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RECOVERY FOR MENTAL ANGUISH IN NORTH CAROLINA

ROBERT G. BYRD†

Despite many decisions on the recovery of damages for mental anguish, the North Carolina courts have failed to develop a logical rule structure for determining when recovery is allowable. Thus, the cases are resolved on an ad hoc basis, producing much uncertainty in the area. Professor Byrd, after an exhaustive study of the North Carolina cases, identifies several distinct patterns in these decisions and discusses possible future development within this framework. Professor Byrd warns that to overlook these patterns in favor of a continued ad hoc approach jeopardizes logical development of the law of recovery for mental and emotional harm.

I. BACKGROUND AND EARLY DEVELOPMENT

Although intentional or negligent conduct may cause mental or emotional harm as readily as it causes physical injury, recovery in tort for such harm has met substantially greater resistance from the courts. This resistance has been most evident in relation to claims for mental anguish standing alone; it has also appeared, however, in cases in which other interests of the claimant have been invaded and mental or emotional disturbance is only an element of damage for which recovery is sought.

A number of factors have contributed to the reluctance of courts to allow recovery for mental anguish.¹ Because the subjective nature of the injury makes it easy to feign and difficult to disprove, a fear of fraudulent claims has existed.² The potential for much of normal activity to cause mental disturbance, and thus to give rise to damage claims,³ and the difficulty of drawing boundary lines between trivial

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1. For a discussion of these factors, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 50-51 and 327-28 (4th ed. 1971).

2. See, e.g., *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402 (1941).

3. *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958). The *Bosley* court's holding that a direct impact or physical injury was a prerequisite to recovery was later overruled. *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970).

and meritorious claims⁴ have been major concerns. Doubts about the fairness of imposing liability for unusual consequences of more obviously unacceptable conduct⁵ and distrust of the proof offered to establish the casual relationship between the wrongdoer's conduct and the injury⁶ have been expressed more in connection with mental anguish claims than those for other types of harm and have contributed to the reluctance to sustain them.

The importance of these factors does not seem to depend as much upon their use to test the sufficiency of the facts of an individual case as upon the assumption that they reflect broadly the state of affairs that exists and, therefore, the problems that must ultimately be faced in determining if recovery for mental anguish is to be upheld. Further, the tendency has been to urge these factors en masse,⁷ and in some cases an even more indiscriminate approach is taken by confronting the issue in terms of a "mental anguish doctrine."⁸

Many of these reasons in opposition to recovery for mental anguish are now rejected by courts, and their use as broadside abstractions has particularly been condemned.⁹ Generally, this development has opened the door to recovery for mental anguish in negligence when direct or resulting physical injury occurs¹⁰ and in intentional tort for outrageous conduct that risks and in fact causes severe mental distress.¹¹ Except in cases of intentional infliction of mental anguish, however, recovery for mental or emotional distress is limited by the physical injury threshold,¹² and the existence of this requirement undoubtedly reflects some of the earlier concerns about recovery for mental anguish in general. --

4. *E.g.*, *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419 (1969).

5. *E.g.*, *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960).

6. *See, e.g.*, *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970). On this issue the *Restatement (Second) of Torts* provides:

Nothing [herein] is intended to mean that where the evidence in a particular case as to the emotional disturbance or the resulting illness is inadequate, unreliable, or otherwise so unsatisfactory that it does not sustain the plaintiff's burden of proof, . . . the court may not refuse, as a matter of administrative policy, to permit the actor to be held liable . . . This is true particularly where the evidence consists entirely of the plaintiff's own subjective testimony, uncorroborated by other witnesses or by the external facts.

RESTATEMENT (SECOND) OF TORTS § 436, Comment g, at 460 (1965).

7. *See, e.g.*, *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958).

8. *E.g.*, *Chappell v. Ellis*, 123 N.C. 259, 31 S.E. 709 (1898).

9. *E.g.*, *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402 (1941).

10. W. PROSSER, *supra* note 1, at 330-33.

11. *Id.* at 55-60.

12. *E.g.*, *Ver Hagen v. Gibbons*, 47 Wis. 3d 220, 177 N.W.2d 83 (1970) (no physical injury; recovery denied).

Surprisingly, very little discussion of the reasons other courts have given for denial of claims for mental and emotional harm appears in the North Carolina decisions. The difficulty of measuring damages for mental anguish claims has been raised in a number of cases but has been consistently rejected as a basis for denial of recovery.¹³ The idea that there may be some limitation on the right to recover for mental anguish is also reflected in the North Carolina Supreme Court's frequent reiteration in dicta¹⁴ of the statement that fright alone is not compensable.¹⁵ Finally, the court's concern about both the number and nature of suits that could arise from mental anguish claims has been expressly stated in a number of cases and is evident in limitations imposed upon the right to recover in other cases.¹⁶ As a result, no examination has been made of the reasons for limiting recovery for mental anguish to instances in which physical injury has resulted.

Neither a review of the historical development of the law in North Carolina relating to recovery for emotional distress nor a look at its current status reveals a completely logical rule structure. A number of early cases seem to make little distinction between mental anguish and other types of harm caused by tortious conduct, and both their holdings and rationales seem to recognize broadly a right to recover.¹⁷ Although later developments probably limit their authority, for a period of time

13. *Harrison v. Western Union Tel. Co.*, 143 N.C. 147, 151, 55 S.E. 435, 436 (1906) (concurring opinion); *Cashion v. Western Union Tel. Co.*, 124 N.C. 459, 32 S.E. 746 (1899); *Young v. Western Union Tel. Co.*, 107 N.C. 370, 11 S.E. 1044 (1890).

14. In *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 42 S.E. 983 (1902) the court, in allowing recovery, found consequential physical injury and reserved decision on the question whether fright without physical injury would be compensable. *Kimberly v. Howland*, 143 N.C. 399, 55 S.E. 778 (1906), a case in which recovery was also based upon consequential physical injury, advanced in dictum the proposition that fright alone was not compensable. The dictum was repeated in subsequent cases: *Arthur v. Henry*, 157 N.C. 438, 73 S.E. 211 (1918); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936); *Sparks v. Tennessee Mineral Prods. Corp.*, 212 N.C. 211, 193 S.E. 31 (1937).

15. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979) (resulting physical injury alleged); *Crews v. Provident Fin. Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967) (resulting physical injury); *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E.2d 683 (1965) (resulting physical injury); *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960) (recovery denied, apparently on proximate cause rationale); *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885 (recovery denied), *cert. denied*, 279 N.C. 348, 186 S.E.2d 176 (1971).

16. See, e.g., text accompanying notes 79 & 80 *infra*.

17. *Carmichael v. Southern Bell Tel. & Tel. Co.*, 162 N.C. 333, 337, 78 S.E. 507, 508 (1913) (negligent termination of telephone service; "defendant was guilty of a tort, and is liable for all damages flowing naturally and proximately from the wrongful act"); *Carmichael v. Southern Bell Tel. & Tel. Co.*, 157 N.C. 21, 72 S.E. 619 (1911) (negligent termination of telephone service; emotional harm as much an element of compensatory damages as other harm); *Bowers v. Western Union Tel. Co.*, 135 N.C. 504, 505, 47 S.E. 597, 597 (1904) (negligent delivery of telegram: "Mental anguish is as real as physical, and recovery in proper cases is allowed of just compensation, when anguish, whether physical or mental, is caused by the negligence, default, or wrongful act of another.").

these holdings were interpreted more broadly to permit recovery in different types of cases from those in which they were established.¹⁸ For example, in *Young v. Western Union Telegraph Co.*,¹⁹ the initial case in which the question of recovery for mental anguish for negligent transmission of telegraph messages was presented, the court, in recognizing a cause of action, relied upon a variety of earlier cases that had allowed compensation for mental anguish.²⁰ This analysis led the court to conclude:

It seems to us that this action is in reality in the nature of tort for the negligence, and that, as is usually the case for such actions, the plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damage done him, and that mental anguish is actual damage.²¹

Although attempts to limit the authority of these decisions were rejected in a number of cases,²² their broader significance gradually diminished, and today they are important primarily in the context of the narrow fact situations before the court when they were decided. The cases involving negligent transmission of telegraph messages were the most notable ones in this group both because of the large number that were decided and because they squarely presented the question of recognition of a cause of action in negligence for mental anguish alone.²³ This view of the right to recovery for mental anguish was not limited, however, to the telegraph cases, and a wide range of cases, in-

18. For example, *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), which held in a defamation case that mental suffering constituted compensatory damage, was subsequently relied upon in upholding recovery for mental anguish for negligent transmission of a telegram, *Green v. Western Union Tel. Co.*, 136 N.C. 489, 49 S.E. 165 (1904); negligent delay in delivering a casket, *Byers v. Southern Express Co.*, 165 N.C. 542, 81 S.E. 741 (1914), *rev'd on other grounds*, 240 U.S. 612 (1916); wrongful ejection from a train, *Ammons v. Southern R.R.*, 140 N.C. 196, 199, 52 S.E. 731, 732 (1905) (concurring opinion) and negligent termination of telephone service, *Carmichael v. Southern Bell Tel. & Tel. Co.*, 157 N.C. 21, 72 S.E. 619 (1911).

19. 107 N.C. 370, 11 S.E. 1044 (1890).

20. *Id.*

Damages for injury to the feelings, such as mental anguish or humiliation, are given, though there may be no physical injury, in many cases. They are allowed where a party is wrongfully put off a train . . . ; in actions for breach of promise of marriage; in actions for slander and libel . . . ; in actions for malicious arrest and prosecution . . . ; in actions for false imprisonment . . . ; and for seduction, and in other cases We see, therefore, no reason why the doctrine of compensation for injury to feelings should not embrace a case like the one before us.

Id. at 384, 11 S.E. at 1048 (citations omitted).

21. *Id.* at 385, 11 S.E. at 1048.

22. *Alexander v. Western Union Tel. Co.*, 158 N.C. 473, 74 S.E. 449 (1912); *Green v. Western Union Tel. Co.*, 136 N.C. 489, 49 S.E. 165 (1904); *Cashion v. Western Union Tel. Co.*, 124 N.C. 459, 32 S.E. 746 (1899); *Sherill v. Western Union Tel. Co.*, 116 N.C. 655, 21 S.E. 429 (1895).

23. See text accompanying notes 103-113 *infra*.

cluding actions for negligent termination of telephone services,²⁴ negligent discharge of railway passengers,²⁵ seduction,²⁶ alienation of affections²⁷ and defamation,²⁸ contributed to its development.

Other cases in the same time period reflect substantially less willingness to view mental anguish as damage to be compensated routinely on the same basis as physical injury or other harm and introduce the requirement of contemporaneous or resulting physical harm as a prerequisite to recovery.²⁹ The significance of these cases was unclear for a number of reasons. Initially, this view was expressed in only a few cases. No effort was made in them to distinguish or limit the cases allowing recovery for mental anguish alone; in fact no reference of any kind was made to those cases. Finally, as noted previously, even in the cases in which the court imposed the physical injury threshold, a basis for recovery was generally found, and the statement of the court in these cases that fright alone was not compensable was not crucial to the decisions.³⁰

A third and entirely separate line of cases evolved from the supreme court's recognition of a civil action for forcible trespass,³¹ a common law and statutory crime.³² The essence of this "tort" seems to be the aggravated nature of the defendant's conduct,³³ and apparently neither an actual trespass to land nor an assault is essential to its existence. Thus, in *Saunders v. Gilbert*,³⁴ a large, hostile crowd, after following plaintiff from church to his home, stood in the street in front of

24. See text accompanying note 119 *infra*.

25. See text accompanying notes 114-118 *infra*.

26. See text accompanying notes 77-81 *infra*.

27. See text accompanying notes 84-94 *infra*.

28. See note 18 *supra*. For a further discussion of cases, see notes 95-102 and accompanying text *infra*.

29. See note 14 *supra*.

30. *Id.*

31. *E.g.*, *Martin v. Spencer*, 221 N.C. 28, 18 S.E.2d 703 (1942); *Freeman v. General Motors Acceptance Corp.*, 205 N.C. 257, 171 S.E. 63 (1933); *Beasley v. Byrum*, 163 N.C. 3, 79 S.E. 270 (1913).

32. See Sharpe, *Forcible Trespass to Real Property*, 39 N.C.L. Rev. 121 (1961).

33. In *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934) (recovery denied), for example, the court stated:

[T]he act complained of must have been with a strong hand, '*manu forti*,' and this implies the exercise of greater force than is expressed by the words '*vi et armis*.' Rudeness of language, mere words, or even a slight demonstration of force against which ordinary firmness is a sufficient protection will not constitute the offense.

Id. at 11, 173 S.E. at 8; see *Kaylor v. Sain*, 207 N.C. 312, 312-13, 176 S.E. 560, 561 (1934) (quoting *Anthony*).

34. 156 N.C. 463, 72 S.E. 610 (1911).

his house and made threats against him. The court, upholding the sufficiency of the evidence to state a cause of action, said:

It can make no difference that this large multitude of people did not actually enter upon the premises of the plaintiff or go within their curtilage. We have held that the gathering of a large number of persons on the public road in front of a man's house, or the use of violent, abusive or insulting language in a public or private road, or in the street of a city, in the presence and hearing of the owner of adjoining property, constitutes a forcible trespass.³⁵

If, as appears to be the case, the court recognized a defendant's "show of force" as a substantive basis of recovery, it resembles the tort of assault, and a plaintiff's mental and emotional security would be the principal interest safeguarded by it. Although in these cases physical injury appears to have resulted from the emotional distress, proof of such injury should not be necessary if any significance is to be attached to the court's characterization of the defendant's conduct as a forcible trespass.³⁶

The forcible trespass cases set the stage for *Kirby v. Jules Chain Stores Corp.*,³⁷ a case that has become a watershed between earlier cases and the law's subsequent development. In *Kirby*, a bill collector came to plaintiff's home to request payment on an account she owed. While sitting in his car, which was parked about fifteen feet away from plaintiff, he "hollered" at plaintiff: "'By G—, you are like all the rest of the damn deadbeats. You wouldn't pay when you could. . . . If you are so damn low you won't pay, I guess when I get the sheriff and bring him down here you will pay then.'"³⁸ He repeated three or four times his threat to get the sheriff and have plaintiff arrested and then drove away. Plaintiff became frightened and suffered a miscarriage.

Neither plaintiff's complaint nor the judge's charge identified a specific substantive tort theory for recovery. The issue submitted to the jury was whether the defendant had unlawfully and wrongfully frightened plaintiff and thereby caused her miscarriage.³⁹ The jury found for plaintiff, and on appeal plaintiff's attorney relied in part upon earlier forcible trespass cases to argue that the judgment should be affirmed.⁴⁰ Two cases, decided shortly before *Kirby* arose, had held that proof of

35. *Id.* at 474, 72 S.E. at 614.

36. Under this view of the cases, a clear parallel exists between these cases and the tort of intentional infliction of mental anguish. See text accompanying notes 164-182 *infra*.

37. 210 N.C. 808, 188 S.E. 625 (1936).

38. *Id.* at 809, 188 S.E. at 625.

39. Record at 57.

40. Brief for Plaintiff at 5-8.

facts somewhat similar to those in *Kirby* failed to make out a case in forcible trespass.⁴¹

The court, without deciding whether the facts were sufficient to constitute a forcible trespass, upheld the verdict and judgment. By eliminating the forcible trespass theory, it confronted directly the issue whether plaintiff's claim could be based upon conduct, not otherwise actionable, that threatened foreseeable mental or emotional harm. A cause of action based upon such conduct was recognized:

It is true, the basis of the action in most of the cases has been forcible trespass, and it is contended that in the case at bar no forcible trespass has been shown, hence no liability exists. Without conceding the correctness of the syllogism as applied to the instant case, it is observed that much of the confusion on the subject seems to have come from worshipping at the shrine of words and formulas, rather than applying correct principles to the facts in hand. . . . It is no doubt correct to say that fright alone is not actionable, . . . but it is faulty pathology to assume that nervous disorders of serious proportions may not flow from fear or fright. . . .

. . . .

If it be actionable willfully or negligently to frighten a team by blowing a whistle, . . . or by beating a drum, . . . thereby causing a run-away and consequent damage, it is not perceived upon what logical basis of distinction the present action can be dismissed as in case of nonsuit.⁴²

In *Kirby*, the court stated that "[t]he gravamen of plaintiff's cause of action is trespass to the person."⁴³ In a later case in which plaintiff had been frightened by defendant's conduct and suffered a miscarriage, plaintiff, relying on the above statement, based her action on an allegation of "trespass to person."⁴⁴ On the authority of *Kirby*, the supreme court upheld plaintiff's recovery. In doing so, the court observed: "There is evidence of a forcible trespass and also trespass to the person of the plaintiff."⁴⁵

Finally, in 1967 in *Crews v. Provident Finance Corp.*,⁴⁶ a case involving facts similar to those in *Kirby*, the supreme court followed *Kirby* and referred to the provisions of section 436 of the *Restatement (Second) of Torts*. This section recognizes a cause of action when de-

41. *Kaylor v. Sain*, 207 N.C. 312, 176 S.E. 560 (1934); *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934).

42. 210 N.C. at 812-13, 188 S.E. at 627-28.

43. *Id.* at 810, 188 S.E. at 626.

44. *Martin v. Spence*, 221 N.C. 28, 30, 18 S.E.2d 703, 703 (1942).

45. *Id.* at 30, 18 S.E.2d at 703.

46. 271 N.C. 684, 157 S.E.2d 381 (1967).

fendant's negligence causes fright or other emotional disturbance that "the actor should recognize as involving an unreasonable risk of bodily harm," although that harm results solely through the internal operation of the fright or other emotional disturbance.⁴⁷

The above developments created uncertainty about the North Carolina law relating to recovery for mental anguish. The supreme court itself has summarized the situation in this way:⁴⁸

The foregoing resume demonstrates the lack of harmony in the decisions of the courts in this area of the law. It appears that cases have usually been decided strictly upon the factual situations presented. Indeed, it is a field of law in which there is a great difficulty in adhering to any fixed set of principles. It is clear that our Court has decided cases in this category strictly upon the facts as presented without adopting inflexible rules.⁴⁹

Some of the uncertainty that has existed may be traceable to the supreme court's early struggle to decide if claims for mental anguish should be treated any differently from other claims. This struggle may have resulted in parallel lines of decisions on the issue and forestalled any attempt to reconcile or limit them. Additional uncertainty has been created by the court's utilization of less traditional theories, such as forcible trespass and trespass to the person, to allow recovery in some cases. There is a tendency in the decisions to treat all mental anguish claims alike, and as a result distinctions are seldom made between intentional conduct and negligence, or between the determination of the extent of liability and the decision if a cause of action exists at all. A problem in interpreting these cases arises because it is not possible to determine from the decisions whether these possible distinctions were considered and rejected or simply not addressed by the court. While the idea that fright alone is not compensable seems to have become well embedded in North Carolina law, the cases have explored the problem very little beyond this level.

Although it is true that no single rule has evolved to control the award of damages for mental and emotional harm and that to some extent the right to recover hinges upon the circumstances out of which the harm arose, some fairly distinct patterns have emerged in the cases. This Article will analyze the North Carolina cases in this area, undertake to identify the patterns that exist and explore possibilities for change or further development in this general framework.

47. *Id.* at 689, 157 S.E.2d at 386 (citing RESTATEMENT (SECOND) OF TORTS § 436 (1965)).

48. *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960).

49. *Id.* at 506, 112 S.E.2d at 53-54.

II. WHEN A SEPARATE TORT EXISTS: THE PARASITIC DAMAGES RULE

There are a number of torts in which mental or emotional harm is the interest or one of the primary interests protected by the cause of action. Actions for assault, battery and false imprisonment, because of the dignitary interest involved, are of this type.⁵⁰ Defamation,⁵¹ malicious prosecution,⁵² seduction⁵³ and alienation of affections⁵⁴ also should probably be placed in this category. Damages for mental anguish and emotional distress, at least to the extent that they result immediately from the defendant's conduct, are universally allowed in these actions.

The observation is frequently made that damages for mental suffering may be recovered parasitic to a cause of action in tort that exists independently of the mental harm. Yet, neither the rule nor the extent of its application is clearly stated in the cases.⁵⁵ The rule is usually applied in cases in which an invasion of the person, reputation or other dignitary interest has occurred.⁵⁶ In these cases recovery extends to any mental harm reasonably related to the defendant's conduct.⁵⁷ Thus, in an assault action compensation is awarded not only for apprehension of immediate harmful or offensive contact but also for other mental disturbance proximately caused by it. An important application of the rule is to situations in which defendant's conduct has caused a direct physical injury; in these cases recovery for mental and emotional harm has been readily allowed.⁵⁸

The greatest uncertainty in North Carolina and elsewhere in relation to application of the parasitic damages rule arises in connection with actions that primarily involve invasions of property interests. In many of the cases upholding recovery in such actions from other juris-

50. *Trogdon v. Terry*, 172 N.C. 540, 90 S.E. 583 (1916) (assault); *Hodges v. Hall*, 172 N.C. 29, 89 S.E. 802 (1911) (assault and battery); *Bedsole v. Atlantic Coast Line R.R.*, 151 N.C. 152, 65 S.E. 925 (1909) (assault); *Young v. Western Union Tel. Co.*, 107 N.C. 370, 11 S.E. 1044, 1890 (dictum) (false imprisonment).

51. For discussion of cases, see text accompanying notes 100-107 *infra*.

52. *Carver v. Lyles*, 262 N.C. 345, 352-53, 137 S.E.2d 139, 145 (1964); *Kelly v. Durham Traction Co.*, 132 N.C. 369, 43 S.E. 923 (1903).

53. For discussion of cases, see text accompanying notes 80-84 *infra*.

54. For discussion of cases, see text accompanying notes 88-99 *infra*.

55. See cases cited notes 50-54 *supra*.

56. RESTATEMENT (SECOND) OF TORTS § 905 (1965) provides for compensation for emotional distress in a separate cause of action. Such damages "are most frequently given in actions for bodily contact and harm to reputation . . . , but they may also be given in actions for other types of harm." *Id.* Comment a, at 456.

57. See cases cited notes 50-54 *supra*.

58. For discussion of these cases, see text accompanying notes 128-43 *infra*.

dictions, the defendant's conduct has involved a significant element of abuse, threat or intimidation. Courts have characterized this conduct as wilfull or malicious and on that basis have allowed recovery for emotional distress.⁵⁹ When an element of aggravation is not present, broad generalizations about the law in other jurisdictions become difficult.⁶⁰

Two of the North Carolina cases on this issue require detailed consideration. In the first case, *Chappell v. Ellis*,⁶¹ plaintiff sought to recover for mental suffering incident to the wrongful seizure and detention of personal property. The supreme court, apparently without recognizing the distinction between the case before it and cases in which no cause of action existed apart from the mental suffering, denied damages for mental suffering on the ground that the "mental anguish" doctrine "has never been applied to a case like that at bar."⁶² The case appears to be an isolated one, and, in the only subsequent reference to its holding, the supreme court, in refusing to rely on *Chappell*, seemed to limit its significance.⁶³

The second case, *Matthews v. Forrest*,⁶⁴ upheld recovery for mental suffering, without accompanying or consequential physical injury, caused by defendant's trespass upon and removal of flowers from the grave of plaintiff's wife. The court held that "compensatory damages may be awarded to a plaintiff for mental suffering actually endured by him as the natural and probable consequence of a trespass to his burial lot."⁶⁵ Some uncertainty, however, has resulted from a general disclaimer that was made by the *Matthews* court:

The question whether mental suffering unaccompanied by any corporal injury to the plaintiff constitutes a proper element of damages in an action for trespass to realty has sharply divided the courts of

59. The cases are collected in Annot., 28 A.L.R.2d 1070 (1953).

60. *Id.*

61. 123 N.C. 259, 31 S.E. 709 (1898).

62. *Id.* at 261, 31 S.E. at 711.

63. *Green v. Western Union Tel. Co.*, 136 N.C. 489, 49 S.E. 165 (1904). The *Chappell* decision was apparently based upon a limited view of the fact situations that would permit a finding of the high degree of suffering required under the mental anguish doctrine. This view is evident in the following comparison made by the court: "The anguish of a mother bending over the body of her child, every lock of whose sunny hair is entwined with a heartstring, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig." *Chappell v. Ellis*, 123 N.C. 259, 263, 31 S.E. 709, 710 (1898). The *Green* decision upheld a cause of action for the mental suffering of a sixteen-year-old girl who, because of defendant's negligent delivery of a telegram, was not met by her father upon her arrival at the train station late at night. In so doing, the court rejected the contention that recovery for mental suffering should be limited to circumstances involving death or illness.

64. 235 N.C. 281, 69 S.E.2d 553 (1952).

65. *Id.* at 285, 69 S.E.2d at 556.

the land. . . . We forego entry into the general debate and confine our decision to the precise problem at hand.⁶⁶

Damages for a wide range of mental and emotional harm have been allowed in other actions for trespass to realty.⁶⁷ In each case the defendant's actions included conduct likely to cause mental distress, and in most of the cases that conduct, while not constituting an assault, was likely to cause the plaintiff concern for his own safety.⁶⁸ Recovery has been allowed, however, for aggravated conduct that posed no personal danger to the plaintiff,⁶⁹ and the *Matthews* case, in which defendant removed flowers from the grave of plaintiff's wife, suggests that highly offensive conduct accompanying a trespass may be enough for the application of the parasitic damages rule.

Except when physical injury or illness is caused, it is unclear whether the parasitic damage rule will be applied in negligence actions. In two early cases,⁷⁰ defendant's negligence in blasting with explosives propelled debris through the roof of the house in which plaintiff lived and caused plaintiff serious fright and emotional distress. In each instance, physical injury resulted from the fright, and recovery was based upon this fact. The opinions of the supreme court in the two cases, however, suggest that, had there been no resulting physical injury, recovery for mental anguish would have been denied. Under the facts in these cases, plaintiff probably could not have maintained a negligence action for damages to realty,⁷¹ and for that reason an interpretation of the courts' dicta as denying parasitic damages for mental anguish in negligence actions for property damage would be open to serious question.

66. *Id.*

67. It is held to be the law that an individual whose rights of person or property are thus violated is generally entitled to recover damages for . . . inconvenience, injury to feelings, and mental suffering, pain, vexation, anxiety, the sense of wrong, shame, or humiliation . . . , resulting from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade, or insult Inconvenience, annoyance, or discomfort may also be considered.

Saunders v. Gilbert, 156 N.C. 463, 480, 72 S.E. 610, 617 (1911).

68. *Beasley v. Byrum*, 163 N.C. 3, 79 S.E. 270 (1913) (entered premises armed with a shotgun; shot and killed plaintiff's dog); *May v. Western Union Tel. Co.*, 157 N.C. 416, 72 S.E. 1059 (1911) (used loud, profane and boisterous language; sang lewd and vulgar songs; yelled at plaintiff and invaded her house); *Saunders v. Gilbert*, 156 N.C. 463, 72 S.E. 610 (1911) (large and threatening crowd; firing gun onto property).

69. *Brame v. Clark*, 148 N.C. 364, 62 S.E. 418 (1908) (trespass to seduce plaintiff's wife).

70. *Arthur v. Henry*, 157 N.C. 438, 73 S.E. 211 (1918); *Kimberly v. Howland*, 143 N.C. 399, 55 S.E. 778 (1906).

71. In each case plaintiff lived on the property with her husband, and, if, as seems likely, he owned the realty or they owned it in tenancy by the entirety, she would have had no action for damage to realty. See *West v. Aberdeen & Rockfish R.R.*, 140 N.C. 620, 53 S.E. 477 (1906).

Damages for mental suffering are apparently also denied in a father's action for loss of services and medical expenses based upon negligent injury to a minor child.⁷² Because this type of derivative action provides little additional assurance of the validity of the mental anguish claim, these cases do not necessarily suggest a general rejection of the parasitic damages rule in negligence cases.

In *Williamson v. Bennett*,⁷³ plaintiff was driving her car when it was struck by defendant's car. Plaintiff received no immediate physical injuries but suffered a severe mental disturbance.⁷⁴ Recovery was denied primarily on the ground that the consequences were unusual and remote.⁷⁵ Prior to considering these issues the court said:

It is almost the universal opinion that recovery may be had for mental or emotional disturbance in ordinary negligence cases where, coincident in time and place with the occurrence producing the mental stress, some actual physical impact or general physical injury also resulted directly from the defendant's negligence. . . . North Carolina decisions are in accord.⁷⁶

The court's reliance upon a proximate cause rationale to deny recovery suggests the possibility that the court considered plaintiff's proof sufficient to establish a basis for liability and rejected imposition of liability only because the particular harm to plaintiff was unforeseeable. If this view were accepted, one interpretation of the case, in light of the court's statement set out above, would be that the court regarded the collision with plaintiff's car to be a "physical impact." A parallel could then be drawn between this situation, in which the collision may be viewed as

72. 3 R. LEE, NORTH CAROLINA FAMILY LAW § 241 at 111-12 (1963).

73. 251 N.C. 498, 112 S.E.2d 48 (1960).

74. At the time of the accident, plaintiff feared that she had hit a child on a bicycle. After pulling to the side of the road, she realized that she had hit another car and was relieved to learn she had not struck a child. Shortly after the accident, she experienced mental and emotional difficulties. Psychiatrists testified that the accident triggered her reaction, that it would not have occurred without the accident, that a prior incident in which her brother-in-law had struck a child on a bicycle made her more susceptible to the fear that she had done so and that the "noise . . . like the noise of a bicycle against the side of a car" was a very important factor in her reaction. *Id.* at 500-01, 112 S.E.2d at 49-50.

75. The basic premise of the court's holding was that the plaintiff's neurotic reaction was not due to the actual events of the accident itself but to an imagined state of affairs that she could readily have discovered did not exist and, thus, that the consequences were so extraordinary that defendant should not be held liable for them. *Id.* at 507-08, 112 S.E.2d at 54-55. The court also relied for its decision upon the rule denying recovery for mental harm arising from fear for a third person's safety and possibly upon the plaintiff's contributory negligence in failing to determine what had actually occurred. *Id.* at 508, 112 S.E.2d at 55. It is doubtful, however, that either of these additional theories could stand apart from the court's initial basic premise because the first is applicable only to the state of affairs imagined by the plaintiff and the second ignores the fact that plaintiff's neurotic reaction occurred despite her discovery of the actual facts at the first reasonable opportunity. Neither theory responds to the real issue presented by the case.

76. *Id.* at 503, 112 S.E.2d at 52.

an "impact" that opens the way for recovery of mental distress damages, and the parasitic damages rule, in which invasion of property interests may be given a similar effect. Even if this interpretation of *Williamson* were accepted, however, any conclusion that *Williamson* represents application of the parasitic damages rule in a negligence action would have to be significantly qualified by recognition that the "impact" rule might be limited to cases in which a defendant's conduct risks personal injury to a plaintiff.

Although this interpretation of the case is consistent with the court's decision, no reason exists to prefer it over other possible interpretations that are equally consistent with the decision. Thus the facts in the case probably would have supported a finding that a physical injury had resulted from the mental harm, and the sufficiency of the proof to establish a basis of liability could have been upheld on that basis. Liability would have still been denied because of the remoteness of the harm. Further, the view that the court did not evaluate at all the sufficiency of the proof to establish a basis of liability would not be an unreasonable interpretation of the case.

The reasons relied upon by courts to deny recovery are not as cogent when an independent tort exists as when mental harm is the sole basis of the action. The existence of the separate tort may afford some guarantee of the genuineness of claims and provide an acceptable barrier to trivial and uncertain ones, thereby lessening the likelihood of fraudulent and frivolous suits. The value of these assurances can be questioned, but the judgment about their effectiveness must take into account the position of mental and emotional harm as a proper element of damage and recognize the exceptional nature of the rule denying recovery for such harm. Under this reasoning, recovery for mental distress reasonably related to a defendant's conduct would seem to be as appropriate in a negligence action in which other interests have also been invaded as in the trespass to realty cases. The only reasonable basis for distinguishing them would be that greater legal responsibility should be imposed for intentional conduct.

The parasitic damages rule does not automatically open the way for compensation for all mental and emotional harm, and the failure of the supreme court to recognize that fact may be the source of some of the confusion. The rule simply provides that recovery should not be denied merely because the harm consists of mental or emotional distress. Issues related to actual causation, liability for unusual consequences of conduct and other problems may well arise in this type of

case. As in the case of any other harm, liability may be denied for emotional distress that is remote, unforeseeable or otherwise found not to be proximately caused by the defendant's conduct. Considering these problems under an umbrella of "mental anguish," however, seldom provides an effective way to deal with them.

III. RELATIONAL INTERESTS

Cases involving relational interests pose difficult problems with respect to mental anguish claims and have been troublesome for the North Carolina courts. The nature of the relationship between two people may in itself provide convincing proof that a defendant's conduct in causing injury or death to one will cause genuine emotional distress to the other. Although this result is most obvious in the case of a husband and wife or a parent and child, there are many other relationships in which genuine emotional distress is not unlikely. The same potential for mental anguish is present when a defendant's conduct disrupts a plaintiff's relationship with others, as when he publishes defamatory statements about the plaintiff.

These very facts, however, create the possibility of liability to a large number of people and undoubtedly in some instances pose the dilemma of distinguishing trivial harm and serious interference with emotional security. Under these circumstances the fear of an indefinite liability is a legitimate one, and the need to impose reasonable limits upon the extent of a defendant's responsibility clearly exists. Defining a rule structure for this purpose has proved difficult, and the distinctions that have been made are fairly arbitrary.

These difficulties are apparent in a series of cases dealing with family relations. In a father's action for seduction of his daughter, the courts have recognized that loss of services is only a fiction⁷⁷ and that "[t]he action is really for the humiliation, the mental suffering and anguish inflicted by the seducer, and for punishment to the seducer."⁷⁸ In *Snider v. Newell*,⁷⁹ the supreme court held that proof of neither the daughter's actual performance of services nor a loss of future services was necessary to the action. Yet, the court chose not to abandon the requirement that a loss of services be alleged in the complaint. The court's unwillingness to dispense with the allegation of loss of services

77. See, e.g., *Briggs v. Evans*, 27 N.C. 16 (1884).

78. *Willeford v. Bailey*, 132 N.C. 402, 404, 43 S.E. 928, 929 (1903).

79. 132 N.C. 614, 44 S.E. 354 (1903).

was based upon the view that defendant's liability might otherwise be extended unreasonably. The court said:

It would not require any considerable foresight to see a large yielding of suits for seduction brought by collateral relations upon the suggestion of loss sustained in social position, business relations, mortified sensibilities, etc. We have a striking illustration of this in *Young v. Tel. Co.* . . . in which we held that a husband to whom a message had been sent notifying him of the sickness of his wife could, in an action for failure to deliver promptly, recover, in addition to nominal damages, compensation for mental anguish. Since the decision of that case, we have entertained suits for "compensation for mental anguish" brought by persons of almost every kind and degree of kinship, and we have good reason for thinking that "the end doth not yet appear." It is undoubtedly true that, as we come into a clearer view of social, domestic, and business relations, with their resulting rights and duties, the courts will guard these relations and protect them by appropriate remedies. . . . In doing so, the principles underlying our jurisprudence must not be violated, or sentimental emotions be made cause of actions; nor must we permit the tenderest and most sacred relations of life to become sources of profit and speculation.⁸⁰

The limitation that denies the father an action for seduction of a daughter who has reached majority⁸¹ is patently inconsistent with the theory of compensating him for humiliation and mental suffering and is probably to be regarded as a further indication of the court's desire to restrict this type of action.

Recovery for mental or emotional harm similar to that allowed for seduction has not been recognized in North Carolina, however, with respect to other injury or death of a child.⁸² Recovery for the parents' mental anguish is denied even though a cause of action exists for loss of the child's services or for expenses incurred because of the injury or death.⁸³

Essentially the same issues are presented when a husband or wife seeks to recover for mental suffering caused by negligently or intentionally inflicted injury or death to the other. A substantial parallel also exists in regard to the court's treatment of the two relationships. As in the case of seduction of a minor child, recovery has been allowed for a

80. *Id.* at 619-20, 44 S.E. at 355-56.

81. *Tillotson v. Currin*, 176 N.C. 479, 97 S.E. 395 (1918); *Hood v. Sudderth*, 111 N.C. 215, 16 S.E. 397 (1892).

82. *Michigan Sanitarium & Benevolent Ass'n v. Neal*, 194 N.C. 401, 139 S.E. 841 (1927) (injury); *Croom v. Murphy*, 179 N.C. 393, 102 S.E. 706 (1920) (death); *Ballinger v. Rader*, 153 N.C. 488, 69 S.E. 497 (1910) (death).

83. See 3 R. LEE, *supra* note 72, § 241 at 111-12.

wide range of interests in emotional security⁸⁴ in actions for criminal conversation and alienation of affections.⁸⁵ For mental suffering caused by injury to a spouse by conduct other than that constituting criminal conversation or alienation of affections,⁸⁶ however, no recovery is allowed.⁸⁷ Initially, the supreme court, while recognizing a cause of action in a husband for loss of his wife's services, denied any recovery for mental anguish suffered by him because of her injury.⁸⁸ Later cases, however, upheld his right to recover for mental suffering as a principal element of damage in his action for loss of consortium.⁸⁹ Subsequent to the passage of the Married Woman's Act,⁹⁰ the wife's right to recover for loss of consortium was approved in *Hipp v. Dupont*.⁹¹ The court held that a wife could recover for mental anguish and resulting physical injury caused "by reason of the sudden and fearful injury of her husband . . . and by reason of being forced to look upon him in his horribly mutilated condition."⁹² The issue came before the court again a few years later, but this time the court characterized the claim as one for mental suffering that was not related to any other cause of action, overruled the *Hipp* case, and denied recovery.⁹³ The circle was completed when, in *Helmstetter v. Duke Power Co.*,⁹⁴ the court held that the husband's cause of action for loss of con-

84. *Powell v. Strickland*, 163 N.C. 393, 403, 79 S.E. 872, 876 (1913) (recovery allowed for "mental suffering, injured feelings, humiliation, shame and mortification . . . and the disgrace . . . heaped upon him").

85. *Cottle v. Johnson*, 179 N.C. 426, 102 S.E. 769 (1920); *Powell v. Strickland*, 163 N.C. 393, 79 S.E. 872 (1913); *Sebastian v. Klutz*, 6 N.C. App. 201, 170 S.E.2d 104 (1969).

86. *Helmstetter v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

87. *Craig v. Suncrest Lumber Co.*, 189 N.C. 137, 126 S.E. 312 (1924).

88. *Kimberly v. Howland*, 143 N.C. 398, 405, 55 S.E. 778, 781 (1906).

89. *Bailey v. Long*, 172 N.C. 661, 90 S.E. 709 (1916).

90. Act of May 16, 1913, ch. 13, § 1, 1913 N.C. Sess. Laws 45 (current version at N.C. GEN. STAT. § 52-4 (1976)).

91. 182 N.C. 9, 108 S.E. 318 (1921).

92. *Id.* at 18, 108 S.E. at 322.

93. *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925).

94. 224 N.C. 821, 32 S.E.2d 611 (1944).

In *Nicholson v. Hugh Chatham Mem. Hosp., Inc.*, No. 80-104 (N.C. Sup. Ct. 1980), a case decided after this Article went to press, the North Carolina Supreme Court overruled *Hinnant* and *Helmstetter* and upheld a wife's cause of action for loss of consortium incident to injury to her husband caused by defendant's negligence. In this action, recovery for mental anguish as an element of damages was apparently not alleged and the court did not address the right to recover such damages. In *Hinnant* and *Helmstetter*, denial of recovery for mental anguish was premised upon refusal to recognize a cause of action for loss of consortium. In earlier cases in which a cause of action for loss of consortium had been upheld, damages for mental anguish were allowed. Thus, the effect of *Nicholson* upon the right of recovery for mental anguish incident to a cause of action for loss of consortium is unclear.

As a practical matter, no meaningful distinction can likely be made between mental and emotional harm and invasion of other interests encompassed by consortium. The court identified these interests in *Nicholson* in the following way:

sortium did not survive the destruction of his common-law right to his wife's services and that an independent action could not be maintained by him for mental anguish suffered because of his wife's injury.

The basis on which the supreme court distinguishes, for the purpose of determining a claim for mental distress, cases involving seduction, criminal conversation and alienation of affections from those involving other injury or death to a child or spouse is not clear. The nature of the relationship disrupted by a defendant's conduct does not necessarily differ significantly in the two situations. Moreover, the suffering experienced by a parent or spouse may be as likely and as great when a grave injury or death results as when a seduction occurs. Perhaps the basis of this distinction is that in seduction and related torts a defendant has acted intentionally and with knowledge of the consequences of his conduct to a plaintiff.

Injury to relational interests may also result from conduct that adversely affects the esteem or regard in which a plaintiff is held by others. Defamation is the principal cause of action for protection of these relational interests, and damage may include pecuniary loss, harm to reputation and mental disturbance. Although recovery for mental and emotional harm has been freely allowed in defamation actions,⁹⁵ a distinction is made between publications that are actionable per se and those, the defamatory meaning of which appears only in light of extrinsic facts, that are actionable only upon proof of special damages. Special damages consist only of pecuniary losses, and proof of mental or emotional harm is inadequate to meet this threshold requirement.⁹⁶ One explanation for the view that mental or emotional harm does not constitute special damage was given in *Scott v. Harrison*:⁹⁷ "Perhaps because humiliation and the poignancy of mental dis-

[W]hile we recognize that consortium is difficult to define, we believe the better view is that it embraces service, society, companionship, sexual gratification and affection, and we so hold today. We do so in recognition of the many tangible and intangible benefits resulting from the loving bond of the marital relationship.

Id., slip op. at 9. Because these interests consist of the significant emotional and mental ties between husband and wife, any attempt to identify other mental or emotional harm that exists apart from them for which recovery would be denied seems futile.

In addition, the *Nicholson* court recognized the position stated in the text as the basis for distinguishing, for the purpose of determining a claim for mental anguish, cases involving seduction, criminal conversation and alienation of affections from those involving other injury or death to a child or spouse. It rejected that distinction as unsound, however, and upheld an action for loss of consortium based upon negligence. *Id.*, slip op. at 7.

95. *Roth v. Greensboro News Co.*, 217 N.C. 13, 6 S.E.2d 882 (1940); *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904).

96. *Scott v. Harrison*, 215 N.C. 427, 430-31, 2 S.E.2d 1, 3 (1939).

97. *Id.* at 427, 2 S.E.2d at 1.

trass are not easily measured in money values, they have been, at least in slander cases, considered merely in aggravation of damages."⁹⁸

If proof of special damages is required to establish a cause of action and no proof is offered, recovery for mental and emotional harm is denied.⁹⁹ On the other hand, once a cause of action has been established, either by proof that the publication is actionable per se or, apparently, by proof of special damages, recovery may be had for mental suffering, including humiliation, embarrassment, and hurt feelings, as well as for severe mental anguish.¹⁰⁰ The supreme court has held that mental suffering, as well as other harm, may be presumed from the publication of a per se defamatory statement and that the jury may be permitted to award damages even when a plaintiff has offered no proof of actual harm.¹⁰¹ The presumed damage rule, however, has been restricted, if not overturned, by a recent decision of the United States Supreme Court holding that the Constitution precludes states from limiting free speech in this way.¹⁰²

Two considerations seem important to the award of damages for mental suffering in defamation cases. Mental suffering is almost inseparable from the reputational interest with which defamation is identified, and any attempt to exclude it from the cause of action would be virtually impossible. The other possibility is that the court may view the award for mental suffering as parasitic damages in a cause of action that exists independently of the mental disturbance.

IV. NEGLIGENCE

A. Telegraph and Related Cases

The North Carolina Supreme Court at an early time adopted a liberal view allowing recovery for mental or emotional harm for negligent transmission of telegraph messages.¹⁰³ Recovery was allowed by

98. *Id.* at 431, 2 S.E.2d at 3.

99. *Scott v. Harrison*, 215 N.C. 427, 2 S.E.2d 1 (1939); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

100. *Jones v. Brinkley*, 174 N.C. 23, 93 S.E. 372 (1917); *Barringer v. Deal*, 164 N.C. 246, 80 S.E. 161 (1913); *Fields v. Bynum*, 156 N.C. 413, 72 S.E. 449 (1911).

101. *Roth v. Greensboro News Co.*, 217 N.C. 13, 6 S.E.2d 882 (1940); *Fields v. Bynum*, 156 N.C. 413, 72 S.E. 449 (1911); *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904).

102. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349.

103. *E.g.*, *Green v. Western Union Tel. Co.*, 136 N.C. 489, 49 S.E. 165 (1904); *Young v. Western Union Tel. Co.*, 107 N.C. 370, 11 S.E. 1044 (1890).

the sender of the message,¹⁰⁴ the person to whom it was sent¹⁰⁵ or any other individual who had a beneficial interest in the message of which the company knew or should have known.¹⁰⁶ Although many of the cases involved messages relating to death or illness of close relatives, the right to recover was frequently recognized when neither was present. A cause of action was upheld under any circumstances that put the company on notice, either from the character or content of the message or from knowledge it possessed or had conveyed to it at the time of sending, that mental suffering would naturally and reasonably result from its negligence in handling the message.¹⁰⁷

In several cases the court held that a claimant, in order to recover, had to establish a "high degree of mental suffering" and that proof of mere annoyance, disappointment or regret was insufficient to establish a cause of action.¹⁰⁸ Despite this limitation, the existence of a close family relationship was held to create a presumption of mental suffering sufficient to permit the jury to award damages.¹⁰⁹ Similarly, proof of a close relationship, other than a familial one, was regarded as an important factor in establishing the requisite degree of mental suffering.¹¹⁰ The cases clearly suggest that any genuine mental suffering is compensable and that the denial of recovery for annoyance, disappointment and regret does not indicate any broader limitation than a literal interpretation of those words suggests.

The rationale used by the supreme court in allowing recovery in the cases has varied. Some cases seem simply to apply usual negligence concepts without evidencing any concern that the claim for mental suffering without physical injury requires exceptional treatment.¹¹¹ Other cases justify the award of damages in a more limited way. The company's negligence has been held to be a breach of a public duty undertaken by the company in consideration of the grant of its charter, and

104. *E.g.*, *Kivett v. Western Union Tel. Co.*, 156 N.C. 296, 72 S.E. 388 (1911); *Gerock v. Western Union Tel. Co.*, 147 N.C. 1, 60 S.E. 637 (1908).

105. *E.g.*, *Russ v. Western Union Tel. Co.*, 222 N.C. 504, 23 S.E.2d 681 (1943); *Dayvis v. Western Union Tel. Co.*, 139 N.C. 79, 51 S.E. 898 (1905).

106. *See* *Holler v. Western Union Tel. Co.*, 149 N.C. 336, 63 S.E. 92 (1908); *Laudie v. Western Union Tel. Co.*, 124 N.C. 528, 32 S.E. 886 (1899); *Cashion v. Western Union Tel. Co.*, 124 N.C. 459, 32 S.E. 746 (1899).

107. *Green v. Western Union Tel. Co.*, 136 N.C. 489, 49 S.E. 165 (1904).

108. *Kivett v. Western Union Tel. Co.*, 156 N.C. 296, 72 S.E. 388 (1911); *Harrison v. Western Union Tel. Co.*, 143 N.C. 147, 55 S.E. 435 (1906); *Hancock v. Western Union Tel. Co.*, 137 N.C. 498, 49 S.E. 952 (1905).

109. *Gibbs v. Western Union Tel. Co.*, 196 N.C. 516, 146 S.E. 209 (1929).

110. *Hunter v. Western Union Tel. Co.*, 135 N.C. 458, 47 S.E. 745 (1904); *Bright v. Western Union Tel. Co.*, 132 N.C. 317, 43 S.E. 841 (1903).

111. *See* cases cited note 103 *supra*.

recognition of this special duty seems to have been an important factor in the court's decision.¹¹² A variation of this idea has appeared in other cases in which the court viewed the cause of action as a necessary incentive, which otherwise would be missing, to the company to carry out its responsibility to the public.¹¹³ This general line of reasoning would probably prevail today, and the authority of the cases may, therefore, be limited by it.

Similar reasoning has been used to uphold a cause of action for the negligent or intentional conduct of a carrier in wrongfully ejecting or discharging a passenger,¹¹⁴ carrying him beyond his destination,¹¹⁵ failing to stop at a flag station,¹¹⁶ and using rude and insulting language to a passenger.¹¹⁷ In these actions recovery has been allowed for annoyance, inconvenience, discomfort, humiliation, wounded feeling, and mental suffering and pain.¹¹⁸ The same rationale has also been relied upon in awarding damages for annoyance, inconvenience, humiliation and mental suffering incident to wrongful termination of telephone services.¹¹⁹

B. Mishandling of Dead Bodies

A right to recover for mental or emotional harm caused by negligent or intentional mutilation or mishandling of dead bodies has been recognized. Running over the body with a train,¹²⁰ performing an unauthorized autopsy¹²¹ and withholding the body to induce payment of embalming fees¹²² have all been held sufficient to give rise to the cause

112. *Bryan v. Western Union Tel. Co.*, 133 N.C. 603, 45 S.E. 938 (1903); *Cashion v. Western Union Tel. Co.*, 124 N.C. 459, 32 S.E. 746 (1899).

113. *Penn v. Western Union Tel. Co.*, 159 N.C. 306, 75 S.E. 16 (1912); *Cashion v. Western Union Tel. Co.*, 123 N.C. 267, 31 S.E. 493 (1898); *Sherrill v. Western Union Tel. Co.*, 116 N.C. 655, 21 S.E. 429 (1895).

114. *Hallman v. Southern Ry.*, 169 N.C. 127, 85 S.E. 298 (1915); *Harvey v. Atlantic Coast Line R.R.*, 153 N.C. 567, 69 S.E. 627 (1910); *Mace v. Southern Ry.*, 151 N.C. 404, 66 S.E. 342 (1909).

115. *Hutchinson v. Southern Ry.*, 140 N.C. 123, 52 S.E. 263 (1905).

116. *Williams v. Carolina & N.W.R.R.*, 144 N.C. 498, 57 S.E. 216 (1907).

117. *Hutchinson v. Southern Ry.*, 140 N.C. 123, 52 S.E. 263 (1905).

118. *McNairy v. Norfolk & W.R.R.*, 172 N.C. 505, 90 S.E. 497 (1916); *Sawyer v. Norfolk S.R.R.*, 171 N.C. 13, 86 S.E. 166 (1915); *Edwards v. Southern Ry.*, 162 N.C. 278, 78 S.E. 219 (1913).

119. *Carmichael v. Southern Bell Tel. & Tel. Co.*, 162 N.C. 333, 78 S.E. 507 (1913); *Carmichael v. Southern Bell Tel. & Tel. Co.*, 157 N.C. 17, 72 S.E. 619 (1911).

120. *Morrow v. Southern Ry.*, 213 N.C. 127, 195 S.E. 383 (1938); *Kyles v. Southern Ry.*, 147 N.C. 394, 61 S.E. 278 (1908).

121. *Gurganious v. Simpson*, 213 N.C. 613, 197 S.E. 163 (1938); *Stephenson v. Duke Univ.*, 202 N.C. 624, 163 S.E. 698 (1932).

122. *Bonaparte v. Fraternal Funeral Home*, 206 N.C. 652, 175 S.E. 137 (1934).

of action. On the other hand, mishandling or mutilation is not established by proof of an unauthorized embalming performed by the defendant after the body has been delivered to defendant's funeral home.¹²³

Recovery for mutilation or mishandling of dead bodies, however, has been limited by the rationale that the cause of action is based on a quasi-property right in the body:

Our law recognizes that the next of kin has a quasi-property right in the body—not property in the commercial sense but a right of possession for the purpose of burial—and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently.¹²⁴

Although the artificiality of this rationale was exposed in a dissenting opinion in an early case,¹²⁵ the court has probably deliberately adhered to it to limit recovery from mental suffering to a single class of claimants—the next of kin.¹²⁶

Under this theory recovery is allowed for mental or emotional harm alone, and proof of a resulting physical injury is not required.¹²⁷ The cases in which it has been used have all involved situations in which, although adverse feelings or emotions were caused, no serious mental or emotional injury ensued. The possibility exists that a claimant other than the next of kin might recover under other lines of authority recognizing a cause of action when physical injury is caused. Of course, this possibility would be foreclosed if the court took the position that the mutilation theory was the exclusive method of recovery in this type of case.

C. *Direct Physical Injury*

When a physical injury is caused directly by the defendant's negligence, mental suffering that accompanies or is caused by the physical injury is a proper element of damage.¹²⁸ Generally, recovery has been

123. *Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 138 S.E.2d 214 (1964).

124. *Id.* at 561, 138 S.E.2d at 215-16.

125. *Floyd v. Atlantic Coast Line Ry.*, 167 N.C. 55, 62, 83 S.E. 12, 15 (1914) (Clark, C.J., dissenting).

126. *Stephenson v. Duke Univ.*, 202 N.C. 624, 163 S.E. 698 (1932); *Floyd v. Atlantic Coast Line Ry.*, 167 N.C. 55, 83 S.E. 12 (1914).

127. *Kyles v. Southern Ry.*, 147 N.C. 394, 61 S.E. 278 (1908).

128. *E.g.*, *King v. Higgins*, 272 N.C. 267, 158 S.E.2d 67 (1967); *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 38 S.E.2d 105 (1946); *Britt v. Carolina N.R.R.*, 148 N.C. 37, 61 S.E. 601 (1908).

permitted for any suffering of body and mind,¹²⁹ and the defendant has been held liable for a wide range of adverse consequences, including embarrassment,¹³⁰ humiliation,¹³¹ pain,¹³² mental anguish,¹³³ depressive reaction,¹³⁴ traumatic neurasthenia¹³⁵ and traumatic neurosis.¹³⁶

An obvious element of damage is mental and emotional harm, including pain and suffering, related directly to the physical injury, and recovery is readily allowed for such harm.¹³⁷ Recovery has not been limited to this type of damage, however. The wrongdoer has been held liable for fright or other mental distress produced by the occurrence that caused the physical injury.¹³⁸ Liability has been imposed for mental and emotional harm that, although not caused directly by the physical injury, results from circumstances that are brought into existence by such injury. Thus, recovery has been allowed for mental distress incident to a permanent scar left by the injury¹³⁹ and for pain and suffering experienced in skin-grafting operations performed in treatment of the injury.¹⁴⁰ Even when a plaintiff's harm is less directly connected to the physical injury and results from his response to difficulties he must confront because of it, recovery may be allowed.¹⁴¹ Liability has been imposed for amnesia and depression that were caused in part by the mental stress, financial worries and strain plaintiff experienced due to his incapacity to work because of physical injuries he had received in an accident three months earlier.¹⁴² That a preexisting condition enhances plaintiff's susceptibility to such harm is immaterial when direct physical injury is present.¹⁴³

129. *Ledford v. Valley River Lumber Co.*, 183 N.C. 614, 112 S.E. 421 (1927); *Hargis v. Knoxville Power Co.*, 175 N.C. 31, 94 S.E. 702 (1917).

130. *Parker v. Seaboard Air Line Ry.*, 181 N.C. 95, 106 S.E. 755 (1921).

131. *Id.*

132. *Conrad v. Shuford*, 174 N.C. 719, 94 S.E. 424 (1917).

133. *Muse v. Ford Motor Co.*, 175 N.C. 466, 95 S.E. 900 (1918).

134. *Inman v. Harper*, 2 N.C. App. 103, 162 S.E.2d 629 (1968).

135. *Brown v. Seaboard Air Line Ry.*, 147 N.C. 136, 60 S.E. 898 (1908).

136. *Ford v. Blythe Bros. Co.*, 242 N.C. 347, 87 S.E.2d 879 (1955).

137. *See cases cited notes 128-136 supra.*

138. *See cases cited note 146 infra* (consequential physical injury involved).

139. *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974); *King v. Britt*, 267 N.C. 594, 148 S.E.2d 594 (1966).

140. *Lane v. Southern Ry.*, 192 N.C. 287, 134 S.E. 855 (1926).

141. *Kistler v. Southern Ry.*, 171 N.C. 577, 88 S.E. 864 (1916) (distress and humiliation from jaundice attack caused by injury); *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 74 S.E. 885 (1912) (mental suffering created by likelihood cancer would develop); *Britt v. Carolina N. R.R.*, 148 N.C. 37, 39, 61 S.E. 601, 603 (1908) ("knew he could never be well again, and it almost broke his heart . . . that he would be a cripple for life").

142. *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964).

143. *Id.*

D. Consequential Physical Injury

Recovery in North Carolina has not been limited to cases in which contemporaneous physical injury occurs. Liability has also been found when a defendant's negligence produces fright, anger or other emotional disturbance that in turn causes physical injury. The question whether a cause of action should be recognized under these circumstances came squarely before the court in an early case, *Watkins v. Kaolin Manufacturing Co.*¹⁴⁴ The court, in sustaining a cause of action, said:

[W]e are of the opinion that an action will lie for *physical* injury or disease resulting from fright or nervous shocks caused by negligent acts; from common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells of sickness, and sometimes in sudden death.¹⁴⁵

The right to recover for mental or emotional disturbance and resulting physical injury has been recognized in a number of later cases.¹⁴⁶

No distinct line can be drawn to separate physical injury from mental and emotional harm. The phrase "pain and suffering" probably derives from the difficulty of making any meaningful division of injuries into such categories. In *Hargis v. Knoxville Power Co.*,¹⁴⁷ the court, in rejecting defendant's argument that recovery for mental suffering should be denied because the complaint did not "set up 'mental anguish' as an element of damage as distinct from physical suffering," observed: "As all pain is mental and centers in the brain, . . . the injured party is allowed to recover for actual suffering of mind and body"¹⁴⁸ An equally sensible approach has been taken by the supreme court in applying the rule that consequential physical injury must be present to warrant recovery when mental or emotional harm has been caused. The cases in no way suggest any attempt to establish an inflexible and arbitrary division of injuries into physical and mental harm.

Physical injury, as incorporated in the rule, is not used in the sense of an injury to a specific part of the body, such as a cut, broken bones,

144. 131 N.C. 536, 42 S.E. 983 (1902).

145. *Id.* at 541-42, 42 S.E. at 985.

146. *Crews v. Provident Fin. Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967); *Sparks v. Tennessee Mineral Prods. Corp.*, 212 N.C. 211, 193 S.E. 31 (1937); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936); *Arthur v. Henry*, 157 N.C. 438, 73 S.E. 211 (1911); *May v. Western Union Tel. Co.*, 157 N.C. 416, 72 S.E. 1059 (1911); *Kimberly v. Howland*, 143 N.C. 398, 66 S.E. 778 (1906).

147. 175 N.C. 31, 94 S.E. 702 (1917).

148. *Id.* at 34, 94 S.E. at 703.

or damage to an internal organ.¹⁴⁹ This view is effectively set forth in *May v. Western Union Telegraph Co*¹⁵⁰:

[T]he general principles of the law of torts support a right of action for physical injuries resulting from either a willful or a negligent act, none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, as those of the former class are frequently much more painful and enduring than those of the latter.¹⁵¹

Impairment of health, loss of bodily power, or sickness, without proof of any specific injury, has been held to constitute a physical injury.¹⁵² Similarly, proof that plaintiff became "almost helpless; that she could not go about her daily duties, and could not keep on her feet to attend to her children; that it has affected her ever since, and has caused her female trouble out of its regular course" has been held a sufficient showing of physical injury.¹⁵³ A jury instruction permitting recovery if plaintiff was "put in fear and frightened to such an extent that she suffered physical pain, suffered in body and mind, and was made sick" was held proper.¹⁵⁴ In many of these cases, expert medical testimony was not introduced to establish that the emotional distress could or did operate to cause physical consequences, and proof of the physical injury was through plaintiff's own testimony, much of which seems to have been couched in general language such as "sickness."

Under these holdings it is probable that a "physical" injury can be shown in any case in which significant mental or emotional harm has occurred. Indeed, a reasonable interpretation of the cases would be that the physical injury requirement is simply a vehicle used by the court to distinguish harm of this magnitude from less serious interferences, which, if a multitude of suits are to be avoided, everyone must be left to absorb to some degree. In a recent case, the court, relying upon the broad interpretation of physical injury in earlier cases, held that an allegation that the plaintiff "suffered great mental anguish and anxiety is sufficient . . . to go to trial upon the question of whether the great mental anguish and anxiety . . . [caused] physical injury."¹⁵⁵

It is unclear whether a defendant's conduct, in order to provide a

149. *Crews v. Provident Fin. Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967).

150. 157 N.C. 416, 72 S.E. 1059 (1911).

151. *Id.* at 422, 72 S.E. at 1061.

152. *Sparks v. Tennessee Mineral Prods. Corp.*, 212 N.C. 211, 193 S.E. 31 (1937); *Kimberly v. Howland*, 143 N.C. 398, 55 S.E. 778 (1906).

153. *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 538, 42 S.E. 983, 984 (1902).

154. *Arthur v. Henry*, 157 N.C. 438, 439, 73 S.E. 211, 212 (1911).

155. *Stanback v. Stanbank*. 297 N.C. 181, 199, 254 S.E.2d 611, 623 (1979).

basis for imposition of liability, must create a foreseeable risk of mental or emotional harm of a type likely to cause physical injury. Many of the cases involved fact situations in which unreasonable risks of both emotional distress and resulting physical injury were foreseeable. In the initial case allowing recovery, the supreme court appeared to regard the foreseeability of both risks to be essential¹⁵⁶; but a recent case deals with the risk concept in terms of the foreseeability of "consequences of a generally injurious nature"¹⁵⁷—the standard usually applied in negligence cases. The latter case, however, involved harassment by a bill collector and emotional harm was the principal risk his conduct threatened.

The *Restatement (Second) of Torts* bases this cause of action solely upon the interest in physical security.¹⁵⁸ It recognizes that negligent conduct may threaten physical injury directly or through the operation of emotional disturbance. When conduct risks direct physical injury but causes only emotional distress and consequential physical injury, liability is imposed although neither the distress nor resulting injury is foreseeable.¹⁵⁹ If only mental or emotional harm is threatened by the conduct, a distinction is made between conduct that is intended to cause emotional distress and conduct that, while not intended to cause it, involves an unreasonable risk of causing emotional distress. When the conduct is not intended to cause emotional distress, both the distress and the resulting injury must be reasonably foreseeable before liability attaches.¹⁶⁰ The foreseeability requirement is not as rigorous when the defendant acts for the purpose of causing emotional distress.¹⁶¹

The rule structure set out in the *Restatement* is substantially more elaborate than that which has evolved in the North Carolina cases. The results in the cases in which a defendant has intended to cause emotional distress seem consistent with the *Restatement* position.¹⁶² No specific distinction has been made in them, however, between threatened physical injury and threatened emotional disturbance. Although it is unclear whether specific foreseeability of emotional harm is necessary to establish liability when a defendant's conduct involves un-

156. *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 42 S.E. 983 (1902).

157. *Crews v. Provident Fin. Co.*, 271 N.C. 684, 689, 157 S.E.2d 381, 385 (1967).

158. *RESTATEMENT (SECOND) OF TORTS* § 212, Comment a (1965).

159. *Id.* § 436, Comment d.

160. *Id.* § 313.

161. *Id.* § 312, Comments d, e.

162. See text accompanying notes 164-179 *infra*.

reasonable risks of other harm, the cases seem to support the view that it is not and that unreasonable risks of any type of injury coupled with significant emotional distress is enough.

The risk of direct physical harm may arise from fright or other emotional disturbance created by a defendant's conduct. Thus, when a person is subjected to fright through the perpetration of a practical joke, it may be foreseeable that his response will entail the risk of physical injury to himself or third persons from external circumstances rather than through internal operation of the fright. Although this type of case has been grouped by the court with the cases discussed in this section,¹⁶³ a preferable analysis would be to recognize that liability exists because direct physical injury was risked and in fact caused by the defendant's conduct. Under this analysis, the third person in the above illustration, who may not have been subjected to any fright, would have a cause of action.

V. INTENTIONAL TORT

That mental or emotional harm has been caused by intentional conduct does not necessarily mean that an intentional tort theory will be either relied upon or available for recovery. Risks of emotional distress are more likely to be foreseeable to a defendant who acts intentionally for the purpose of affecting a plaintiff than to one who is only negligent toward him. When foreseeable risks of emotional disturbance arise from a defendant's intentional conduct, a cause of action in negligence may be maintained if emotional distress and consequential physical injury in fact result. Indeed, a number of the North Carolina negligence cases in this area involve situations in which a defendant acted intentionally.¹⁶⁴

Earlier discussion indicated that the supreme court has recognized mental and emotional security as a primary interest intended to be protected by some intentional torts¹⁶⁵ and that recovery for mental and emotional harm caused by these and perhaps other intentional torts may be allowed under the parasitic damages rule.¹⁶⁶ Intentional tort, as a separate basis of liability, seems to have been utilized only in a

163. See, e.g., *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E.2d 683 (1965); *Langford v. Shu*, 258 N.C. 135, 128 S.E.2d 210 (1962).

164. *Crews v. Provident Fin. Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967); *Langford v. Shu*, 258 N.C. 135, 128 S.E.2d 210 (1962); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936).

165. See text accompanying notes 50-54 *supra*.

166. See discussion in part II. of this Article *supra*.

group of cases in which the theory of forcible trespass was relied upon by the court in finding liability.¹⁶⁷ Because of the uniqueness of the forcible trespass theory, any conclusion about the broader significance of this line of cases must be an uncertain one. *Kirby v. Jules Chain Stores Corp.*,¹⁶⁸ a case involving highly abusive conduct by a bill collector, could also be placed in this category, but has been cited in later cases as authority to support recovery in negligence. As consequential physical injury apparently was present in these cases, whether the basis of liability was negligence or intentional tort would seem to be unimportant as a practical matter.

A recent North Carolina case, *Stanback v. Stanback*,¹⁶⁹ found the allegations in a complaint sufficient "to state a claim for what has become essentially the tort of intentional infliction of serious emotional distress."¹⁷⁰ Because of the unusual context in which the decision was made, an opportunity to develop the full dimensions of the tort was not presented, and as a result a number of serious questions were left unanswered by the decision. Plaintiff sought to recover damages for mental anguish and punitive damages for an alleged breach of a separation agreement. The court held that neither could be recovered in an action for breach of contract but upheld recovery of them on the ground that the conduct alleged to show a breach of contract constituted the tort of intentional infliction of serious mental distress.

A large number of states have adopted the tort of intentional infliction of mental anguish¹⁷¹ and generally, in doing so, have followed the model set out in the *Restatement (Second) of Torts*.¹⁷² The *Restatement* model affords protection only against severe emotional distress intentionally or recklessly caused by extreme and outrageous conduct. This interest in mental and emotional security in itself is regarded as sufficiently important to warrant protection through tort action and neither physical injury to nor invasion of other interests of the claimant need be shown to establish a cause of action.

Questions about the North Carolina decision in *Stanback* arise primarily because of the court's characterization of the cause of action as the "tort of intentional infliction of serious emotional distress." Did

167. For discussion of the forcible trespass cases, see text accompanying notes 31-47 *supra*.

168. 210 N.C. 808, 188 S.E. 625 (1936). For discussion of this case, see text accompanying notes 37-45 *supra*.

169. 297 N.C. 181, 254 S.E.2d 611 (1979).

170. *Id.* at 196, 254 S.E.2d at 621-22.

171. W. PROSSER, *supra* note 1, at 49-62.

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

the court intend by this characterization to incorporate into the cause of action the elements that are now generally associated with it in other jurisdictions? Prior cases uphold the right to recover for mental or emotional disturbance and resulting physical injury caused by a defendant's intentional conduct on a negligence theory¹⁷³ and probably an intentional tort theory.¹⁷⁴ Although the earlier decisions may implicitly suggest that hurt feelings, embarrassment, regret, annoyance and other interferences "against which ordinary firmness is a sufficient protection" are insufficient to permit recovery¹⁷⁵ and that, therefore, the interference must be a significant one, it is doubtful that they can be read to require severe mental or emotional disturbance as a prerequisite to recovery.¹⁷⁶ Further, these cases, some of which were relied upon by the court in *Stanback*, cannot reasonably be interpreted to limit recovery for emotional distress and consequential physical injury either to situations in which the defendant's conduct has been extreme and outrageous¹⁷⁷ or to those in which severe mental distress has been intentionally or recklessly caused.¹⁷⁸ Recovery in negligence cases has been based upon conduct involving, at most, the risk of foreseeable mental anguish and, perhaps, resulting physical injury, and, when the conduct is intended to cause emotional distress, even these requirements may be relaxed.¹⁷⁹

Another problem raised by *Stanback* is the holding that resulting physical injury is essential to the cause of action.¹⁸⁰ An important feature of the tort of intentional infliction of mental anguish under the *Restatement* model is that it affords protection against severe mental anguish independently of physical injury or invasion of other interests.¹⁸¹ The stringent requirements for the cause of action serve, to a substantial degree, to guarantee the genuineness of the claim and to eliminate trivial claims and thus to remove the need for a requirement

173. See cases discussed in subparts IV. A. and B. of this Article *supra*.

174. See notes 165-67 and accompanying text *supra*.

175. *Kaylor v. Sain*, 207 N.C. 312, 313, 176 S.E. 560, 561 (1934).

176. See notes 108-110, 127, 137-41, 152-55 and accompanying text *supra*. See also *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934); *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885, *cert. denied*, 279 N.C. 348, 182 S.E.2d 581 (1971).

177. See notes 144-157, 163 and accompanying text *supra*.

178. *Id.*

179. See text accompanying notes 161-62 *supra*.

180. 297 N.C. 181, 198-99, 254 S.E.2d 611, 623 (1979).

181. "[Intentional infliction of emotional distress] is not, however, limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous there may be liability for emotional distress alone, without such harm." *RESTATEMENT (SECOND) OF TORTS* § 46, Comment k.

of contemporaneous or consequential physical injury for this purpose.¹⁸²

Although the court, in recognizing the tort of intentional infliction of severe emotional distress, may have intended to enlarge the right to recover for mental and emotional harm, the danger exists that the case will be interpreted to have the opposite effect. The *Stanback* court seems correct in finding a cause of action, and much of the difficulty in interpreting the decision arises from the name the court chose to describe that cause of action. In this context, it may be significant that the court, in considering the sufficiency of the facts alleged in the complaint to state a cause of action in tort, did not relate them to possible findings of extreme and outrageous conduct or of intent to cause severe mental distress and recklessness. Adoption of the tort of intentional infliction of severe mental distress in North Carolina makes little sense, either in theory or, even more importantly, in light of earlier case law development, *if* a requirement of consequential physical injury is imposed. Although the *Stanback* court, following North Carolina's liberal view of what constitutes a physical injury, practically conceded the existence of one, imposing the technical requirement of a physical injury may be a source of confusion. The implication may well be that, even when a physical injury results, a cause of action will exist only if the other stringent requirements of the tort of intentional infliction of severe emotional distress are present.

VI. SPECIAL PROBLEMS

A. *Thin Skull Rule*

In *Lockwood v. McCaskill*,¹⁸³ plaintiff received physical injuries in an automobile accident caused by defendant's negligence and later, because of worry about the injury, developed amnesia. Had it not been for a preexisting condition that made plaintiff susceptible to mental harm, the amnesia would not have developed. The court applied the thin skull rule to hold defendant liable.

The general rule is that if defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility, except insofar as he was on notice of the existence of such susceptibility, but if his misconduct amounted to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by the plaintiff notwithstanding

182. *Id.*

183. 262 N.C. 663, 138 S.E.2d 541 (1964).

the fact that these damages were unusually extensive because of peculiar susceptibility.¹⁸⁴

In other cases, the imposition of liability, upon the facts involved in them, suggests application of the rule, although the issue was not squarely presented.¹⁸⁵

The suggestion has been made¹⁸⁶ that an earlier case, *Williamson v. Bennett*,¹⁸⁷ may limit, in some uncertain way, the application of the thin skull rule to mental harm. In *Williamson*, defendant negligently caused an automobile accident in which plaintiff suffered no physical injuries. In a prior incident, a car driven by plaintiff's brother-in-law had struck and killed a girl on a bicycle. Plaintiff had a preexisting disposition to neurosis. Because of plaintiff's preexisting condition and the earlier incident, the grinding sound of the collision caused her to believe that she had struck a child on a bicycle and precipitated in her a neurotic reaction. Plaintiff sought to recover for harm related to that reaction.

The court, in a complex decision, essentially held that the harm was too remote to be compensable.¹⁸⁸ Despite the unusual combination of circumstances that caused the neurosis, the thin skull rule could have been applied to hold defendant liable. Both the reaction and the imagined stimulus that prompted it were centered in plaintiff's preexisting condition and defendant's conduct precipitated both. Nevertheless, even if the court had determined that the thin skull rule did apply, a decision to deny liability would not have been unreasonable. Because the court did not directly consider application of the thin skull rule and because of the unique circumstances involved, it is doubtful that the case should be regarded as effecting any significant limitation upon the *Lockwood* case.

In *Lockwood*, contemporaneous physical injury was caused by defendant's conduct. There is no apparent reason why the thin skull rule should not apply when the cause of action is based upon emotional distress that results in physical injury and a plaintiff's peculiar susceptibility is important only to the determination of a defendant's liability for additional harm that is caused by it. The application of the rule is less clear, however, when the initial emotional distress or the resulting

184. *Id.* at 670, 138 S.E.2d at 546.

185. See *Ford v. Blythe Bros. Co.*, 242 N.C. 347, 87 S.E.2d 879 (1955); *Brown v. Seaboard Air Line Ry.*, 147 N.C. 136, 60 S.E. 898 (1908).

186. *Byrd & Dobbs, Survey of North Carolina Case Law, Torts*, 43 N.C.L. REV. 906, 924-25 (1965).

187. 251 N.C. 498, 112 S.E.2d 48 (1960).

188. See notes 74-75 and accompanying text *supra*.

physical injury occurs only because of a plaintiff's susceptibility. If a defendant knows of a plaintiff's susceptibility, the defendant should not be relieved of liability merely because the distress or injury would not have occurred without the plaintiff's peculiar susceptibility. Except for *Williamson*, no North Carolina case has involved the situation in which a defendant is unaware of a plaintiff's susceptibility, and a projection of the position the supreme court might take in this situation is difficult.

Although the traditional view rejects application of the thin skull rule in the determination of negligence and applies it instead to the determination of the extent of liability,¹⁸⁹ these issues are not as readily separable in mental anguish cases as in typical negligence cases. The following example illustrates the problem. Defendant's conduct creates an unreasonable risk of direct physical injury to plaintiff that is not realized; instead fright and consequential physical injury are caused. Should liability be imposed when plaintiff's physical injury was caused by his susceptibility and none would have occurred to a normal person? The *Restatement* provides for liability in this situation.¹⁹⁰ The same question arises when defendant intentionally causes emotional distress and physical injury results because of plaintiff's peculiar susceptibility. The *Restatement* again provides for liability if the susceptibility is one that is common to any appreciable minority of persons.¹⁹¹

B. Fear for a Third Person's Safety

The North Carolina Supreme Court, consistent with decisions in other jurisdictions, has indicated that mental anguish caused by fear for the safety or well-being of a third person is not compensable.¹⁹² In several of the cases the claimant suffered mental anguish because of concern for and worry about a close relative who had been injured by defendant's negligence.¹⁹³ The claimant was not present when the accident occurred, and his own safety was in no way threatened by defendant's negligence. The traditional rule, which is still followed by a

189. See text accompanying note 184 *supra*.

190. RESTATEMENT (SECOND) OF TORTS § 436, Comment d, at 458-59 (1965) (liability exists although fright not a probable result of negligence and physical injury not a probable result of the fright).

191. *Id.* § 312, Comment d, at 111-12. When fright is unintentionally caused, however, liability exists only if physical injury would result to a normal person. *Id.* § 313, Comment c, at 113-14.

192. *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960); *Ferebee v. Norfolk So. R.R.*, 163 N.C. 351, 79 S.E. 685 (1913).

193. *Helmstetter v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1944); *Michigan Sanitarium & Benevolent Ass'n v. Neal*, 194 N.C. 401, 139 S.E. 841 (1927); *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925); *Croom v. Murphy*, 179 N.C. 393, 102 S.E. 706 (1920).

majority of courts, requires that the claimant be in the zone of danger created by defendant's negligence before he may recover.¹⁹⁴ In some jurisdictions a more liberal rule allowing recovery for foreseeable mental anguish arising out of fear for a third person's safety has replaced the "zone of danger" rule.¹⁹⁵ Even under this more liberal rule, however, the claimant's presence at the scene and contemporaneous observation of danger to a close relative are essential to recovery.¹⁹⁶

The unusual facts in *Williamson v. Bennett*,¹⁹⁷ involving a neurotic response to "a non-existent child on an imaginary bicycle," were set out earlier.¹⁹⁸ One of the reasons given by the court to deny liability was that plaintiff's fear was for the safety of a third person. The court said:

Also, it is indisputable that plaintiff's fright and anxiety was for the safety of the imaginary non-existent child and not because of any apprehension for her own safety or well-being. The record does not disclose any evidence that plaintiff feared that she would suffer any harm of any kind from the collision. She thought of herself as one who might have injured another and this was only momentary. She learned immediately that her fears were ungrounded. As already indicated, this Court has held that there can be no recovery for the safety and well-being of another.¹⁹⁹

Projection of the *Williamson* case beyond its own peculiar facts is difficult. Although the decision to deny liability may be a correct one, the appropriateness of this particular rationale for the decision is less clear. To couch the issue in terms of fear for a third person's safety suggests a more clear-cut issue than in fact exists. As noted earlier, both the reaction and the imagined stimulus that prompted it were centered in plaintiff's preexisting condition and defendant's conduct precipitated both. The crucial issue is whether, despite this fact, the injury appears sufficiently tenuous to relieve defendant of liability.

One other case, *Ferebee v. Norfolk Southern Railroad*,²⁰⁰ has been cited to support the view that no recovery can be had in North Carolina for mental anguish arising out of fear for another's safety. The court denied recovery for mental suffering caused by plaintiff's worry that his physical injuries would prevent him from supporting his family and educating his children. This decision seems debatable. When plain-

194. See W. PROSSER, *supra* note 1, at 333-35.

195. *E.g.*, *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

196. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 60.

197. 251 N.C. 498, 112 S.E.2d 48 (1960).

198. See notes 74-75 and accompanying text *supra*.

199. 251 N.C. at 508, 112 S.E.2d at 55.

200. 163 N.C. 351, 79 S.E. 685 (1913).

tiff's injury is permanent, a limitation upon defendant's liability for continuing mental anguish for an extended period of time because of his inability to provide for his family may be reasonable. Justification for denial of recovery for such mental anguish suffered as an immediate consequence of the accident and its aftermath, however, is difficult to find.²⁰¹

The typical situation in which a defendant's negligence endangers a third person and a plaintiff's mental anguish arises out of his fear for that person's safety has not been presented to the court. Most of the cases denying recovery because a plaintiff's anguish was related to the safety of a third person and not his own involved facts under which other courts would have found no liability. Yet, many of these same courts uphold recovery when a close relative of a plaintiff is placed in danger by a defendant's negligence and, depending upon the jurisdiction, the plaintiff is either present or endangered. The earlier North Carolina cases, placed in proper perspective, should therefore be viewed as leaving open the question whether recovery will be allowed under these circumstances.

VII. CONCLUSION

Over a long period of time the North Carolina decisions have generally been liberal in allowing recovery for mental and emotional harm in a negligence action. The supreme court never adopted the view, which prevailed until fairly recently in many jurisdictions, that a contemporaneous physical injury or an impact upon the person is necessary to recovery for mental or emotional harm. The rule allowing recovery for mental disturbance when physical injury results was recognized by the court at an early date, and the court, in applying this rule, has given a broad meaning to physical injury. The suggestion that recovery may be allowed in any case in which significant and genuine mental or emotional harm is caused is reasonable in view of this broad definition. Even though the court has never stated the rule in this way, it is clear that the decisions go far in this direction and that, if they are to be followed, any other position would be difficult to justify. Further, this result is inconsistent with an apparent concern of the court that annoyance, inconvenience, humiliation and other temporary emotional disturbances, although they may become an element of damage in a

201. See *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964) (worry and sense of insecurity); *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 74 S.E. 885 (1912) (apprehension of cancer); *Britt v. Carolina N.R.R.*, 148 N.C. 37, 61 S.E. 601 (1908) (worry that he would never get well and would be a cripple for life).

separate cause of action, should not in themselves give rise to a tort action.

Apparently, recovery for mental and emotional harm would be allowed under an intentional tort theory when contemporaneous or consequential physical injury occurs, just as it is upheld under a negligence theory. Little direct consideration of the intentional tort theory has been made in the decisions. Assessment of the few cases in which a plaintiff's suit was based in intentional tort is difficult because of the court's reliance upon "forcible trespass" in finding a cause of action. Nevertheless, the court, in recognizing the right to recover, frequently states the rule broadly in terms of negligent or intentional conduct, and little doubt exists that no more stringent requirements will be imposed under intentional tort than apply under negligence.

When mental or emotional harm is recognized as a primary interest protected by the tort action or when a separate cause of action exists and recovery for emotional distress is allowed under the parasitic damages rule, damages for mental and emotional harm, including annoyance, inconvenience, humiliation and similar harm, as well as serious mental anguish, are readily allowed. Of course, a defendant's liability in these instances, as in any other tort action, will be limited to harm that is proximately caused by his conduct.

This broad study of all the cases in this area reveals a rather extensive and relatively consistent development in the law in North Carolina. Often, this development seems to be overlooked, and as a result a tendency exists to view cases involving mental anguish claims on an ad hoc basis, an approach that the court itself suggested in the *Williamson* case. Apart from the general unsatisfactory nature of this approach in deciding important legal issues, it involves a real danger that the sensible and sound development in the law that has occurred will unintentionally be undermined in later decisions, and the uncertainties that arise out of the *Stanback* case illustrate this danger.