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Torts - Recovery for Intentional and Negligent Infliction of Emotional Distress - The Presence Requirement - R.D. v. W.H.

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Casenotes

TORTS—Recovery for Intentional and Negligent Infliction of Emotional Distress—The Presence Requirement. *R.D. v. W.H.*, 875 P.2d 26 (Wyo. 1994).

Recovery for intentional and negligent infliction of emotional distress has been available less than ten years in Wyoming.¹ A recent case with a unique fact pattern provided the Wyoming Supreme Court the opportunity to examine the requirements of both torts. *R.D. v. W.H.*² involved a suicide and the subsequent claims of the decedent's family for both intentional and negligent infliction of emotional distress.

G.D. visited her mother and stepfather in Cheyenne on September 20, 1990.³ During that visit, she asked her stepfather to provide her with a firearm for protection.⁴ G.D. attempted to commit suicide with a loaded .22 caliber rifle her stepfather gave her. She did not succeed because the gun jammed.⁵

G.D. again visited her mother and stepfather on September 25, 1990.⁶ She asked her stepfather to help her obtain a prescription for amitriptyline hydrochloride,⁷ claiming she left her medication at home.⁸ G.D. had previously attempted to commit suicide⁹ by taking an overdose of amitriptyline hydrochloride.¹⁰ As a result, her treating physician had can-

1. The Wyoming Supreme Court adopted the tort of negligent infliction of emotional distress in *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986). Shortly thereafter, the court adopted the tort of intentional infliction of emotional distress in *Leithead v. American Colloid Co.*, 721 P.2d 1059 (Wyo. 1986).

2. *R.D. v. W.H.*, 875 P.2d 26 (Wyo. 1994). Because of the sensitive nature of this case and the Appellee's name recognition in the Cheyenne community, defense counsel moved for a confidential docket. The Wyoming Supreme Court granted the motion, hence the initials.

3. Plaintiff/Appellant's Opening Brief at 5, *R.D. v. W.H.*, 875 P.2d 26 (Wyo. 1994) (No. 93-90) [hereinafter Appellant's Opening Brief].

4. *Id.* at 5-6.

5. *Id.* at 6.

6. *R.D. v. W.H.*, 875 P.2d at 28.

7. Amitriptyline hydrochloride, also known by the trade name Elavil, is an antidepressant with sedative effects, prescribed to relieve symptoms of depression. PHYSICIANS' DESK REFERENCE 2332 (48th ed. 1994).

8. *R.D. v. W.H.*, 875 P.2d at 28.

9. G.D. had a long history of psychiatric hospitalizations and numerous suicide attempts. Appellant's Opening Brief, *supra* note 3, at 5.

10. *Id.* at 6.

celed her prescription for the drug.¹¹ Although, according to the court, G.D.'s stepfather was aware or should have been aware of the previous overdose, he contacted a physician and asked him to write a prescription for amitriptyline hydrochloride for G.D.¹² The physician wrote the prescription without meeting with her or speaking to her, and without contacting her treating physicians in Denver.¹³

Two days later, on September 27, 1990, G.D. ingested an overdose of the amitriptyline hydrochloride at her home in Colorado.¹⁴ She died on October 6, 1990, as a result of the overdose.¹⁵

G.D.'s husband, Appellant, filed a complaint against G.D.'s stepfather, Appellee, in the District Court, First Judicial District, Laramie County, Wyoming.¹⁶ Appellant filed the complaint both individually and as legal guardian for his and G.D.'s minor child.¹⁷ Appellant subsequently amended the complaint and included claims for: 1) wrongful death on the basis of Appellee's negligent actions; 2) wrongful death on the basis of Appellee's intentional acts; 3) intentional infliction of emotional distress; and 4) negligent infliction of emotional distress.¹⁸ The claim for intentional infliction of emotional distress was based on Appellee providing G.D. a loaded weapon and a prescription for amitriptyline hydrochloride.¹⁹ The claim for negligent infliction of emotional distress was based on the fact that Appellant and his minor child witnessed the immediate aftermath of G.D.'s overdose and were emotionally damaged as a result.²⁰

Appellee moved to dismiss the Appellant's amended complaint.²¹ He argued that Appellant could not recover under the emotional distress theories because mental suffering of survivors is not an element of wrong-

11. *Id.*

12. R.D. v. W.H., 875 P.2d at 28.

13. Appellant's Opening Brief, *supra* note 3, at 6-7.

14. *Id.* at 7.

15. *Id.*

16. R.D. v. W.H., 875 P.2d at 27. The complaint also named the physician who wrote the prescription. The claim against the physician was eventually settled out of court. Appellant's Opening Brief, *supra* note 3, at 2-4.

17. R.D. v. W.H., 875 P.2d at 27.

18. *Id.* at 28. The complaint alleged that Appellee, G.D.'s stepfather, had sexually abused her throughout her childhood, adolescence, and early adulthood and that her psychiatric difficulties were the direct and proximate result of that abuse. Appellant's Opening Brief, *supra* note 3, at 2. This casenote is limited to an analysis of the emotional distress claims and the impact of the decision on mental suffering damages in wrongful death cases. The causation issues raised in the wrongful death claims are beyond the scope of this note.

19. Appellant's Opening Brief, *supra* note 3, at 20.

20. *Id.*

21. R.D. v. W.H., 875 P.2d at 27.

ful death damages.²² Appellee also argued that the emotional distress claims were insufficient because Appellant did not allege that he and the minor child were "present," as required by both torts.²³ The district court dismissed Appellant's amended complaint for failure to state a claim upon which relief could be granted.²⁴

Appellant appealed the district court's decision to the Wyoming Supreme Court.²⁵ The Wyoming Supreme Court reversed, holding that Appellant sufficiently stated all four claims and that the complaint should not have been dismissed. The case was remanded to the district court.²⁶

This casenote focuses on the presence requirement for recovery for intentional and negligent infliction of emotional distress. First, the casenote examines the history of both torts and their evolution in Wyoming. The casenote then evaluates the current status of the emotional distress torts in Wyoming after the *R.D. v. W.H.* decision. The note suggests that the Wyoming Supreme Court obscured the significance of the presence requirement by failing to explicitly analyze how the presence requirement should be applied in *R.D. v. W.H.* Finally, the casenote discusses the approach Wyoming should take regarding the presence requirement, considering both policy concerns and implications for potential litigants.

BACKGROUND

Traditionally, a plaintiff could not recover for mental or emotional disturbances²⁷ absent some physical injury.²⁸ Courts have been reluctant to redress mental injuries because of the proof problems that such claims pose,

22. *Id.* at 31.

23. *Id.* at 32. Plaintiffs must meet a presence requirement in order to recover under both intentional and negligent infliction of emotional distress. A successful claim for intentional infliction of emotional distress requires that the plaintiff be present at the time of the outrageous conduct. *See infra* notes 48-52 and accompanying text. A successful claim for negligent infliction of emotional distress requires that the plaintiff observe the infliction of serious bodily harm or death, or observe the serious bodily harm or death shortly after its occurrence but without material change in the condition and location of the victim. *See infra* notes 69-74 and accompanying text.

24. *R.D. v. W.H.*, 875 P.2d at 28.

25. *Id.*

26. *Id.* at 35. As of October 21, 1994, the case had not been scheduled for further proceedings in the district court.

27. Emotional distress is also referred to as "mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

28. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 54-56; § 54, at 362-64 (5th ed. 1984).

the potential for abuse by plaintiffs, and the difficulty in setting the boundaries for recovery.²⁹ Notwithstanding these concerns, around 1930 courts began to recognize emotional distress as a valid cause of action, even where no traditional ground of tort liability existed.³⁰ Tort actions based on intentional and negligent infliction of emotional distress have been widely recognized only in recent decades, and both torts are still evolving.³¹

In a wrongful death situation, whether a survivor's mental suffering is compensable depends on the court's interpretation of the applicable wrongful death statute.³² Damages for grief or mental suffering of survivors are not permitted in most jurisdictions.³³

Intentional Infliction of Emotional Distress

Section 46 of the Restatement (First) of Torts rejected any independent liability for intentional infliction of emotional distress.³⁴ The Restatement (Second) of Torts specifically allowed recovery for outrageous conduct causing severe emotional distress.³⁵ Intentional infliction of emotional distress, also known as the tort of outrage or extreme and outrageous conduct, is recognized in the Restatement form in most states.³⁶

The Restatement formulation places limits on recovery for intentional infliction of emotional distress.³⁷ Liability is imposed only where the defendant's conduct has been extreme and outrageous.³⁸ The tort requires

29. RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (1965).

30. PROSSER AND KEETON, *supra* note 28, § 12, at 60. For a historical perspective on the adoption of the mental distress torts, see Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

31. PROSSER AND KEETON, *supra* note 28, § 12, at 55.

32. PROSSER AND KEETON, *supra* note 28, § 127, at 951-52.

33. *Id.*

34. RESTATEMENT (FIRST) OF TORTS § 46 (1934).

35. § 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time if such distress results in bodily harm.

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

36. David Crump, *Evaluating Independent Torts Based on "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 446 (1992).

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

38. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

outrageous conduct which goes beyond all possible bounds of decency,³⁹ and distress so severe that no reasonable man could be expected to endure it.⁴⁰

The Restatement allows recovery in two circumstances: 1) where a person suffers severe emotional distress as a result of extreme and outrageous conduct directed toward him; and 2) where a person suffers severe emotional distress as a result of extreme and outrageous conduct directed toward a third person.⁴¹ Recovery in the second circumstance is limited to the third person's immediate family members⁴² who were present at the time, as distinguished from those who discover later what has occurred.⁴³ Most courts interpreting the presence requirement have held that the plaintiff must be present when the outrageous conduct occurs.⁴⁴

The Restatement limitations are justified by a practical need to limit recovery for emotional distress.⁴⁵ The mental distress claim of a woman who witnessed her husband's murder is more compelling (and perhaps more genuine) than the same claim from a woman who learns that her husband was murdered ten years earlier.⁴⁶ The Restatement drafters included a Caveat to section 46, recognizing that situations may arise that are outside the usual limitations, but that nonetheless justify imposing liability.⁴⁷

Wyoming adopted intentional infliction of emotional distress as an independent tort in *Leithead v. American Colloid Co.*, decided in 1986.⁴⁸ In

39. *Id.* Comment d states that "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." *Id.*

40. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

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

42. Plaintiffs who are not members of the third party's immediate family cannot recover for their emotional distress unless such distress results in bodily harm. RESTATEMENT (SECOND) OF TORTS § 46(2)(b) (1965).

43. RESTATEMENT (SECOND) OF TORTS § 46 cmt. l (1965).

44. *R.D. v. W.H.*, 875 P.2d at 33. Chief Justice Macy refers the reader to the following cases and annotation: *Lund v. Caple*, 675 P.2d 226, 229 (Wash. 1984) (en banc); *Bradshaw v. Nicolay*, 675 P.2d 630, 632 (Colo. Ct. App. 1988); Annotation, *Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another*, 5 A.L.R. 4TH 833, § 1[a] (1981).

45. RESTATEMENT (SECOND) OF TORTS § 46 cmt. l (1965).

46. *Id.*

47. § 46 Caveat:

The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress.

RESTATEMENT (SECOND) OF TORTS § 46 Caveat (1965). Comment c provides: "The Caveat is intended to leave fully open the possibility of further development of the law, and the recognition of other situations in which liability may be imposed." RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1965).

48. *Leithead v. American Colloid Co.*, 721 P.2d 1059 (Wyo. 1986).

Leithead, a discharged employee sued his employer for intentional infliction of emotional distress.⁴⁹ The Wyoming Supreme Court evaluated the policy considerations, including concerns about fraudulent and frivolous claims, and concluded that the limitations imposed by Restatement section 46, together with the jury's common sense, should safeguard against those concerns.⁵⁰ The court denied the plaintiff's claim,⁵¹ but expressly adopted the Restatement formulation as a valid cause of action in Wyoming.⁵²

Since *Leithead*, the Wyoming Supreme Court has decided only a handful of cases involving the tort of intentional infliction of emotional distress.⁵³ *R.D. v. W.H.* was the first case before the Wyoming Supreme Court that involved a plaintiff's attempt to recover damages for emotional distress caused by a defendant's outrageous and intentional conduct directed at a third party.⁵⁴

Negligent Infliction of Emotional Distress

Courts have been slower to recognize negligent infliction of emotional distress as a valid, independent cause of action.⁵⁵ Early decisions denied recovery under a negligence theory for nervous shock or emotional distress in the absence of some physical impact to the plaintiff.⁵⁶ Courts

49. *Id.* at 1061.

50. *Id.* at 1065-66.

51. *Id.* at 1067. *Leithead* was unsuccessful in his claim for intentional infliction of emotional distress because the court concluded his suffering, as a matter of law, was not severe enough to be compensable. *Id.*

52. *Id.* at 1066. Although the court stated it was adopting the tort of intentional infliction of emotional distress as reflected in § 46 of the Restatement, the facts in *Leithead* did not provide the court the opportunity to analyze § 46(2), which covers third-party actions.

53. See, e.g., *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211 (Wyo. 1994) (discharged employee's claim of intentional infliction of emotional distress against employer); *Elmore v. Van Horn*, 844 P.2d 1078 (Wyo. 1992) (father's claim of intentional infliction of emotional distress against counselor for mishandling child's sex abuse allegations against father); *Darlow v. Farmers Ins. Exch.*, 822 P.2d 820 (Wyo. 1991) (insured's claim of intentional infliction of emotional distress against insurance company for bad faith handling of claim).

54. *R.D. v. W.H.*, 875 P.2d at 32.

55. PROSSER AND KEETON, *supra* note 28, § 54, at 360. Courts have been reluctant to allow recovery for mental distress alone because of proof problems, fears of increased litigation, and the potential for false claims. The concerns are even more pronounced where a defendant's acts are merely negligent, as opposed to intentional. *Id.* See also David B. Millard, *Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation*, 15 IND. L. REV. 617, 622-25 (1982).

56. PROSSER AND KEETON, *supra* note 28, § 54, at 363. The requirement of physical impact is referred to in the cases as the "impact" rule. See, e.g., *Spade v. Lynn & Boston R.R. Co.*, 47 N.E. 88 (Mass. 1897); *Miller v. Baltimore & Ohio S.W. R.R. Co.*, 85 N.E. 499 (Ohio 1908).

The Restatement adopts an "impact" rule:

§ 436 A. Negligence Resulting in Emotional Disturbance Alone

If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily

soon began to explore the limits of the impact requirement, allowing a cause of action where there was only the slightest physical impact.⁵⁷ Other courts allowed recovery for nervous shock even without physical impact where the plaintiff reasonably feared immediate personal injury because she was located in the zone of danger.⁵⁸

In a pivotal case decided in 1969, *Dillon v. Legg*, the California Supreme Court held that the "impact" and "zone of danger" rules were no longer necessary to state a claim for recovery for mental trauma.⁵⁹ The court held that a mother who saw her infant child run down by a negligent motorist could recover from the motorist for her emotional harm.⁶⁰ The *Dillon* court determined recovery based on 1) whether the plaintiff was located near the scene of the accident, 2) whether the plaintiff personally observed the accident, and 3) whether the plaintiff was closely related to the victim.⁶¹ *Dillon* has received mixed reactions in jurisdictions across the country, but the decision paved the way for bystander recovery under the theory of negligent infliction of emotional distress.⁶²

State courts have diverged in their treatment of the presence limitation on recovery for negligent infliction of emotional distress.⁶³ Some jurisdictions have adopted a bright line presence test, in which the plaintiff must have witnessed the accident in order to recover.⁶⁴ In fact, California subsequently refined the *Dillon* decision, opting for a bright line presence test.⁶⁵ In *Thing v. La Chusa*, the California Su-

harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

RESTATEMENT (SECOND) OF TORTS § 436 A (1965).

57. See, e.g., *Porter v. Delaware, L. & W. Ry.*, 63 A. 860 (N.J. 1906) (allowing recovery when "something" slight hit plaintiff's neck and she got dust in her eyes); *Kerney v. Wong Len*, 128 A. 343 (N.H. 1925) (allowing recovery when a mouse in a bite of chicken dressing touched plaintiff's mouth).

58. The cases in which the plaintiff is threatened with physical impact or fears for her own safety often describe the plaintiff as being in the "zone of danger." See, e.g., *Waube v. Warrington*, 258 N.W. 497, 500-01 (Wis. 1935); *Keck v. Jackson*, 593 P.2d 668, 669 (Ariz. 1979).

59. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

60. *Id.*

61. *Id.* at 920.

62. Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 491 (1982). See also *Gates v. Richardson*, 719 P.2d 193, 195-96 (Wyo. 1986).

63. See Annotation, *Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another*, 5 A.L.R. 4TH 833 (1981 & Supp. 1993). There are competing underlying policy considerations justifying each approach. These policy concerns are discussed *infra* at notes 136-149.

64. See, e.g., *Garrett v. New Berlin*, 362 N.W.2d 137, 143 (Wis. 1985); *Glendening v. Weis*, 560 A.2d 995, 996 (Conn. 1988).

65. *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989). In *Dillon*, one of the factors the court evaluated

preme Court denied recovery for negligent infliction of emotional distress to a mother who had not witnessed the automobile accident which injured her child.⁶⁶ At the other extreme, some jurisdictions have allowed plaintiffs to recover regardless of whether they observed the accident.⁶⁷ A third approach lies between the two extremes, and allows recovery in situations where the plaintiff was present at the time of or in the immediate aftermath of the accident.⁶⁸

The Wyoming Supreme Court adopted the tort of negligent infliction of emotional distress in 1986, in *Gates v. Richardson*.⁶⁹ In *Gates*, a six-year-old boy was struck by a car while riding his bicycle. His mother and siblings brought suit against the driver of the car for negligent infliction of emotional distress. One sibling had witnessed the accident and the mother and other sibling arrived at the scene shortly afterward.⁷⁰ The court expressly adopted the tort as a valid cause of action in Wyoming and proceeded to set limits for recovery.⁷¹

The court ruled that the potential class of plaintiffs must be limited to those who can bring an action for the primary victim's death under Wyoming's wrongful death statute.⁷² Wyoming chose a middle-of-the-road presence test, allowing recovery when the plaintiff "observed the infliction of serious bodily harm or death, or if he observed the serious bodily harm or death shortly after its occurrence but without material change in the condition and location of the victim."⁷³ The court pointed out that the immediate aftermath may be more shocking than the actual impact, and that the real shock may come when the

was whether the plaintiff was located near the scene of the accident. 441 P.2d at 920. In *Thing*, the court determined that the plaintiff must have been present at the scene of the injury-producing accident at the time it occurred and aware that it was causing injury to the victim. 771 P.2d at 829-30.

66. 771 P.2d 814 (Cal. 1989).

67. See, e.g., *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980) (court allowed emotional distress claims predicated on viewing the injured person at the hospital).

68. See, e.g., *Corso v. Merrill*, 406 A.2d 300 (N.H. 1979); *General Motors Corp. v. Grizzle*, 642 S.W.2d 837 (Tex. Ct. App. 1982).

69. 719 P.2d 193 (Wyo. 1986). See David F. Askman, Note, *Wyoming Recognizes a Cause of Action for Negligent Infliction of Emotional Distress*, 23 LAND & WATER L. REV. 651 (1988) for an early analysis of *Gates*.

70. *Id.* at 194.

71. *Id.* at 198-201.

72. *Id.* at 198-99. In *Wetering v. Eisele*, the Wyoming Supreme Court interpreted Wyoming's wrongful death statute, WYO. STAT. § 1-38-102 (Cum. Supp. 1983), to determine proper plaintiffs in a wrongful death action. *Wetering*, 682 P.2d 1055 (Wyo. 1984). The court held that the persons for whose benefit a wrongful death action may be brought are identified in the intestacy statute, WYO. STAT. § 2-4-101 (Cum. Supp. 1983). *Id.* at 1061-62. Proper plaintiffs include spouses, children, parents, and siblings. *Gates*, 719 P.2d at 198-99.

73. *Gates*, 719 P.2d at 199.

plaintiff views the crushed and bleeding body and hears the cries of pain or dying words of the victim.⁷⁴

Since *Gates*, the Wyoming Supreme Court has decided a handful of cases involving claims based on negligent infliction of emotional distress.⁷⁵ In those cases, recovery turned on whether the plaintiffs met the presence requirements set out in *Gates*.⁷⁶ In *Thunder Hawk*, six-year-old Alex's leg was amputated by a train while he was playing on the tracks. His parents were denied recovery because they were first notified of Alex's injury at their workplace and did not see him until he was transported to the hospital.⁷⁷ In *Contreras*, seven-year-old James was knocked down on the playground at school by a fifth grader playing football. The fall resulted in a severe fracture of James' leg. His mother was denied recovery because she first saw James lying on a cot in the principal's office in a substantially different location and condition than when the accident occurred.⁷⁸

R.D. v. W.H. is the first case decided by the Wyoming Supreme Court that involved a claim of negligent infliction of emotional distress as a result of witnessing the death (as opposed to the injury) of a third party.

Mental Suffering Damages for Survivors in Wrongful Death Cases

In wrongful death cases, the measure of damages is determined by the language of the statute creating the cause of action.⁷⁹ Every state has a statutory remedy for wrongful death.⁸⁰ There are two general types of wrongful death statutes, those in which damages are for the benefit of the estate, and those in which damages are directly for the benefit of survivors.⁸¹ Where a statute provides that damages are for the benefit of the estate, the basis of damages is the decedent's expected lifetime earnings, less his living expenses or contributions, or some variation on this formula.⁸² Where a statute, like Wyoming's statute, provides that damages are for the benefit of survivors, the jury takes

74. *Id.*

75. *See, e.g., Thunder Hawk ex rel. Jensen v. Union Pac. R.R. Co.*, 844 P.2d 1045 (Wyo. 1992); *Contreras v. Carbon County Sch. Dist. No. 1*, 843 P.2d 589 (Wyo. 1992).

76. *See, Thunder Hawk*, 844 P.2d at 1052; *Contreras*, 843 P.2d at 593.

77. *Thunder Hawk*, 844 P.2d at 1052.

78. *Contreras*, 843 P.2d at 594.

79. PROSSER AND KEETON, *supra* note 28, § 127, at 949-51.

80. *Id.* at 945.

81. *Coliseum Motor Co. v. Hester*, 3 P.2d 105, 107 (Wyo. 1931).

82. PROSSER AND KEETON, *supra* note 28, § 127, at 950.

into consideration the pecuniary value of the loss of the comfort, society and protection of the deceased.⁸³

In an early Wyoming case, *Coliseum Motor Co. v. Hester*, the Wyoming Supreme Court, interpreting the Wyoming wrongful death statute, ruled that the mental suffering of survivors is too remote to be a proper element of damages under the statute.⁸⁴ The *Coliseum* case has never been expressly overruled, nor has Wyoming's wrongful death statute been materially amended since *Coliseum*.⁸⁵

PRINCIPAL CASE

In *R.D. v. W.H.*, the Wyoming Supreme Court held that the Appellant sufficiently pleaded a cause of action for both intentional and negligent infliction of emotional distress and that Appellant's claims should not have been dismissed by the district court.⁸⁶ The court further held that Appellant's claims were not barred by *Coliseum*.⁸⁷ In an opinion authored by Chief Justice Macy, and joined by Justices Thomas, Cardine, Golden, and Taylor, the court discussed the parameters of both emotional distress torts. Justice Cardine filed a specially concurring opinion.⁸⁸

Intentional Infliction of Emotional Distress

Prior to *R.D. v. W.H.*, the Wyoming Supreme Court had never expressly addressed a claim for third-party intentional infliction of emotional distress.⁸⁹ In *R.D. v. W.H.*, Appellant claimed that the Appellee's intentional acts, which were directed at the decedent, caused Appellant and his child to suffer severe emotional distress.⁹⁰ The Wyoming Supreme Court determined that this type of claim should be recognized by the

83. *Id.* at 951. WYO. STAT. § 1-38-102(a) provides that "[e]very such action shall be brought by and in the name of the personal representative of the deceased person." Section 1-38-102(c) provides that "[e]very person for whose benefit such action is brought may prove his respective damages, and the court or jury may award such person that amount of damages to which it considers such person entitled, including damages for loss of probable future companionship, society, and comfort." WYO. STAT. § 1-38-102 (1988).

84. *Coliseum*, 3 P.2d at 111.

85. In *R.D. v. W.H.*, the court allowed Appellant's emotional distress claims, which resulted from G.D.'s wrongful death. A question arises as to how the decision affects the *Coliseum* rule. See *infra* notes 133-135 and accompanying text.

86. *R.D. v. W.H.*, 875 P.2d at 34-35.

87. *Id.* at 31.

88. *Id.* at 35.

89. *Id.* at 32.

90. *Id.*

Wyoming courts, and expressly adopted Restatement (Second) of Torts section 46(2), which covers third party actions.⁹¹

Under the Restatement provision, the plaintiff must be "present at the time" in order to establish liability.⁹² Most cases have required that the plaintiff be present when the outrageous conduct occurs.⁹³ Here, the Appellant did not allege that he and the minor child were present when Appellee gave the firearm to G.D. or when Appellee helped G.D. obtain the amitriptyline hydrochloride. Appellant did allege, however, that he and his child witnessed the immediate aftermath of G.D.'s overdose.⁹⁴

The Wyoming Supreme Court stated that it is generally a better practice to limit recovery for intentional infliction of emotional distress to circumstances in which plaintiffs were present when the outrageous conduct occurred.⁹⁵ However, the court relied on the Restatement Caveat and Comment 1⁹⁶ to support its holding that the facts of *R.D. v. W.H.* placed it within a narrow exception to the general rule. Appellant and the minor child were present in the immediate aftermath of the "tragic results of Appellee's outrageous conduct, and the suicide was the final result of a continuing course of conduct instigated by Appellee."⁹⁷

Negligent Infliction of Emotional Distress

The Wyoming Supreme Court held that Appellant's amended complaint sufficiently alleged that he and his minor child witnessed the immediate aftermath of the decedent's suicide, and therefore, met the presence requirement for negligent infliction of emotional distress.⁹⁸ The presence requirement, as set out by the *Gates* court, allows recovery only where the plaintiff observed the infliction of serious bodily harm or death, or observed the serious bodily harm or death shortly after its occurrence but without material change in the condition and location of the victim.⁹⁹

91. *Id.* See *supra* note 35. The court adopted Restatement § 46 in *Gates*, but the court did not have occasion to analyze § 46(2) in that case. The majority, in order to clarify the law, expressly adopted § 46(2) in *R.D. v. W.H.* 875 P.2d at 33.

92. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965). In addition, the plaintiff must be a member of the third party's immediate family. *Id.*

93. *R.D. v. W.H.*, 875 P.2d at 33.

94. *Id.*

95. *Id.*

96. See *supra* note 47. Comment 1 states that "[t]he Caveat is intended, however, to leave open the possibility of situations in which presence at the time may not be required." RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965).

97. *R.D. v. W.H.*, 875 P.2d at 33-34.

98. *Id.* at 35.

99. *Gates*, 719 P.2d at 201.

Appellant did not specify the negligent acts which resulted in his and the minor child's emotional distress, though the complaint supplied a number of possibilities.¹⁰⁰ For example, Appellant alleged that Appellee sexually abused G.D. and provided her the means to commit suicide. Appellant did not allege that he or the minor child had witnessed any of these negligent events.¹⁰¹

The court noted that while the negligent act and the infliction of serious bodily harm or death will often occur simultaneously, there can be times, as in this case, when the negligent act will be removed in time from the actual infliction of serious bodily injury or death.¹⁰² The court elaborated on the *Gates* standard, holding that a plaintiff is present for the purpose of establishing a negligent infliction of emotional distress claim when he witnesses the infliction of a serious bodily injury or death, or its immediate aftermath, regardless of whether he observed the negligent act happening.¹⁰³ "The essence of the tort is the shock caused by the perception of an especially horrendous event."¹⁰⁴ The court held that the district court should not have dismissed the claim.¹⁰⁵

The Coliseum Argument

The Appellee argued to the trial court that the ruling in *Coliseum Motor Co. v. Hester* precluded Appellant from recovering for emotional distress.¹⁰⁶ The general rule emerging from *Coliseum* was that mental suffering of survivors is not an element of damages for wrongful death.¹⁰⁷ The Wyoming Supreme Court responded that the emotional distress torts were not recognized in Wyoming until long after *Coliseum* had been decided.¹⁰⁸ The *Coliseum*

100. R.D. v. W.H., 875 P.2d at 34.

101. *Id.*

102. *Id.*

103. *Id.* at 35. The court undertook a lengthy analysis to determine whether the plaintiff must be present at the time of the injury or present at the time of the negligent act(s). The court noted that in many cases the negligent act and the infliction of bodily harm will occur simultaneously, but that there may be situations, as in this case, where the act and the injury are removed in time. The court cited cases from other jurisdictions illustrating factual situations where the negligent act and the resulting injury were removed in time. For instance, in *Pearsall v. Emhard Indus., Inc.*, 599 F. Supp. 207 (E.D. Pa. 1984), a plaintiff witnessed the bodies of her family being removed from their burning house. She did not allege that she witnessed the improper manufacture of the smoke detector. The Pennsylvania court held that the presence requirement was satisfied. The cited cases aptly illustrated the absurdity of requiring presence at the time of the negligent act where the act and injury are removed in time. *Id.* at 34-35.

104. R.D. v. W.H., 875 P.2d at 35 (citing *Gates*, 719 P.2d at 199).

105. R.D. v. W.H., 875 P.2d at 35.

106. *Id.* at 31.

107. *Coliseum*, 3 P.2d at 107.

108. R.D. v. W.H., 875 P.2d at 31.

court was concerned about the difficulty in calculating mental damages, the potential for excess verdicts, and the possibility of feigned grief.¹⁰⁹ The majority in *R.D. v. W.H.* stated that “[t]his Court overcame those concerns when it adopted the mental distress torts.”¹¹⁰

The court explained the difference between emotional distress claims and mental suffering claims as an element of damages for wrongful death.¹¹¹ In a wrongful death action, claimants are entitled to recover for the loss of care, comfort, and society of the decedent.¹¹² Wrongful death claimants are *not* entitled to recover damages for their own grief and mental suffering as a result of the decedent’s death.¹¹³ In contrast, emotional distress claims generally occur when a plaintiff witnesses the infliction of a relative’s injury or death which has been caused by a negligent, intentional, or reckless act.¹¹⁴ The emotional distress torts allow for recovery in special circumstances where the plaintiff suffers from extreme shock.¹¹⁵ They do not allow recovery for the typical kind of grief suffered by those who lose a loved one.¹¹⁶

In *R.D. v. W.H.*, Appellant pleaded the emotional distress claims separately from the wrongful death claims.¹¹⁷ The court stated that the claims were not parasitic¹¹⁸ to the wrongful death claims even though they arose out of the same circumstances.¹¹⁹

Justice Cardine wrote a specially concurring opinion in *R.D. v. W.H.* to clarify his position regarding the *Coliseum* case.¹²⁰ Justice Cardine considered the *R.D. v. W.H.* decision a narrow exception to the general rule of *Coliseum*. The exception allows for recovery in the limited

109. *Id.*

110. *Id.*

111. The essentials of a wrongful death claim are: 1) the plaintiffs’ capacity to sue as personal representative of the deceased; 2) that plaintiffs are the persons entitled by statute to damages; 3) that plaintiffs allege sufficient facts to show in what way the defendant was negligent; 4) that defendant’s negligence was the proximate cause of death; and 5) damages. *Harris v. Grizzle*, 599 P.2d 580, 583 (Wyo. 1979).

112. *R.D. v. W.H.*, 875 P.2d at 32.

113. *Coliseum*, 3 P.2d at 111.

114. *R.D. v. W.H.*, 875 P.2d at 32.

115. *Id.*

116. *Id.*

117. *Id.*

118. An element of damage is parasitic in that it appears only as attached to an independent, existing cause of action. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 880 (1939). See also 1 THOMAS A. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 470 (1906), where the author states “[t]he treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability.”

119. *R.D. v. W.H.*, 875 P.2d at 32.

120. *Id.* at 35.

circumstance when the plaintiff is present and views the incident causing injury or death or comes upon it immediately thereafter. Absent this circumstance, there can be no recovery for grief or mental suffering resulting from the death of another.¹²¹

ANALYSIS

R.D. v. W.H. is an important case because the court redefined the limits for both intentional and negligent infliction of emotional distress in the third party context. Both torts have a presence requirement that must be met in order for a plaintiff to recover. The presence requirement plays a fundamental role in limiting claims for emotional distress arising from the injury or wrongful death of a third party. However, the Wyoming Supreme Court failed to closely analyze the presence requirement in *R.D. v. W.H.*, obscuring its significance and leaving unclear to what extent presence will be required for recovery in future cases.

R.D. v. W.H. also provides an opportunity to look at the presence requirement in terms of competing policy considerations, and in light of those considerations to analyze how Wyoming should approach the presence requirement in the future. This note argues that the Restatement approach is appropriate for third-party intentional infliction of emotional distress claims. This note further argues that the "present in the immediate aftermath" test should be retained in third-party negligent infliction of emotional distress claims. Because important policy considerations underlie the presence limitations, the court should apply the rules rigorously in the future.

The Intentional Infliction of Emotional Distress Holding

The Wyoming Supreme Court's holding on Appellant's claim of intentional infliction of emotional distress raises questions as to the extent presence is a prerequisite for recovery. *R.D. v. W.H.* was the first case before the Wyoming Supreme Court involving a plaintiff's claim for intentional infliction of emotional distress based on the defendant's intentional acts directed at a third party.¹²² The court expressly adopted Restatement section 46(2) as "the basis for third-party intentional-infliction-of-emotional-distress claims in Wyoming."¹²³ However, the court further held that the facts of *R.D. v. W.H.*

121. *Id.*

122. *Id.* at 32.

123. *Id.*

placed it within a narrow exception to the general rule that a plaintiff must be present at the time of the outrageous conduct in order to recover.¹²⁴

The court used the Caveat and Comment 1 to support this exception.¹²⁵ The court noted that some jurisdictions have recognized that special factual circumstances may exist which negate the need for presence at the time of the outrageous conduct.¹²⁶ While some jurisdictions have recognized that the Caveat and Comment 1 leave open the possibility that the presence requirement may be modified in the future, only one of the cases cited by the court actually allowed an exception to the presence rule based on special factual circumstances.¹²⁷ In fact, many courts have denied recovery in circumstances that appear to be at least equally as disturbing as those in *R.D. v. W.H.*¹²⁸ Though the court described its ruling as a narrow exception to the Restatement general rule, the decision leaves the door open for other plaintiffs claiming exceptional circumstances, who were not present at the time of the outrageous conduct, to bring their claims before the court. If too many exceptions are allowed, the rule will eventually become ineffectual as a limitation to recovery.

124. *Id.* at 33.

125. *Id.*

126. *Id.* The court cited the following cases: *H.L.O. ex rel. L.E.O. v. Hossle*, 381 N.W.2d 641 (Iowa 1986); *Nancy P. v. D'Amato*, 517 N.E.2d 824 (Mass. 1988); *Foster v. Trentham's Inc.*, 458 F. Supp. 1382 (E.D. Tenn. 1978).

127. In *Foster v. Trentham's Inc.*, a case involving malicious institution of criminal proceedings, Mrs. Foster brought a claim for intentional infliction of emotional distress based on the defendant's outrageous conduct directed at her husband. The court concluded that, although it was not clear which of the acts took place in Mrs. Foster's presence, the allegation that the arrest took place at her home, plus the continuing nature of the conduct, was sufficient to satisfy the presence element for purposes of a motion to dismiss. 458 F. Supp. 1382 (E.D. Tenn. 1978).

Both *H.L.O. ex rel. L.E.O. v. Hossle* and *Nancy P. v. D'Amato* involved the defendants' sexual abuse of minor children, and the subsequent claims of family members for intentional infliction of emotional distress. *Hossle*, 381 N.W.2d 641 (Iowa 1986); *D'Amato*, 517 N.E.2d 824 (Mass. 1988). In both cases, the courts recognized the Restatement provision and the Caveat. In *Hossle*, the Iowa court held the presence requirement was not met because the parents were not present at the time of the defendant's outrageous conduct. 381 N.W.2d at 644-45. In *D'Amato*, the court did not base its decision on presence. Instead, the court denied recovery because the mother did not learn of the abuse for approximately one year, and there was no finding of severe emotional distress attributable to the defendant. 517 N.E.2d at 828.

128. A review of the third-party intentional infliction of emotional distress cases reveals that many involve the sexual abuse of minor children and the subsequent claims of family members for their emotional distress. See, e.g., *Hossle*, 381 N.W.2d 641 (Iowa 1986) (denying parents' recovery for intentional infliction of emotional distress against neighbor who sexually abused their four minor children because they were not present at the time of the abuse); *Johnson v. Caparelli*, 625 A.2d 668 (Pa. 1993) (denying parents' recovery for intentional infliction of emotional distress against priest who sexually molested their son because they were not present at the time of the outrageous conduct). As a Massachusetts court noted, often the facts in such cases provide a compelling argument for creating an exception to the presence requirement. *D'Amato*, 517 N.E.2d at 522.

The Negligent Infliction of Emotional Distress Holding

The Wyoming Supreme Court's holding on the Appellant's claim of negligent infliction of emotional distress, like the intentional infliction of emotional distress holding, raises doubts as to the extent presence is now a prerequisite for recovery. The majority opinion stated only that "Appellant's amended complaint sufficiently alleged that he and the minor child had witnessed the immediate aftermath of the decedent's suicide."¹²⁹ The court did not include any further analysis of Appellant's presence.¹³⁰ The court's approach was curious, considering the importance placed on the presence factor in the *Contreras* and *Thunder Hawk* cases.¹³¹

The court apparently determined that Appellant arrived on the scene shortly after G.D.'s overdose. Presumably, under the "presence in the immediate aftermath" test articulated in *Gates*¹³² and previously applied by the court, the claims would have been resolved differently if Appellant had found G.D.'s body several days later, or if a neighbor had found the body first and told Appellant before he entered the room, or if Appellant had arrived home as his wife's body was being removed on a stretcher. However, the court's opinion, which will serve as precedent for future litigants, did not indicate that the court undertook a factual analysis. Nor did the opinion indicate that the court viewed the presence requirement as an important factor to be

129. R.D. v. W.H., 875 P.2d at 35.

130. R.D. v. W.H. was before the Wyoming Supreme Court in the context of Appellee's 12(b)(6) motion to dismiss. 875 P.2d at 27. The factual record before the court was, therefore, not fully developed. Appellant's opening brief stated that Appellant and his minor child "saw the immediate aftermath of the suicide." Appellant's Opening Brief, *supra* note 3, at 20. Appellant's reply brief stated that Appellant and the child "observed the immediate aftermath of the overdose taken by the decedent and were present at the scene of her overdose, where they discovered her body." Plaintiff/Appellant's Reply Brief at 24, R.D. v. W.H., 875 P.2d 26 (Wyo. 1994) (No. 93-90). Nevertheless, the court's opinion did not even touch on the allegations on which the court relied to reverse the dismissal, nor did the court give any indication that recovery would be denied if the fully developed factual record does not satisfactorily establish Appellant's presence.

131. The court did not mention *Contreras* and only made a brief cite to *Thunder Hawk*, even though both those cases had been decided less than six months before. In fact, the presence requirement was fatal to the plaintiffs' claims in those cases. See *supra* notes 77-78 for a summary of the *Contreras* and *Thunder Hawk* decisions.

The court did undertake a lengthy analysis to determine whether plaintiff must witness the negligent acts. See *supra* note 103. It is interesting that the court spent so much time deciding that the plaintiff need not observe the negligent acts in certain circumstances, yet gave so little attention to the requirement that the plaintiff be present in the immediate aftermath.

132. The *Gates* formulation of the presence test requires that the plaintiff observe the infliction of serious bodily harm or death, or observe the serious bodily harm or death shortly after its occurrence but without material change in the condition and location of the victim. 719 P.2d at 199.

established at trial before Appellant can recover. If the facts surrounding Appellant's presence were not important, then it is impossible to reconcile *R.D. v. W.H.* with *Contreras* and *Thunder Hawk*.

The court's failure to emphasize the presence requirement in the negligent infliction of emotional distress claim undermined the importance of the requirement as a limitation to recovery. Like the intentional infliction of emotional distress holding, the decision creates uncertainty for potential litigants and enhances the possibility that unwarranted claims will be presented to the court.

Mental Suffering, Wrongful Death, and the Presence Test

The court did not overrule *Coliseum*, although at first glance, the opinion leaves doubt about what remains. The *Coliseum* court held that in a wrongful death action, survivors could not recover for their own mental suffering.¹³³ In *R.D. v. W.H.*, the court stated that *Coliseum* concerns about feigned grief and excessive verdicts were overcome when the emotional distress torts were adopted. The court held that the Appellant was not precluded from bringing his claims because of *Coliseum*.¹³⁴

Justice Cardine's concurrence focused on the limited nature of the *R.D. v. W.H.* decision as it relates to survivors' mental suffering damages where wrongful death claims are involved. In a large number of wrongful death cases, the mental suffering of the plaintiff will still not be compensable because the presence requirement is not met.¹³⁵ However, Justice Cardine's concurrence underscores the need for the court to carefully analyze the presence requirement in order to properly limit recovery. The court's intentional and negligent infliction of emotional distress holdings in *R.D. v. W.H.*, by blurring the presence requirements, may result in enlarging the circumstances under which a plaintiff can recover for mental suffering as a result of the wrongful death of a third party. The court's treatment of the presence requirement in *R.D. v. W.H.* erodes the *Coliseum* rule by leaving unclear when mental suffering damages are appropriate in the wrongful death context.

133. 3 P.2d at 107.

134. 875 P.2d at 31.

135. For example, if a hunter is negligently shot and killed by his friend on a hunting trip, the hunter's family will not be able to recover for their mental suffering. Under *Coliseum*, survivors' mental suffering is not an element of damages under a wrongful death claim. 3 P.2d at 31. And the family members will not be able to state a claim for negligent infliction of emotional distress because they cannot satisfy the presence requirement.

What Should Wyoming's Presence Requirement Be?

Courts have been slow to recognize an individual's interest in freedom from mental disturbance, even where there is intentional interference with that right.¹³⁶ Forceful policy arguments finally tipped the scale toward allowing recovery for mental distress.¹³⁷ These arguments included compensating harmed individuals, deterring intentional behaviors that harm plaintiffs, and shifting the burden for both intentional and negligently caused harms from innocent plaintiffs to defendants.¹³⁸ Nevertheless, there continued to be a recognition, as stated by Professor Magruder, that "[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be."¹³⁹

The major concerns causing courts to hesitate in allowing recovery for mental distress are reflected in the limitations that are imposed on recovery.¹⁴⁰ Courts and commentators have expressed concern about the potential for feigned grief and fraudulent claims, the proof problems inherent in mental injuries where there is no accompanying physical injury, and the burdens on the court system of unlimited causes of action.¹⁴¹ Various limitations address these concerns, such as restricting recovery to immediate family members, requiring severe emotional distress, and imposing a presence requirement. The following paragraphs focus on the use of presence as a limiting factor, and discuss the pros and cons of various presence schemes.

A bright line test, requiring presence at the scene of the accident or injury, limits recovery in a nonarbitrary manner. A bright line test also

136. Crump, *supra* note 36, at 447. See also, PROSSER AND KEETON, *supra* note 28 § 54, at 360-61.

137. See generally, Prosser, *supra* note 118; Magruder, *supra* note 30; and PROSSER AND KEETON, *supra* note 28, §§ 12, 54.

138. See Crump, *supra* note 36, at 476-78; PROSSER AND KEETON, *supra* note 28, § 54, at 361; Prosser, *supra* note 118, at 876-78.

139. Magruder, *supra* note 30, at 1035.

140. Cf. Millard, *supra* note 55, at 625-26. Professor Millard notes that courts have erected barriers to recovery because of a "fear of fraudulent claims, fear that the courts will be drowned in a flood of emotional distress litigation, fear that emotional distress damages are not susceptible of accurate measurement, and a felt need to limit liability." *Id.* The barriers that Professor Millard refers to are the "impact" and "zone of danger" rules, discussed *infra* at notes 56-58. *Id.* However, his reasoning applies equally as well to other restrictions on recovery for mental distress that the courts and Restatement drafters have developed.

141. See, e.g., Gates v. Richardson, 719 P.2d 193, 197-200 (Wyo. 1986); Contreras v. Carbon County Sch. Dist. No. 1, 843 P.2d 589, 593 (Wyo. 1992); Dillon v. Legg, 441 P.2d 912, 916-20 (Cal. 1968). See also, PROSSER AND KEETON, *supra* note 28, § 12, at 55-56, § 54, at 359-61; Crump, *supra* note 36, at 447; Millard, *supra* note 55, at 633-35.

serves the legitimate purposes of providing predictability and ease of administration. The Restatement authors chose this approach to limit intentional infliction of emotional distress.¹⁴² In the *Gates* case, the lone dissenter, Justice Rooney, was convinced that a bright line test should be used in a negligent infliction of emotional distress case.¹⁴³ Recognizing the artificiality of any line, Justice Rooney reasoned that if it is the sight of injuries which causes the shock, then shock can occur upon viewing the victim in the hospital or the morgue as easily as at the scene of the accident.¹⁴⁴ However, Justice Rooney also recognized the need to limit recovery, and he was persuaded that the presence test used in Restatement section 46 would work equally as well in the context of negligent infliction of emotional distress. Therefore, Justice Rooney argued that recovery should be limited to plaintiffs who were at the scene of the accident and witnessed its occurrence.¹⁴⁵

At the other extreme, the presence requirement could be eliminated entirely, with recovery based on different factors. The court would then be required to undertake an ad hoc review of each case to determine whether the plaintiff should recover.¹⁴⁶ A Massachusetts court stated that "[e]very effort must be made to avoid arbitrary lines which 'unnecessarily produce incongruous and indefensible results.' . . . The focus should be on underlying principles."¹⁴⁷ An ad hoc approach centers on the underlying policy favoring compensation of legitimately harmed plaintiffs. Concern about feigned claims is secondary. Such an approach has inherent problems.¹⁴⁸ First, a case-by-case review of mental distress claims affords potential litigants little in the way of predictability. Second, ad hoc rules are difficult and time-consuming for courts to administer. The court must

142. The drafters did build in a flexibility provision via the Caveat. RESTATEMENT (SECOND) OF TORTS § 46 Caveat (1965).

143. 719 P.2d at 201 (Rooney, J., dissenting).

144. *Id.* at 205.

145. *Id.* at 202.

146. Cf. Millard, *supra* note 118, at 632. Professor Millard (referring to the inconsistent treatment of intentional infliction of emotional distress and negligent infliction of emotional distress) stated:

The only rational way to avoid arbitrary lines and artificial barriers is to weigh all those considerations of policy which favor a plaintiff's recovery against those favoring a limitation on defendant's liability and determine in each particular case whether the balance tips the scale against or in favor of recovery.

Id. Professor Millard's comments offer an example of a balancing approach a court could take to determine whether a plaintiff is entitled to recover for negligent infliction of emotional distress.

147. *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1302 (Mass. 1978).

148. This approach is not widely accepted, and Justice Cardine noted in *Contreras* that even Massachusetts has "shown marked reluctance to further broaden the horizons of emotional distress claims." 843 P.2d at 593 n.1 (citations omitted).

look at the facts of each case and attempt to balance competing interests. Finally, review on a case-by-case basis potentially opens the floodgates for increased litigation because there are no factors limiting the circumstances in which claims may be brought. These concerns are significant and outweigh the potential benefits.

The Wyoming Supreme Court adopted a compromise presence standard that falls between the two extremes.¹⁴⁹ Wyoming's presence in the immediate aftermath test avoids the pitfalls of a bright line test or no presence test at all. Yet the test is still relatively easy to apply and provides guidance for future litigants. The Wyoming standard is not without its problems, as is represented by the increasingly troublesome cases that have come before the Wyoming Supreme Court since *Gates* was decided.

The *Contreras* case provides a particularly good example of the difficulty involved in applying the presence in the immediate aftermath rule. In *Contreras*, the presence in the immediate aftermath test as applied was artificial, and bore little relation to whether Mrs. Contreras should recover for her emotional distress. It is hard to imagine that Mrs. Contreras was any less shocked at seeing her son lying in the principal's office, crying in pain with his twisted femur exposed, than she would have been if she saw him lying in a similar condition a few feet away on the playground. Given the facts in *Contreras*, the court would have had to relax the presence in the immediate aftermath test or abandon presence altogether in order for Mrs. Contreras to recover. The court could have held that presence in the immediate aftermath did not require the plaintiff to witness serious bodily injury or come upon the scene before there was a substantial change in the location of the victim. But doing so would have led the court down a slippery slope, at the bottom of which there is no presence rule at all. For reasons described above, the problems with no presence rule outweigh the benefits.

No single test will prove satisfactory in all conceivable circumstances. The Wyoming Supreme Court has chosen a reasonable "presence in the immediate aftermath" rule. The rule serves important policy purposes, and the court should allow exceptions only in very limited situations. A close factual analysis to insure presence in the immediate aftermath should be an integral part of the court's evaluation of future mental distress claims.

149. See *supra* note 73 and accompanying text.

CONCLUSION

The Wyoming Supreme Court's decision in *R.D. v. W.H.* undermines the significance of the presence requirement as a limiting factor for recovery for intentional and negligent infliction of emotional distress. The court adopted Restatement section 46(2) as the basis of recovery for third-party intentional infliction of emotional distress claims, but allowed an exception to the presence requirement because of the unusual facts of *R.D. v. W.H.* The court continued its adherence to the presence in the immediate aftermath test as a prerequisite to recovery in negligent infliction of emotional distress claims, but did not set out in the opinion how Appellant met that test.

The presence rules for intentional and negligent infliction of emotional distress are based on sound policy considerations. However, the court's application of both of these rules in *R.D. v. W.H.* creates some uncertainty for potential litigants. An exacting application of the existing rules will offer relief for plaintiffs who have been intentionally or negligently harmed, provide guidance for future litigants, and yet properly limit recovery in an area subject to abuse.

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