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Application of Transferred Intent to Cases of Intentional Infliction of Emotional Distress

The doctrine of transferred intent¹ is a legal fiction used in cases of intentional torts. When the defendant either intends to cause harm to a person other than the plaintiff² or intends to cause a type of harm different from the actual injury suffered by the plaintiff,³ the tortious intent is "transferred" to the resulting injury of the plaintiff rendering the defendant liable for the harm he has caused. A good illustration is the shooting hypothetical proposed by Dean Prosser.⁴ The defendant shoots at a third person, intending either to hit or to scare him; he misses his intended target and the bullet travels through a fence not directly in the intended line of fire and strikes the plaintiff. The defendant is unaware of the plaintiff's presence and could not reasonably be expected to foresee the plaintiff's injury. There is no intent to injure the plaintiff and there is no negligence toward him. Although the injury to the plaintiff is accidental, the intent to commit an assault or battery upon the third person is coupled with the plaintiff's injury to render the defendant liable for battery.⁵ "The fact that the injury resulted to another than was intended does not relieve the defendant from responsibility."⁶

The origin of transferred intent can be traced to the medieval criminal law of England.⁷ In the seminal case of *The Queen v. Saunders & Archer*,⁸ defendant John Saunders tried to kill his wife because he wished to marry another woman. He put poison in a roasted apple and gave it to his wife to eat while she was sick. She later gave a part of the

1. The classic article on the subject is Prosser, *Transferred Intent*, 45 TEX. L. R. 650 (1967).

2. See *Talmage v. Smith*, 59 N.W. 656, 657 (Mich. 1894) (defendant threw a stick at one person and unintentionally hit the plaintiff); see also *Singer v. Marx*, 144 Cal. App. 2d 637, 301 P.2d 440 (1956); *Alteiri v. Colasso*, 362 A.2d 798 (Conn. 1975).

3. See *Brown v. Martinez*, 361 P.2d 152, 159-60 (N.M. 1961) (defendant shot at trespassing children to frighten them and unintentionally hit the plaintiff). See also *Vandenburgh v. Truax*, (4 Denio. 464) 47 American Decisions 268 (N.Y. 1847).

4. Prosser, *supra* note 1, at 650.

5. *Id.*

6. *Talmage v. Smith*, 59 N.W. 656, 657 (Mich. 1894).

7. See *Agnes Gore's Case*, 77 Eng. Rep. 853, 854 (1611); *The Queen v. Saunders and Archer*, 75 Eng. Rep. 706, 707-09 (1576); *Regina v. Salisbury*, 75 Eng. Rep. 158, 159-60 (1553). All of these cases were felonies.

8. 75 Eng. Rep. 706 (1576).

fruit to their infant daughter who ate it and died.⁹ Although Saunders had no intent to poison his daughter, the court found him guilty of murdering the child.¹⁰ The defendant's intent to kill his wife was attached to the resulting death of his daughter; the court "transferred" Saunders' criminal intent over to the death of his infant child.¹¹ The reasoning of the court is clear: the loss of a queen's subject caused by a person who intended to kill should not go unpunished and the defendant is not excused because he intended to kill another person.¹²

Transferred intent was first used in the emerging law of torts in England,¹³ late in the eighteenth century, to help define the cause of action of trespass.¹⁴ The doctrine was used only once more in tort law in England¹⁵ and then mysteriously disappeared.¹⁶ In the United States, however, the doctrine has been applied in many intentional tort cases when the defendant intended to injure a person other than the plaintiff¹⁷ and when the defendant's actions formed the basis of an intentional tort other than one that he intended.¹⁸

Perhaps in a mistaken belief that the doctrine originated in the old common-law action of trespass,¹⁹ transferred intent has been restricted to the five intentional torts that arose out of the trespass cause of action: assault, battery, false imprisonment, trespass to chattels, and trespass to land.²⁰ The purpose of this comment is to show that the modern policy reasons that support the application of transferred intent in these five traditional intentional torts also support the application of this doctrine to the recently recognized²¹ tort of intentional infliction of emo-

9. *Id.* at 707.

10. *Id.* at 708.

11. *Id.*

12. *Id.*

13. *Scott v. Shepherd*, 96 Eng. Rep. 525 (1773).

14. Prichard, M.J., *Scott v. Shepherd* (1773) and the Emergence of the Tort of Negligence: Selden Society lecture delivered in the Old Hall of Lincoln's Inn, July 4, 1973, 4-7 (Selden Society, London, 1976).

15. *James v. Campbell*, 172 Eng. Rep. 1015, 1016 (1832).

16. Prosser, *supra* note 1, at 654.

17. *Lopez v. Surchia*, 112 Cal. App 2d 314, 318, 246 P.2d 111, 113 (1952) (shooting); *Carnes v. Thompson*, 48 S.W. 2d 903, 904 (Mo. 1932) (striking); *Singer v. Marx*, 144 Cal. App. 2d 637, 642, 301 P. 2d 440, 442-43 (1956) (rock-throwing).

18. Thus one who intends to frighten people by shooting at them (assault) is liable for battery when the bullet unforeseeably hits a third person. *Brown v. Martinez*, 361 P.2d 152, 159-60 (N.M. 1961).

19. See, e.g., Prosser, *supra* note 1, at 650. See *infra* text accompanying notes 84-136 (the author's explanation of why the view is mistaken).

20. See Prosser, *supra* note 1, at 655.

21. The following states have now recognized intentional infliction of emotional distress as an independent tort: *Savage v. Boies*, 272 P.2d 349 (Ariz. 1954); *Chicago, Rock Island & Pac. Ry. v. Caple*, 179 S.W.2d 151 (Ark. 1944); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Hiers v. Cohen* 329 A.2d 609 (Conn. Sup. Ct. 1973); *Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956 (Fla. Dist. Ct. App. 1979); *Dawson v. Associates Financial Services Co. of Kansas*, 529 P.2d 104 (Kan. 1974); *Knierim v. Izzo*, 174 N.E.2d 157 (Ill. 1961); *Aetna Life Ins. Co. v. Burton*, 12 N.E.2d 360 (Ind. App. 1938); *Curnett v. Wolf*, 57 N.W.2d 915 (Iowa 1953);

tional distress. This comment will document the history of transferred intent and its relation to the medieval writ of trespass to determine if historical reasons exist for limiting the doctrine to the traditional intentional torts. This comment next will examine the public policy reasons that preclude the use of transferred intent. Finally, a means of applying transferred intent to allow recovery in cases of intentional infliction of emotional distress will be advanced. Since intentional infliction of emotional distress is a cause of action that, in some respects, differs from other intentional torts,²² a brief examination of the history and characteristics of this tort²³ is necessary to understand why transferred intent has not yet been applied in cases of intentional infliction of emotional distress.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of emotional distress developed slowly through case law during the course of the twentieth century.²⁴ In California, the law did not accord independent legal protection to an individual's interest in freedom from emotional anguish²⁵ until 1952 when the California Supreme Court decided the landmark case of *State Rubbish Collector's Ass'n v. Siliznoff*.²⁶ Due to the recent recognition of intentional infliction of emotional distress, the full contours of this new tort have not yet been developed²⁷ and in this respect, the law is clearly in a process of growth.²⁸ In particular, when intentionally tortious conduct is directed at a third person, the doctrine of transferred intent has not been applied²⁹ and courts have generally allowed the plaintiff to recover only when the harm was reasonably foreseeable to the defendant.³⁰

Quina v. Robert's, 16 So. 2d 558 (La. Ct. App. 1944); Agis v. Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976); Warren v. June's Mobile Home Village & Sales, Inc., 239 N.W.2d 380 (Mich. App. 1976); Saenger Theatres Corp. v. Herndon, 178 So. 86 (Miss. 1938); La Salle Extension Univ. v. Fogarty, 253 N.W. 424 (Neb. 1934); Burrus v. Nevada, Cal., Or. R.R., 145 P. 926 (Nev. 1915), *error dismissed*, 244 U.S. 103 (1917); Mahunkashey v. Mahunkashey, 113 P.2d 190 (Okla. 1941); Rockhill v. Pollard, 485 P.2d 28 (Or. 1971); First Nat'l. Bank v. Bragdon, 167 N.W.2d 381 (S.D. 1969); Stafford v. Steward, 295 S.W.2d 665 (Tex. Civ. App. 1956); Womack v. Eldridge, 210 S.E.2d 145 (Va. 1974); Contreras v. Crown Zellerbach Corp. 565 P.2d 1173 (Wash. 1977); Alsteen v. Gehl, 124 N.W.2d 312 (Wis. 1963).

22. See *infra* text accompanying notes 187-92.

23. The classic article on this subject is Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

24. See generally W. PROSSER, LAW OF TORTS, 51-60 (4th ed. 1971).

25. With the exception of the tort of assault, of course. RESTATEMENT (SECOND) OF TORTS §24, comment c (1961).

26. 38 Cal. 2d 330, 240 P.2d 222 (1952).

27. RESTATEMENT (SECOND) OF TORTS §46, comment c (1961).

28. See *id.*; PROSSER, *supra* note 24, at 50.

29. See PROSSER, *supra* note 24, at 60-61.

30. See *id.*

A. History

"Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act causes that alone,"³¹ said Lord Wensleydale in the famous English case of *Lynch v. Knight*.³² His phrase commanded uncritical acceptance by the courts until the beginning of the twentieth century.³³ Intentional infliction of emotional distress, standing alone, could not support a cause of action³⁴ although if an independent tort such as assault,³⁵ battery,³⁶ or seduction³⁷ could be proved, damages for the resulting emotional distress could be recovered.³⁸ Injury from mental suffering alone was considered "too remote"³⁹ or "easily feigned"⁴⁰ and judges feared that allowing a recovery of damages for fright or shock would soon open a "wide door"⁴¹ for injuries resting upon conjecture or speculation.⁴² Gradually, courts of law rejected these contentions, recognizing that the nervous system is as much a part of the human body as bones or muscles.⁴³ Decisions now recognize⁴⁴ that emotional damage is only slightly more difficult to measure than physical pain⁴⁵ and disturbance of emotional tranquility is a natural consequence of certain types of outrageous conduct.⁴⁶ An individual who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is liable for the resulting mental harm.⁴⁷

31. *Lynch v. Knight*, 11 Eng. Rep. 854, 863 (1861).

32. *Id.*

33. Magruder, *supra* note 23, at 1033, 1035. *Wilkinson v. Downton*, 2 Q.B. 57 (1897) is generally thought to be the breakthrough case. See PROSSER, *supra* note 24, at 55.

34. PROSSER, *supra* note 24, at 49; RESTATEMENT (SECOND) OF TORTS §46, comment b (1961).

35. *Kline v. Kline*, 64 N.E. 9, 10 (Ind. 1902); *Trogden v. Terry*, 90 S.E. 583, 585 (N.C. 1916).

36. *Draper v. Baker*, 21 N.W. 527, 530 (Wis. 1884); *Williams v. Underhill*, 71 N.Y.S. 291, 292-93 (App. Div. 1901).

37. *Anthony v. Norton*, 56 P. 529, 530 (Kan. 1899).

38. Justice Traynor recognized this anomaly and used it as the overriding factor in recognizing the independent tort of intentional infliction of emotional distress. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952).

39. *Chicago, B. & Q.R. Co. v. Gelvin*, 238 F. 14, 24 (1917).

40. *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 355 (N.Y. 1896).

41. 238 F. at 24.

42. See PROSSER, *supra* note 24, at 49-51.

43. See *Watson v. Dilts*, 89 N.W. 1068, 1069 (Iowa 1902); *Purcell v. St. Paul City Ry. Co.*, 50 N.W. 1034, 1035 (Minn. 1892).

44. See *Knierim v. Izzo*, 174 N.E. 2d 157, 163-65 (Ill. 1961) (for an excellent summary describing the establishment of intentional infliction of emotional distress as an independent tort).

45. *Hargis v. Knoxville Power Co.*, 94 S.E. 702, 703 (N.C. 1917). See Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 503-06 (1922).

46. PROSSER, *supra* note 24, at 51; Throckmorton, *Damages For Fright*, 34 HARV. L. REV. 260, 268-72 (1921). See *Alabama Fuel & Iron Co. v. Baladoni*, 73 So. 205, 207 (Ala. 1916).

47. RESTATEMENT (SECOND) OF TORTS §46 comment d (1961). "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. . . . Generally, the case is one in which the recitation of the facts to an average member of the community would lead him to exclaim 'Outrageous'." *Id.* See also PROSSER, *supra* note 24, at 56.

For many years, courts would not allow recovery for either negligently or intentionally inflicted emotional distress unless the plaintiff suffered physical harm such as a miscarriage or physical shock.⁴⁸ This was believed to be an additional guarantee of the sincerity of the plaintiff's claim.⁴⁹ In 1952, the California Supreme Court eliminated this requirement in *State Rubbish Collector's Ass'n v. Siliznoff*,⁵⁰ establishing intentional infliction of emotional distress as an independent cause of action. Plaintiffs no longer need to suffer any physical consequences from the defendant's conduct to recover.⁵¹ The court, recognizing that claims for mental suffering often are a major element in damages for other torts,⁵² stated: ". . . it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury."⁵³

Intentional infliction of emotional distress is now a clearly recognized, independent tort.⁵⁴ A California court of appeal recently stated:

The argument that emotional disturbance is a trivial injury, not equal with physical injury, is an antiquated concept which the advance of modern psychology has repudiated; research has shown that mental trauma can be just as debilitating as a physical paralysis.⁵⁵

Emotional damage is now recognized as equal to the harm resulting from other intentional torts.⁵⁶

Clearly, a developing trend in tort law is bringing the intentional infliction cause of action within the body of law common to the traditional intentional torts.⁵⁷ The doctrine of transferred intent, although consistently applied to the traditional intentional torts,⁵⁸ has not been used in cases of intentional infliction of emotional distress.⁵⁹ When intentional harm is directed at a person other than the plaintiff⁶⁰ or when

48. See *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 680, 44 P. 320, 322 (1896); PROSSER *supra* note 24, at 59-60.

49. See RESTATEMENT (SECOND) OF TORTS §46, comment k (1961); PROSSER, *supra* note 24, at 59-60.

50. 38 Cal.2d 330, 240 P.2d 282 (1952).

51. *Id.* at 338, 240 P.2d at 286.

52. *Id.*; see, e.g., *Deevey v. Tassi*, 21 Cal. 2d 109, 120, 130 P.2d 389, 396 (1942).

53. 38 Cal. 2d at 338, 240 P.2d at 286.

54. See generally 23 AM. JUR. PROOF OF FACTS 185-219 (1969).

55. *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 933, 122 Cal. Rptr. 470, 481 (1975).

56. Liability for the several established intentional torts is proven when the elements of the tort itself are established, therefore no special element of damages need be shown. See PROSSER, *supra* note 24, at 35, 38, 43. See generally RESTATEMENT (SECOND) OF TORTS §870, comments a, c (1961).

57. See *Richardson v. Pridmore*, 97 Cal. App. 2d 124, 130-31, 217 P.2d 113, 117 (1950). See generally RESTATEMENT (FIRST) OF TORTS §46 (1948 Supplement) at 616; RESTATEMENT (SECOND) OF TORTS §46, comment c (1961).

58. See *supra* text accompanying notes 17-18.

59. See *infra* text accompanying notes 153-70.

60. RESTATEMENT (SECOND) OF TORTS §46, comment l (1961) See cases cited in notes 153-62, *infra*.

the defendant intends to invade a plaintiff's legally protected interest other than freedom from emotional distress,⁶¹ the doctrine of transferred intent is not applied⁶² even though the defendant's acts caused the plaintiff to suffer severe mental harm. For reasons that will be made clear,⁶³ the law has not expanded the application of transferred intent to cases of intentional infliction of emotional distress and therefore has not given equal recognition to this new tort. Instead, as the next section of this comment demonstrates, plaintiffs are limited to stating a cause of action when the defendant has either intentionally or negligently caused the plaintiff's emotional distress.

B. Limitations on Recovery for Emotional Distress When The Defendant's Conduct is Directed at a Third Person

When the defendant directs extreme and outrageous conduct at a third person and the plaintiff suffers resulting severe emotional distress, courts have been hesitant to allow a recovery.⁶⁴ As commentators have noted,⁶⁵ the doctrine of transferred intent, applied in similar circumstances to other intentional torts,⁶⁶ is not used in cases of emotional distress.⁶⁷ With one exception,⁶⁸ courts have allowed the plaintiff to recover only under circumstances in which the defendant could reasonably have anticipated the plaintiff's emotional disturbance.⁶⁹

Courts have used two theories—intentional tort and negligence—to allow plaintiffs a recovery of damages for emotional distress when they were not the intended victims.⁷⁰ First, under an intentional tort theory, courts have imposed liability on defendants when their outrageous conduct was so *substantially certain* to cause the plaintiff's emotional distress that, under the circumstances, their conduct must be treated as intended to cause emotional distress in the plaintiff as well as in any third persons.⁷¹ Second, under a negligence theory, liability is based upon the view that the defendant's intentionally harmful conduct di-

61. RESTATEMENT (SECOND) OF TORTS §47 (1961).

62. See *infra* text accompanying notes 153-66.

63. See *infra* text accompanying notes 167-70.

64. PROSSER, *supra* note 24, at 59-60; see, e.g., Taylor v. Vallelunga, 171 Cal. App. 2d 107, 339 P.2d 910 (1959)(discussed *infra* in text accompanying notes 76-80).

65. See Prosser, *supra* note 1, at 657; Magruder, *supra* note 23, at 1042.

66. See, e.g., Brown v. Martinez, 361 P.2d 152, 159-60 (N.M. 1961) (defendant fired a gun to frighten trespassing children and unforeseeably hit the plaintiff).

67. *Id.*; see RESTATEMENT (SECOND) OF TORTS 46, comment 1 (1961).

68. Lambert v. Brewster, 125 S.E. 244 (W. Va. 1924) (discussed extensively *infra* in text accompanying notes 173-79).

69. PROSSER, *supra* note 24, at 60-61.

70. *Id.*

71. See Rogers v. Williard, 223 S.W. 15 (Ark. 1920); Jeppsen v. Jensen, 155 P. 429 (Utah 1916); see also RESTATEMENT (SECOND) OF TORTS §46, comment 1 (1961).

rected at a third person is also negligence toward bystanders when under the circumstances, there is an *unreasonable risk* that a bystander will suffer bodily harm or emotional distress from the defendant's acts.⁷² In all of these cases, recovery has been limited to plaintiffs who were present at the time of the tortious conduct⁷³ and whose presence was known to the defendant.⁷⁴ Under both theories, unless the plaintiff's emotional injury is reasonably foreseeable to the defendant at the time of his tortious actions, the court will deny the plaintiff a recovery for emotional distress caused by the defendant's conduct.⁷⁵

Under the intentional tort theory, when the facts of a case do not allow the court to infer that the defendant intended his tortious conduct *toward the plaintiff*, recovery is denied. In the California case of *Taylor v. Vallelunga*,⁷⁶ plaintiff Gail Taylor alleged that she witnessed a beating upon her father which caused her severe fright and emotional distress.⁷⁷ A California court of appeal held that the plaintiff could not recover because she did not plead that the defendants *intended* to cause her emotional distress. The court defined "intent" as acts done by the defendants for the purpose of causing her distress or acts done with knowledge on the part of the defendants that severe emotional distress would be substantially certain to be produced by their conduct.⁷⁸ The case was dismissed.⁷⁹ Similarly, under the negligence theory, if the plaintiff's emotional harm is not reasonably foreseeable to the defendant at the time, recovery is also denied.⁸⁰

Using these two theories of recovery, courts have required that the plaintiff's emotional distress be reasonably foreseeable to the defendant, therefore, the application of transferred intent has effectively been precluded in cases of emotional distress.⁸¹ When a defendant intends

72. See *Hill v. Kimball*, 13 S.W. 59, 59-60 (Tex. 1890).

73. Apparently no reported case exists which allows recovery when the plaintiff was not present at the time of the defendant's tortious conduct. Magruder, *supra* note 23, at 1044, (cited in PROSSER, *supra* note 24 at 61, n.31). See e.g., *Koontz v. Keller*, 3 N.E.2d 694 (Ohio Ct. App. 1936).

74. *Goddard v. Walters*, 82 S.E. 304, 305-06 (Ga. App. Ct. 1914); *Reed v. Ford*, 112 S.W. 600, 601 (Ky. 1908); *Phillips v. Dickerson*, 85 Ill. 11, 14-16 (1877); *Hutchinson v. Stern*, 101 N.Y.S. 145, 146 (N.Y. App. Div. 1906).

75. See PROSSER, *supra* note 24, at 60-61.

76. 171 Cal. App. 2d 107, 339 P.2d 910 (1959); see also *Vescovo v. New Way Enterprises, Ltd.* 60 Cal. App. 3d 582, 588, 130 Cal. Rptr. 86, 89-90 (1976).

77. 171 Cal. App. 2d at 109, 339 P.2d at 911.

78. *Id.* The court referred to Illus. 3 of the Restatement (First) of Torts §46 (1948 Supp.): "A is sitting on her front porch watching her husband B, who is standing on the sidewalk. C, who hates B and is friendly to A, whose presence is known to him, stabs B, killing him. C is liable to A for the mental anguish, grief and horror he causes." (Emphasis added by the court). *Id.*

79. *Id.* at 110, 339 P.2d at 912.

80. See cases cited *infra* notes 153, 158, 162.

81. See RESTATEMENT (SECOND) OF TORTS §46, comment 1 (1961). When the defendant intends a tortious interference with the plaintiff and plaintiff's only resulting injury is emotional distress, the tort is not transferred and recovery is also denied. See *id.* §47.

to harm a third person, this intent cannot be "transferred" to the emotional distress suffered by the plaintiff because the mental injury must be foreseeable to the defendant.

Commentators have advanced both historical⁸² and public policy⁸³ reasons to justify the preclusion of transferred intent from cases of emotional distress. The next section of this comment will trace the development of transferred intent and examine the historical justifications for limiting the doctrine to the traditional intentional torts.

TRANSFERRED INTENT

The legal fiction of transferring a defendant's wrongful intent originally was first used in English criminal cases during the sixteenth century.⁸⁴ Transferred intent was not applied in a civil case until two hundred years later when an English Assize Court used the concept in a trespass action of battery.⁸⁵ The doctrine remained peculiar to trespass cases of battery for almost a century afterwards. The application of transferred intent was not expanded to other intentional torts until the distinction between the actions of trespass and case had become unimportant, and liability became more dependent upon the intention of the defendant.⁸⁶

A. *Development From Appeals of Felony*

Legal historians are in disagreement as to the origins of the medieval cause of action known as trespass,⁸⁷ but clearly this action had mixed civil and criminal elements.⁸⁸ The essence of the action was a complaint brought by a private individual asserting damages for the defendant's direct interference with the person or property of the accuser.⁸⁹ Every action of trespass brought in the royal courts also asserted a breach of the king's peace,⁹⁰ in the sense that the alleged actions were a violation of the king's law.⁹¹ Defendants convicted in a trespass action faced imprisonment unless they paid a fine directly to the king's treasury.⁹² The writ of trespass was aimed at both a punitive

82. See Prosser, *supra* note 1, at 652-58.

83. See RESTATEMENT (SECOND) OF TORTS §46, comment 1 (1961).

84. See *supra* note 7 and accompanying text.

85. See *infra* notes 112-24 and accompanying text.

86. See *infra* notes 131-36 and accompanying text.

87. See FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW ch. 3 (1949) (explanation of the various theories of the origin of the writ of trespass).

88. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 572-73 (1895).

89. FIFOOT, *supra* note 87, at 46.

90. *Id.* at 44-45; MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 283, 286-87 (2d ed. 1981).

91. MILSOM, *supra* note 90, at 286.

92. POLLOCK, *supra* note 88, at 464.

and exemplary result,⁹³ and dealt with certain wrongs that today, would be considered both criminal and civil.⁹⁴ Therefore, in this sense, a cause of action in trespass can be considered as both a tort and a crime.

Dean Prosser, in his article on transferred intent,⁹⁵ asserts that the origins of this doctrine "lie deep in the old common-law action of trespass;"⁹⁶ yet the first cases in which the fiction was used were appeals of felony,⁹⁷ a cause of action distinct from trespass.⁹⁸ Felonies were purely criminal in character and the king's courts were understandably concerned with punishment of killers whose only mistake was the identity of their victim.⁹⁹ Even if the trespass writ did develop from appeals of felony,¹⁰⁰ at the time of the first cases of transferred intent¹⁰¹ the two actions were clearly separate, each one having distinctive characteristics.¹⁰²

Although the action of trespass retained criminal *characteristics* until the seventeenth century,¹⁰³ the writ was clearly developing toward a purely civil action throughout its history. In the thirteenth century, accusations of a "fictitious" breach of the king's peace were placed in writs of trespass to gain the jurisdiction of royal courts¹⁰⁴ and by the late fourteenth century the king's courts were hearing the writs without the allegation of *contra pacem regis*.¹⁰⁵ In these writs of trespass, the royal courts insisted on plaintiff's explanation of how the defendant's conduct amounted to a wrong against him, even though the conduct did not amount to a breach of the king's peace.¹⁰⁶ By the early sixteenth century, at the time of the first appearance of transferred intent in felony cases, the meaning of *contra pacem* in trespass writs had been reduced to a nominal fine paid to the king.¹⁰⁷ While the writ of trespass rapidly developed into a purely civil action,¹⁰⁸ appeals of felony

93. *Id.* at 573.

94. Thus one writ of trespass asserted assault, battery, robbery, and "other outrages." *Lorimer v. Comyn*, 55 Selden Society Reports 64 (1280). See FIFOOT, *supra* note 87, at 55; PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 458 (5th ed. 1956). See generally FINCH, H., SIR, A SUMMARY OF THE COMMON LAW OF ENGLAND, tables 12, 14, 15 (London, 1654).

95. Prosser, *supra* note 1.

96. *Id.* at 650.

97. See note 7, *supra*.

98. POLLOCK, *supra* note 88, at 464-67, 572; *Milsom*, *supra* note 90, at 285.

99. See *supra* text accompanying notes 11 and 12.

100. The theory is discussed in FIFOOT, *supra* note 87, at 44-47.

101. The late 16th century. See *supra* note 7.

102. See MILSOM, *supra* note 90, at 404.

103. Prosser, *supra* note 1, at 651.

104. MILSOM, *supra* note 90, at 287, 288-89; POLLOCK, *supra* note 88, at 464.

105. MILSOM, *supra* note 90, at 291.

106. Prichard, *supra* note 14, at 8.

107. MILSOM, *supra* note 90, at 309.

108. POLLOCK, *supra* note 88, at 464; PLUCKNETT, *supra* note 94, at 458.

remained a distinct group of crimes broadly marked off from other offenses.¹⁰⁹ Felonies were unemendable crimes that deserved a judgment of maiming or death and forfeiture of property to the lord and king.¹¹⁰ Limited to cases of a felony, transferred intent was not applied in a civil case until the late eighteenth century when trespass actions had become purely civil in character.¹¹¹

B. Application in Tort

Transferred intent was not carried over from the criminal law into cases of tort because of their common origins in the writ of trespass, rather the doctrine was applied in the eighteenth century battery case of *Scott v. Shepherd*¹¹² to help define the writ of trespass.¹¹³ In this celebrated English case,¹¹⁴ the defendant Shepherd threw a lighted squib,¹¹⁵ made of gunpowder and other combustibles, into a crowded market-house on a fair day at Milbourne Port. The squib fell next to a bystander, Willis, who "instantly and to prevent injury to himself and the wares of William Yates"¹¹⁶ threw it across the square; the squib next fell close to another bystander, Ryal, who also threw it away to prevent his own injury. The squib's final resting place was near the plaintiff's face where it exploded and put out one of his eyes.¹¹⁷ Scott sued Shepherd for the damage to his eye in an action of trespass.¹¹⁸

The decision of the court assumes the liability of the defendant.¹¹⁹ The only issue was whether, on the facts of the case, the plaintiff should bring an action in trespass or sue on the case.¹²⁰ The justices took the settled distinction to be that when the injury is immediate and direct an action of trespass will lie, whereas, when damages are only consequential an action on the case must be brought.¹²¹ The majority of justices believed that the injury to Scott was the direct result of Shepherd's acts, therefore the action for trespass would lie in the circumstances of this

109. POLLOCK, *supra* note 88, at 470. "The word felony is also being used to signify the moral guilt which deserves a punishment of the highest order. Homicide by felony is frequently contrasted with homicide by self-defense. " *Id.* at 468.

110. See MILSOM, *supra* note 90, at 405-06; O. PHILLIPS & A. HUDSON, A FIRST BOOK OF ENGLISH LAW 269 (7th ed. 1977).

111. See *supra* notes 103-08.

112. 96 Eng. Rep. 525 (1773).

113. Prichard, *supra* note 14, at 4.

114. See *id.* at 1.

115. A firecracker that hisses and spurts, ending in an explosion. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1765 (2d ed. 1960).

116. 96 Eng. Rep. at 526.

117. *Id.*

118. *Id.* at 525.

119. *Id.* at 526; see Prichard, *supra* note 14, at 4.

120. 96 Eng. Rep. at 526; Prichard, *supra* note 14, at 4.

121. 96 Eng. Rep. at 526, 528. See generally MILSOM, *supra* note 90, at 312-13 (for discussion of the distinction).

case:¹²²

The throwing [of] the squib was an act unlawful. . . . So far mischief was originally intended. . . . Whatever mischief therefore follows, he is the author of it: *Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows.¹²³

As part of Chief Judge de Grey's strained effort¹²⁴ to classify plaintiff's injuries as the direct result of the defendant's actions, the principle of transferred intent was used.

These cases demonstrate that transferred intent did not originate in writs of trespass. The doctrine actually was borrowed from the criminal law and used to bring cases of battery in which the defendant did not intend harm to the plaintiff within the scope of the trespass cause of action.¹²⁵ The concern of the courts was in the distinction between direct and consequential harm:¹²⁶ the difference between actions of trespass and case.¹²⁷ The plaintiff's tortious intent to commit a battery made any resulting harm direct damage that was therefore within the scope of the trespass cause of action.¹²⁸ Each intentional tort had developed specific elements that stated a cause of action¹²⁹ and transferred intent became a means of establishing the direct causal relation between the defendant's acts and the plaintiff's harm in cases of battery.¹³⁰

Transferred intent was not expanded to other intentional torts until the distinction between the writs of trespass and case had become unimportant.¹³¹ As the old forms of pleading disappeared, a modern conception of liability dependent mainly upon the intention of the actor

122. 96 Eng. Rep. at 526, 527, 528 (Nares, J.; Gould, J.; De Grey, C.J.).

123. *Id.* at 528 (opinion of De Grey, C.J.).

124. Prichard, *supra* note 14, at 4.

125. In addition to *Scott v. Shepherd*, see also *James v. Campbell*, 172 Eng. Rep. 1015, 1016 (1832) (defendant, fighting with a third person, swung and unintentionally hit the plaintiff).

126. See *supra* text accompanying note 123. The emphasis was on the relation between the act and the injury. See F. HARPER & F. JAMES, *THE LAW OF TORTS* 218 (1956).

127. See Prichard, *supra* note 14, at 6.

128. See *supra* text accompanying note 122.

129. See generally *RESTATEMENT (SECOND) OF TORTS*, ch. 2, introductory note (1961).

130. See *Anderson v. Arnold's Ex'r.*, 79 Ky. 370, 372-73 (1881). See also *STREET*, 1 *FOUNDATIONS OF LEGAL LIABILITY, TORTS* 4-5 (1906).

131. In *Vandeburgh v. Truax* (4 Denio. 464) 47 American Decisions 268 (N.Y. 1847), the defendant was chasing a boy with a pick-ax and the boy ran into the plaintiff's store and knocked the faucet from a cask of wine, spilling the contents. The court found the defendant liable, stating: "When one does an illegal or mischievous act, which is likely to prove injurious to others [tortious intent]. . . he is answerable, in some form of action, for all the consequences which may directly and naturally result from his conduct." (emphasis added). *Id.* at 269. The court added: "It is not necessary to inquire whether the action should be trespass or case; for this declaration may as well be considered one thing as the other. . ." *Id.* at 271.

In *Dangerfield v. Thompson*, 74 Va. (33 Gratt. 136) 402 (1880) defendant shot at the plaintiff's door and unintentionally hit the plaintiff. The court declared: "allegations of this declara-

developed.¹³² Indirect or intervening forces causing the plaintiff's harm generally do not prevent an imposition of liability on the defendant when his tortious conduct is intentional.¹³³ As courts began emphasizing the defendant's intent to commit a wrongful act,¹³⁴ transferred intent was applied to other intentional torts.¹³⁵ Thus, application of transferred intent cannot be limited to the traditional torts on a historical basis: transferred intent was not used in civil cases until the eighteenth century and the doctrine did not share its origins in the old writs of trespass with the traditional intentional torts.

After the disappearance of the medieval forms of pleading, courts began to transfer the tortious intent of defendants to the resulting injuries of plaintiffs in an increasing number of cases.¹³⁶ Instead of serving to fulfill the technical requirements of the writ of trespass in battery cases, however, modern policy reasons developed to support the application of transferred intent in other intentional tort cases.

C. Modern Public Policy Reasons Supporting Transferred Intent

The policy reasons justifying the use of transferred intent in the older criminal cases were similar to those used to support the application of the doctrine in early tort decisions as well.¹³⁷ Defendants were held liable for all the natural consequences of their unlawful or wanton original acts, however remote.¹³⁸ A person was presumed to intend the consequences of his unlawful act because the act itself was wrong and the accidental nature of the injury to another person could not be used to excuse the defendant from liability.¹³⁹ More recent decisions have emphasized policies supporting transferred intent that have broadened

tion. . . certainly make out a case for trespass. . . . And under our statute, wherever an action of trespass will lie, trespass on the case may be maintained. . . ." *Id.* at 404.

In *Rex v. Huggins*, 92 Eng. Rep. 518 (K.B. 1730) a warden of the Fleet Street prison was held guilty of murder because he unlawfully detained the decedent, a prisoner, within a dangerously unclean room. Dean Prosser cites this case as an example of transferred intent applied to false imprisonment but a close examination reveals the court held that the defendant intended the murder of the decedent, or, in the alternative, that the defendant knew to a substantial certainty the decedent would at least suffer grave harm. *Id.* at 521-22.

132. HARPER & JAMES, *supra* note 127, at 218.

133. *Tate v. Canonica*, 180 Cal. App. 2d 898, 907-09, 5 Cal. Rptr. 28, 35-36 (1960). See HARPER & JAMES, *supra* note 112, at 218. See generally Note, *The Tie That Binds: Liability of Intentional Tort-Factors for Extended Consequences*, 14 STAN. L. REV. 362 (1952).

134. See *Vandenburgh v. Truax*, (4 Denio. 464) 47 American Decisions 268 at 269.

135. See, e.g., *Du Lac v. Perma Trans Products, Inc.*, 103 Cal. App. 3d 937, 943-44, 163 Cal. Rptr. 335, 338 (1980).

136. See generally Prosser, *supra* note 1, at 655, n.n. 35, 36, 37.

137. Compare cases cited *supra* note 7, with case cited *supra* note 12.

138. See *Isham v. Dow's Estate*, 41 A. 585, 585 (Vt.1898) (defendant shot plaintiff's dog which ran into plaintiff, knocking her down); see also *Wyant v. Crouse*, 86 N.W. 527, 529 (Mich. 1901); *Drum v. Miller*, 47 S.E. 421, 422 (N.C. 1904).

139. See *Carnes v. Thompson*, 48 S.W.2d 903, 904 (Mo. 1932) (defendant struck at plaintiff's husband with pliers, hitting plaintiff).

and refined the base upon which this doctrine stands. These cases of unprivileged intentional harm place the risk of this conduct upon the intentional wrongdoer rather than upon his innocent victim.¹⁴⁰

As long as the principle of compensation in tort cases is based largely upon the concept of the defendant's fault,¹⁴¹ the moral culpability of the defendant's conduct will be a strong factor in deciding liability.¹⁴² Aside from moral delinquency, conduct intended to cause harm has much less "social utility" than acts that negligently cause injury.¹⁴³ While liability in negligence cases is generally limited to the risks of reasonably foreseeable harm,¹⁴⁴ this limitation is not applied to cases in which the defendant intended to cause harm.¹⁴⁵ The problem of actual causation is the same in cases of negligence, reckless misconduct, and intentional wrongs, but the rules determining the limits of compensation for remote harm are most severe upon the intentional wrongdoer.¹⁴⁶ Part of this severity is the doctrine of transferred intent.¹⁴⁷

When the plaintiff suffers severe emotional distress as a result of the defendant's intentionally tortious conduct, transferred intent is not applied by the courts.¹⁴⁸ As Dean Prosser has noted,¹⁴⁹ there seems to be little reason to apply the fiction when the plaintiff suffers physical harm, and to reject it when mental damage is inflicted.¹⁵⁰ As between an innocent plaintiff suffering mental distress and the defendant who intended harm toward another person, it would seem an obvious sense

140. See PROSSER, *supra* note 24, at 18-19.

141. See Vold, *Legal Allocation of Risk in Assault, Battery and Imprisonment*, 17 NEB. L. BULL. 149, 163 (1938).

142. *Amaya v. Home Ice, Fuel, & Supply Co.*, 59 Cal. 2d 295, 314-15, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45, (1963); *Rowland v. Christian*, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968); see Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 588-92 (1933); PROSSER, *supra* note 24, at 30-31.

143. 59 Cal. 2d at 314-15, 379 P.2d at 525, 29 Cal. Rptr. at 45.

144. See generally HARPER & JAMES, *supra* note 127, at 929-30; PROSSER, *supra* note 24, at 145-46.

145. 59 Cal. 2d at 314-15, 379 P.2d at 525, 29 Cal. Rptr. at 45. The limitation on liability for defendants engaged in intentionally tortious conduct is not foreseeability, but rather a concept of "natural" outcome. "In the later case [intentional wrong] the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not. . . ." *Drum v. Miller*, 47 S.E. 421, 423 (N.C. 1904); see also *Huckey v. Spangler*, 521 S.W.2d 568, 574 (Tenn. 1975).

146. Bauer, *supra* note 142, at 588. "Causation, as distinguished from duty, is purely a matter of producing a subsequent event. In determining how far the law will trace causation and afford a remedy, the facts as to the defendant's intent, his imputable knowledge, or his justifiable ignorance are often taken into account. The moral element is here the factor that has turned close cases one way or the other. For an intended injury the law is astute to discover even very remote causation." *Derosier v. New England T. & T. Co.*, 130 A. 145, 152 (N.H. 1925) (Snow, J.).

147. *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 101 (N.Y. 1928) (Cardozo, C.J.).

148. See *infra* text accompanying notes 152-67.

149. PROSSER, *supra* note 24, at 60.

150. Compare *Corn v. Sheppard*, 229 N.W. 869, 871 (Minn. 1930) (recovery allowed when defendant shot at a dog, missed, and unforeseeably hit plaintiff) with *Renner v. Canfield*, 30 N.W. 435, 435-36 (Minn. 1886) (recovery denied when defendant shot at a dog and unforeseeably caused emotional shock to the nearby plaintiff).

of justice to place liability on the guilty party.¹⁵¹ In the next section, this comment will briefly describe several important decisions exemplifying the refusal of courts to apply transferred intent to cases of intentional infliction of emotional distress.

D. Transferred Intent in Cases of Emotional Distress

Courts consistently refuse to transfer the defendant's tortious intent to the plaintiff's resulting severe emotional distress. Recovery is denied if the plaintiff's harm was unforeseeable to the defendant at the time of his acts.¹⁵²

In *Phillips v. Dickerson*,¹⁵³ the plaintiff overheard defendant threaten her husband with a knife.¹⁵⁴ The plaintiff heard the exchange from her bed in a room that opened onto the back porch where the incident took place.¹⁵⁵ As a result of the assault on her husband, the plaintiff began suffering pains that eventually resulted in a miscarriage.¹⁵⁶ The court declined to hold the defendant liable since there was no evidence that he knew of the plaintiff's presence and could not reasonably have foreseen the results of his misconduct.¹⁵⁷

In *Goddard v. Waters*¹⁵⁸ the defendant assaulted the plaintiff's husband in front of their home with a revolver.¹⁵⁹ Plaintiff, who watched the incident from the front door of the house, suffered severe emotional distress and eventually had a miscarriage.¹⁶⁰ The court held that the plaintiff could not recover since the acts complained of were not directed at her, nor was it foreseeable to the defendant that she would suffer any injuries.¹⁶¹

In *Ellsworth v. Massacar*,¹⁶² the defendants forcibly abducted the plaintiff's husband and later forced him to submit to various indignities¹⁶³ designed to test his loyalty to America.¹⁶⁴ The plaintiff, although

151. Prosser, *supra* note 1 at 661.

152. See *infra* note 167 and accompanying text.

153. 85 Ill. 11 (1877).

154. *Id.* at 12-13.

155. *Id.*

156. *Id.*

157. *Id.* at 15.

158. 82 S.E. 304 (Ga. 1914).

159. *Id.* at 304.

160. *Id.*

161. *Id.* at 305-06.

162. 184 N.W. 408 (Mich. 1921).

163. The plaintiff was tricked into coming out of his house late at night, forcibly abducted (while being "cursed, kicked, and struck") and then taken to a piece of woods about a mile from his home. He was forcibly led to a tree by a group of men with a rope and threatened with hanging if he did not recant his allegedly pro-German allegiance and disloyalty to America during the First World War. Apparently he had found fault with the bread that Americans had to eat during the war years and his abductors believed he had failed to contribute his share to the Red Cross and Liberty bonds. He denied the accusations and later took an oath of allegiance to vary-

not actually a witness to the abduction, saw the defendants forcibly detain her husband outside of their home.¹⁶⁵ The court held that the defendants were not liable for her resulting emotional distress.¹⁶⁶

The factor tying these cases together is the unforeseeability of the plaintiff's mental distress: the defendant could not have reasonably anticipated that his acts would cause the plaintiff emotional injury. The Restatement (Second) of Torts supports these decisions by requiring that the defendant know to a substantial certainty that plaintiff's emotional distress will result from his acts.¹⁶⁷ The commentators to the Restatement offer two public policy reasons to deny recovery for unforeseeable emotional distress resulting from intentional conduct directed at a third person:¹⁶⁸ unlimited liability for the defendant¹⁶⁹ and insincerity of emotional distress claims.¹⁷⁰ The next section of this comment will demonstrate that the application of transferred intent in cases of intentional infliction of emotional distress will allow a class of plaintiffs who have suffered severe emotional harm at the hands of an intentional wrongdoer a right to recover for their injuries without disturbing the policies expressed in the Restatement.

APPLICATION OF TRANSFERRED INTENT TO CASES OF INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

As long as a defendant's reasonable anticipation of the plaintiff's emotional harm is required for recovery in cases in which the defendant's outrageous conduct is not directed at the plaintiff,¹⁷¹ transferred intent will never be applied to intentional infliction of emotional dis-

ing governmental bodies "right on down to the school board" and concluded the ceremony by kissing an American flag. The plaintiff was then peacefully returned to his home. *Id.* at 408-09.

164. *Id.*

165. *Id.* at 410.

166. *Id.*

167. RESTATEMENT (SECOND) OF TORTS §46, comment 1 (1961).

168. The Restatement also denies recovery when the defendant intended a tortious act other than infliction of emotional distress toward the plaintiff and the only resulting harm is plaintiff's severe emotional distress. *See* RESTATEMENT (SECOND) OF TORTS §47 (1961). "When a defendant's conduct is tortious solely because it involves a risk of invading an interest other than the interest in freedom from emotional distress, the tortious quality of the act is insufficient to create liability for emotional distress alone." *Id.*, comment a. The author will leave for another comment discussion of which types of conduct, short of tortious interference, may make a defendant liable for a plaintiff's resulting emotional distress. *See generally* RESTATEMENT (SECOND) OF TORTS §870 (1961).

169. RESTATEMENT (SECOND) OF TORTS §46, comment 1 (1961). The authors state: "The limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited. . . ." *Id.*

170. *Id.*

171. *See supra* text accompanying notes 153-70.

stress.¹⁷² The West Virginia case of *Lambert v. Brewster*¹⁷³ is the only case attacking the requirement of foreseeability of the plaintiff's mental injury.¹⁷⁴ In *Lambert*, the plaintiff and her husband lived on premises adjacent to that of her father, Mr. Wingo. One evening the defendant, who lived nearby, came up to Wingo's gate and called out to him about a dispute involving the defendant's children. They had a heated conversation that led to the defendant striking Wingo. Unknown to the defendant, Mrs. Lambert viewed the whole encounter from her doorstep, became extremely upset and ultimately had a miscarriage.¹⁷⁵ After finding that the plaintiff's injuries were a direct result of the defendant's acts, the court dismissed the defendant's argument that injuries from emotional distress are compensable only when defendant's actions were directed at the person injured.¹⁷⁶ "If defendant's wrongful act is the proximate cause of injury to plaintiff, of the character for which the law allows compensation, then the question of whether defendant could or should have foreseen the result becomes immaterial."¹⁷⁷ Even though the defendant did not know of the plaintiff's presence and therefore could not foresee the results of his tortious conduct, he was not excused from liability.¹⁷⁸

The *Lambert* court did not require the defendant to reasonably anticipate the plaintiff's emotional distress, emphasizing that foreseeability should not be a limitation on recovery in cases of intentional torts.¹⁷⁹ Other decisions have recognized that a defendant's liability for the harm resulting from deliberate tortious conduct extends to consequences which he did not intend and could not reasonably have foreseen.¹⁸⁰ In actions of *negligence*, the imposition of liability is dependent upon the concept of reasonable foreseeability of risk toward the plaintiff.¹⁸¹ If the defendant's conduct foreseeably involves an unreasonable risk of harm to the plaintiff, then the defendant owes the plaintiff a duty to use due care to avoid an injury.¹⁸² This concept of

172. This is because transferred intent is completely divorced from any concept of foreseeability of harm. See *supra* text accompanying notes 1-5.

173. 125 S.E. 244 (W. Va. 1924).

174. See PROSSER, *supra* note 20, at 61 n.27.

175. 125 S.E. at 244-45.

176. *Id.* at 250.

177. *Id.* at 245.

178. *Id.*

179. See *supra* text accompanying notes 177-78; see also *Harris v. Hindman*, 278 P. 954, 956 (Or. 1929).

180. See cases cited in PROSSER, *supra* note 24, at 31, notes 24-26.

181. *Palsgraf v. Long Island R. R. Co.*, 162 N.E. 99, 99-100, (N.Y. 1928) (Cardozo, C.J.); see *HARPER & JAMES, supra* note 127, at 929-30, 1018; PROSSER, *supra* note 24, at 145-46, 254-55.

182. *HARPER & JAMES, supra* note 127, at 1018. This is the majority view in the United States. Under a minority view, a duty is owed to the whole world with respect to an injury that might be caused by negligent conduct. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting opinion).

duty evolved during the industrial revolution, and courts probably chose this means to limit the responsibilities of growing commerce and industry within reasonable bounds.¹⁸³ This policy limitation has no application in intentional tort cases. Foreseeability of injury should not be required in cases of intentional torts.¹⁸⁴ When a defendant intends a tortious interference, he is liable for the results, even though unintended, unforeseeable, and not directed at the plaintiff.¹⁸⁵

Once foreseeability of the plaintiff's harm is eliminated as a requirement of recovery in cases of intentional infliction of emotional distress, the only essential remaining policy obstacle preventing an application of transferred intent is a reasonable limitation on the defendant's liability.¹⁸⁶ The remaining portion of this comment will focus on applying transferred intent to protect a class of plaintiffs previously denied recovery without imposing unlimited liability upon defendants.

A. Reasonable Application of Transferred Intent in Cases of Emotional Distress Based on the Tort of Assault

The torts of assault and intentional infliction of emotional distress share a common characteristic: protection of an individual's interest in freedom from mental invasion.¹⁸⁷ In contrast, a battery,¹⁸⁸ false imprisonment,¹⁸⁹ trespass to chattels,¹⁹⁰ or trespass to land¹⁹¹ is a physical invasion and can be accomplished without the plaintiff's knowledge at the time it takes place. A later discovery of the invasion is sufficient to maintain a cause of action.¹⁹²

The interest protected in an action for assault is a mental one of freedom from apprehension of physical contact: ". . .there is a touching of the mind, if not the body."¹⁹³ The plaintiff must be aware of the de-

183. See *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76, (1968); PROSSER, *supra* note 24, at 325; James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315, 316-17 (1959).

184. See generally PROSSER, *supra* note 24, at 325.

185. See *supra* cases cited in notes 112, 146, 173, 180; see also *supra* notes 141-47 and accompanying text.

186. See *supra* text accompanying note 167; Magruder, *supra* note 23, at 1043, n.40.

187. PROSSER, *supra* note 24, at 49.

188. *Mohr v. Williams*, 104 N.W. 12, 16 (Minn. 1905); *Hively v. Higgs*, 253 P. 363, 365 (Ore. 1927). See PROSSER, *supra* note 24, at 35.

189. PROSSER, *False Imprisonment: Consciousness of Confinement*, 55 COLUM. L. REV. 847, 850 (1955). Very young children, and extremely ill people could be confined without their knowledge and suffer real damage. See, e.g., *Barker v. Washburn*, 93 N.E. 958 (N.Y. 1911) (idiot); *Commonwealth v. Nickerson*, 87 Mass. 518 (1861) (child four years old). But see RESTATEMENT (SECOND) OF TORTS §42 (1961).

190. *Juniata Acceptance Corp. v. Hoffman*, 11 A.2d 494, 496 (Pa. 1940). This is the modern view. See PROSSER, *supra* note 24, at 78.

191. *Miller v. Miller*, 41 Md. 623, 631 (1874); *Dodson v. Culp*, 133 S.E.2d 631, 634 (Ga. 1963). See PROSSER, *supra* note 24, at 68-69.

192. RESTATEMENT (SECOND) OF TORTS §22 (1961); see PROSSER, *supra* note 24, at 39.

193. *Kline v. Kline*, 64 N.E. 9, 10 (Ind. 1902).

fendant's acts at the time of the assault to recover;¹⁹⁴ therefore he must be present as well. In cases of transferred intent,¹⁹⁵ the plaintiff must suffer actual apprehension of harm due to the defendant's conduct. The plaintiff must, therefore, observe the actions of the defendant at the time of the threats, no matter toward whom they are directed.¹⁹⁶

Similarly, the tort of intentional infliction of emotional distress is a strictly *mental* invasion,¹⁹⁷ even if physical harm results. In actions for assault, an element needed for recovery is apprehension of imminent physical contact from the defendant's acts.¹⁹⁸ While damages for emotional distress may be recovered for threats of future harm,¹⁹⁹ the plaintiff still must be present at the time of the defendant's threats.²⁰⁰ Therefore, a plaintiff's mental distress should generally be a valid cause of action only when the defendant's tortious conduct is directly observed or heard by the plaintiff.²⁰¹

In judging injury from emotional distress, the exact circumstances of the plaintiff's perception of the tortious conduct are important.²⁰² Individuals who hear later accounts of tortious conduct cannot be expected to be affected as greatly as if they had directly observed the defendant's acts.²⁰³ In an action for assault, when the plaintiff no longer has an actual fear of bodily contact, his apprehension of harm must necessarily decrease. The same is true for emotional distress; later accounts of the defendant's conduct cannot have the same impact on the plaintiff's psyche as direct observation.²⁰⁴ Of course, an account of a death or other tragedy may be so outrageous that the words themselves are considered tortious and directed toward the recipient of the news.²⁰⁵

194. If the defendant aims a gun at a person who is unaware of it at the time, it is not assault. RESTATEMENT (SECOND) OF TORTS §22, illustration 2 (1961).

195. See *Jeppsen v. Jensen*, 155 P. 429, 430 (Utah 1916) (defendant assaulted plaintiff's husband while he was in the same room as the plaintiff).

196. See *supra* note 194; see, e.g., RESTATEMENT (SECOND) OF TORTS §32, comment b, illustration 3 (1961).

197. RESTATEMENT (SECOND) OF TORTS §46, comment b (1961); PROSSER, *supra* note 24, at 49.

198. RESTATEMENT (SECOND) OF TORTS §24 (1961).

199. See *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 335-36, 240 P.2d 282, 384-85 (1952).

200. Cf. RESTATEMENT (SECOND) OF TORTS §22, comment a (1961) with *id.* §46, comment 1.

201. The plaintiff need not necessarily need strictly present, but in sufficient proximity to strongly perceive the defendant's acts. Cf. *Phillips v. Dickerson*, 85 Ill. 11, 12-13 (1877); *Goddard v. Waters*, 82 S.E. 304, 304 (Ga. 1914).

202. See *Smith, Relation of Emotions to Injury: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 254 (1944).

203. Compare RESTATEMENT (SECOND) OF TORTS §22, comment a (1961) with *id.* §46, comment j.

204. See *Smith, supra* note 202, at 254. Of course, the plaintiff must suffer emotional distress himself and cannot recover "vicariously" for someone else's mental anguish. See generally RESTATEMENT (SECOND) OF TORTS, §46 (1961) (elements of intentional infliction of emotional distress).

205. See, e.g., *Wood v. United Air Lines, Inc.*, 404 F.2d 162, 166 (10th Cir. 1968).

As previously discussed, cases of emotional distress involve harm to the plaintiff's nervous system.²⁰⁶ Since this may be caused in an almost infinite number of ways, courts have grappled with the problem of placing reasonable limits on a defendant's liability, particularly when the defendant's conduct was not directed at the plaintiff. The California Supreme Court considered this problem at length in the *negligence* case of *Dillon v. Legg*. When the defendant's conduct is merely negligent toward the third person and the plaintiff suffers resulting emotional distress, the court presented a set of guidelines to determine the liability of the defendant. In the next section, this comment will examine the use of those guidelines to apply transferred intent in cases of intentional infliction of emotional distress.

*B. Application of Transferred Intent in Cases of Emotional Distress
Based on the Guidelines of Dillon v. Legg*

In *Dillon v. Legg*,²⁰⁷ the plaintiff's infant daughter, while lawfully crossing a street, was run over by a car driven negligently by the defendant. The tragedy was witnessed by the plaintiff mother while in "close proximity" to the child.²⁰⁸ In overturning the rule that plaintiffs must be within the "zone of danger" to recover for emotional distress caused by the negligence of the defendant,²⁰⁹ the court held that a plaintiff may recover damages for emotional distress so long as the defendant owed a duty to the plaintiff. This holding was based on foreseeability of risk:²¹⁰ "Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails."²¹¹ The court set guidelines to determine whether the defendant owed the plaintiff a duty in cases of emotional distress when the plaintiff witnessed the defendant's negligent acts toward a third person.²¹²

- 1) Whether plaintiff was located near the scene of the accident;
- 2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;
- 3) Whether plaintiff and primary victim were closely related.

These guidelines were ostensibly set to determine foreseeability of harm to the plaintiff based upon the concept of duty. Duty, however, is

206. See *supra* notes 43-54 and accompanying text; see also Smith, *supra* note 202, at 212-26.

207. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

208. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

209. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

210. *Id.* at 739-40, 441 P.2d at 920, 69 Cal. Rptr. at 79.

211. *Id.*

212. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

not an old and deep-rooted doctrine, rather it is a legal device developed in the latter half of the nineteenth century, and designed to curtail the fear that the law might countenance legal redress for unlimited foreseeable harm.²¹³ The court noted that a denial of duty by courts "emanates from the twin fears that courts will be flooded with an onslaught of (1) fraudulent and (2) indefinable claims."²¹⁴ These are the identical policy reasons used by courts to deny application of transferred intent to cases of intentional infliction of emotional distress.²¹⁵ The California Supreme Court defined the limits of liability using these guidelines to ensure that a recovery for emotional distress resulting from negligent conduct directed at a third person would not allow the plaintiff to bring an unjustified cause of action claiming emotional distress or place a burden of unlimited liability on the defendant.²¹⁶ This comment proposes that the guidelines applied by the *Dillon* court to cases of negligent infliction of emotional distress should also be used to determine the defendant's liability when transferred intent is applied in cases of intentional infliction of emotional distress.

C. Use of Dillon Guidelines to Limit Defendant's Liability

The guidelines proposed by the *Dillon* court to determine the duty of the defendant are actually arbitrary standards in relation to the foreseeability of risk.²¹⁷ Many foreseeable victims may be denied recovery because their cases do not fall within the *Dillon* guidelines.²¹⁸ The guidelines do not appear to be a determination of foreseeability, rather they are additional guarantees of the sincerity of the plaintiff's emotional distress and place limits on liability due to the nature of the injury.²¹⁹

Unrestricted application of transferred intent to cases of intentional infliction of emotional distress would impose practically unlimited lia-

213. *Id.* at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76.

214. *Id.* at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.

215. See *supra* notes 168-70 and accompanying text.

216. Compare 68 Cal. 2d at 734-35, 441 P.2d at 916-17, 69 Cal. Rptr. at 76-77 with *id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 79.

217. See Pearson, R., *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 UNIV. OF FLA. L. REV. 477, 490-501 (1982).

218. See *Hair v. County of Monterey*, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975). Plaintiff's child suffered brain damage, blindness, and ultimately became a quadriplegic after undergoing oral surgery allegedly performed negligently by the defendant. The court ruled that plaintiff could not recover because she was in the waiting room of the defendant's office while the surgery was being performed and did not fit within the *Dillon* guidelines. *Id.* at 543-44, 119 Cal. Rptr. at 642; cf. *Krouse v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977). The plaintiff was allowed to recover although he did not actually see his wife struck by the defendant's automobile. *Id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872.

219. Compare *supra* text accompanying notes 213-16, with Pearson, *supra* note 217, at 500-01.

bility on defendants for consequences of their tortious acts.²²⁰ Unlike most traditional intentional tort cases, the injury of emotional distress may be separated by long periods of time and great lengths in distance from the defendant's acts that caused the mental injury.²²¹ This becomes particularly true when defendants are held liable for the unintended consequences of their tortious acts.²²² Defendants are not held liable for *all* the consequences of their tortious conduct, even if their acts are intended to cause harm.²²³ The *Dillon* guidelines are applicable to limit the defendant's liability in cases of transferred intent because they were specifically designed to prevent unlimited liability for infliction of emotional distress.²²⁴ This comment proposes that the guidelines only be used as a starting point in applying transferred intent to cases of intentional infliction of emotional distress. In *Dillon*, the defendant's conduct was not intentionally tortious, but only negligent toward the third person.²²⁵ In cases of intentionally inflicted harm the defendant's liability is expanded to the more remote consequences of his acts.²²⁶

The traditional intentional torts usually take place within a very small space of time and distance. The defendant shoots a gun and the bullet immediately strikes the plaintiff. When the defendant's intentional act causing the plaintiff's injury is separated in time or space from the tortious invasion, as happens more often in cases of emotional distress, courts have had no trouble in linking together the defendant's intent to cause harm and the harm itself.²²⁷ In the next section, this comment will demonstrate that this link between cause and effect, if uninterrupted, should serve as the basis for an exception in application of the *Dillon* guidelines to cases of transferred intent for intentional infliction of emotional distress.

D. An Exception to Use of the Dillon Guidelines

In cases of the traditional intentional torts, courts have had little problem in linking tortious injury with earlier acts intended to cause

220. Magruder, *supra* note 23, at 1043, n.40; *see, e.g.*, RESTATEMENT (SECOND) OF TORTS §46, comment 1 (1961).

221. *See generally* Magruder, *supra* note 23, at 1042-45.

222. *See infra* notes 232-35 and accompanying text.

223. *See, e.g.*, Oklahoma Gas & Elec. Co. v. Hofrichter, 116 S.W.2d 599, 600-01 (Ark. 1938) (defendant who forced a mother to go with him to look at a gas meter was not liable for injuries suffered by her baby who, while the mother was gone, had swallowed a safety pin). *See generally* Note, *supra* note 133, at 365-68.

224. *See supra* text accompanying notes 214, 219.

225. *See supra* text accompanying notes 207-10.

226. *See supra* text accompanying notes 140-47, PROSSER, *supra* note 24, at 30-31; *see also* Smith, *supra* note 202, at 270-71.

227. *See infra* cases cited in notes 228, 232, 235.

harm. In *Katko v. Briney*,²²⁸ the defendant set up a spring-gun in his unoccupied house so that it would wound any intruder.²²⁹ Several weeks later, the gun blew off the plaintiff's leg as he was opening a door in the house.²³⁰ The court held the defendant liable for a battery.²³¹ Although the tortious act took place at the time the gun discharged and the bullet invaded the plaintiff's body, the actual cause of the injury was the defendant's earlier act of setting up the trap gun. Thus, the defendant is still liable when the harm is the direct result of his earlier intentionally tortious act.

Courts have also linked together the tortious interference with earlier causes of the harm when the defendant *intended* to cause severe emotional distress. In *Blakeley v. Shortal's Estate*,²³² the defendant killed himself in the plaintiff's kitchen where the plaintiff discovered his mutilated body later that day.²³³ The defendant's estate was held liable for the plaintiff's resulting emotional distress. The court reasoned that the defendant knew to a high probability the plaintiff would find his body and therefore must have intended to cause the plaintiff emotional distress by committing suicide in her kitchen.²³⁴ The earlier act of defendant, which caused the plaintiff's emotional distress, was linked together with the plaintiff's later perception of the act to make the defendant liable for his tortious conduct.²³⁵

The concept of linking acts intended to cause tortious consequences with the directly resulting tort invasion itself can also be accomplished using transferred intent. Although in *Katko* and *Blakeley*, the defendants more or less intended to cause a foreseeable type of harm,²³⁶ this comment has already demonstrated that foreseeability of harm should not be a limiting factor in applying transferred intent to cases of intentional infliction of emotional distress.²³⁷ Removing the limitation of foreseeability, a defendant's intent to cause injury is extended to *unforeseeable* harm caused by his conduct. Thus, when the plaintiff is a witness to the physical results of the defendant's conduct before any intervening acts break the chain of causation, the defendant's intent can be transferred from his original tortious act to the plaintiff's result-

228. 183 N.W.2d 657 (Iowa 1971).

229. *Id.* at 658.

230. *Id.* at 658-59.

231. *Id.* at 658. (Intent was not an issue in the case); see *id.* at 662-63 (dissenting opinion).

232. 20 N.W.2d 28 (Iowa 1945); see also *Mahnke v. Moore*, 77 A.2d 923, 926-27 (Md. 1951).

233. 20 N.W. 2d at 29-30.

234. *Id.* at 29; see also RESTATEMENT (SECOND) OF TORTS §46, comment i (1961).

235. 20 N.W.2d at 31; see also *Great A. & P. Tea Co. v. Roch*, 153 A. 22 (Md. 1930) (defendant grocer wrapped a dead rat in a package instead of a loaf of bread and sent it to the plaintiff who recovered for intentional infliction of emotional distress).

236. See 183 N.W. at 662-63 (dissenting opinion); 20 N.W.2d at 29.

237. See *supra* text accompanying notes 171-85.

ing emotional distress. The defendant's acts must directly cause the plaintiff's injuries, otherwise, no recovery should be allowed.²³⁸

The facts of *Koontz v. Keller*²³⁹ provide an example of an application of this concept. In *Koontz*, the defendant brutally murdered the plaintiff's sister, leaving the body in the plaintiff's backyard where it was later discovered by the plaintiff.²⁴⁰ The court held that the plaintiff could not recover because the defendant did not intend to cause the decedent's sister emotional distress.²⁴¹ Applying transferred intent, however, the defendant's intent to kill the plaintiff's sister can be coupled with the plaintiff's resulting emotional distress to render the defendant liable. Although the plaintiff was not present at the time of the tortious conduct, she personally witnessed the direct results of the defendant's actions, establishing a chain of causal relation.²⁴² The defendant's intent to cause harm is transferred to the plaintiff's emotional distress so long as no other event intervenes and acts as a cause of the harm.

CONCLUSION

The doctrine of transferred intent embodies a trend in the courts to hold an intentional wrongdoer responsible for even remote consequences of his harmful acts.²⁴³ When a person suffers severe emotional distress caused by the defendant, however, the law consistently has refused to allow a transfer of the defendant's tortious intent to the innocent person's resulting emotional distress. Although the history of the doctrine suggests that transferred intent should not be limited to the traditional intentional torts, courts have not applied the doctrine to the new tort of intentional infliction of emotional distress.

238. Cf. *Oklahoma Gas & Elec. Co. v. Hofrichter*, 116 S.W.2d 599, 600-01 (Ark. 1938); *People v. Rockwell*, 39 Mich. 503, 504 (1878). Even in cases of negligence, if no new cause of harm intervenes between the defendant's wrong and the plaintiff's injury, courts do not hesitate to allow a recovery although the harm could not have been foreseen. See Carpenter, *Workable Rules For Determining Proximate Cause*, 20 CAL. L. REV. 229, 241 (1932).

239. 3 N.E.2d 694 (Ohio 1936).

240. *Id.* at 695.

241. *Id.* at 696.

242. "The shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself." *Archibald v. Braverman*, 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723, 725 (1969). A clear illustration of the limits of a defendant's liability are the facts of the recent case of *Calliari v. Sugar*, 435 A.2d 139 (N.J. 1980). Purchasers of a house brought suit against the vendor claiming damages for intentional infliction of emotional distress allegedly resulted from the plaintiff's discovery of the body of the vendor's wife buried in the back yard of the property and from plaintiff's belief that she was murdered by the vendor. The defendant's tortious intent toward his wife could not be transferred to the plaintiff's resulting emotional distress because plaintiff neither witnessed the defendant's conduct nor did the plaintiff observe the direct results since there were intervening acts of burial and disinterment. The limitation on plaintiff's recovery is the same as in most other intentional torts: natural consequences of the defendant's acts. See *supra* note 238.

243. See Prosser, *supra* note 1, at 662.

The modern public policy reasons that support application of transferred intent should be used to expand the application of the doctrine to cases of emotional distress, so long as reasonable limitations are placed on the liability of the defendant. This comment has suggested that application of the guidelines announced in *Dillon v. Legg* is an appropriate means of restricting liability because these guidelines were designed to meet the specific problem of unlimited liability inherent in torts of emotional distress. The public policies of preventing unlimited liability and eliminating fraudulent claims are satisfied by the reasonable application of the transferred intent doctrine in cases of intentional infliction of emotional distress.

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