.* § 293 comment a.

person, unreasonable risk and social utility are flexible and variable. The Restatement recognizes this flexibility: "If the legal valuation differs from that attached to the respective interests by a persistent and long-continued course of public conviction, as distinguished from a novel and possibly ephemeral opinion, courts should and often do re-examine their valuation and make it conform to the settled popular opinion."<sup>57</sup>

The same could be said about the concept of legal duty. No matter how much harm one might cause, if the law does not recognize a legal duty to refrain from causing such harm, then the victim cannot legally complain. As Dean Prosser has observed:

[A]s our ideas of human relations change the law as to duties has changed with them. Various factors undoubtedly have been given conscious or unconscious weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others. Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists.<sup>58</sup>

Consequently, at least in some cases, whether a duty exists may be impossible to discern until the case is adjudged.<sup>59</sup>

In the context of actions for plaintiffs' emotional distress, most jurisdictions in essence agree that there is a duty not to intentionally inflict such harm. Fewer courts agree that there is a duty not to cause such harm negligently, but the number is growing.<sup>60</sup> Whenever a court seeks to expand liability for negligence resulting in emotional distress, it implicitly or explicitly addresses the duty question. Thus, the Hawaii Supreme Court in *Rodrigues* aptly noted that, in determining the existence of a duty, it must "weigh the considerations of policy which favor the plaintiff's recovery against those which favor limiting the defendant's liability."<sup>61</sup> The court then declared that "there is a duty to refrain from the negligent infliction of serious emotional distress."<sup>62</sup>

Seen in the light of the concepts of negligence and duty, then, devices such as the impact rule, the physical manifestation require-

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57. *Id.* § 291 comment d.

58. PROSSER & KEETON, *supra* note 9, at 359.

59. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1025 (1928).

60. See *supra* notes 25-29 and accompanying text. See also Annot., 64 A.L.R.2D 100,109-10 (1959).

61. 52 Hawaii at 166, 472 P.2d at 519.

62. *Id.* at 167, 472 P.2d at 520.

ment, and the zone-of-physical-danger rule can be understood as useful in helping to ascertain not only whether a duty exists, but also the standard of care expected of a reasonable person, and the unreasonableness of the risk. One can likewise see how greater uncertainty and unpredictability enter the equation as the courts move away from these relatively easy-to-apply rules and toward a more flexible foreseeability standard.

### III. NEGLIGENT INFLICTION AND MASS MEDIA DEFENDANTS

Suits against media defendants for negligent infliction can be traced to at least 1921, when a newspaper in Maine was sued by a plaintiff whose son's photograph had mistakenly been published with a report of the death of another person having the same name.<sup>63</sup> The trial court sustained the newspaper's demurrer. It was upheld by the Maine Supreme Court on the ground that recovery for emotional distress or subsequent illness was barred in any negligence action where there was no physical injury.<sup>64</sup> Similar facts—a false newspaper report that plaintiffs' father had died—led to a negligent infliction action in 1937 against a New Mexico newspaper.<sup>65</sup> This time, however, one of the plaintiffs had subsequently suffered a heart attack, and another had become ill. Nevertheless, the state supreme court upheld dismissal of the case, holding that damages could not be recovered from a newspaper publisher "for the consequences of grief resulting in physical injury, occasioned by reading in such paper a negligently published false report of the death of the reader's parent."<sup>66</sup> The result in both cases was, of course, consistent with the courts' ever-present reluctance to allow recovery for harm inflicted merely by emotional distress.<sup>67</sup>

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63. *Herrick v. Evening Express Pub. Co.*, 120 Me. 138, 113 A. 16 (1921).

64. *Id.* at 139-40, 113 A. at 17. This principle was overruled nearly 50 years later in *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117, 121 (Me. 1970), a case which was later held not binding in *Culbert v. Sampson's Supermkts., Inc.*, 444 A.2d 433, 436 (Me. 1982).

65. *Curry v. Journal Pub. Co.*, 41 N.M. 318, 68 P.2d 168 (1937).

66. *Id.* at 330, 68 P.2d at 176. Secondary sources indicate that several actions were brought against CBS for physical and emotional damages allegedly caused by the notorious Mercury Theatre radio broadcast of *War of the Worlds*. W. PALEY, AS IT HAPPENED 112 (1979), Houseman, *The Men from Mars*, HARPER'S, Dec. 1948, at 74, 82. Houseman wrote that none of the suits "was substantiated or legally proved." *Id.* At least one legal commentator argued that, under a negligence theory, CBS should be held responsible for fright-induced physical illness caused by the broadcast. Note, *Broadcasting—Invasion from Mars—Recovery for Fright Without Impact*, 10 AIR L. REV. 192 (1939).

67. There are more recent examples of unsuccessful negligent infliction actions against media defendants. See, e.g., *Saunders v. Air Florida Inc.*, 558 F. Supp. 1233 (D.D.C. 1983) (suit by father who via television witnessed injuries sustained by son who was killed by defendant's crashing airliner); *Beresky v. Techner*, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978) (suit by parents against newspaper which published series of

Until recently, plaintiffs' successes had been limited to one seemingly aberrant default judgment.<sup>68</sup> But since 1982, three cases have resulted in success for plaintiffs, if success can be defined to include refusal or reversal of dismissal or summary judgment. In the first, *Hyde v. City of Columbia*, the Missouri Court of Appeals reversed the dismissal of a suit by a woman who, while the assailant remained at large, was identified by a newspaper as a kidnapping victim.<sup>69</sup> The assailant thus discovered her identity and was able to terrorize her on several occasions.<sup>70</sup> In the second, *Parnell v. Booth Newspapers, Inc.*, a federal district court refused to grant summary judgment to a newspaper that had published a retouched but allegedly still identifiable photograph of the plaintiff in connection with articles on prostitution.<sup>71</sup> In the third, *Rubinstein v. New York Post*, a New York court refused to dismiss a suit based on an erroneous report of plaintiff's death.<sup>72</sup> None of these successful suits was ultimately decided by a jury, although there has been one directed verdict for a defendant.<sup>73</sup>

Not surprisingly, plaintiffs' success has depended on the courts' consideration of such issues as defendants' legal duty, impact or physical manifestation of emotional distress, foreseeability of harm, the relevance of defenses applicable to companion causes of action, and first amendment concerns. Each of these concerns deserves closer attention.

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articles regarding death of son from drug overdose). This article does not address cases in which plaintiffs have sued non-media defendants for emotional distress suffered because of information communicated to them through the media.

68. *Blinick v. Long Island Daily Press Pub. Co.*, 67 Misc. 2d 254, 323 N.Y.S.2d 853 (Civ. Ct. 1971), *appeal dismissed*, 71 Misc. 2d 986, 337 N.Y.S.2d 859 (Sup. Ct. 1972). Default judgment was entered against a newspaper and advertiser where an advertisement erroneously listed plaintiff's phone number and urged single adults to call for an "interesting recorded message" and to meet new people "preselected to please you." A torrent of calls, many of them obscene, resulted. Judgment was \$1,750.00 against the newspaper, \$2,500.00 against the advertiser. Unfortunately, the courts were less than clear on precisely what theory of liability was being pursued. *Id.*

69. 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983).

70. *Id.* at 253.

71. 572 F. Supp. 909 (W.D. Mich. 1983).

72. 9 MEDIA L. REP. (BNA) 1581 (Sup. Ct. N.Y. 1983). The court mentioned neither the *Herrick* nor the *Curry* case. It did, however, cite an unpublished New York case, *LeBrecque v. New York News, Inc.*, N.Y. L.J., April 4, 1979, at 12 (Civ. Ct.).

73. *Cole v. Dun & Bradstreet Pubs. Corp.*, No. 80-1015, slip op. (6th Cir., Oct. 22, 1981) (unpublished slip opinion). The federal appeals court upheld the directed verdict in a suit by a woman whom *Dun's Review* identified as the "ex-wife" of a man to whom she was still married. *Id.*

## A. Duty

As might be expected, there is a strong correlation between plaintiffs' successes and whether courts find journalists to owe plaintiffs any legal duty, although nearly half the decisions neither explicitly nor implicitly address the question.

For example, in *Curry v. Journal Publishing Co.*,<sup>74</sup> the conclusion that the paper owed no legal duty to third persons, or to plaintiffs<sup>75</sup> was central to the court's finding that the newspaper was not legally responsible for emotional harm to third persons not directly involved in the allegedly offensive story. And in rejecting a suit by a reader upset over another inaccurate story, a federal district court in New Jersey noted that plaintiff "was not one to whom the defendants owed any particular duty of care."<sup>76</sup> In that case, the plaintiff, under indictment for murder, brought suit after a newspaper incorrectly reported on a state supreme court decision which, had the story been correct, would have meant dismissal of the charges against him. As a result, he claimed to have become wrongly elated and then despondent.<sup>77</sup>

On the other hand, in *Hyde*,<sup>78</sup> *Parnell*,<sup>79</sup> *Blinick v. Long Island Daily Press Publishing Co.*,<sup>80</sup> *Apostle v. Booth Newspapers, Inc.*,<sup>81</sup> and *Rubinstein*,<sup>82</sup> courts either explicitly or implicitly agreed that media defendants owed plaintiffs a legal duty. In *Blinick*, the court found that where a newspaper accepted personal ads soliciting phone calls from single adults "it must likewise accept the concomitant burden of verifying any telephone number or address given . . . ."<sup>83</sup> The court in *Rubinstein* reached a similar conclusion regarding the publication of death notices.<sup>84</sup> *Apostle* and *Parnell* both stemmed from a newspaper's coverage of prostitution. The plaintiffs in *Apostle* alleged that the stories falsely implied that they and their businesses were con-

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74. 41 N.M. 318, 68 P.2d 168 (1937).

75. *Id.* at 327, 68 P.2d at 174.

76. *Tumminello v. Bergen Evening Record, Inc.*, 454 F. Supp. 1156, 1159-60 (D.N.J. 1978).

77. *Id.*

78. 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983).

79. 572 F. Supp. 909 (W.D. Mich. 1983).

80. 67 Misc. 2d 254, 323 N.Y.S.2d 853 (1971), *appeal dismissed*, 71 Misc. 2d 986, 337 N.Y.S.2d 859 (Sup. Ct. 1972).

81. 572 F. Supp. 897 (W.D. Mich. 1983).

82. 9 MEDIA L. REP. (BNA) 1581 (Sup. Ct. N.Y. 1983).

83. 67 Misc. 2d at 256, 323 N.Y.S.2d at 855.

84. 9 MEDIA L. REP. at 1582. To bolster its conclusion, the court cited *Johnson v. State*, 37 N.Y.2d 378, 372 N.Y.S.2d 638, 334 N.E.2d 590 (1975), a case holding that a plaintiff had a right to sue for negligence where a hospital mixed up its files and falsely reported to plaintiff that her mother had died. The court did concede, however, that hospitals might have a greater duty of care than newspapers. 9 MEDIA L. REP. at 1582.

nected with prostitution;<sup>85</sup> whereas the plaintiff in *Parnell* claimed she had been falsely connected with prostitution by a retouched photograph of her used in connection with the articles.<sup>86</sup> In both cases, the plaintiffs alleged that the newspaper had a legal duty to use reasonable care in investigating, verifying accuracy, and following "acceptable journalistic standards."<sup>87</sup> In neither case, however, was the assertion of legal duty challenged.<sup>88</sup>

By far the most extensive treatment of the duty question came in *Hyde*. There, the plaintiff argued that the reporter and newspaper owed her a legal duty not to identify her and to protect her from a foreseeable risk of intentional harm by an assailant when the defendants knew he was still at large and when publication of such information was otherwise forbidden by the newspaper's own internal policy.<sup>89</sup> The appellate court agreed, concluding that the publication of Hyde's name and address was:

a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication.<sup>90</sup>

The court found this duty to derive from several policy considerations: a balance between the public's right to know and the right to personal security, social consensus that common decency considers such information of insignificant public importance compared to the likely injury, and the known character and tendencies of the assailant.<sup>91</sup> As for the plaintiff's contention that the newspaper's own policy was relevant, the court noted that such policy, even though technically unwritten, indicated a belief that a victim's identity is of no legitimate public concern and that publication could seriously harm innocent persons: "A deviation from that industry standard, therefore, becomes evidence of negligence . . . ."<sup>92</sup>

## B. *Impact/Physical Manifestation*

The impact rule or requirement that emotional distress be physi-

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85. 572 F. Supp. 897 (W.D. Mich. 1983).

86. *Id.* at 909.

87. *Apostle*, 572 F. Supp. at 900; *Parnell*, 572 F. Supp. at 916.

88. The court dismissed *Apostle*'s negligent infliction action on other grounds but without prejudice. See *infra* notes 99-100 and accompanying text.

89. 637 S.W.2d at 256.

90. *Id.* at 269.

91. *Id.* at 269-70.

92. *Id.* at 269 n.25.



cally manifested has been directly dealt with in several court decisions. This requirement seems to have been instrumental in defendants' success in four cases,<sup>93</sup> but in two of the states in which those cases arose, subsequent decisions have rejected the impact or physical manifestation requirements.<sup>94</sup> In at least two other cases, plaintiffs have been able to allege sufficient physical manifestation to satisfy that requirement, at least preliminarily.<sup>95</sup>

### C. Foreseeability of Harm

The foreseeability issue has explicitly arisen in several cases, and appears to have been central in at least three of them. In *Curry*, the plaintiff lost in part because the court found that the injury to plaintiff was so unlikely and unusual that the newspaper could not possibly, under the reasonable person standard, be expected to have realized that its error created any appreciable risk.<sup>96</sup> On the other hand, in *Blinick* the court found that the suggestive nature of the advertisement in which the error occurred "renders it highly foreseeable that what happened would happen if the telephone number was wrong."<sup>97</sup> And in *Hyde*, the court specifically stated what the relevant test was: whether the defendant knew or had reason to foresee that the conduct involved an unreasonable risk of injury to another but failed to protect against that hazard.<sup>98</sup>

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93. See *Anderson v. Atlanta Newspapers*, 212 Ga. 776, 95 S.E.2d 847 (1956) (demurrer upheld in absence of evidence of "property damage" where plaintiff sought relief for mental anguish allegedly caused by advertising, without plaintiff's permission, of plaintiff's house for sale "to colored persons"); *Herrick v. Evening Express Pub. Co.*, 120 Me. 138, 113 A. 16 (1921), *overruled by* *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117, 121 (Sup. Ct. Me. 1970) (no recovery for emotional distress without physical injury); *Langworthy v. Pulitzer Pub. Co.*, 368 S.W.2d 385 (Sup. Ct. Mo. 1963) (no relief for emotional harm without impact where plaintiff was upset by newspaper story about theft from his home); *Cole v. Dun & Bradstreet Pubs. Corp.*, No. 80-1015 (6th Cir., Oct. 22, 1981, unpublished opinion) (no evidence of major shock or injury).

94. *Herrick* was specifically overruled by *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117, 121 (Sup. Ct. Me. 1970); the impact rule and physical manifestation requirements were specifically rejected by the Missouri Supreme Court in *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983), thus undermining the principles applied in *Langworthy*.

95. In *Apostle*, sufficient physical manifestation was alleged by claims of high blood pressure, chest pains, grinding of teeth, heavy menstrual periods, nervousness, irritability, depression and withdrawal from socializing. 572 F. Supp. at 901. In *Parnell*, the requirement was met by allegations of lost appetite, nausea, tremor, shakes and reclusion. 572 F. Supp. at 917-18.

96. 41 N.M. at 327, 68 P.2d at 174.

97. 67 Misc. 2d at 256, 323 N.Y.S.2d at 855.

98. 637 S.W.2d at 271. The plaintiffs in *Apostle* and *Parnell* both alleged that the newspaper should have reasonably foreseen the harm the articles and photos allegedly would cause. *Apostle*, 572 F. Supp. at 899-900; *Parnell*, 572 F. Supp. at 916. The court did not further address the issue.

*D. Relevance of Other Defenses*

Defendants have attempted to stop negligent infliction claims with defenses to libel or invasion of privacy. The rationale is that if the law has found a type of conduct to have such utility that it should be privileged against suits for libel or invasion of privacy, it should also be privileged against suits for negligent infliction. Otherwise, conduct that would ordinarily be privileged would become actionable. Precisely such an assertion became central in the *Apostle* and *Parnell* cases. In *Apostle*, the court agreed that where a negligent infliction claim is based on the same set of facts as a libel claim and where the libel claim is subject to an assertion of qualified privilege, as a matter of law the negligence claim cannot survive. That is, if a showing of mere negligence would not be sufficient under state law to overcome the qualified privilege, it would be illogical to allow a plaintiff to circumvent the privilege with a negligent infliction claim.<sup>99</sup> The court then dismissed the negligent infliction claim.<sup>100</sup> However, the same argument failed in *Parnell* because the court believed a factual question remained as to whether the state privilege applied when the newspaper coverage was about prostitution, but not necessarily about the plaintiff, who argued that she was simply not directly involved in the issue.<sup>101</sup> Obviously, if the privilege was found not to apply because of such a distinction, it could not be used to bar the negligent infliction claim. Summary judgment was thus refused.<sup>102</sup>

The defendants in *Hyde* pressed a privilege argument on several fronts. They argued first that the publication of plaintiff's name and address was privileged as an accurate report of truthful information contained in public records. The court of appeals replied that, despite the fact that the police department believed the record to be public, and despite the fact that the state open records law did not exempt the police records from disclosure, the information given out by the police was nevertheless not a public record.<sup>103</sup> The court reached

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99. 572 F. Supp. at 906. Compare *Fitzgerald v. Penthouse Int'l, Ltd.*, 525 F. Supp. 585, 603 (D. Md. 1981) (same standard should be used for defamation and false light causes of action where plaintiff brings both in single suit); *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285, 1288 (D.D.C. 1981) (same standard should be used for defamation and false light causes of action where plaintiff brings both in single suit).

100. 572 F. Supp. at 906, 909. However, the dismissal was without prejudice because the court found that the issue of what fault standard should apply to private figure libel plaintiffs in Michigan was undetermined. *Id.*

101. 572 F. Supp. at 918.

102. *Id.* at 922.

103. 637 S.W.2d at 263.

this conclusion by reasoning that it would make no sense for the Legislature to have intended to make such a record public.<sup>104</sup> The court held that this conclusion also rendered inapplicable the United States Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*,<sup>105</sup> which held that the first amendment created a privilege protecting the publication of truthful information obtained from open court records.<sup>106</sup> *Cox Broadcasting* could further be distinguished, the court asserted, because *Hyde* did not involve judicial records.<sup>107</sup>

Second, the defendants, analogizing *Hyde* to an invasion of privacy action, asserted a newsworthiness/public interest defense. The court rejected that argument on the grounds that *Hyde* was simply not a libel or privacy action.<sup>108</sup>

Finally, the defendants argued that the publication should not be actionable in view of the Missouri Court of Appeals decision in *Hood v. Naeter Brothers Publishing Co.*, an emotional distress suit brought by a witness to a robbery-murder whose identity was publicized while the suspect remained at large.<sup>109</sup> The *Hood* court concluded that the newspaper's action was insufficiently outrageous to support an action for intentional infliction of emotional distress.<sup>110</sup> The *Hyde* court found the cases distinguishable precisely because *Hood* was an intentional infliction, not negligent infliction, suit.<sup>111</sup> Thus, *Hyde*'s suit was allowed to proceed.

#### *E. The First Amendment*

Surprisingly few negligent infliction decisions have addressed the first amendment implications of such actions. In only three cases have courts shown any explicit solicitude for the potential impact of negligent infliction cases on free expression. In *Shifflet v. Thomson Newspapers*, the Ohio Supreme Court affirmed summary judgment for the defendant in a suit involving a plaintiff upset over publicity given at a hearing during which he was granted expungement of an indecent exposure conviction. There, the court rested its decision squarely on first amendment grounds.<sup>112</sup> Citing *Cox Broadcasting* and two other United States Supreme Court decisions, the court held that "the First and Fourteenth Amendments would not permit exposing the press to liability for truthfully publishing information re-

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104. *Id.*

105. *Id.* at 264 n.19, 269 n.25.

106. 420 U.S. 469, 492-93 (1975).

107. 637 S.W.2d at 269 n.25.

108. *Id.* at 264.

109. 562 S.W.2d 770 (Mo. Ct. App. 1978).

110. *Id.* at 771.

111. 637 S.W.2d at 269 n.25.

112. 69 Ohio St. 2d 179, 431 N.E.2d 1014 (1982).

leased to the public in court proceedings and from court records."<sup>113</sup> *Cox Broadcasting* was also used by a Florida circuit court to justify summary judgment for a defendant who had revealed the identity of a rape victim who had testified during a public trial.<sup>114</sup> An even broader first amendment privilege was suggested by a federal district court in dismissing a suit brought by a plaintiff disgruntled by inaccurate reporting of a court decision.<sup>115</sup> The court noted that the state could not, consistent with the requirements of the first amendment, impose liability for a negligently untruthful news story:

Accuracy in news reporting is certainly a desideratum, but the chilling effect of imposing a high duty of care on those in the business of news dissemination and making that duty run to a wide range of readers or TV viewers would have a chilling effect which is unacceptable under our Constitution.<sup>116</sup>

The Missouri Court of Appeals reached a contrary conclusion in *Hyde*. The court conceded that Hyde's negligent infliction claim confronted the "paramount social utility of a press free to report on topics of public concern," but found that because Hyde was a private figure her suit fell "validly within the culminated constitutional balance struck by *Gertz* which allows a private redress against a newspaper for a negligent publication of information on a theory of fault free from the proof constraints of *New York Times*."<sup>117</sup>

#### IV. RELATIONSHIP TO OTHER TORTS

Given the fact that negligent infliction claims are frequently accompanied by alternative claims based on other theories of tort liability

113. *Id.* at 184, 431 N.E.2d at 1018. The court also cited *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Oklahoma Pub. Co. v. District Court*, 430 U.S. 308 (1977).

114. *Williams v. New York Times*, 10 MEDIA L. REP. (BNA) 1494 (Fla. Cir. Ct. 1984).

115. *Tumminello v. Bergen Evening Record, Inc.*, 454 F. Supp. 1156, 1159-60 (D.N.J. 1978).

116. *Id.*

117. 637 S.W.2d at 266-67. The court was referring to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which allowed recovery in libel cases by private figures upon proof of negligence. This is a lesser standard of care than that required of public officials and public figures who must under *New York Times v. Sullivan*, 376 U.S. 254 (1964), meet an actual malice or a recklessness standard. Thus, *Hyde* provides corroboration for the concern expressed at the outset of this paper that *Gertz* may give impetus to negligent infliction actions. See *supra* note 6 and accompanying text. The only other decision to discuss the first amendment extensively in a negligent infliction case was *Curry v. Journal Pub. Co.*, 41 N.M. 318, 68 P.2d 168 (1937), but that court sidestepped facing the first amendment issue directly.

ity,<sup>118</sup> and given the possible relevance of other tort defenses to negligent infliction,<sup>119</sup> it becomes important to compare negligent infliction and related causes of action. What, then, are the salient similarities and differences between negligent infliction and libel, the various strains of invasion of privacy, and intentional infliction of emotional distress?

#### A. Libel

Although negligent infliction and libel both involve alleged emotional harm, which may stem from falsehoods and require some showing of fault,<sup>120</sup> there are substantial differences between the two theories. No jurisdiction requires a libel plaintiff to meet physical impact or manifestation standards. Nor does a negligent infliction plaintiff have to allege reputational harm. In fact, there is no reason to believe that negligent infliction plaintiffs must wait until something is published before suing.<sup>121</sup> Conceivably, the negligent conduct might involve a journalist's newsgathering method.

In libel, the cause of action generally must be personal to the plaintiff—that is, the only party who can sue is the one specifically about whom the defamatory statement was published.<sup>122</sup> This requirement appears to be relaxed for negligent infliction plaintiffs, as many of the bystander cases and some of the direct victim cases suggest.<sup>123</sup> Further, the success of many libel plaintiffs may depend in large part on whether they are found to be private or public figures, since in most states private figures need show less fault than public figures.<sup>124</sup> Negligent infliction cases thus far have made no such distinction;

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118. See, e.g., *Apostle v. Booth Newspapers, Inc.*, 572 F. Supp. 897 (W.D. Mich. 1983).

119. See *supra* notes 99-117 and accompanying text.

120. In general, private libel plaintiffs must show at least negligence, just as must plaintiffs in negligent infliction, although public figure and public official libel plaintiffs must satisfy a recklessness test. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

121. Fault and damages aside, the fundamental elements of actionable libel are identification, publication and defamation. See, e.g., D. GILLMOR & J. BARRON, *MASS COMMUNICATION LAW* 197-201 (4th ed. 1984); PROSSER & KEETON, *supra* note 9, at 771-85, 797-98.

122. PROSSER & KEETON, *supra* note 9, at 778. Of course there may be some situations in which two parties stand in such a close relationship that something defamatory of one becomes defamatory of both. *Id.* at 778-79.

123. By definition, bystander cases are brought by plaintiffs alleging that they were indirectly harmed by conduct not specifically directed at or even involving them. Several negligent infliction cases have been brought by plaintiffs distraught over publications concerning a third party. See, e.g., *Tumminello v. Bergen Evening Record, Inc.*, 454 F. Supp. 1156 (D.N.J. 1978); *Beresky v. Teschner*, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978); *Herrick v. Evening Express Pub. Co.*, 120 Me. 138, 113 A. 16 (1921); *Curry v. Journal Pub. Co.*, 41 N.M. 318, 68 P.2d 168 (1937).

124. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-45 (1974). For a useful summary of state fault standards for private-figure libel plaintiffs, see 1 *COMMUNICATIONS LAW* 159 (1983) (PLI course handbook).

thus, plaintiffs of all types may be able to succeed upon proving negligence.<sup>125</sup> Finally, libel defendants have at their disposal a variety of powerful defenses—the first amendment, truth, fair comment, qualified privilege and others.<sup>126</sup> However, it remains questionable whether the courts are moving toward finding the same types of defenses applicable to negligent infliction actions.<sup>127</sup>

### *B. Privacy*

Tort actions for invasion of privacy may be divided into four traditional categories—appropriation of a plaintiff's name or likeness for commercial purposes, placing a plaintiff in a false light, disclosing highly personal facts about a plaintiff, or intruding on a plaintiff's physical solitude.<sup>128</sup> The latter three classes are most relevant to comparison with negligent infliction. Both theories of liability—invasion of privacy and negligent infliction—seem clearly aimed at protecting plaintiffs' emotional tranquility. On the other hand, like libel, privacy actions require no physical impact on the plaintiff or any physical manifestation of the emotional harm suffered. Generally, privacy is considered a right personal to the plaintiff—that is, a person cannot sue for invasion of privacy unless it is literally his own privacy that is invaded.<sup>129</sup> As already noted, this is apparently not the case with negligent infliction actions.<sup>130</sup> Beyond such broad comparisons, however, it is more useful to examine the relevant strains of the privacy tort individually.

Privacy actions for intrusion generally emerge from complaints about the way in which journalists have gone about gathering information.<sup>131</sup> Publication is not an element of the tort.<sup>132</sup> There appears to be no reason why a given course of conduct cannot lead to a suit either for intrusion or for negligent infliction, since the latter also requires no publication. On the other hand, negligent infliction might encompass a considerably broader range of circumstances than

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125. None of the reported cases to date have involved a public-figure or public-official plaintiff.

126. See PROSSER & KEETON, *supra* note 9, at 824-39.

127. See *supra* notes 99-117 and accompanying text.

128. Prosser is generally credited with this categorization. See PROSSER & KEETON, *supra* note 9, at 849-69.

129. *Id.* at 851-66.

130. See *supra* note 123.

131. See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). See also GILLMOR & BARRON, *supra* note 121, at 347; PROSSER & KEETON, *supra* note 9, at 807-09.

132. PROSSER & KEETON, *supra* note 9, at 854-56.

intrusion, being more applicable to less extreme forms of conduct in a wider range of places. It might more easily encompass conduct which, though not physically intrusive, intrudes on a person's mental solitude.<sup>133</sup> Thus far, the courts have not been sympathetic to media defendants' arguments that the Constitution should provide some degree of defense to intrusion actions.<sup>134</sup> There is no reason to believe that negligent infliction defendants will have better luck when suits emerge from intrusion-like circumstances.

Suits for false light invasion of privacy resemble negligent infliction suits inasmuch as both can be triggered by published falsehoods that fall short of being defamatory. Indeed, a publication might even create an admirable or sympathetic picture of a plaintiff and still be actionable as either false light or negligent infliction.<sup>135</sup> Both torts require a showing of some degree of fault. However, the United States Supreme Court has intervened in false light actions by requiring plaintiffs involved in matters of public interest to prove that the offensive material was published "with knowledge of its falsity or in reckless disregard of the truth."<sup>136</sup> Negligent infliction plaintiffs face no such hurdle.

On the other hand, negligent infliction plaintiffs face a larger hurdle on the issue of fault than plaintiffs suing for disclosure invasion of privacy. In fact, fault appears irrelevant in disclosure suits because the basis of the action is the publication of truthful information. This distinction, however, is deceptive because disclosure plaintiffs run squarely into the broadly recognized defense of newsworthiness—if the information may generally be defined as newsworthy, it will be immune from a disclosure suit unless the revelation is "so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."<sup>137</sup> Rarely have plaintiffs been able

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133. In some extreme cases, courts have allowed intrusion actions even when the defendant's conduct occurred in a public place. *See, e.g., Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972).

134. In the language of the court in *Dietemann v. Time, Inc.*: "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." 449 F.2d 245, 249 (9th Cir. 1971).

135. *See, e.g., Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974) (newspaper article discussed impact on family of father's death in a bridge collapse); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (magazine published account of play re-enacting hostage situation).

136. *Time, Inc. v. Hill*, 385 U.S. at 387-88. It may be that the *Gertz* libel case has modified this requirement for private-figure false light plaintiffs by substituting a negligence standard for them, but the Supreme Court has thus far not made that clear.

137. *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). This standard has been called the unconscionability standard. *See Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1262 (1976). *See also* RESTATEMENT (SECOND) OF TORTS § 652D (1976).

to overcome this defense.<sup>138</sup> Even if they can, they may be confronted with another hurdle: the first amendment. The Supreme Court has held that, at least in the context of judicial records, the first amendment will tolerate no sanction for publication of truthful information contained in records open to public inspection.<sup>139</sup> At this point, it is safe to say that neither newsworthiness nor the first amendment has become a broadly recognized defense to negligent infliction actions.<sup>140</sup>

### C. *Intentional Infliction of Emotional Distress*

In many respects, negligent infliction's closest legal relative may be the tort of intentional infliction of emotional distress. The Restatement has influentially defined such liability this way:

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.<sup>141</sup>

Indeed, intentional infliction and negligent infliction appear intended to protect the same interest in emotional tranquility. Both encompass conduct broader than mere publication of information, both require some showing of fault, both appear not to make truth or falsity a necessarily decisive factor, and both may be used when the defendant's conduct was in fact aimed at a third person.

But there are crucial differences. Intentional infliction requires no impact or physically manifested harm.<sup>142</sup> On the other hand, the conduct supporting a claim for negligent infliction need not be "outrageous," nor must the defendant have intended any harm at all. In addition, setting the impact and physical manifestation requirements aside, it remains unclear just how severe a negligent infliction victim's harm must be. Thus, at least in those states that have liberalized the rules for recovery, negligent infliction may well be the more attractive theory of liability for plaintiffs.

Analysis thus reveals that negligent infliction can be co-extensive

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138. D. PEMBER, *PRIVACY AND THE PRESS* 238 (1972).

139. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 495.

140. See *supra* notes 112-117 and accompanying text.

141. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). For studies of intentional infliction and the mass media, see Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24 (1983); Stevens, *Media Tort Liability for Emotional Distress*, 54 JOURNALISM Q. 157 (1977); Drechsel, *supra* note 7.

142. PROSSER & KEETON, *supra* note 9, at 64.



with the torts of libel and invasion of privacy, and can encompass conduct broader than that reached by either of them. It also can cover conduct far broader than that which would support an action for intentional infliction. In fact, almost any imaginable type of journalistic *faux pas* could trigger a negligent infliction suit. States seem to be moving inexorably toward liberalized rules for recovery for a tort which already has a relatively undemanding fault requirement. At the same time, the legal concept of journalistic duty remains rather dangerously unsettled.<sup>143</sup> Consequently, there would appear to be a real risk that conduct previously in the realm of journalistic ethics alone might become vulnerable to legal scrutiny.<sup>144</sup> At the same time, negligent infliction, with its lower fault requirement, could create a loophole through which plaintiffs who might obviously be foreclosed from success on other theories of liability could still succeed. An inescapable conclusion, therefore, is that as they have developed and are developing, the rules of recovery for negligent infliction do not strike an appropriate balance between safeguarding expression and protecting the interest in emotional tranquility.

## V. RESOLVING THE PROBLEM

It is important to recognize at the outset that there is no need, and no justification, for cutting off all redress for negligent infliction of emotional distress for all types of plaintiffs against all types of defendants. Indeed, there may well be contexts in which free expression causes horrible emotional distress which any reasonable assessment of interests would conclude should be redressed.<sup>145</sup> But in the context of suits against the mass media—particularly for journalistic content, information, and gathering conduct—legal redress

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143. See *supra* notes 75-92 and accompanying text.

144. Such situations are not difficult to imagine. See, e.g., C. CHRISTIANS, K. ROTZOLL & M. FACKLER, *MEDIA ETHICS* (1983); J. HULTENG, *THE MESSENGER'S MOTIVES* (1976); *Council Warns that New Laws May Restrict Crime Reporting*, QUILL, Dec. 1983, at 43-44 (National News Council Report); Coleman, *A Day in the Life*, QUILL, July-Aug. 1983, at 22; Goodwin, *The Ethics of Compassion*, QUILL, Nov. 1983, at 38; Hart & Johnson, *Fire Storm in Missoula*, QUILL, May 1979, at 19. The reality of the risk is well illustrated by *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982), cert. denied, 459 U.S. 1226 (1983). See *supra* notes 87-90 and accompanying text. Media defendants ought also to consider their conceivable vulnerability under the special relationship rule discussed *supra* notes 48-49 and accompanying text. One can envision, for example, an unhappy source arguing that the existence of a state journalist's shield statute has created a special relationship, and thus a legal obligation of duty, between a journalist and source.

145. Examples might include inappropriate conduct by debt collectors, or even circumstances such as those leading to *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). See *supra* notes 34-40 and accompanying text. It may also be appropriate to allow recovery from the media for intentional infliction. See Drechsel, *supra* note 7.

should be limited lest media defendants must fear being sued for almost everything they do.

One way of resolving the problem might be to somehow clearly spell out precisely what legal duties the media has, or perhaps simply to conclude that none exists. But duty is a slippery concept, and there is no justification for immunizing the mass media from negligent infliction suits simply because it is the mass media. A far better solution focuses not on who the defendant is, but on the type of expression and conduct for which protection is sought. The following principles would do precisely that:

1. In any action alleging negligent infliction of emotional distress, when a plaintiff's only alleged harm is emotional, or where physical harm has allegedly resulted from emotional distress alone, a plaintiff may not recover damages or seek any other remedy for such harm when the conduct alleged to have caused the harm
  - a. was a statement, information or image published in connection with an event or issue of public or general interest; or
  - b. was the act of obtaining a statement, information or image in connection with an event or issue of public or general interest; or
  - c. would otherwise be privileged under any other theory of liability asserted by the plaintiff or clearly and directly relevant to the conduct.
2. The burden shall be on the plaintiff to prove with convincing clarity that the subject of the conduct was not an event or issue of public or general interest.
3. If a defendant believes that a theory of liability not explicitly asserted by the plaintiff is relevant in view of the complained of conduct, and that conduct would be privileged under that theory of liability, the defendant may assert such privilege, provided that the defendant bears the burden of proof that the theory of liability is clearly and directly relevant to the defendant's conduct.<sup>146</sup>

These principles partially transplant the public interest criterion used by the United States Supreme Court in *Rosenbloom v. Metromedia*<sup>147</sup> and *Time, Inc. v. Hill*<sup>148</sup> in order to erect a strong and

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146. These guidelines were developed by the author.

147. 403 U.S. 29 (1971). *Rosenbloom* was a plurality libel decision in which the Court extended first amendment protection from libel suits to defendants who had published material concerning an issue of public or general concern. In such situations, plaintiffs—regardless of whether they were public officials, public figures or private figures—were required to prove “actual malice,” i.e., that the libelous statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). In *Gertz*, 418 U.S. 323 (1974), the court rejected this approach, concluding that private figures should be able to win upon a showing of negligence. But negligent infliction is not libel, and there is no reason to expect the reasoning of *Gertz* to be controlling in negligent infliction cases.

148. 385 U.S. at 387-88. The case extended the “actual malice” standard of *New York Times v. Sullivan* to false light privacy suits. Particularly relevant to the present study is the Court's remark in *Hill* that a negligence test “would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps

broad newsworthiness defense to negligent infliction actions.<sup>149</sup> Clearly, the intent is to deal with privilege situations, whether they involve the gathering or publication of material, where emotional distress has been caused by a nonphysical stimulus.

Implicit in the suggested principles is the assumption that there is no legal duty to avoid negligently inflicting emotional distress when gathering or publishing information of public interest. This assumption is consistent with the argument that "[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be."<sup>150</sup> Yet it purposely leaves open redress under narrower theories of liability including libel, invasion of privacy, and intentional infliction of emotional distress. Such causes of action, in addition to encompassing a narrower scope of conduct, also have more appropriate proof requirements and defenses.

The suggested principles incorporate the public interest standard precisely because of its breadth and strength in limiting actions.<sup>151</sup> The principles forbid negligent infliction actions where the defendant's conduct occurs "in connection with" an event or issue of public interest. Therefore, what matters is not whether the defendant's conduct, taken in isolation, might be considered of public interest, but whether the conduct involves an event or issue of public interest. The distinction can be centrally important. Situations can arise in which a specific piece of information in and of itself may not be of public interest, yet clearly involves an event that is. For example, publication of the name of a sexual assault victim might not, in isola-

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taken by it to verify the accuracy of every reference to a name, picture or portrait." *Id.* at 389.

149. Further, and quite intentionally, this standard may also apply to much advertising, an application consistent with the United States Supreme Court's increased protection of commercial speech. *See, e.g.,* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (New York law prohibiting electric utility from advertising to promote use of electricity violated first and fourteenth amendments); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (Virginia statute prohibiting advertisement of drug prescription prices held invalid); Bigelow v. Virginia, 421 U.S. 809 (1975) (Virginia could not prohibit advertisement for New York abortions).

150. Magruder, *supra* note 9, at 1035. *See also* Smith, *supra* note 9, at 247-48. Several observers have suggested different approaches to handling negligent infliction claims generally. *See* Goodrich, *supra* note 42, at 506 (when physical manifestation results, recovery allowed upon proof of negligence in violation of duty); Nolan & Ursin, *supra* note 9, at 609 (required foreseeability and serious emotional distress); Miller, *supra* note 9, at 39 (type of damages available restricted); Russo, *Malicious, Intentional and Negligent Mental Distress in Florida*, 11 FLA. ST. U.L. REV. 339, 366-67 (1983) (foreseeability/proximate cause test). None of these writers, however, specifically address free expression issues.

151. One authority has noted that after the *Rosenbloom* decision the press "enjoyed a respite from libel laws." GILLMOR & BARRON, *supra* note 121, at 224.

tion, be considered of public interest. But publication of the name—insensitive though such may be—in connection with coverage of a criminal case would be publication of information involving an event of public interest.

The public interest standard also was selected because it does not make a plaintiff's public or private status directly relevant to recovery.<sup>152</sup> This is a vitally important provision since negligent infliction cases may commonly arise over coverage of private persons<sup>153</sup> and because negligent infliction actions might otherwise be possible by public figures and officials who would be precluded from suing successfully under other theories of liability.<sup>154</sup> To make the plaintiff's task even more demanding, the suggested principles place on the plaintiff the burden of proof that the defendant's conduct falls outside of the protected sphere. Thus, the plaintiff must prove with convincing clarity<sup>155</sup>—not by a mere preponderance of the evidence—that the conduct did not relate to an event or issue of public or general interest.

Under the suggested principles, defenses to libel, invasion of privacy and intentional infliction of emotional distress become applicable when any such claim might arise from the same conduct as that which triggers a negligent infliction action.<sup>156</sup> At least two reasons dictate the need for this requirement. First, it helps guarantee that negligent infliction is a truly independent tort and that it will not become merely a convenient end run around more difficult, but in fact more appropriate, theories of liability. Second, if a defendant's conduct would be privileged under another relevant theory of liability, the existence of such privilege implies legal recognition of the utility of the conduct. Under these circumstances, it becomes very clear that a defendant has no duty not to negligently inflict emotional dis-

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152. Conceivably, such status might be indirectly relevant to the degree that in some cases it might bear on whether or not a borderline situation really was newsworthy. Nevertheless, the test requires a court to rest its decision on the topic of the conduct, not on its "victim."

153. Almost all of the extant negligent infliction actions have been brought by private figures.

154. See, e.g., *Gertz*, 418 U.S. at 334-36 (public figure may not recover for defamation unless actual malice or reckless disregard is shown); *New York Times*, 376 U.S. at 280-81 (public official may not recover for defamation unless knowledge or reckless disregard is shown).

155. This standard is drawn from the constitutional libel defense established in *New York Times v. Sullivan*, 376 U.S. at 285-86.

156. Of course, intentional infliction is less relevant because a plaintiff able to recover on an intentional infliction theory need not worry about also being able to prove negligence.

tress.<sup>157</sup> The suggested principles, of course, also make such factors as reasonableness of conduct and foreseeability of harm irrelevant in many cases. These concepts are simply inappropriately flexible and unpredictable.<sup>158</sup>

The suggested principles are consistent with precedent refusing to find that the media has a duty to avoid negligent infliction,<sup>159</sup> and with precedent finding other defenses to be relevant in negligent infliction cases.<sup>160</sup> They are also consistent with the impact/physical manifestation requirements in the sense that their intent is to limit the cause of action significantly and assure that the tort expands, if at all, under stringent limits. Obviously, the principles conflict with the expansiveness of such decisions as *Rodrigues* and *Molien* and their progeny in other states.<sup>161</sup> Limiting such expansion is precisely the principles' goal.

Although the suggested principles still allow actions for negligent infliction alone, and as such are inconsistent with the position of the Restatement,<sup>162</sup> they are actually more restrictive than the Restatement in situations where physical harm results from unintentionally inflicted emotional distress.<sup>163</sup> The principles are consistent with the Restatement's view of common law privilege—that a privilege may be based upon “the fact that its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise.”<sup>164</sup> The overriding interest justifying the privilege is the interest in freedom of expression. Ultimately, then, the principles are consistent with the first amendment itself, because they allow maximum media freedom from recovery under a dangerously broad theory of liability.

Applied to the cases already brought against media defendants, the principles would affirm all of the decisions in favor of defendants, and require reversal of the defendants' setbacks in *Hyde*, *Parnell*, *Rubinstein* and *Blinick*. The topic of the offensive, and concededly thoughtless, article in *Hyde* was a police report of a serious crime;<sup>165</sup>

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157. See generally *supra* notes 50-62 and accompanying text.

158. *Id.*

159. See *supra* notes 75-77 and accompanying text.

160. See *supra* notes 99-117 and accompanying text.

161. See *supra* notes 33-40 and accompanying text.

162. RESTATEMENT (SECOND) OF TORTS § 436A (1965) refuses to recognize a cause of action for negligence resulting in emotional distress only.

163. RESTATEMENT (SECOND) OF TORTS § 313 (1965) favors recovery for physical harm resulting from some unintentionally inflicted emotional distress. The principles suggested in this study would foreclose recovery in some circumstances for either emotional harm or resulting physical harm.

164. RESTATEMENT (SECOND) OF TORTS § 10(2)(b) (1964).

165. 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983). *Hyde* well illustrates how important it is for courts to distinguish carefully between whether

the photographs in *Parnell* were published in connection with a story about local prostitution problems;<sup>166</sup> *Rubinstein* stemmed from a false death notice;<sup>167</sup> and *Blinick* resulted from a wrong telephone number published in a personals ad.<sup>168</sup> Certainly all of these involve topics of public interest.

## VI. CONCLUSION

This article has examined in depth the developing tort of negligent infliction of emotional distress and particularly its application to mass media defendants. The tort, particularly in light of developments during the past half-dozen years, presents a threat of a dangerously broad theory of liability for a wide range of plaintiffs for conduct which heretofore has been considered only within the realm of ethics. New limits are necessary to more appropriately balance the interest in emotional tranquility with the interest in freedom of expression. Consequently, negligent infliction actions should not be permitted where the conduct complained of involves an event or issue of public interest. Nor should recovery be permitted where the conduct would otherwise be privileged under another directly relevant theory of liability.

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information is in itself of public interest and whether the event to which the information relates is of public interest. The latter should be central, but in *Hyde* the court focused on the former and in so doing created a massive problem for the defendants.

166. 572 F. Supp. 909 (W.D. Mich. 1983). The decision in a case arising from the same series of stories, *Apostle v. Booth Newspapers, Inc.*, 572 F. Supp. 897 (W.D. Mich. 1983), should be modified so that the negligent infliction action is dismissed with prejudice.

167. 9 MEDIA L. REP. (BNA) 1581 (Sup. Ct. N.Y. 1983).

168. 67 Misc. 2d 254, 323 N.Y.S.2d 853 (Civ. Ct. N.Y. 1971).

