



1986

Casenotes: Tort Law — Emotional Distress Capable of Healing Itself Is an Insufficient Injury for a Claim of Intentional Infliction of Emotional Distress, and Emotional Distress That Does Not Cause Physical Injury Capable of Objective Determination Is an Insufficient Injury for a Claim of Negligence. *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 502 A.2d 1057, cert. denied, 306 Md. 118, 507 A.2d 631 (1986)

Neal C. Barody
University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>

 Part of the [Law Commons](#)

Recommended Citation

Barody, Neal C. (1986) "Casenotes: Tort Law — Emotional Distress Capable of Healing Itself Is an Insufficient Injury for a Claim of Intentional Infliction of Emotional Distress, and Emotional Distress That Does Not Cause Physical Injury Capable of Objective Determination Is an Insufficient Injury for a Claim of Negligence. *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 502 A.2d 1057, cert. denied, 306 Md. 118, 507 A.2d 631 (1986)," *University of Baltimore Law Review*: Vol. 16: Iss. 1, Article 7.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol16/iss1/7>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

TORT LAW—EMOTIONAL DISTRESS CAPABLE OF HEALING ITSELF IS AN INSUFFICIENT INJURY FOR A CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND EMOTIONAL DISTRESS THAT DOES NOT CAUSE PHYSICAL INJURY CAPABLE OF OBJECTIVE DETERMINATION IS AN INSUFFICIENT INJURY FOR A CLAIM OF NEGLIGENCE. *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 502 A.2d 1057, cert. denied, 306 Md. 118, 507 A.2d 631 (1986).

A mother and daughter purchased a truck from a dealer who assigned the installment contract to a credit company.¹ After several payments were made, the mother became preoccupied with her terminally ill husband, and the daughter became unable to work full time because of injuries suffered in a car accident.² The installment payments became overdue, and a representative of the credit company began telephoning the mother in a rude and hostile manner, on one occasion as late as 10:00 in the evening.³ During these conversations, the representative threatened to sue the mother, ruin her credit, and referred to her daughter as a liar. As a consequence, the mother suffered extreme agitation and experienced difficulty sleeping.⁴

After the credit company repossessed the truck, the mother and daughter visited the credit company's office to reinstate the installment contract.⁵ While at the credit company's office, the mother asked to speak with the representative who had been telephoning her.⁶ In response, the representative shouted from another room that he wanted nothing to do with her.⁷ The mother became so embarrassed that "[she] could have cried."⁸ Subsequently, in contravention of the sales contract, the credit company rejected the offer to reinstate the contract.⁹

The mother and daughter brought suit against the credit company and its representative for, *inter alia*,¹⁰ intentional infliction of emotional

-
1. *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 51, 502 A.2d 1057, 1059-60, cert. denied, 306 Md. 118, 507 A.2d 631 (1986).
 2. *Id.* at 51-52, 502 A.2d at 1060.
 3. *Id.* at 52, 502 A.2d at 1060.
 4. *Id.* at 52-53, 502 A.2d at 1060. For several years, the mother also suffered urinary incontinence causing her to get up several times each night. *Id.* at 53, 502 A.2d at 1060.
 5. *Id.* at 55, 502 A.2d at 1060-61.
 6. *Id.* at 55, 502 A.2d at 1061.
 7. Record Extract at 296, *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 502 A.2d 1057, cert. denied, 306 Md. 118, 507 A.2d 631 (1986).
 8. *Hamilton*, 66 Md. App. at 55, 502 A.2d at 1061.
 9. *Id.* at 55, 502 A.2d at 1062. The credit company erroneously applied Florida law which permitted reinstatement of the installment contact only if the balance was paid in full. *Id.*
 10. *Id.* at 55-56, 502 A.2d at 1062. The amended complaint included six counts: 1) conversion by wrongful deprivation of the truck; 2) conversion by wrongful retention of the truck; 3) violation of the Maryland Consumer Debt Collection Act; 4) breach of contract by failure to return the truck and reinstate the conditional sales agreement; 5) intentional infliction of emotional distress; and 6) negligent infliction of emotional distress.

distress¹¹ and negligent infliction of emotional distress.¹² The Circuit Court of Maryland for Baltimore County dismissed the claim for negligent infliction of emotional distress¹³ and granted the defendant's motion for judgment notwithstanding the verdict in favor of plaintiffs on the claim for intentional infliction of emotional distress.¹⁴ The Court of Special Appeals of Maryland affirmed.¹⁵

According to the majority view,¹⁶ which has adopted the Restatement (Second) of Torts,¹⁷ the tort of intentional infliction of emotional distress includes four elements: 1) the defendant's act is intentional or reckless; 2) the defendant's conduct is extreme and outrageous; 3) the defendant's conduct causes the plaintiff's emotional distress; and 4) the plaintiff's emotional distress is severe. Maryland follows the majority view in requiring that each of these four elements coalesce before liability is imposed.¹⁸

The first element of the tort is satisfied if the defendant desires to inflict severe emotional distress. This desire is indicated where the defendant knows that such distress is substantially certain to result from his conduct, or where he acts recklessly in deliberate disregard of a high degree of probability that such distress will follow.¹⁹ Despite the charac-

11. See RESTATEMENT (SECOND) OF TORTS § 46 (1965); see also W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 12 (5th ed. 1984) [hereinafter PROSSER & KEETON].

12. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Rodriguez v. State*, 52 Haw. 156, 472 P.2d 509 (1970); *Culbert v. Sampson's Supermarkets*, 444 A.2d 433 (Me. 1982); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1972). See also Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d Later Case Service 100, § 8.5 (1984); PROSSER & KEETON, *supra* note 11, at 359-67.

13. *Hamilton*, 66 Md. App. at 56, 502 A.2d at 1062.

14. *Id.* The award of punitive damages for the conversion claim, however, was left undisturbed. *Id.* at 57, 502 A.2d at 1062.

15. *Id.* at 68, 502 A.2d at 1068. The trial court's decision which allowed the claim of punitive damages for conversion to go to the jury was affirmed because the defendant's conduct evidenced actual malice. *Id.* at 65-66, 502 A.2d at 1067. For a discussion of actual malice in the context of an intentional infliction of emotional distress cause of action, see *infra* notes 22 & 52.

16. See Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort: "Outrage,"* 38 A.L.R.4th 998 § 3 (1985).

17. RESTATEMENT (SECOND) OF TORTS § 461 (1965) states:

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.

Id.

18. *Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977); see generally Case Comment, *Intentional Infliction of Emotional Distress: A New Tort for Maryland - Harris v. Jones*, 38 MD. L. REV. 366 (1978).

19. RESTATEMENT (SECOND) OF TORTS § 46 comment i (1965). Black's Law Dictionary defines recklessness as:

The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing

terization of the tort as the *intentional* infliction of emotional distress, Maryland follows the majority view in permitting an action where the defendant's act is either intentional or *reckless*.²⁰

Whether the defendant's act is intentional or reckless, his conduct also must be extreme and outrageous. Such conduct is defined as "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."²¹ In determining whether conduct is extreme and outrageous, proof of a malicious intent alone is insufficient.²² Several factors are considered relevant: whether

such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended.

BLACK'S LAW DICTIONARY 1142-43 (5th ed. 1979). See also RESTATEMENT (SECOND) OF TORTS § 500 (1965).

20. See *Vance v. Vance*, 41 Md. App. 130, 139-40, 396 A.2d 296, 302 (allowing cause of action when emotional distress is caused by reckless conduct), *aff'd in part and rev'd in part*, 286 Md. 490, 408 A.2d 728 (1979).
21. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965); see also *Harris v. Jones*, 281 Md. 560, 567, 380 A.2d 611, 614 (1977) (adopting RESTATEMENT (SECOND) OF TORTS § 46 (1965)).
22. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965) states in part:
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 the emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.

Id. Therefore, actual malice is not an element of the tort of intentional infliction of emotional distress. See *infra* note 52. It may be, however, the basis of punitive damages in a tort action arising out of a contractual relationship. *American Laundry Mach. v. Horan*, 45 Md. App. 97, 115, 412 A.2d 407, 419 (1980). Proof of extreme and outrageous conduct and proof of actual malice have different legal purposes. Proof of extreme and outrageous conduct permits compensation for emotional distress and ensures that the distress is genuine and substantial. *LaFleur by Blackey v. Mosher*, 109 Wis. 2d 112, 117, 325 N.W.2d 314, 316 (1982); see 2 F. HARPER, F. JAMES & O. GRAY, LAW OF TORTS § 9.1, at 610 n.32 (2d ed. 1986) [hereinafter HARPER, JAMES & GRAY]. Proof of actual malice, however, permits punitive damages as a deterrent against evil behavior in a contractual setting. See RESTATEMENT (SECOND) OF TORTS § 908 comment a (1979) ("Conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."). The Court of Appeals of Maryland has defined narrowly actual malice as "the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and wilfully injure the plaintiff." *H. & R. Block, Inc. v. Testerman*, 275 Md. 36, 43, 338 A.2d 48, 52 (1975). *E.g.*, *Rinaldi v. Tana*, 252 Md. 544, 250 A.2d 533 (1969) (threatening a sister into refraining from selling her shares in jointly owned stock); *McClung-Logan Equip. Co. v. Thomas*, 226 Md. 136, 172 A.2d 494 (1961) (forcing a buyer to release all claims as a condition of redemption on a contract which already had been assigned); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212 (threatening an employee with legal action for refusing a polygraph test despite knowledge that the employee had a statutory right to make the refusal), *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985). The majority of states have adopted the Restatement (Second) of Torts, but the more narrow definition set forth in *Testerman* is the stan-

the plaintiff was particularly susceptible to emotional distress,²³ whether the defendant knew that the plaintiff was particularly susceptible to emotional distress,²⁴ and whether the defendant's relationship with the plaintiff gave the defendant actual or apparent authority over the plaintiff or power to affect the plaintiff's interest.²⁵ In Maryland, the relevancy of the defendant-plaintiff relationship becomes more significant when the

dard applied in Maryland. *American Laundry*, 45 Md. App. at 111 n.4, 412 A.2d at 416 n.4.

23. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 887-88 (1939) ("There is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States marine."). For an interpretation of this wording by the Court of Special Appeals of Maryland, see *Vance v. Vance*, 41 Md. App. 130, 140 n.11, 396 A.2d 296, 302 n.11, *aff'd in part and rev'd in part*, 286 Md. 490, 408 A.2d 728 (1979).

24. RESTATEMENT (SECOND) OF TORTS § 46 comment f (1965) states in part:

The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.

Id. See, e.g., Bundren v. Superior Court of Venture, 145 Cal. App. 3d 784, 193 Cal. Rptr. 671 (1983) (dunning of patient still feeling effects of surgery by hospital employees).

25. RESTATEMENT (SECOND) OF TORTS § 46 comment e (1965) states:

The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. Thus an attempt to extort money by a threat of arrest may make the actor liable even where the arrest, or the threat alone, would not do so. In particular police officers, school authorities, landlords, and collecting creditors have been held liable for extreme abuse of their position. Even in such cases, however, the actor has not been held liable for mere insults, indignities, or annoyances that are not extreme or outrageous.

Id. Professors Prosser and Keeton have discussed the problem arising from the heavy handed efforts of creditors to collect debts:

The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff's interests

It is on this basis that the tort action has been used as a potent counter-weapon against the more outrageous high-pressure methods of collection agencies and other creditors. These are sufficiently well known, ranging from violent cursing, abuse, and accusations of dishonesty, through a series of . . . telephone calls around the clock, or attempts to pile up the pressure by involving the plaintiff's employer, relatives, or neighbors . . . in the controversy It is seldom that any one such item of conduct is found alone in a case; and the liability usually has rested on a prolonged course of hounding by a variety of extreme methods.

PROSSER & KEETON, *supra* note 11, at 61-62 (footnotes omitted). For a statutory definition of wrongful conduct by a creditor in Maryland, see Maryland Consumer Debt Collection Act. MD. CON. LAW CODE ANN. §§ 14-201 to 14-204 (1975).

plaintiff is particularly susceptible to emotional distress by reason of a mental condition.²⁶

The third element of the tort is a fact-finding matter; the trier of fact must determine whether the defendant's conduct caused the plaintiff's injury. The fourth element — "severe" emotional distress—however, has led to judicial attempts at definition.²⁷ Although the emotional distress need not result in a physical injury,²⁸ it must be so severe that no reasonable man could be expected to endure it.²⁹ The Restatement (Second) of Torts states, "Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional

26. Compare *Young v. Hartford Accident & Indem. Co.*, 303 Md. 182, 492 A.2d 1270 (1985) (recovery allowed where employer required a psychiatric examination only to harass an *emotionally disturbed* employee into either suicide or abandoning her claim for worker's compensation); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212 (recovery allowed where employer transferred a dedicated, middle-aged employee with a *preexisting nervous disorder*, reduced her hours, and took her company keys because she refused to take a polygraph test), *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985) with *Leese v. Baltimore*, 64 Md. App. 442, 497 A.2d 159 (recovery denied where employer denied an employee a full-time position by virtue of a sham interview and fired him because of personal bias), *cert. denied*, 305 Md. 106, 501 A.2d 845 (1985); *Dick v. Mercantile-Safe Deposit & Trust Co.*, 63 Md. App. 270, 492 A.2d 674 (1985) (recovery denied where creditor shouted angrily and threatened to attach a debtor's home and wages, demanded cash, and accused the debtor of lying); *Beye v. Bureau of Nat'l Affairs*, 59 Md. App. 642, 477 A.2d 1197 (recovery denied where employer gave an employee a low evaluation, passed over him to promote those less qualified, appointed as his supervisor the same man he attempted to have prosecuted, and deceived the employee into resigning), *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984); *Continental Casualty Co. v. Mirabile*, 52 Md. App. 387, 449 A.2d 1176 (1982) (recovery denied where employer gave an employee a low evaluation, moved him from desk to desk, hummed and made faces at him, screamed at him to move from a certain desk, pushed him, and tapped him on the nose).

27. The Supreme Court of Illinois stated:

It has been suggested that not . . . every emotional upset should constitute the basis of an action. Indiscriminate allowance of actions for mental anguish would encourage neurotic overreactions to trivial hurts, and the law should aim to toughen the psyche of the citizen rather than pamper it. But a line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional action's wholly lacking in social utility.

Knierim v. Izzo, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961) (quoting Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936)).

28. RESTATEMENT (SECOND) OF TORTS § 46 comment k (1965) states in part: [I]f the conduct is sufficiently extreme and outrageous there may be liability for the emotional distress alone, without [bodily] harm. In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.

Id.

29. *Moniodis*, 64 Md. App. at 15, 494 A.2d at 219 ("Where the extreme and outrageous conduct by the defendant is proven, this may be 'important evidence that the distress has existed'.") (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965)), *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).

distress is a part of the price of living among people.”³⁰ In determining whether emotional distress is severe, proof of a peculiar susceptibility to emotional distress is relevant, but not determinative.³¹ Other factors considered relevant include the intensity³² and duration³³ of the emotional distress. In Maryland, the relevancy of the duration of the emotional distress becomes more significant when the plaintiff is “unable to function or tend to necessary matters.”³⁴

According to the majority view,³⁵ which has adopted the Restatement (Second) of Torts,³⁶ negligent infliction of emotional distress is not an independent tort. There is no duty to refrain from negligent conduct if it only inflicts emotional distress that fails to produce bodily reactions resulting in physical injury.³⁷ Recovery for emotional distress alone is denied because the plaintiff’s injury is not sufficiently severe to permit burdening the court with a lawsuit, the plaintiff’s testimony is not suffi-

30. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

31. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965) states in part, “The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.” *Id.*; see also *Moniodis*, 64 Md. App. at 16, 494 A.2d at 219; *cf. supra* text accompanying note 24 (plaintiff’s particular susceptibility to emotional distress is relevant in determining whether the defendant’s conduct is extreme and outrageous).

32. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

33. *Id.*

34. *Leese v. Baltimore*, 64 Md. App. 442, 471, 497 A.2d 159, 174 (quoting *Moniodis*, 64 Md. App. at 16, 494 A.2d at 219), *cert. denied*, 305 Md. 106, 501 A.2d 845 (1985). *Compare Moniodis*, 64 Md. App. at 16, 494 A.2d at 219-20 (emotional distress was sufficiently severe where employee became reclusive and was no longer able to perform household chores); *Vance v. Vance*, 41 Md. App. 130, 137, 396 A.2d 296, 301 (emotional distress was sufficiently severe where wife suffered “nervousness, spontaneous crying, hollowed appearance, and an inability to relate to the present”), *aff’d in part and rev’d in part*, 286 Md. 490, 408 A.2d 728 (1979) with *Harris v. Jones*, 281 Md. 560, 572-73, 380 A.2d 611, 617 (1977) (emotional distress was insufficiently severe where employee suffered humiliations, aggravation of nervous condition and speech impediment, and felt “like going into a hole to hide”); *Moniodis*, 64 Md. App. at 15, 494 A.2d at 219 (emotional distress was insufficiently severe where employee suffered increased smoking, lost sleep, and hives); *Leese*, 64 Md. App. at 472, 497 A.2d at 174 (emotional distress was insufficiently severe where employee suffered physical pain and great mental anguish).

35. *E.g.*, *Payton v. Abbot Labs.*, 386 Mass. 540, 437 N.E.2d 171 (1982); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965). See Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d Later Case Service 100, § 7(a) (1984).

36. RESTATEMENT (SECOND) OF TORTS § 436A (1965) states, “If the actor’s conduct is negligent as creating an unreasonable risk of causing either bodily 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.” *Id.*

37. RESTATEMENT (SECOND) OF TORTS § 436A comment a (1965). See *Vance v. Vance*, 286 Md. 490, 501 n.4, 408 A.2d 728, 734 n.4 (1979). There are two possible exceptions: (1) the negligent transmission of messages, especially those announcing death by telegraph companies; and (2) the negligent mishandling of corpses. PROSSER & KEETON, *supra* note 11, at 362.

ciently corroborated to avoid fraudulent claims, or the defendant's conduct is not sufficiently culpable to permit liability for purely emotional injury.³⁸ Maryland follows the majority view in denying an action for negligent infliction of emotional distress.³⁹

Nevertheless, there is liability for negligent conduct that inflicts emotional distress if the emotional distress in fact produces bodily reactions resulting in physical injury. The physical injury provides the requisite evidence necessary for an ordinary negligence action.⁴⁰ The emotional distress is not the basis for recovery, but rather an additional factor considered in measuring damages.⁴¹

Despite the characterization of the tort as *negligence*, an action is permitted where the defendant's act was *intentional* provided the consequential injury suffered by the plaintiff was unintentional.⁴² If the de-

38. RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965).

39. *Vance*, 286 Md. at 501 n.4, 408 A.2d at 734 n.4. *But see* *Hearst Corps. v. Hughs*, 297 Md. 112, 145, 466 A.2d 486, 502-03 (1983) (Davidson, J., dissenting); *Hunter v. Board of Educ. of Montgomery County*, 292 Md. 481, 495, 439 A.2d 582, 589 (1982) (Davidson, J., concurring and dissenting); *McCance v. Lindau*, 63 Md. App. 504, 513, 492 A.2d 1352, 1357 (1985). Only six months before *Hamilton*, the Court of Special Appeals of Maryland stated, "What the trial court characterizes as a restatement of a claim for assault, we perceive to be a claim for the negligent infliction of emotional distress — inartfully worded, but legally sufficient." *McCance*, 63 Md. App. at 513, 492 A.2d at 1357.

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

41. *Id.* § 47 comment b (1965). An individual's interest in emotional well-being is given only partial legal protection. If the sole effect of the negligent conduct is to cause emotional distress, the plaintiff cannot maintain a cause of action against the defendant. If the defendant's conduct causes other recoverable damage, however, the emotional distress can be attached as an additional element of damages. *Id.*; *see also* *Patapsco Loan Co. v. Hobbs*, 129 Md. 9, 98 A. 239 (1916) (trespass); *see generally* Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956).

42. RESTATEMENT (SECOND) OF TORTS §§ 312, 436A(1) (1965); *see McCance*, 63 Md. App. at 513-14, 492 A.2d at 1357-58 (citing *Ghassemieh v. Schafer*, 52 Md. App. 31, 447 A.2d 84, *cert. denied*, 294 Md. 543 (1982)).

Negligence based upon emotional distress also may arise from an unintentional act. RESTATEMENT (SECOND) OF TORTS §§ 313, 436(2)-(3) (1965). Where the plaintiff by chance escapes foreseeable physical impact, but the threat of that physical impact causes emotional distress that produces a physical injury, the unintentional act has caused an unintentional, but foreseeable physical injury. *Id.* § 437 comment b.

A minority of judges on the Court of Appeals of Maryland have confused the difference between negligence based upon emotional distress arising from an intentional and an unintentional act. The majority of the court of appeals has held that, where the defendant intentionally threatened the plaintiff's emotional well-being, proof that the plaintiff was within the physical zone of danger is unnecessary. *See* *Great Atlantic & Pacific Tea Co. v. Roch*, 160 Md. 189, 153 A. 22 (1931) (the plaintiff fainted after receiving a package that appeared to be a loaf of bread, but contained a dead rat). The majority of the court of appeals also has held that, where the defendant unintentionally threatened the plaintiff's emotional well-being, proof that the plaintiff was within the physical zone of danger is necessary. *Bowman v. Williams*, 164 Md. 397, 402, 165 A. 182, 184 (1933) (while on the first floor of his home, a father saw a truck crash into the basement where his children were playing, and recovered because he was within the physical zone of danger); *Resavage v. Davies*, 199 Md. 479, 487, 86 A.2d 879, 883 (1951) (while standing on her front porch,

fendant intentionally subjects the plaintiff to emotional distress that a reasonable man would foresee as likely to result in a physical injury, the intentional act has resulted in an unintentional, but actionable physical injury.⁴³ In determining whether conduct is negligent, proof that the plaintiff suffered a physical impact⁴⁴ or feared for his physical safety,⁴⁵ or that the defendant's conduct was extreme and outrageous⁴⁶ is unnecessary. In Maryland, however, this type of negligence resembles conduct considered extreme and outrageous.⁴⁷

Under a negligence action, the severity and genuineness of the emotional distress is corroborated by the consequential physical injury. In

a mother saw an automobile jump a curb and kill her two daughters, but could not recover because she was outside the physical zone of danger); cf. *State, Use of Aro-noff v. Baltimore Transit Co.*, 197 Md. 528, 80 A.2d 13 (1951) (fear for one's personal property was insufficient where plaintiff was outside the physical zone of danger); see generally Comment, *Negligent Infliction of Emotional Distress; Developments in the Law*, 14 U. BALT. L. REV. 135, 143-51 (1984). Nevertheless, in *Resavage*, the dissent misconstrued *Great Atlantic & Pacific Tea Co.* to suggest that, where the defendant *unintentionally* threatened the plaintiff's emotional well-being, proof that the plaintiff was within the physical zone of danger is *unnecessary*. *Resavage*, 199 Md. at 495-97, 86 A.2d at 887 (Delaplaine & Markell, J.J., dissenting).

43. RESTATEMENT (SECOND) OF TORTS § 436(1) (1965) states:

If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

Id.

44. See *Green v. T.A. Shoemaker*, 111 Md. 69, 80-81, 73 A. 688, 692 (1909).

45. RESTATEMENT (SECOND) OF TORTS § 436 comments a-c (1965); see *Great Atlantic & Pacific Tea Co.*, 160 Md. 189, 153 A. 22.

46. RESTATEMENT (SECOND) OF TORTS § 312 comment b (1965).

47. Compare cases involving negligence: *Vance v. Vance*, 286 Md. 490, 408 A.2d 728 (1979) (a husband left his wife and two children for another woman after 18 years of marriage; thereafter, the wife obtained a decree for alimony and child support, but the husband filed a motion to strike the decree and annul the marriage on the ground that their marriage was void because he was not divorced from his first wife at the time he married his present wife); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951) (a young child's father fatally shot her mother in her presence and confined her in the same room with the corpse for six days; thereafter, the child's father committed suicide in her presence and, in the process, drenched her in his blood); *Great Atlantic & Pacific Tea Co.*, 160 Md. 189, 153 A. 22 (a dead rat was mistakenly packaged as a loaf of bread and delivered to a nervous woman); *McCance v. Lindau*, 63 Md. App. 504, 492 A.2d 1352 (1985) (an attempt to personally serve notice of process on a woman resulted in a high speed car chase which included bumping cars); with cases involving extreme and outrageous conduct: *Young v. Hartford Accident & Indem. Co.*, 303 Md. 182, 492 A.2d 1270 (1985) (an employer required a psychiatric examination only to harass an emotionally disturbed employee into either suicide or abandoning her claim for worker's compensation); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212 (an employer transferred a dedicated, middle-aged employee with a preexisting nervous disorder, reducing her hours, and taking her company keys because she refused to take a polygraph test), *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).

Maryland, the physical injury is sufficient if it is "capable of objective determination"⁴⁸ based upon "symptoms clearly indicative of a resultant pathological, physiological, or mental state."⁴⁹ Although defined in different terms, physical injury capable of objective determination resembles severe emotional distress as determined by Maryland courts.⁵⁰

In *Hamilton v. Ford Motor Credit Co.*,⁵¹ the Court of Special Appeals of Maryland held that the plaintiff's proof was insufficient to justify recovery on the claim for intentional infliction of emotional distress because the defendant's conduct was not extreme and outrageous and the plaintiff's emotional distress was not severe.⁵² In finding that the defendant's conduct was not extreme and outrageous, the court recognized that "[c]reditors have the right to insist on payment of just debts and may threaten legal proceedings."⁵³ Additionally, the court noted that

-
48. *Vance*, 286 Md. at 500, 408 A.2d at 733-34; see also RESTATEMENT (SECOND) OF TORTS § 436 (1965) (bodily harm caused by the internal operation of fright or other emotional disturbance will suffice in a negligence action); Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences in the Absence of Impact or Other Actionable Wrong*, 674 A.L.R.2d Later Case Service 100, § 9(b) (1984) (a definite nervous disorder is a physical injury that will support damages in a negligence action).
49. *Vance*, 286 Md. at 500, 408 A.2d at 733-34 (quoting *Bowman v. Williams*, 164 Md. 397, 402, 165 A. 182, 184 (1933)).
50. Compare cases involving physical injury capable of objective determination: *Vance*, 286 Md. 490, 408 A.2d 728 (experiencing symptoms of an ulcer, functioning abnormally, suffering insomnia, embarrassment, emotional collapse, and depression manifesting itself in unkempt hair, sunken cheeks, and dark eyes); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951) (suffering nervousness and physical injuries coupled with shock and mental anguish); *Bowman*, 164 Md. at 402, 165 A. at 184 (becoming hysterical, bedridden for two weeks, and unable to work for six months); *Great Atlantic & Pacific Tea Co. v. Roch*, 160 Md. 189, 153 A. 22 (1931) (suffering excruciating pain, mental anguish, and becoming a "nervous wreck"); *Green v. T.A. Shoemaker*, 111 Md. 69, 73 A. 688 (1909) (suffering a nervous disorder that prevents employment); with cases involving severe emotional distress: *Moniodis v. Cook*, 64 Md. App. 1, 16, 494 A.2d 212, 219-20 (1985) (becoming reclusive and no longer able to perform household chores); *Vance v. Vance*, 41 Md. App. 130, 137, 396 A.2d 296, 301 (suffering "nervousness, spontaneous crying, hollowed appearance, and an inability to relate to the present"), *aff'd in part and rev'd in part*, 286 Md. 490, 408 A.2d 728 (1979).
51. 66 Md. App. 46, 502 A.2d 1057 (1986).
52. *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 59, 502 A.2d 1057, 1064, *cert. denied*, 306 Md. 118, 507 A.2d 631 (1986). The court, however, also held that punitive damages were recoverable under the plaintiff's claim for conversion because the defendant's conduct met the criterion for actual malice. *Id.* at 65, 502 A.2d at 1067. In finding that the defendant's behavior was sufficiently culpable to meet the malice test for punitive damages, but insufficiently culpable to meet the extreme and outrageous test for intentional infliction of emotional distress, the court implicitly held that actual malice does not elevate wrongful conduct to an extreme and outrageous level. See *supra* note 22 and accompanying text.
53. *Hamilton*, 66 Md. App. at 61, 502 A.2d at 1064; see RESTATEMENT (SECOND) OF TORTS § 46 comment g (1965) (conduct that otherwise would be extreme and outrageous may be privileged under some circumstances). Although the setting of the conduct is a factor in measuring its outrageousness, the setting also may mitigate what otherwise would be extreme and outrageous conduct.

The *Hamilton* court also identified the similarity between the debtor-creditor

the plaintiff "did not meekly endure the telephone calls but responded in a hostile fashion herself . . ." ⁵⁴ In finding that the plaintiff's emotional distress was not severe, the court stated, "Although [the plaintiff's] distress was keen and apparently genuine, it was not disabling. Her ego was bruised and her dignity was bent, but neither was destroyed." ⁵⁵ The court explained that "recovery [for intentional infliction of emotional distress] will be meted out sparingly, its balm reserved for those wounds that are truly severe and *incapable of healing themselves*." ⁵⁶

The court also held that the tort of negligent infliction of emotional distress is not recognized in Maryland. ⁵⁷ The tort is unnecessary, the court reasoned, because a plaintiff could recover under either a tort action for intentional infliction of emotional distress if the defendant's negligence is so extreme and outrageous as to indicate recklessness, or a "tort action for emotional distress arising out of negligent conduct" if the emotional distress is only a factor considered in measuring damages. ⁵⁸

The *Hamilton* reasoning indicates that the extreme and outrageous conduct necessary to satisfy an intentional infliction of emotional distress action must be unilateral. A combative behaviorial response by the plaintiff diminishes the legal impact of what otherwise would be extreme and outrageous conduct by the defendant because such a response is a contributing factor to the defendant's wrongful behavior. ⁵⁹ Alternatively, such a response may indicate that the plaintiff is not particularly susceptible to emotional distress. ⁶⁰ Thus, proof that the defendant's conduct is extreme and outrageous depends not only upon the defendant's conduct, but upon the plaintiff's conduct as well. ⁶¹

relationship and the employer-employee relationship. *Hamilton*, 66 Md. App. at 61, 502 A.2d at 1065; see also RESTATEMENT (SECOND) OF TORTS § 46 comment e (1965). Compare Annotation, *Recovery for Emotional Distress or its Physical Consequences Caused by Attempts to Collect Debt Owed by Third Party*, 46 A.L.R.3d 772 (1972) with Annotation, *Liability of Employer, Supervisor, or Manager for Intentionally or Recklessly Causing Employee Emotional Distress*, 86 A.L.R.3d 454 (1978).

54. *Hamilton*, 66 Md. App. at 60, 502 A.2d at 1064. The court noted that the plaintiff "did not meekly endure the telephone calls [of the creditor] but responded in a hostile fashion herself, speaking loudly and hanging up on occasion, generating . . . 'thrust and parry' . . ." *Id.* (quoting *Dick v. Mercantile-Safe Deposit & Trust Co.*, 63 Md. App. 270, 492 A.2d 674 (1985)).

55. *Hamilton*, 66 Md. App. at 61, 502 A.2d at 1064-65.

56. *Id.* at 61, 502 A.2d at 1065 (emphasis added).

57. *Id.* at 62-63, 502 A.2d at 1065 (citing *Vance v. Vance*, 286 Md. 490, 501 n.4, 408 A.2d 728, 734 n.4 (1979)). The court also stated, "Neither this court nor the Court of Appeals ever suggested that Maryland recognizes or should establish such a tort." *Hamilton*, 66 Md. App. at 62, 502 A.2d at 1065. *But see supra* note 39.

58. *Hamilton*, 66 Md. App. at 63-64, 502 A.2d at 1066.

59. HARPER, JAMES & GRAY, *supra* note 22, at 612-13 ("The courts seem disinclined to make fine distinctions and are not concerned with who started the verbal barrage or in comparative opprobrium. If people will call each other names, they can hardly expect a court to determine the winner and give solace to his victim.").

60. See *supra* text accompanying note 23.

61. The behaviorial response by the plaintiff, however, is irrelevant in determining whether the emotional distress suffered is severe because the severity of the emotional distress is measured objectively by what a person "of ordinary sensibilities

Hamilton expressly limits the type of injury that is recoverable under an intentional infliction of emotional distress action by requiring proof that the plaintiff's emotional distress be "incapable of healing itself."⁶² Whether an inability to function or tend to necessary matters, as required by prior decisions,⁶³ constitutes emotional distress incapable of healing itself is uncertain. Nevertheless, based upon *Hamilton*, plaintiffs who are unable to attend to necessary matters owing to emotional distress may be unable to recover because such disabilities ultimately might heal over time without the need for medical or psychiatric intervention.⁶⁴ In *Hamilton*, the court acknowledged that the plaintiff's emotional distress was genuine, but denied recovery because the injury was capable of healing itself. Implicitly, the court recognized that society's need to deter trivial litigation outweighs the individual's right to recover for an injury that, although genuine, would heal itself over time.

Hamilton is perhaps most significant for its confirmation of Maryland's nonrecognition of the tort of negligent infliction of emotional distress.⁶⁵ The court reasoned that negligently inflicted emotional distress without further corroboration is recoverable only where the negligence is so extreme and outrageous as to indicate recklessness, thus warranting recovery under intentional infliction of emotional distress.⁶⁶ This reasoning adequately distinguishes the difference between the requisite conduct for a negligence action and an intentional infliction of emotional distress action. Implicitly, this reasoning also distinguishes the difference between the requisite injury for each cause of action⁶⁷ and clarifies the extreme nature of the emotional distress necessary to satisfy a negligence

would undergo under the circumstances." See PROSSER & KEETON, *supra* note 11, at 63.

62. *Hamilton*, 66 Md. App. at 61, 502 A.2d at 1065.

63. See *supra* text accompanying note 34.

64. But see *Vance*, 286 Md. at 502-03, 408 A.2d at 734-35 (medical expert testimony is unnecessary where there is an insignificant temporal lapse between the defendant's negligent conduct and the plaintiff's physical injury).

65. *Accord Vance v. Vance*, 286 Md. 490, 501 n.4, 408 A.2d 728, 734 n.4 (1979). The Committee on Civil Pattern Jury Instructions cited several cases suggesting that negligent infliction of emotional distress is a cause of action in Maryland. See Maryland Civil Pattern Jury Instructions 19:7 (2d ed. 1984) ("A person who negligently causes severe mental distress to another may be held responsible."). The *Hamilton* court characterized this instruction as "misleading." *Hamilton*, 66 Md. App. at 62, 502 A.2d at 1065. *Vance* also is cited erroneously as permitting an ordinary negligence action for the infliction of emotional distress without proof of a physical injury. PROSSER & KEETON, *supra* note 11, at 364 n.59. Although *Vance* and the cases cited by the Committee on Civil Pattern Jury Instructions did involve negligent conduct that caused emotional distress, recovery was permitted only because the emotional distress resulted in a physical injury capable of objective determination. See cases cited *supra* note 50.

66. *Hamilton*, 66 Md. App. at 63, 502 A.2d at 1065-66.

67. For negligence, the emotional distress must result in a physical injury capable of objective determination. See *supra* text accompanying notes 48-50. For intentional infliction of emotional distress, the emotional distress must be severe. See *supra* text accompanying notes 27-34.

action. Courts are more willing to impose liability where the defendant acts with a high degree of moral fault.⁶⁸ Conversely, the less culpable the defendant's conduct, the more extreme the plaintiff's injury need be to constitute a cause of action. Negligence is less culpable than extreme and outrageous recklessness,⁶⁹ therefore, injury caused by negligence should be more extreme than injury caused by extreme and outrageous recklessness. As a consequence, emotional distress resulting in physical injury capable of objective determination is more extreme than severe emotional distress and should be sufficient to satisfy an action for intentional infliction of emotional distress.

Hamilton narrowly defines the legal protection for emotional distress. The severity of the emotional distress necessary to warrant recovery depends upon the culpability of the defendant's conduct. If the defendant's act is intentional or reckless, the defendant's conduct must be unilaterally extreme and outrageous, and the plaintiff's emotional distress must require medical treatment. If the defendant's act is merely negligent, the defendant's conduct need not be extreme and outrageous, but the plaintiff's emotional distress must require medical treatment and manifest itself in a physical injury capable of objective determination. Reflecting the judiciary's continued concern that trivial and fictitious claims persist in actions based upon emotional distress,⁷⁰ *Hamilton* limits the scope of liability for intentional infliction of emotional distress and clarifies the scope of liability for negligence.

Neal C. Baroody

68. See Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 878 (1939) (citing Bauer, *The Degree of Moral Fault Affecting Defendant's Liability*, 81 U. PA. L. REV. 586 (1934)).

69. Compare RESTATEMENT (SECOND) OF TORTS § 283 (1965) (defining negligence) with RESTATEMENT (SECOND) OF TORTS § 500 (1965) (defining recklessness). In Maryland, however, conduct considered negligent and conduct considered extreme and outrageous are apparently the same. See *supra* text accompanying note 47.

70. See *Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977).