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INFLICTION OF EMOTIONAL DISTRESS

Belinda Johnson-Hurtado*

I. ELEMENTS OF IED CLAIMS

The tort of intentional infliction of emotional distress (“IED”) arises when a defendant (1) engages in “extreme and outrageous” conduct that (2) intentionally or recklessly (3) causes (4) severe emotional distress to another.¹ It is the intent to harm the plaintiff emotionally that constitutes the basis of the tort, and the requirements to prove this tort are “rigorous.”² When emotional distress, which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, is caused by a defendant’s negligent or otherwise tortious conduct, a claim for the independent tort of negligent infliction of emotional distress (“NIED”) can arise.³ In regards to the alleged emotional distress in either intentional or negligent infliction of emotional distress (collectively “IED”) claims, a plaintiff must satisfy the “impact rule” or its progeny. There is no recovery where there has been only economic damage or loss.⁴

A. INTENTIONAL AND RECKLESS CONDUCT IN IED CLAIMS

The intent to harm emotionally constitutes the basis for this tort.⁵ In an appropriate case, the question can be decided as a matter of law.⁶ “It may be

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¹ *Creel v. I.C.E. Assoc., Inc.*, 771 N.E.2d 1276, 1282 (Ind. Ct. App. 2002); *Haegert v. McMullan*, No. 82A01-1008-CT-470, 2011 WL 4349391, at *10 (Ind. Ct. App. Sept. 19, 2011).

² *Id.*; *Ledbetter v. Ross*, 725 N.E.2d 120, 124 (Ind. Ct. App. 2000). Using *Cullison* as a guide, Indiana courts have been very reluctant to recognize the tort of intentional infliction of emotional distress. *Hamilton v. State Farm Mut. Inc. Co.*, No. IP 00-1718-C-T/K, 2002 WL 664020, at *4 (S.D. Ind. Mar. 13, 2002).

³ *Schaumber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991); *K.D. v. Chambers*, 951 N.E.2d 855, 862-63 (Ind. Ct. App. 2011); *Indiana Patient’s Compensation Fund v. Winkle*, 863 N.E.2d 1, 6-7 (Ind. Ct. App. 2007).

⁴ *Ketchmark v. Northern Ind. Pub. Serv. Co.*, 818 N.E.2d 522, 524 (Ind. Ct. App. 2004).

⁵ *Creel*, 771 N.E.2d at 1282; *Ledbetter*, 725 N.E.2d at 124.

⁶ *See Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 523 (Ind. Ct. App. 2001) (finding that there was no showing of an intent to harm).

noted that a demonstrated intent to harm seems inconsistent with mere reckless conduct.”⁷

In *Branham v. Celadon Trucking Services, Inc.*, a plaintiff employee was sleeping at work during a break, and a coworker asked a supervisor to take a picture of them.⁸ In the photograph, the coworker was standing by the plaintiff-employee with his pants down and his hand held suggestively in front of his genital area.⁹ The supervisor took the picture, and the coworker showed it to other coworkers, who then began teasing the plaintiff about the picture.¹⁰ The plaintiff did not know the contents of the picture until a couple of weeks later when he asked the supervisor to have the coworker give him the photo.¹¹ The court upheld the trial court’s granting of summary judgment for defendants as there was no evidence that anyone involved intended to harm the plaintiff.¹² All evidence showed that both the coworker and the supervisor thought the photo was a practical joke.¹³ Plaintiff himself stated that he had no reason to contradict this testimony.¹⁴ Therefore, there was no intent to harm.¹⁵

However, although intent is a required element, it is not enough that the defendant acted with an intent that is tortious or even criminal, or that he intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort.¹⁶ Rather, the defendant’s conduct must also have been extreme and outrageous.¹⁷

B. EXTREME AND OUTRAGEOUS CONDUCT IN IED CLAIMS

Liability for IED has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.¹⁸ Generally speaking, the case is one in which the recitation of the facts to an average member of the community would stir his resentment against the actor and lead him to exclaim, “Outrageous!”¹⁹

⁷ *Lachenman v. Stice*, 838 N.E.2d 451, 457 n.5 (Ind. Ct. App. 2005).

⁸ *Branham*, 744 N.E.2d at 519.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 523.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Creel*, 771 N.E.2d at 1282.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

The Indiana Court of Appeals has quoted, with approval, the *Restatement (Second) of Torts* § 46 cmt. D (1965):

The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or by a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the act, and lead him to exclaim, "Outrageous!"²⁰

To establish a claim of IED, affirmative conduct is required of an outrageous and extreme nature, beyond that which is merely unreasonable.²¹ "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam."²²

What constitutes extreme and outrageous conduct depends, in part, upon prevailing cultural norms and values.²³ In the appropriate case, the question can be decided as a matter of law.²⁴ In fact, the *Restatement* indicates that IED cases are well suited for summary judgment. "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to re-

²⁰ *Haegert*, 2011 WL 4349391, at *10 (citing *Bradley v. Hall*, 720 N.E.2d 747, 752-53 (Ind. Ct. App. 1999)).

²¹ *Inlow v. Wilkerson*, 774 N.E.2d 51, 57 (Ind. Ct. App. 2002).

²² *Gable v. Curtis*, 673 N.E.2d 805, 810 (Ind. Ct. App. 1996).

²³ *Creel*, 771 N.E.2d at 1282.

²⁴ *Id.*

sult in liability.”²⁵ Conduct may indeed be “cold, callous, and lacking sensitivity,” but that does not make it outrageous.²⁶

1. No Outrageous Conduct, as a Matter of Law

No outrageous conduct was found as a matter of law where the chair of the English department at the University of Evansville, Margaret McMullan, filed a harassment complaint against John Haegert, a tenured professor of English, because she believed Haegert had violated the university’s zero-sexual-harassment policy.²⁷

In *Curry v. Whitaker*, Jeffery and Davina Curry brought an action against their neighbors, Andrew Whitaker and Grace Santa-Cruz Chavez, for—among other things—the intentional infliction of emotional distress. Whitaker had installed surveillance cameras aimed at a common yard and at Curry’s property and used the video footage to report to law enforcement that one of the Currys had damaged their property.²⁸ The court found, as a matter of law, that Whitaker and Chavez’s conduct did not constitute outrageous behavior.²⁹

No outrageous conduct was found where a sheriff announced a deputy’s arrest at a press conference and refused to assist that deputy in completing retirement forms.³⁰

No outrageous conduct was found where a contractor’s wife telephoned a purchaser seven times in one hour, screaming and threatening to repossess a home and to come over, and stating repeatedly that the purchasers “would pay.”³¹

No outrageous conduct was found where a private investigator secretly videotaped a preacher and his wife during church services at the request of an insurance company from which wife was claiming long term disability resulting from a motor vehicle accident. Due to the nature of the investigation, it was necessary to employ covert rather than overt surveillance procedures, and videotaping was not prohibited during church services.³²

No outrageous conduct was found where a security manager of a department store “accused” a lessor’s employee of substance abuse, shoplifting, and dishonesty in “a gruff and intimidating manner” while she was detained in an interview room.³³ The court found that the security manager’s

²⁵ RESTATEMENT (SECOND) OF TORTS § 46 cmt. h.

²⁶ *Humana of Ky., Inc. v. Seitz*, 796 S.W.3d 1, 4 (Ky. 1990).

²⁷ *Haegert*, 2011 WL 4349391, at *10.

²⁸ *Curry v. Whitaker*, 943 N.E.2d 354 (Ind. Ct. App. 2011).

²⁹ *Id.* at 361-62.

³⁰ *Conwell v. Beatty*, 667 N.E.2d 768, 775-77 (Ind. Ct. App. 1996).

³¹ *Gable*, 673 N.E.2d at 809-11.

³² *Creel*, 771 N.E.2d at 1282-83.

³³ *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 970 (Ind. Ct. App. 2001).

actions occurred in the context of a detainment for the purpose of determining the extent of the plaintiff's unauthorized conduct.³⁴ Such actions, taken in context, did not constitute outrageous behavior, nor did they exceed all bounds usually tolerated by a decent society.³⁵

No outrageous conduct found where a woman's dog was injured and consequently died after being attacked by neighbors' dogs.³⁶ The court found that even though the neighbors may have been negligent in failing to keep their dogs on leashes and otherwise properly supervising them, such actions did not constitute outrageous behavior as contemplated by the narrow definition adopted from the *Restatement*.³⁷ Further, the court found that there was nothing in the records to support a reasonable inference that the neighbors intended to cause the plaintiff emotional distress by their behavior.³⁸

No outrageous conduct was found by the U.S. District Court in the Southern District of Indiana when the plaintiff accused State Farm of intentionally causing emotional distress with its unreasonable delay and failure to pay the plaintiff's medical bills pursuant to her insurance policy. She claimed that the delay implied "that Plaintiff Paula Hamilton is exaggerating or presenting a fraudulent claim." Even if this were true, it simply does not rise to the level of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."³⁹

A plaintiff's claim of IED distress failed as a matter of law because the employer's act of firing him pursuant to its disciplinary policy did not constitute extreme and outrageous conduct. "As we have previously discussed, the Record reveals that once Powdertech learned of the fight between Plaintiff and Dilts—a fight that sent Dilts to the emergency room—it conducted an investigation and, ultimately, discharged Plaintiff according to its disciplinary policy. Powdertech's actions did not exceed all possible bounds of decency, nor could they be regarded as atrocious or utterly intolerable in a civilized community."⁴⁰

In a claim brought on the basis of racial discrimination and/or conspiracy to discriminate in order to "harass plaintiffs out of town," the U.S. District Court, Northern District of Indiana, stated:

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Lachenman*, 838 N.E.2d at 457.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Hamilton v. State Farm Mut. Auto Ins. Co.*, No. IP 00-1718-C-T/K, 2002 WL 664020, at *4 (S.D. Ind. Mar. 13, 2002).

⁴⁰ *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002).

Quite simply, the Plaintiffs have not alleged a single action undertaken by Ruby or Leo Kundrat that rises to the level of outrageous conduct required to support a claim for intentional infliction of emotional distress. Ruby Kundrat spoke at two Council meetings and attended a meeting with the Hobart police department. Leo Kundrat attended the Council meetings and took pictures of children in the street. Nothing in those acts, by themselves, are outside the norms tolerated by society. Moreover, even if, for the sake of argument, we were to infer some sort of racial animus in the Kundrats' comments or actions, their activities still would not rise to the level of "outrageous" conduct. *See Rosa v. Valparaiso Comm. Sch. Dist.*, 2006 U.S. Dist. LEXIS 11300, 2006 WL 487880 at *7 (N.D. Ind. Feb. 27, 2006) (holding that defendants' use of racial slurs did not amount to extreme and outrageous behavior for purposes of IIED claim).⁴¹

Similarly, under Pennsylvania law, a plaintiff's allegation that the defendants' (reality television personalities) antics on their reality television programs caused him intense emotional and psychological strain, failed to state a claim for IED.⁴² "The gravamen of the tort is outrageous conduct; in Pennsylvania, 'courts have found intentional infliction of emotional distress only where the conduct at issue has been atrocious and utterly intolerable in a civilized community.'" The court found that the alleged conduct was not sufficiently outrageous to sustain such a claim.⁴³

To support IED claims in Florida, plaintiffs are required to show conduct so outrageous that it goes "beyond all bounds of decency" and is "to be regarded as odious and utterly intolerable in a civilized society."⁴⁴ The "source of the [plaintiffs'] continuous emotional distress was being constructively evicted from the premises as a result of [the defendant's] knowing failure to maintain the same in accordance with Florida law, and not having adequate alternative housing readily available to them."⁴⁵ The court found that "[t]he anxiety and/or stress associated with being constructively evicted from one's residence under the circumstances presented in this case, and not having suitable alternative housing is certainly understandable. It is not, however, the type of conduct that is so outrageous in character and so extreme in degree as to go beyond the bounds of decency and be deemed utterly intolerable in a civilized community."⁴⁶

⁴¹ Fitzpatrick v. City of Hobart, 2006 WL 2763127 (N.D. Ind. Sept. 25, 2006).

⁴² Goodson v. Kardashian, 413 Fed. Appx. 17, 418, 2011 WL 167272, at *1 (Ct. App. 3 (Pa.) 2011).

⁴³ *Id.*

⁴⁴ Clemente v. Horne, 707 So. 2d 865, 866 (Fla. 3d Dist. Ct. App. 1998).

⁴⁵ *Id.* at 867.

⁴⁶ *Id.*

2. Issue of Fact Whether Conduct Was Outrageous

In *Bradley v. Hall*,⁴⁷ genuine issue of material fact existed as to whether an employee's supervisor engaged in extreme and outrageous conduct by allegedly shouting at the employee, criticizing her work in front of other employees, inquiring about the employee's menopause and whether her husband was sexually impotent from diabetes, and misrepresenting the company's intentions regarding the security of the employee's position.

The court in *Holbrook v. Lobdell-Emery Manufacturing Co.*⁴⁸ did not render an opinion as to whether the acts committed by the plaintiff's co-workers and supervisors meet the standard for extreme and outrageous conduct because the plaintiff did not sue the proper plaintiffs. However, in dicta, the court stated, "It is not difficult to imagine that a jury would exclaim 'Outrageous!' upon hearing that plaintiff's co-workers taunted him and set him on fire knowing that he had recently been released from a hospital where he was being treated for severe depression and psychosis. We join the district court's assessment that verbally and physically assaulting a mentally disabled man is cruel and inexcusable. Because he sued his employer rather than his co-workers, however, the district court was correct to grant summary judgment in favor of Lobdell-Emery under Indiana law."⁴⁹

C. SEVERE EMOTIONAL DISTRESS TO ANOTHER IN ALL IED CLAIMS

In order to establish a claim for IED, a plaintiff must satisfy either the modified impact rule, ("MIR") or the bystander rule, or a new rule, which has not yet been clearly formulated.⁵⁰ Where the physical impact is slight or the evidence of the physical impact is tenuous, the court will evaluate the alleged emotional distress to determine whether it is speculative, exaggerated, fictitious, or unforeseeable.⁵¹

Originally, Indiana allowed recovery for the infliction of emotional distress only in circumstances involving impact to the plaintiff's person under what was called the direct impact rule.⁵² The direct impact rule survives today, although it has been modified extensively. It has three elements: (1) an impact on the plaintiff, (2) that causes physical injury to the plaintiff, and (3) in turn causes emotional distress.⁵³ Therefore, under the direct impact rule, recovery was precluded if a plaintiff sustained no physical injury.⁵⁴ However, in 1991, the Indiana Supreme Court expanded the direct

⁴⁷ 720 N.E.2d 747, 752 (Ind. Ct. App. 1999).

⁴⁸ 219 F.3d 598, 602 (7th Cir. Ind. 2000).

⁴⁹ *Id.*

⁵⁰ *Alexander v. Scheid*, 726 N.E.2d 272, 283 (Ind. 2000).

⁵¹ *Atlantic Coast Airlines v. Cook*, 857 N.E.2d 989, 998 (Ind. 2006).

⁵² *Ketchmark*, 818 N.E.2d at 523.

⁵³ *Id.*

⁵⁴ *Id.*

impact rule, creating what is known as the modified impact rule.⁵⁵ This modified impact rule holds that:

When . . . a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.⁵⁶

Further, Indiana also allows for damages for infliction of emotional distress when a plaintiff witnesses an injury to the person of a close relative without any physical impact on the plaintiff—the bystander-direct-involvement test.⁵⁷ This test was announced in *Groves v. Taylor*,⁵⁸ which held:

Where the direct impact test is not met, a bystander may nevertheless establish “direct involvement” by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant’s negligent or otherwise tortious conduct.⁵⁹

This is the bystander rule.

The test for bystander recovery requires a specific relationship between the parties and proximity to the scene.⁶⁰ Both the relationship and proximity requirements under *Groves* are issues of law.⁶¹ The proximity requirement is both a matter of time and circumstances.⁶² “The scene viewed by the claimant must be essentially as it was at the time of the incident, the victim must be in essentially the same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene.”⁶³ In *York*, the decedent’s daughter and granddaughter brought a claim against a funeral home and others for negli-

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Shaumber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

⁵⁷ *Id.*

⁵⁸ 729 N.E.2d 569 (Ind. 2000).

⁵⁹ *Id.* at 524.

⁶⁰ *York v. Fredrick*, 947 N.E.2d 969, 974 (Ind. Ct. App. (2011) (citing *Smith v. Toney*, 862 N.E.2d 656, 658 (Ind. 2007)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

gent infliction of emotional distress when they discovered that the decedent's casket was placed into a vault that was too small and could not be sealed. The Indiana Court of Appeals found, as a matter of law, that the plaintiffs claim was insufficient as they failed to arrive on the scene shortly after the injury and because they were informed of the alleged injury before witnessing the claimed injury.⁶⁴

Further, there is also an exception to the physical impact requirement for claims of intentional torts.⁶⁵ In *Cullison v. Medley*, the Indiana Supreme Court found that there is no requirement of a physical impact when emotional distress is claimed due to a commission of an intentional tort such as trespass or assault.⁶⁶ In addition, *Cullison* recognized for the first time the tort of IED in the state of Indiana.⁶⁷

However, Indiana has further expanded this jurisprudence in several situations by allowing recovery or by refusing to dismiss claims for failure to state a claim under the direct involvement rationale:

- 1) Where human remains were lost.⁶⁸
- 2) Where an individual was mistakenly diagnosed with Hepatitis C.⁶⁹
- 3) Where alleged medical malpractice led to miscarriage.⁷⁰
- 4) Where alleged medical malpractice led to "a continued pregnancy and the physical transformation [plaintiff's] body underwent as a result."⁷¹

The *Blackwell* case (listed first above) has been referred to as a "fact-specific expansion of the *Groves* bystander rule."⁷² Therefore, it does not appear to be an expansion of the MIR. Rather, it can be understood as an anomaly in case law. As for the other cases that did not involve "the bystander rule as set forth in *Groves*, the only cases which a direct, physical impact was not a prerequisite for recovery for negligent infliction of emotional distress involve medical malpractice."⁷³

⁶⁴ *Id.*

⁶⁵ *Cullison v. Medley*, 570 N.E.2d 27, 30 (Ind. 1991); *Shaumber*, 579 N.E.2d at 454; *Atlantic Coast Airlines v. Cook*, 857 N.E.2d 989, 998 (Ind. 2006).

⁶⁶ *Cullison*, 570 N.E.2d at 30.

⁶⁷ *Id.* at 31.

⁶⁸ *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692 (Ind. Ct. App. 2002).

⁶⁹ *Keim v. Potter*, 783 N.E.2d 731 (Ind. Ct. App. 2003).

⁷⁰ *Ryan v. Brown*, 827 N.E.2d 112 (Ind. Ct. App. 2005).

⁷¹ *Bader v. Northeast Ind. Genetic Counseling, Inc.*, 732 N.E.2d 1212 (Ind. 2000).

⁷² *Lachenman*, 838 N.E.2d at 460.

⁷³ *Id.*

The Indiana Supreme Court attempted to clarify the confusion caused by these expansion cases in *Atlantic Coast Airlines*.⁷⁴ It explained that the underlying rationale for the rule that damages for mental or emotional distress were recoverable only when accompanied by and resulting from a physical injury was that “absent physical injury, mental anguish is speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there is no rational basis for awarding damages.”⁷⁵

However, the MIR maintains the requirement of a direct physical impact although the impact does not need to cause physical injury to the plaintiff.⁷⁶ In addition, the emotional trauma suffered by the plaintiff does not need to result from a physical injury caused by the impact.⁷⁷ But, how does the court assess whether the degree of impact is sufficient to satisfy the requirements of the rule (how much and what kind of physical impact is required)? The court has answered:

[W]hen the courts have been satisfied that the facts of a particular case are such that the alleged mental anguish was not likely speculative, exaggerated, fictitious, or unforeseeable, then the claimant has been allowed to proceed with an emotional distress claim for damages even though the physical impact was slight, or the evidence of physical impact seemed to have been rather tenuous. *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000) (finding that mother’s continued pregnancy and the physical transformation that her body underwent satisfied the direct impact requirement) (citing *Alexander v. Scheid*, 726 N.E.2d 272, 283-84 (Ind. 2000) (holding that patient suffering from the destruction of healthy lung tissue due to physician’s failure to diagnose cancer was sufficient for negligent infliction of emotional distress); *Holloway v. Bob Evans Farms, Inc.*, 695 N.E.2d 991, 996 (Ind. Ct. App. 1998), trans. not sought (concluding that restaurant patron’s ingestion of a portion of vegetables cooked with a worm was a direct physical impact under the modified impact rule); *Dollar Inn, Inc., v. Slone*, 695 N.E.2d 185, 189 (Ind. Ct. App. 1998), trans. denied (finding that hotel guest stabbing herself in the thumb with a hypodermic needle concealed in a roll of toilet paper was sufficient for claim of emotional distress associated with guest’s fear of contracting).⁷⁸

The court acknowledged that there have been calls to abandon the impact rule altogether because there are concerns that Indiana’s the rule, even as

⁷⁴ 857 N.E.2d at 989.

⁷⁵ *Id.* at 998.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Atlantic Coast Airlines*, 857 N.E.2d at 998.

modified, may prohibit some litigants from recovering damages for bonafide emotional injury when there has been no physical impact. This jurisdiction is not alone in grappling with this area of the law for which there is no generally recognized theory. The Indiana Supreme Court agreed with the observations of the California Supreme Court:

In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited . . . [W]e balance the impact of arbitrary lines which deny recovery to some victims whose injury is very real against that of imposing liability out of proportion to culpability for negligent acts. We also weigh in the balance the importance to the administration of justice of clear guidelines under which litigants and trial courts may resolve disputes. *Thing v. La Chusa*, 771 P.2d 814, 826-27 (Cal. 1989) (reaffirming California's application of the bystander rule for emotional distress damages).⁷⁹

The Indiana Supreme Court's view is that the requirements under Indiana's MIR are modest and that a less restrictive rule could lead to a flood of trivial suits, pose the possibility of fraudulent claims that are difficult for judges and juries to detect, and result in unlimited and unpredictable liability.⁸⁰ The supreme court, therefore, reaffirmed that Indiana's impact rule continues to require a plaintiff to demonstrate a direct physical impact resulting from the negligence of another.⁸¹

That being said, there is but one exception to the physical impact requirement for IED claims:

Mindful that the underlying rationale for direct impact is that "it provides clear and unambiguous evidence that the plaintiff was so directly involved in the incident giving rise to the emotional trauma that it is unlikely that the claim is merely spurious," we recognized that there may be circumstances under which a "plaintiff does not sustain a direct impact" but is nonetheless "sufficiently directly involved in the incident giving rise to the emotional trauma that we are able to distinguish legitimate claims from the mere spurious." *Groves v. Taylor*, 729 N.E.2d 569, 572 (Ind. 2000). We thus adopted what is now commonly referred to as the bystander rule. "[W]here the direct impact test is not

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

met, a bystander may nevertheless establish ‘direct involvement’ by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant’s negligent or otherwise tortious conduct.” *Id.* at 573. In sum, in order to recover damages for the negligent infliction emotional distress, a plaintiff must satisfy either the modified impact rule or the bystander rule. The elements for each are separate and distinct.⁸²

II. ANALYZING IED CLAIMS

Two threshold issues when analyzing an IED claim are (1) evaluating the mental injury the plaintiff claims to have suffered and (2) whether the complained-of conduct was outrageous. In evaluating the first issue, forensic psychiatrists and/or forensic psychologists can determine whether a plaintiff suffers from a mental disorder and, if so, if there is any correlation between the disorder and the complained-of conduct. Secondly, counsel will need to identify the exact conduct the plaintiff claims caused her mental disorder. Remember, “[t]he rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone’s feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.”⁸³

When one commits an intentional tort upon another, emotional damages flow to the victim regardless of whether there is a physical impact. If such tortious conduct is also outrageous and committed with the intent to harm the victim emotionally, then the tort of IED has been committed as well. The question is, when one commits an intentional tort, can a bystander, as well as the victim, make a claim for emotional damages? The rationale for the bystander rule seems to apply equally to negligent and intentional torts.

First, “[a] fatal injury or a physical injury that a reasonable person would view as serious can be expected to cause severe distress to a bystander. Less serious physical harm to a victim would not ordinarily result in severe emotional distress to a reasonable bystander of average sensitivity.” *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 444 (Wis. 1994). Second, emotional distress

⁸² *Id.*

⁸³ *Gable*, 673 N.E.2d at 810.

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may accompany the death or severe injury of persons such as friends, acquaintances, or passersby. But the emotional trauma that occurs when one witnesses the death or severe injury of a loved one with a relationship to the plaintiff analogous to “a spouse, parent, child, grandparent, grandchild, or sibling is unique in human experience and such harm to a plaintiff’s emotional tranquility is so serious and compelling as to warrant compensation.” . . . Third, “witnessing either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs is an extraordinary experience, distinct from the experience of learning of a” loved one’s death or severe injury by indirect means.⁸⁴

However, when one commits a negligent tort upon another, the victim has to suffer a direct physical impact or the claim must involve allegations of medical malpractice. In addition, one who witnesses or comes upon the scene soon after the death or severe injury of a loved one (spouse, parent, child, sibling, or grandparent-child), may recover damages for emotional distress.⁸⁵

⁸⁴ *Groves*, 729 N.E.2d at 572-73.

⁸⁵ In *Bader*, the supreme court stated that whether the husband of a plaintiff claiming medical malpractice could recover for emotional distress, since he did not suffer a direct impact as a result of the claimed medical negligence, should be determined at trial if he could qualify as a “bystander.”