I. Macneil, Contracts: Exchange Transactions and Relationships p. 279-81 (1971)

(4) MANIPULATING MANIFESTATIONS OF INTENT

Little experience in reading contract cases is necessary before one senses the pervasiveness of judicial manipulation of the manifested intent of the parties. To some extent such manipulation of manifested intent may represent efforts of the court to effectuate what it thinks was the "real" or subjective intention of both of the parties, in which case it can be said that a consensual notion of justice is being applied. Or it may represent an effort to effectuate the real, i. e. subjective, intention of one of the parties contrary to his manifested intention because of some overriding reason why his intent should prevail, e. g. careless and ambiguous use of language by the other party. Still closely related to real intention is the possibility that the court is manipulating manifested intention in order to achieve what it thinks were the basic purposes of the parties in carrying on the contractual relationship, even though neither their manifestations of intention nor their conscious subjective intentions matched those fundamental purposes.[52] At this point it can still be said that the court is operating by a standard of consent.

The court may also manipulate manifested intention for the purpose of effectuating the relationship in accordance with the situation which has developed since the parties first planned it. It may do so, even though the later developments lead it to application of principles of justice which do not harmonize readily with the original purposes of the parties. Its doing so may nevertheless be in harmony with a notion of consent, because the parties' view of the relationship may be thought to have changed as the relationship developed. Or it may be that the later developments reveal real gaps in the parties' planning, not only in conscious but even in sub-conscious planning, gaps which the court is filling as best as it can. While such gap-filling is not contradictory of a consent principle it does introduce an additional principle of justice to the extent that the gap-filling cannot be based on the consent of the parties. (This fact is sometimes obscured in practice by a judicial rationale that the gap-filling is what the parties would have done if they had thought about the problem, a verbaliza-

[redacted]

tion which at first glance appears to refer to subjective intent. In fact the intent is often fictional.)

Finally, however, the court may manipulate manifested intention to achieve goals contrary to the mutual purposes of the parties in establishing or continuing the relationship. When it does so it is engaged in a form of regulation of contractual relationships no different in principle from any other limitation on freedom (power) of contract. For lack of a better term this form of regulation can be called a "social adjustment" principle, as distinguished from the "consent principle."[53] Unquestionably a great deal of this kind of regulation of contract has occurred through judicial decisions and will continue to occur. Professor Llewellyn has described the processes in a book review in 52 Harv.L.Rev., 700, 702 (1939):

> A court can "construe" language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome one. It can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement by one side for want of "mutuality," though allowing enforcement by the weaker side because "consideration" in some other sense is present. Indeed, the law of agreeing can be subjected to divers modes of employment, to make the whole bargain or a particular clause stick or not stick according to the status of the party claiming under it: as when, in the interest of the lesser party, the whole contract is conditioned on some presupposition which is held to have failed.

It should be noted that when a court engages in activities such as those described by Professor Llewellyn it is often not possible to ascertain whether it is effectuating the consent principle, making a social adjustment, or engaging in gap-filling, a process which lies somewhere in between.

53. The discussion in the text omits for the sake of simplicity an extremely important and regularly recurring situation. One party enters a contract reasonably expecting, or at least hoping for, certain things of it. The other party expects different things of it, and expresses them in such a way that it would be unreasonable to expect the first party to learn of them. This is, of course, a typical consumer contract situation in which the printed form purports to take away all kinds of things that the consumer might have thought he was getting. (Such "contracts of adhesion" will be dealt with in more detail in the next sub-section and in Ch. 9.) There is considerable tendency in legal thinking to consider refusals of courts to enforce such uncommunicated provisions as constituting "social adjustments" rather than as effectuating a "consent principle." In fact, such refusals are quite in harmony with the "consent principle." Llewellyn pointed this out in his book, The Common Law Tradition—Deciding Appeals 370–1 (1960). First, he noted that the only specific assent is to the few dickered terms, e. g. price, and to the broad type of transaction, e. g., sale of a vacuum cleaner. He then suggests that there is a kind of "blanket assent" to "any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms." While he may attribute too much breadth to the blanket assent, certainly he is right that there is no mutual consent to terms which *do* alter or eviscerate the reasonable meaning of the dickered terms. When the court refuses to enforce such terms, it is therefore difficult to see that it is acting contrary to the consent principle. The most that could be said is that whatever it substitutes for the eliminated term is a "gap-filler."

[redacted]

Professor Llewellyn goes on to describe the ill effects of covert control techniques which he has described:

> First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to recur to the attack. Give him time, and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction: that of marking out for any given type of transaction what the *minimum decencies* are which a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type. Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.

HART AND SACKS, THE LEGAL PROCESS (1958)

NOTE TO THE LOCKWOOD CASE, P. 251-56

B. Notes on Judicial Regulation of Private Law Making.

1. In Problem No. 3 dealing with a percentage lease, counsel had to consider how a court would treat various matters in the absence of any express agreement. As that problem should have made clear,

this "filling-in" function of the court is a vital part of any system of private ordering, and the court's conception of its role greatly affects the manner in which private client and lawyer proceed with their task.

Many examples can be given of optional, supplementing terms which the law attaches to a relationship in the absence of special provision by the parties to the contrary. When marriage occurs, in the absence of a special arrangement the respective duties and rights, powers and lack of powers, of a husband and wife in relation to property owned before marriage and acquired after it are officially defined. But within limits these terms may be varied by a marriage settlement and sometimes by post-nuptial agreement.

A canvass of legal arrangements, and particularly of private law, will disclose how pervasive this type of provision is. It will disclose also the widely varying degrees of force in the policies expressed in these official terms. Sometimes the terms represent nothing more than a presumption of probable intention, drawn from the court's understanding of popular practice, and yielding to relatively slight indication of a contrary intention in the particular transaction. Sometimes they represent public policies which the parties are permitted to vary only if they make the purpose completely clear and adhere exactly to carefully prescribed procedural formalities.

To speak of the development of optional terms as a mode of regulation of private lawmaking may at first blush seem to be paradoxical. But it is not - if only for the reason already mentioned that the requirements for effective private variation may differ greatly. It is not paradoxical also for a reason which cuts deeper into the essence of the problem of controlling the future. No private lawmaker can enact a completely comprehensive code to take care of every possible contingency that may affect his arrangement, even if he is accorded a theoretically complete power to do so. In some degree, therefore, he is inescapably dependent upon the agency of authoritative application - usually the courts - to fill in some of the details for him. In other situations the dependency is a matter not so much of necessity as convenience. A private lawmaker who expects to engage in a large number of transactions of a particular kind may find it worth his while to develop a standard form going into a considerable degree of detail. But for transactions which do not repeat themselves in significant number, such an expenditure of effort is unthinkable. The courts in developing rules and standards which in general reflect customary ways of dealing thus perform an enormous service to the business community. Judicially-developed doctrines of this kind in turn significantly shape community customs and expectations.

2. In the present problem, counsel in 1850 could not ignore the "filling-in" function of the court; he had to consider what the railroad's liability would be if he failed to include any express provisions concerning responsibility for freight. This was not too difficult a question. But he had a further and more perplexing problem:

Was he free to depart from the terms filled in by the court? Put another way, were these terms optional or suppletive, or were they mandatory or constructive in character? Even this formulation of the question is too simple. For, as already indicated, in the end the liability of the carrier was held to be subject to change by contract in part but only in part.

Consider the following excerpt from LABOR RELATIONS AND THE LAW (Robert E. Mathews, ed. 1953) 67-68:

"* * * while the common law in its pure or classical form has few, if any, rules concerning the content of contract, the Continental legal system, with differences in degree, distinguishes between contractual terms that are open to the parties to stipulate according to their free desires, called in French *dispositions facultatives*, and those terms which are mandatory, *dispositions imperatives* or *obligatoires*. The German terminology expresses this distinction in the words *ius dispositivum* and *ius cogens*. The Continental doctrine has, from an early day, presented contracts in general, and labor contracts in particular, as transactions which are pervaded with terms prescribed by law. By contrast, the prevalent American concept of freedom of contract (derived from English law) identifies a contract with promises voluntarily made by the parties. That even the leading text /Williston/ has ignored the fact that the law may attach to promises legal obligations that modify the actual promises, shows how strange to our law the concept of compulsory minimum terms has remained. As late as 1915, the U.S. Supreme Court read into the due process clause a guaranty of 'freedom of contract' which barred prescription or proscription of terms of labor contracts. (See *Coppage v. Kansas*, 236 U.S. 1.) Were it not for the many puzzling problems which the Wage and Hour Law of 1938 offered to lawyers trained exclusively in private contractualism, the idea of compulsory terms imposed upon contracting parties would still be little known in this country. Is the American lawyer puzzled by what might be called the 'unwaivability' of the seaman's right to maintenance and cure? It is because the 'unwaivability' does not fit into the traditional concept of common law contract, law on admiralty being derived from the Continental law. Alien as was the notion of terms imposed by law upon contracting parties, the idea of nonwaivability could be explained here only by the fiction that seamen are 'wards of the court.' It would be somewhat difficult, however, to carry this explanation over to the unwaivable right to overtime rates of thirty million American workers! Knowledge of the labor law of other countries would have eased understanding of such American labor legislation."

Does not this passage somewhat overstate its point about the American legal system? Note that the author seems to be confining his attention to required terms which affect only the relations between the parties themselves. But even as so limited, is the idea of conditions imposed by law as an inescapable incident of a relationship which the parties voluntarily assume really so unfamiliar? Witness the legal incidents of marriage. Witness various obligations of a trustee, and

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of a principal and agent as between themselves. Witness the mortgagor's equity of redemption. Note that, in contrast to the Wage and Hour Act, these other illustrations are the creatures of decisional law.

If the scope of attention is broadened to include required terms governing relationships to third persons and to the government growing out of consensual transactions, it will become apparent that we are here dealing with one of the most common and most important techniques of control of private lawmaking. As in the case of marriage, the law creates a more or less standardized institution - officially standardized. The private power-holder is free to exercise his power or not exercise it. But he is not free in all respects to tailor the resulting relationships to his own wishes.

A good deal of the law of property follows this pattern, and much of commercial law also. Again and again, the exercise of a private power brings into play officially-defined duties, subsidiary powers, rights of action, as well as various other ready-made legal positions. The duties involved, it will be observed, are of two main types, both of which are illustrated by the power to marry. Sometimes they are duties assumed by the power-holder, serving to check him in his decision to exercise the power. Sometimes they are duties of which he makes himself the beneficiary of performance, helping to induce him to exercise the power. In either case the associated duties, powers, and other conditions form a characteristic cluster of incidents attached to the exercise of the power which serve to define a social institution or facility of which the members of the society are free to take advantage. Much of the art of establishing effective conditions of social living lies in the ways in which these crystallized social relationships are defined.

3. What considerations should guide a court in determining whether the normal incidents of a private relationship are mandatory or optional - or in deciding whether variations of these incidents are valid or invalid?

All private law making, of course, is subject to the general principle that private powers shall not be used for explicitly unlawful purposes. Moreover, many powers, such as those of contract and of making wills, are subject to the more amorphous limitation that they shall not be exercised for purposes which are "contrary to public policy." In some instances, as the Lockwood case illustrates, the courts have openly avowed a still broader power to review the "reasonableness" of private laws, in much the same way in which they will consider whether the substance of an administrative regulation or statute is arbitrary or capricious. But this has tended to be confined to special situations, such as those of a private lawmaker who has the status of a "public utility," or who pursues a "common calling." Anglo-American courts have been slow to assert openly a power to disregard, in continental fashion, contractual provisions which are deemed to be "unconscionable."

A not dissimilar control, however, may be exercised in indirect ways. The power of courts to interpret contractual and other arrangements may serve to ameliorate the harshness of many provisions. Sometimes it may be used with entire openness to defeat overreaching, as where a court announces that provisions in an insurance or other elaborate contract are to be taken most strongly against the party who drew the instrument. Closely related is the courts' power, discussed below, to determine when "boiler-plate" provisions - and particularly those in fine print - are to be treated as "part of the contract" and when not.

Did Justice Bradley draw sound distinctions in the Lockwood decision? The Court did not hold that a contract purporting to exempt a person from liability for negligence would be invalid as between any two persons. It limited its holding to the railroad and gave as its reason the superior bargaining power of the carrier.

In other words, whether an agreement is reasonable may depend on the parties to the agreement, at least in part. If we confine ourselves to the relationship between the parties, and ignore the effect on third persons, is a court ever justified in upsetting their agreement unless it can find some defect in the relative bargaining positions? In what other circumstances?

If we accept Justice Bradley's thesis that shippers could not "higgle or stand out" against the railroad, can we justify the Court's willingness to accept the contract in which the railroad relieved itself of its special carrier's liability? By the time the Lockwood case was decided, it was fairly well settled that such contracts were valid, and Justice Bradley offered the explanation that it was "just and reasonable" for the railroad to avoid liability for "sheer accident." Is this consistent with the underlying rationale of carrier's liability?

For an example of a modern court struggling with such questions, see the divergent viewsexpressed in the three opinions handed down in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

4. Counsel to the railroad had to consider not only what provisions were open to him, but by what means the agreement with the shipper was to be reached. He was aware that most courts would not permit the railroad to limit its liability by the simple device of posting a notice in the station. Other means much better calculated to inform the shipper were readily available, and in reason and good conscience ought to be used.

This is one of the most illuminating examples of the many provisions which require that private law making powers must be exercised in a certain way if they are to be effectual. These provisions serve the purpose of guarding against one or another kind of abuse. The doctrine of consideration, before it was trivialized by unthinking judicial application, served such a function, just as the doctrine respecting the effect of a seal did. It marked off transactions of serious import, which it was thought that people could justly count upon having fulfilled, from others. The requirement of a writing for certain kinds of contracts, and in the case of a will the requirement of witnesses,

[redacted]

give protection against the possibilities of abusive and hard-to-disprove assertions of an earlier exercise of law making power. Many other examples will readily occur to any lawyer or law student.

A crucial problem in the modern law of contract is the effect which ought to be given to elaborate clauses drawn up by one of the parties and inserted in a printed form. These problems may be handled, in part, by the device of strict construction against the author of the form. Or they may be handled more forthrightly by direct examination of the question: is this a sound and reasonable method of making a private law? See, generally, Note, *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494. For a lively recent discussion, see Mellinkoff, *How to Make Contracts Illegible*, 5 STAN. L. REV. 418 (1953). Compare the various statutory provisions collected in this article with the treatment of the problem by the courts. *E.g.*, *U Drive & Tour, Ltd. v. System Auto Parks, Ltd.*, 28 Cal. App.2d 782, 71 P.2d 354 (App. Dept. Sup'r Ct. L.A. 1947).

PROSSER ON TORTS
p. 442-45

Express Agreement

It is quite possible for the parties expressly [29] to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent.[30] There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself. Thus one who accepts a gratuitous pass on a railway train,[31] or enters into a lease,[32] or rents a horse,[33] or employs an agent,[34] or enters into a variety of similar relations involving free and open bargaining between the parties,[35] may agree that there shall be no obligation to take precautions, and hence no liability for negligence.

The courts have refused to uphold such agreements, however, where one party is at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence. Thus it is generally held that a contract exempting an employer from all liability for negligence toward his employees is void as against public policy.[36] The same is true as to the efforts of public utilities to escape liability for negligence in the performance of their duty of public service.[37] A carrier who transports goods [38] or passengers for hire,[39] or a telegraph company transmitting a message,[40] may not contract away its public responsibility, and this is true although the agreement takes the form of a limitation of recovery to an amount less than the probable damages.[41] It has been held, however, that the contract will be sustained where it represents an honest attempt to fix a value as liquidated damages in advance, and the carrier graduates its rates according to such value, so that full protection would be open to the plaintiff upon paying a higher rate.[42] The same rules apply to innkeepers [43] and public warehousemen.[44]

There has been a definite tendency to extend the same rule to other professional bailees who are under no public duty but deal with the public, such as garagemen and owners of parking lots,[45] and of parcel checkrooms,[46] on the ground that the indispensable need for their services deprives the customer of all real equal bargaining power. As to other private bailees for hire, the courts are divided as to the validity of a contract against liability for negligence—some holding that such a general agreement is valid,[47] while others regard it as against public policy.[48] The decision is likely to turn upon the extent to which it is considered that the public interest is involved. Where it is not, it seems the better view that there is an unfair advantage to the bailee in permitting him to set the terms upon which he will receive the goods, so long as the bailor is free without any serions disadvantage to himself to reject them.[49] It is generally agreed that he may at least contract that he is not required to exercise care to protect the deposited goods against a specific limited risk.[50]

If an express agreement exempting the defendant from liability for his negligence is to be sustained, it must appear that its terms were brought home to the plaintiff; [51] and if he did not know of the provision in his contract and a reasonable person in his position would not have known of it, it is not binding upon him, and the agreement fails for want of mutual assent.[52] It is also necessary that the expressed terms of the agreement be applicable to the particular misconduct of the defendant.[53] In general, and on the basis either of common experience as to what is intended, or of public policy to discourage aggravated wrongs, such agreements are not construed to cover the more extreme forms of negligence which are described as wilful, wanton, reckless or gross,[54] or to any conduct which constitutes an intentional tort.[55] It follows, for example, that when a warehouseman negligently misdelivers goods, a clause in the contract of storage limiting his liability, which would be effective if the action were for negligence, can be circumvented by suing for conversion.[56]

2. *Insurance claims cases.* Similar principles also arise in cases in which the plaintiffs allege that the defendants willfully and maliciously refused to pay claims to individual plaintiffs under insurance policies. Thus, in Eckenrode v. Life of America Insurance Co., 470 F.2d 1, 4-5 (7th Cir. 1972), the plaintiff alleged that the defendant refused to honor its immediate obligation to pay the plaintiff $5,000 on proof of her husband's accidental death, notwithstanding her repeated demands for payment. The plaintiff further alleged that she had a critical need of the money to support her several children, and that in consequence of the defendant's breach of its obligation she had no money, even for funeral expenses, and that her "family was required to live with, and accept charity from, relatives." The court sustained her complaint, holding that Illinois law accepted the tort of "intentional infliction of severe emotional distress" as applied in the insurance context in Fletcher v. Western National Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970):

> Here Insurer's alleged bad faith refusal to make payment on the policy, coupled with its deliberate use of "economic coercion" (i.e., by delaying and refusing payment it increased plaintiff's financial distress thereby coercing her to compromise and settle) to force a settlement, clearly rises to the level of "outrageous conduct" to a person of "ordinary sensibilities."
>
> Furthermore, it is common knowledge that one of the most frequent considerations in procuring life insurance is to ensure the continued economic and mental welfare of the beneficiaries upon the death of the insured. The very risks insured against presuppose that upon the death of the insured the beneficiary might be in difficult circumstances and thus particularly susceptible and vulnerable to high pressure tactics by an economically powerful entity. In the case before us Insurer's alleged high pressure methods (economic coercion) were aimed at the very thing insured against, and we think that the insurance company was on notice that plaintiff would be particularly vulnerable to mental distress by reason of her financial plight.

See Chapter 14E for a further discussion of bad-faith settlement of insurance claims.

355 N.E. 2D 315

Debra AGIS et al.[1]

v.

HOWARD JOHNSON COMPANY et al.[2]

Supreme Judicial Court of Massachusetts,
Suffolk.

Argued March 3, 1976.

Decided Oct. 1, 1976.

Wife sought to recover damages from owner and manager of restaurant in which she was employed for mental anguish and emotional distress allegedly caused by her summary dismissal from such employment and husband sought to recover for loss of

1. James Agis.

2. Roger Dionne.

[redacted]

services, love, affection and companionship of his wife. The Superior Court, Suffolk County, Adams, J., dismissed complaint. After granting spouses' request for direct appellate review, the Supreme Judicial Court, Quirico, J., held that complaint stated cause of action for intentional or reckless infliction of severe emotional distress, without resulting bodily injury, and that husband had cause of action for loss of consortium arising out of that distress.

Judgment reversed.

1. Pleading ⟹360(8)

Allegations in complaint are to be accepted as true for purposes of ruling on motion to dismiss.

2. Damages ⟹49

One who, without privilege, causes emotional distress to another is subject to liability for such distress, even though no bodily harm may result, if the actor intended to inflict emotional distress or knew or should have known that emotional distress was likely result of his conduct, if the conduct is extreme and outrageous, beyond all possible bounds of decency and utterly intolerable and if the distress sustained is severe and of a nature that no reasonable man could be expected to endure.

3. Damages ⟹149

Complaint stated cause of action for intentional or reckless infliction of severe emotional distress, without resulting bodily injury, by virtue of plaintiff's summary dismissal from her employment. Rules of Civil Procedure, rule 12(b)(6).

4. Husband and Wife ⟹209(1)

Action for loss of consortium by either spouse may be maintained where such loss is shown to arise from personal injury to one spouse caused by negligence of the third person.

5. Husband and Wife ⟹209(2)

Where wife had cause of action for intentional or reckless infliction of severe emotional distress, husband had cause of action for loss of consortium arising out of that distress. Rules of Civil Procedure, rule 12(b)(6).

Dante G. Mummolo, Boston, for plaintiffs.

John P. Ryan, Dorchester (John C. Lacy, Boston, with him), for defendants.

Before REARDON, QUIRICO, BRAUCHER and WILKINS, JJ.

QUIRICO, Justice.

This case raises the issue, expressly reversed in *George v. Jordan Marsh Co.*, 359 Mass. 244, 255, 268 N.E.2d 915 (1971), whether a cause of action exists in this Commonwealth for the intentional or reckless infliction of severe emotional distress without resulting bodily injury. Counts 1 and 2 of this action were brought by the plaintiff Debra Agis against the Howard Johnson Company and Roger Dionne, manager of the restaurant in which she was employed to recover damages for mental anguish and emotional distress allegedly caused by her summary dismissal from such employment. Counts 3 and 4 were brought by her husband, James Agis, against both defendants for loss of the services, love, affection and companionship of his wife. This case is before us on the plaintiffs' appeal from the dismissal of their complaint.

[1] Briefly, the allegations in the plaintiffs' complaint, which we accept as true for purposes of ruling on this motion, *Hub Theatres, Inc. v. Massachusetts Port Authority*, — Mass. —, —[a], 346 N.E.2d 371

a. Mass.Adv.Sh. (1976) 1031, 1032.

(1976), are the following. Debra Agis was employed by the Howard Johnson Company as a waitress in a restaurant known as the Ground Round. On or about May 23, 1975, the defendant Dionne notified all waitresses that a meeting would be held at 3 P.M. that day. At the meeting, he informed the waitresses that "there was some stealing going on," but that the identity of the person or persons responsible was not known, and that, until the person or persons responsible were discovered, he would begin firing all the present waitresses in alphabetical order, starting with the letter "A." Dionne then fired Debra Agis.

The complaint alleges that, as a result of this incident, Mrs. Agis became greatly upset, began to cry, sustained emotional distress, mental anguish, and loss of wages and earnings. It further alleges that the actions of the defendants were reckless, extreme, outrageous and intended to cause emotional distress and anguish. In addition, the complaint states that the defendants knew or should have known that their actions would cause such distress.

The defendants moved to dismiss the complaint pursuant to Mass.R.Civ.P. 12 (b)(6), 365 Mass. 755 (1974), on the ground that, even if true, the plaintiffs' allegations fail to state a claim upon which relief can be granted because damages for emotional distress are not compensable absent resulting physical injury. The judge allowed the motion, and the plaintiffs appealed.

1. Our discussion of whether a cause of action exists for the intentional or reckless infliction of severe emotional distress without resulting bodily injury starts with our decision in *George v. Jordan Marsh Co.*, 359 Mass. 244, 268 N.E.2d 915 (1971). While in that case we found it unnecessary to address the precise question raised here, we did summarize the history of actions for emotional distress and concluded that the law of the Commonwealth should be, and is, "that one who, without a privilege to do so, by extreme and outrageous conduct intentionally causes severe emotional distress to another, *with bodily harm resulting* from such distress, is subject to liability . . ." (emphasis supplied). 359 Mass. at 255, 268 N.E.2d at 921. The question whether such liability should be extended to cases in which there is no resulting bodily injury was "left until it arises," *ibid.*, and that question has arisen here.

In the *George* case, we discussed in depth the policy considerations underlying the recognition of a cause of action for intentional infliction of severe emotional distress with resulting physical injury, and we concluded that the difficulties presented in allowing such an action were outweighed by the unfair and illogical consequences of the denial of recognition of such an independent tort. In so doing, we examined the persuasive authority then recognizing such a cause of action, and we placed considerable reliance on the Restatement (Second) of Torts § 46 (1965). Our examination of the policies underlying the extension of that cause of action to cases where there has been no bodily injury, and our review of the judicial precedent and the Restatement in this regard,[3] lead us to conclude that such extension is both warranted and desirable. See *Baldassari v. Public Fin. Trust*, — Mass. —, —, — [b], 337 N.E.2d 701 (1975).

The most often cited argument for refusing to extend the cause of action for intentional or reckless infliction of emotional distress to cases where there has been no physical injury is the difficulty of proof and the danger of fraudulent or frivolous

3. Most courts today recognize a cause of action for intentionally or recklessly causing severe emotional distress by extreme and outrageous conduct. *Womack v. Eldridge*, 215 Va. 338, 341 n. 1, 210 S.E.2d 145 (1974). See Annot., 64 A.L.R.2d 100, § 8 at 120 (1959), and cases cited. See also Restatement (Second) of Torts § 46, comment *b* (1965).

b. Mass.Adv.Sh. (1975) 3188, 3189, 3194.

claims. There has been a concern that "mental anguish, standing alone, is too subtle and speculative to be measured by any known legal standard," that "mental anguish and its consequences are so intangible and peculiar and vary so much with the individual that they cannot reasonably be anticipated," that a wide door might "be opened not only to fictitious claims but to litigation over trivialities and mere bad manners as well," and that there can be no objective measurement of the extent or the existence of emotional distress. *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 649, 254 S.W. 2d 81, 86 (1953). There is a fear that "[i]t is easy to assert a claim of mental anguish and very hard to disprove it." *Id.* at 650, 254 S.W.2d at 86, citing *Gardner v. Cumberland Tel. Co.*, 207 Ky. 249, 254, 268 S.W. 1108 (1925). See *Bartow v. Smith*, 149 Ohio 301, 78 N.E.2d 735 (1948); *Hetrick v. Willis*, 439 S.W.2d 942 (Ky.1969). See also Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L.Rev. 1033 (1936); W. Prosser, Torts § 12 (4th ed. 1971).

While we are not unconcerned with these problems, we believe that "the problems presented are not . . . insuperable" and that "administrative difficulties do not justify the denial of relief for serious invasions of mental and emotional tranquility . . . ." *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 338–339, 240 P.2d 282, 286 (1952). "That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform." *Samms v. Eccles*, 11 Utah 2d 289, 293, 358 P.2d 344, 347 (1961). See *George v. Jordan Marsh Co.*, 359 Mass. 244, 251, 268 N.E.2d 915 (1971). See also *Sorensen v. Sorensen*, — Mass. —, — [c], 339 N.E.2d 907 (1975).

Furthermore, the distinction between the difficulty which juries may encounter in determining liability and assessing damages where no physical injury occurs and their performance of that same task where there has been resulting physical harm may be greatly overstated. "The jury is ordinarily in a better position . . . to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury. . . . Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom." *State Rubbish Collectors Ass'n v. Siliznoff*, *supra*, 38 Cal.2d at 338, 240 P.2d at 286. We are thus unwilling to deny the existence of this cause of action merely because there may be difficulties of proof. Instead, we believe "the door to recovery should be opened but narrowly and with due caution." *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 1312, 242 N.W. 25, 28 (1932).

[2] In light of what we have said, we hold that one who, by extreme and outrageous conduct and without privilege, causes severe emotional distress to another is subject to liability for such emotional distress even though no bodily harm may result. However, in order for a plaintiff to prevail in a case for liability under this tort, four elements must be established. It must be shown (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct, Restatement (Second) of Torts § 46, comment *i* (1965); *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *Samms*

c. Mass.Adv.Sh. (1975) 3662, 3680.

v. Eccles, 11 Utah 2d 289, 293, 358 P.2d 344 (1961); (2) that the conduct was "extreme and outrageous," was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community," Restatement (Second) of Torts § 46, comment *d* (1965); *George v. Jordan Marsh Co.,* 359 Mass. 244, 254–255, 268 N.E.2d 915 (1971); (3) that the actions of the defendant were the cause of the plaintiff's distress, *Spackman v. Good,* 245 Cal.App.2d 518, 54 Cal.Rptr. 78 (1966); *Womack v. Eldridge,* 215 Va. 338, 341, 210 S.E.2d 145 (1974); and (4) that the emotional distress sustained by the plaintiff was "severe" and of a nature "that no reasonable man could be expected to endure it." Restatement (Second) of Torts § 46, comment *j* (1965); *Womack v. Eldridge, supra.* These requirements are "aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved," *Womack v. Eldridge, supra* at 342, 210 S.E.2d at 148, and we believe they are a "realistic safeguard against false claims . . . ." *Samms v. Eccles, supra.*

[3] Testing the plaintiff Debra Agis's complaint by the rules stated above, we hold that she makes out a cause of action and that her complaint is therefore legally sufficient. While many of her allegations are not particularly well stated, we believe that the "[p]laintiff has alleged facts and circumstances which reasonably could lead the trier of fact to conclude that defendant's conduct was extreme and outrageous, having a severe and traumatic effect upon plaintiff's emotional tranquility." *Alcorn v. Anbro Eng'r, Inc.,* 2 Cal.3d 493, 498, 86 Cal.Rptr. 88, 90, 468 P.2d 216, 218 (1970). Because reasonable men could differ on these issues,[4] we believe that "it is for the jury, subject to the control of the court," to determine whether there should be liability in this case. Restatement (Second) of Torts § 46, comment *h* (1965). *Womack v. Eldridge,* 215 Va. 338, 342, 210 S.E.2d 145 (1974). While the judge was not in error in dismissing the complaint under the then state of the law, we believe that, in light of what we have said, the judgment must be reversed and the plaintiff Debra Agis must be given an opportunity to prove the allegations which she has made.

[4, 5] 2. Counts 3 and 4 of the complaint are brought by James Agis seeking relief for loss of consortium as a result of the mental distress and anguish suffered by his wife Debra. There is no question that an action for loss of consortium by either spouse may be maintained in this Commonwealth where such loss is shown to arise from personal injury to one spouse caused by the negligence of a third person. *Diaz v. Eli Lilly & Co.,* 364 Mass. 153, 167–168, 302 N.E.2d 555 (1973). The question before us is whether an action for loss of consortium may be maintained where the acts complained of are intentional, and where the injuries to the spouse are emotional rather than physical.

Traditionally, where the right to sue for loss of consortium has been recognized, intentional invasions of the marriage relationship such as alienation of affections or adultery have been held to give rise to this cause of action. *Diaz v. Eli Lilly & Co., supra* at 158–160, 302 N.E.2d 555 and cases cited. We see no reason not to apply the same rule to the tort of intentional or reckless infliction of severe emotional distress. Similarly, the fact that there is no physical injury should not bar the plaintiff's claim. In the *Diaz* case, we hinted that "psychological injury" could provide

4. Compare *Golden v. Dungan,* 20 Cal.App.3d 295, 97 Cal.Rptr. 577 (1971), and *Alcorn v. Anbro Eng'r Inc.,* 2 Cal.3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970), with *Cornblith v. First Maintenance Supply Co.,* 268 Cal.App.2d 564, 74 Cal.Rptr. 216 (1968), *Agostini v. Strycula,* 231 Cal.App.2d 804, 42 Cal.Rptr. 314 (1965), and *Perati v. Atkinson,* 213 Cal.App.2d 472, 28 Cal.Rptr. 898 (1963).

the basis for a consortium action. 364 Mass. at 160, 302 N.E.2d 555. In addition, the underlying purpose of such an action is to compensate for the loss of the companionship, affection and sexual enjoyment of one's spouse, and it is clear that these can be lost as a result of psychological or emotional injury as well as from actual physical harm. Cf. *Garrison v. Sun Printing & Publishing Ass'n,* 207 N.Y. 1, 10, 100 N.E. 430 (1912). Accordingly, we hold that, where a person has a cause of action for intentional or reckless infliction of severe emotional distress, his or her spouse also has a cause of action for loss of consortium arising out of that distress.

3. The judgment entered in the Superior Court dismissing the plaintiffs' complaint is reversed.

So ordered.

PRIVATE EYE, No. 410 (LONDON, 9/2/77)

Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress

Regina Austin*

The conventional wisdom is that, in the workplace, abuse can b legitimate instrument of worker control and an appropriate form of c cipline.[1] By "abuse" I mean treatment that is intentionally emotion: painful, offensive, or insulting. Rebukes and reprimands are the v sort of "behavior that one would expect from a superior who is dissa fied with his subordinate's performance."[2] Young black men may deed be offended by the close surveillance and suspicious scrutiny tl receive in the course of performing low-paying, unskilled jobs,[3] l that is "their problem." Furthermore, the white-collar manager w suffers despair as a result of an unexplained denial of the "perks" exalted status is supposed to get the message and seek employm elsewhere.[4]

It is generally assumed that employers and employees alike ag that some amount of such abuse is a perfectly natural, necessary, a defensible prerogative of superior rank. It assures obedience to co mand. Bosses do occasionally overstep the bounds of what is cons ered reasonable supervision, but, apart from contractually bas understandings[5] and statutory entitlements to protection from hara ment,[6] there are few objective standards of "civility" by which to juc

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1. *See e.g.*, C. BRODSKY, THE HARASSED WORKER 6, 149-50 (1976).
2. Magruder v. Selling Areas Marketing, Inc., 439 F. Supp. 1155, 1166 (N.D. Ill. 19
3. *See generally* Anderson, *Some Observations of Black Youth Employment*, in YOUTH EMP MENT AND PUBLIC POLICY 64 (B. Anderson & I. Sawhill eds. 1980) [hereinafter Anders *Youth Employment*]; Anderson, *The Social Context of Youth Employment Programs*, in YOUTH EMPL MENT AND TRAINING PROGRAMS: THE YEDPA YEARS 348 (1985) [hereinafter Anderson, *Emp ment Programs*].
4. *See, e.g.*, Wells v. Thomas, 569 F. Supp. 426 (E.D. Pa. 1983); Snyder v. Sunshine Da 87 Or. App. 215, 742 P.2d 57 (1987).
5. Some workers are protected by bureaucratic safeguards that are codified in un contracts and employee handbooks. *See* text accompanying notes 219-236 *infra*.
6. *See* notes 46-51 *infra* and accompanying text.

a superior's treatment of a subordinate. Workers for their part are expected to respond to psychologically painful supervision with passivity, not insubordination and resistance. They must and do develop stamina and resilience. If the supervision is intolerable, they should quit and move on to another job.

In sum, there is little reason for workers to take undue umbrage at the treatment they receive at work. The pain, insults, and indignities they suffer at the hands of employers and supervisors should be met with acquiescence and endurance. That's life.

Who believes this?

My experiences as a "subordinate" and as an observer of life among the "subordinates" who work where I do[7] suggest that employees' attitudes toward, and actions against supervisors are frequently at odds with any concept of deference to authority. The conventional wisdom is reflected in the appellate court opinions applying the tort of intentional infliction of emotional distress in suits brought by employees against their employers and supervisors. It is not, however, reproduced in the everyday actions and attitudes of workers. As I began to read cases applying the so-called tort of outrage to the claims of employees, a passage from Toni Morrison's novel *Tar Baby*[8] often came to mind. Morrison captures the familiar tenor of the banter and behavior of black female workers, especially that occurring in the absence of the boss:

> [I]f ever there was a black woman's town, New York was it. . . . Snapping whips behind the tellers' windows, kicking ass at Con Edison offices, barking orders in the record companies, hospitals, public schools. . . . They jacked up meetings in boardrooms, turned out luncheons, energized parties, redefined fashion, tipped scales, removed lids, cracked covers and turned an entire telephone company into such a diamondhead of hostility the company paid you for not talking to their operators. The manifesto was simple: "Talk shit. Take none."[9]

Sassy rhetoric and a sense of style challenge the status quo and liberate the spirit. They are the sort of cultural devices that many workers employ, if not to conquer the oppressions of the workplace, then at least to create moments of resistance and autonomy from employer

7. As a teenager growing up in black Washington, D.C. (what I call "the vast federal plantation"), I got jobs through summer youth employment programs. I mainly worked in offices and laboratories. Now that I am a law professor, I suppose that I am more of a superordinate than subordinate, but I do not imagine that there is an academic alive who has not engaged in her or his share of "dean-trashing." I have spent most of my professional life as a token, one of two or three or four blacks and/or women occupying high-level positions. I have felt especially comfortable with and supported by the secretaries, office help, library personnel, security guards, and housekeeping staff. I share deep cultural ties with them, and their common sense and critical assessments of their working situations have been of immeasurable instruction and encouragement.

8. T. MORRISON, TAR BABY (1981).

9. *Id.* at 222.

control. Despite all their feisty vitality, informal discourses, practic and understandings neither fully negate the workers' acquiescence abusive authority nor fuel sustained warfare against a hierarchical s tem that differentiates among employees with regard to the oppressi ness of supervisory control. The mechanisms of workplace and gro culture are partial, incomplete, and disorganized. They are no mai for the seeming inevitability of the dictate that abusive authority obeyed.

Indeed, the cultural modes and coping mechanisms of minority a female workers are used to justify discipline and discrimination. Ev day I see young black women and men working behind the counter busing tables at fast food restaurants, delivering packages about to or otherwise engaging in employment requiring few skills. Their pc tions are essentially dead-end jobs: pay is poor and supervision is tig there is no opportunity for advancement; turnover is high and work move from job to job without acquiring additional training or improvement in working conditions.[10] As hard as they try, the w experiences of these young people must be demoralizing for them a others similarly situated. Because of the narrow corridor in whicl travel I see less often the vast number of minority young folks who unemployed or have dropped out of the labor market entirely. Ne accounts suggest that not only do these prospective minority empl ees have difficulty satisfying skill requirements, but their demeanor a commitment to the "work ethic" may also be found wanting.[11] T panacea seems to be socializing the workers to appreciate author Given the nature of the jobs, and the ubiquity of conflict in the empl ment relationship, socializing the authority figures to be more respe ful and understanding of the ways of young workers would a facilitate the full participation of minority women and men in the la force.[12] Of course, transforming bosses will be no easy matter.

The focus of concern throughout this article will be the work conditions and experiences of black and Latino employees of b sexes, and female workers, black, brown and white, all of whom occ the lower tiers of the labor force.[13] To be sure, the sources of the r

10. *See* B. GARSON, THE ELECTRONIC SWEATSHOP 17-39 (1988); Blount, *"If You Got Ti Lean, You Got Time to Clean.,"* SOUTHERN EXPOSURE, Winter 1981, at 73-76; Marriot, *More but Not Careers, for Youth,* N.Y. Times, March 19, 1988, at 29.

11. *See* Marriott, *supra* note 10; Daley, *For Dropouts, Finding Jobs Is Tough Task,* N.Y. Ti August 1, 1988, at B4, col.1; W. WILSON, THE TRULY DISADVANTAGED 60-61 (1987).

12. *See* Anderson, *Employment Programs, supra* note 3, at 355; Teltsch, *Helping Least-Em able Find Jobs,* N.Y. Times, Aug. 21, 1988, at 20, col. 1 (nat'l ed.).

13. There is no short, concise way to refer to the overlapping categories of workers I be discussing. The expressions that are typically used seem to exclude minority women HOOKS, AIN'T I A WOMAN 7-9 (1981). It should be understood that in this article the t "minority workers" includes both males and females, while the term "female" includes men who are white and women who are not. My use of "and" to link these words, rather t "and/or" or an expression such as "minority women and men and white women," is inten to be fully inclusive.

terial circumstances of these minority men, minority women, and majority women are not the same. There are dangers in ignoring the particularities of the ideological and economic conditions and cultural responses that separate each group from the others as well as from the group of white male low status workers. Yet many members of these groups historically subject to multiple oppressions share a common experience of abusive supervision. For them, it is not isolated and sporadic rudeness, but a pervasive phenomenon that causes and perpetuates economic and social harm as well as emotional injury. In the places where these workers labor, racism and sexism obscure and are obscured by the perniciousness of class oppression. Mistreatment that would never be tolerated if it were undertaken openly in the name of white supremacy or male patriarchy is readily justified by the privileges of status, class, or color of collar.[14] Moreover, minority and female low status workers appear to have little economic clout with which to combat such supervisory abuse. They do, however, criticize their work situations and resist them to a limited extent. This article explores how the law might be useful in maximizing the affirmative politically progressive potential of their informal, local, and largely defensive cultural opposition to mistreatment on the job.

The analysis that follows considers supervisory abuse from three perspectives. It first describes the approach of courts and commentators in evaluating intentional infliction of emotional distress claims brought by employees. Although the generality of the tort doctrine betokens the possibility of an expansive remedy, the holdings generally support norms justifying abusive supervision. A second, antithetical perspective is supplied by the work and group culture of minority and female low status workers. Rejecting the view that dominates the tort analysis, these workers criticize abuse on the job and oppose it through a wide range of devices and tactics. Through these same mechanisms, however, they ultimately accommodate harsh supervisory oversight. The implications of the disparity between the workers' critical consciousness and their acquiescent behavior will be explored in depth. The third perspective fits authoritative workplace abuse into structural context by linking it to systems of supervisory control and the stratification or segmentation of the labor force. Whereas the cultural perspective emphasizes the way in which workers create opportunities for the exercise of choice in the face of hostile supervision, the structural perspective reveals the coercion that limits the real possibility of achieving freedom through informal means. Because workplace abuse has both a structural and cultural basis, however, reform might be possible if small-scale cultural resistance escalated into broad political activity ac-

14. Although not specifically invoked elsewhere, "color of collar" includes pink-collar workers. Pink-collar workers are those engaged in occupations that are associated with feminine traits and predominantly held by women, such as hairdressers, waitresses, and private household domestics. *See* L. HOWE, PINK COLLAR WORKERS 11-12 (1977).

companied by material structural dislocations that shift the balance economic factors in workers' favor.

Drawing on the three perspectives of authoritative abuse, the fi section of the article considers the role tort law might play in turni the workers' critique into the normative foundation of an oppositio movement led by those who are oppressed not only by their race a sex but also by their class. Movements are built on "real-life stori that teach, inspire, fortify, and remind the participants of the justness their cause.[15] The cultural resistance of low status minority and fem workers represents a rich lode of true tales to fuel a movement. T tort of outrage would serve a useful pedagogical function if instead compelling accommodation and surrender it incorporated the wisd of the critique, extolled the dignity of workers, and legitimated th claims to respectful treatment by supervisors. A "worker-centric" t of outrage would not convey anything particularly new to the worke it would merely formulate in a formal, pointed, coherent statement t emancipatory themes of the lessons experience has already tau them.[16] Tort law can do no less if employers are to be brought arou to the view that intentionally inflicted emotional distress is an unacce able tool of worker control.

I. IN SUPPORT OF AUTHORITATIVE ABUSE

This section offers a summary of what the courts and commentat have to say about abuse in the workplace in the context of the tort outrage.[17] Legal discourse on the subject is largely in accord with t widely disseminated "conventional wisdom" regarding employer :

15. D. BELL, AND WE ARE NOT SAVED 253 (1987).

16. *Cf.* S. ARONOWITZ & H. GIROUX, EDUCATION UNDER SIEGE 107-08, 156 (1985) (r cal pedagogy must incorporate aspects of the cultural resistance of students).

17. There are a number of cases in which the courts have not reached the merits of employees' claims because applicable statutory provisions either preempt the courts' juris tion or preclude the application of state tort law. Federal labor law, for example, may pro the sole form of relief for plaintiffs who are covered by collective bargaining agreements. note 278 *infra* and accompanying text. Furthermore, claims of intentional infliction of e tional distress have sometimes been defeated by the exclusivity provisions of state work compensation laws. *See, e.g.*, Battista v. Chrysler Corp., 454 A.2d 286, 288-89 (Del. Super. 1982); Brown v. Winn-Dixie Montgomery, Inc., 469 So. 2d 155 (Fla. Dist. Ct. App. 19 Simmons v. Merchants Mut. Ins. Co., 394 Mass. 1007, 476 N.E.2d 221 (1985); Foley v. P oid Corp., 381 Mass. 545, 413 N.E.2d 711 (1980); Hood v. Trans World Airlines, 648 S.W 167 (Mo. Ct. App. 1983). Many jurisdictions, however, allow such tort suits to proceed they involve intentional misconduct and emotional (rather than physical) harm. *See, e.g.*, sell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482 (9th Cir. 1983) (applying California *rev'd on other grounds*, 473 U.S. 134 (1985); Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d (1987); Beauchamp v. Dow Chemical Co., 427 Mich. 1, 398 N.W.2d 882 (1986); Hoga Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986). *Compare* Benne Furr's Cafeterias, Inc., 549 F. Supp. 887 (D. Colo. 1982) (sexual harassment giving ris distress claim is too remote from employment to be barred by worker's compensation) Kandt v. Evans, 645 P.2d 1300 (Colo. 1982) (exclusivity provisions bar tort action where duct is not in course of employment). *See also* 2A A. LARSON, THE LAW OF WORKMEN'S C PENSATION § 68.34(d) (1987) (exclusivity should depend upon whether tort is addresse non-physical injury and whether plaintiff seeks recovery for substantial physical harm).

pervision.[18] As such, it reflects a view that is neither overtly supportive of workers, nor instrumentally biased in favor of employers.[19] Although employees win cases, the employers somehow come out ahead.

In delineating the requirements of a cause of action for the intentional infliction of emotional distress, the courts generally rely on Section 46 of the *Restatement (Second) of Torts*.[20] Section 46 requires that the plaintiff prove that the defendant's conduct was

> so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"[21]

If the conduct does not rise to the requisite level, it is dismissed as being among those "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" to which the victim "must nec-

18. Although judicial opinions and law review articles are addressed to a small elite group and are not widely disseminated, their content bears some relationship to the messages that other institutions are spreading. *See, e.g.*, Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281, 286-87 (D. Kairys ed. 1982); Greer, *Antonio Gramsci and "Legal Hegemony,"* in *id.* at 304. It is not claimed here that the law has instrumental or deterministic control over the broad spectrum of societal groups. The law's most salient purpose may be to "legitimate," in the minds of those who are privy to it, their exercises of power over others. *See* J. MERQUIOR, THE VEIL AND THE MASK 37-38. *See also* Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 543-47.

19. The analysis in this article draws heavily upon the theory of hegemony associated with Antonio Gramsci. *See* A. GRAMCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. Smith eds. 1971). *See also* C. BOGGS, GRAMSCI'S MARXISM (1976); Mouffe, *Hegemony and Ideology in Gramsci*, in GRAMSCI AND MARXIST THEORY 168 (C. Mouffe ed. 1979); Przeworski, *Material Bases of Consent: Economics and Politics in a Hegemonic System*, 1 POL. POWER & SOC. THEORY 21 (1980); C. WEST, PROPHESY DELIVERANCE!: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY 112-212 (1982). Gramsci's theory of hegemony rejects the thesis that the ideas or ideological institutions of the dominant class rigidly structure and dictate the lives of ordinary people. *See* Mouffe, *supra*, at 195-96, 189-92. Rather, the existing social order is maintained through the organization of force or coercive power, *see, e.g.*, Anderson, *The Antinomies of Antonio Gramsci*, NEW LEFT REVIEW 5-78 (1976-1977); Przeworski, *supra*, at 25, 58, and through the manufacture of "active consent," A. GRAMSCI, *supra*, at 244, or of "a collective will," Mouffe, *supra*, at 184. *See also* M. FOUCAULT, POWER/KNOWLEDGE 78-108 (C. Gordon ed. 1980); J. GAVENTA, POWER AND POWERLESSNESS (1980). For Gramsci, "ideologies . . . organize human masses, and create the terrain on which [people] move, acquire consciousness of their position, struggle, etc." A. GRAMSCI, *supra*, at 377. At the ideological level, hegemonic dominance is maintained through the ascendancy of a coherent world view which is unified by values related to the role of the hegemonic class, but which also "include[s] elements from varying sources." Mouffe, *supra*, at 193. The effect of this world view on the ideas and beliefs of the subordinate classes may be subtle and indirect, limiting their oppositional potential rather than dictating positive affirmation. *See generally* P. WILLIS, LEARNING TO LABOUR: HOW WORKING CLASS KIDS GET WORKING CLASS JOBS (1977).

20. RESTATEMENT (SECOND) OF TORTS § 46 (1965) reads as follows: "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."

21. *Id.* at comment d.

essarily be expected and required to be hardened."[22] As applied to employment relationship, this means that every practice or patter emotional mistreatment except the outrageous, atrocious, and intol ble is treated as the ordinary stuff of everyday work life.

The approach mandated by Section 46 immediately focuses whether the employer's or supervisor's coercion was excessive skips the threshold issue of whether any amount of emotional mistr ment was justified. In this regard, it differs from the 1948 versio the section which required that the defendant show that abuse of plaintiff was privileged.[23] The legal analysis required by the cur version of Section 46 thus allows courts to avoid elaborate explanati for their decisions. Beginning with the assumption that some amc of intentionally inflicted pain is acceptable, they need not and ofter not go much beyond quoting the comments to Section 46 and offe several conclusory sentences sprinkled with *Restatement* terminol Courts concentrate on the facts of the appeal at hand, and emphasiz depreciate the nuances that distinguish them from those of previo decided cases.[24]

The very ad hoc nature of the adjudications casts abuse as a con drum too amorphous, ephemeral, and slippery to be effectively cu with judicial relief. Although the courts acknowledge that abuse ca a problem and invoke an indeterminate test that should be sufficie malleable to support broad relief,[25] their vague factual analyses b their expressions of concern. Overall, the legal analysis confirms abuse cannot really be systematically attacked because it lacks spec ity and concreteness. Moreover, in the eyes of the law, abuse se less a privilege of employers than an intrinsic predicament of the ployment relationship. It is part of the natural disorder of work life cannot be changed.

If the indeterminacy and contradictions the holdings reflect

22. *Id.* In addition, First Amendment concerns may dictate that insulting lang slurs, and epithets be immune from liability. *See generally First Amendment Limits on Tort Li for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985) (stu author).

23. The 1948 version of section 46 provided that "[o]ne who, without a privilege so, intentionally causes severe emotional distress to another is liable (a) for such emot distress, and (b) for bodily harm resulting from it." RESTATEMENT OF THE LAW: 1948 SU MENT, TORTS § 46 (1948). Daniel Givelber, in his extensive article on the tort, suggests the privilege approach was subsequently rejected because it required that "issues such a legitimacy of coercion" be directly addressed. Givelber, *The Right to Minimum Social D and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Condu* COLUM. L. REV. 42, 62 (1982).

24. *See, e.g.*, Zamboni v. Stamler, 847 F.2d 73 (3d Cir. 1988); Salazar v. Furr's Inc., 6 Supp. 1403 (D.N.M. 1986); Surrency v. Harbison, 489 So. 2d 1097, 1105-06 (Ala. 1986); v. C.B. Johnson, 660 P.2d (Colo. App. 1983); Jackson v. Sun Oil Co. of Pa., 521 A.2d 46 1987); Hurst v. Farmer, 40 Wash. App. 116, 697 P.2d 280 (1985).

25. Givelber lauds the seeming indeterminacy of the outrageousness standard o ground that it "has facilitated [the tort's] development by freeing courts of the necessi rationalizing results in terms of rules of universal applicability." Givelber, *supra* note 2 43.

deemphasized, and the opinions are read as a single body united by common ideological threads, patterns do emerge. These patterns bespeak the conventional wisdom regarding authoritative abuse.

A. *Traditional Employer Prerogatives*

The courts accord employers wide latitude in directing their employees' activities in ways that cause them emotional distress. The courts leave little doubt as to who is in charge of the workplace.[26] The employer is free to ignore any interest workers may have in performing particular tasks, using particular skills, or doing a job at a particular level of proficiency or ease.[27] Thus, work assignments are "managerial decisions . . . [that do] not qualify as intentional infliction of severe mental distress."[28] Similarly, while imposition of an inordinate work load may "creat[e] an environment which is oppressive to function

26. Employers have attempted to extend their control beyond the workplace into the homes and private lives of their employees. The courts in outrage cases have sometimes allowed workers a sphere of privacy in which the employers' concerns are not given priority. *See* Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (false diagnosis of fatal illness communicated by team physician to sportswriter); Baltz v. County of Will, 609 F. Supp. 992 (N.D. Ill. 1985) (deputy sheriff forcibly removed from home and jailed by employer); Collins v. General Time Corp., 549 F. Supp. 770 (N.D. Ala. 1982) (injured employee badgered in her home about malingering); Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (supervisor demanded that subordinate end personal relationship with employee of competitor). *But see* Woodring v. Board of Grand Trustees, 633 F. Supp. 583 (W.D. Va. 1986) (plaintiff's job required wife; not outrageous to terminate plaintiff after he was widowed); Salazar v. Furr's Inc., 629 F. Supp. 1403 (D.N.M. 1986) (pregnant employee fired for being married to employee of competitor does not state a claim for infliction of emotional distress); Pemberton v. Bethlehem Steel Co., 66 Md. App. 133, 502 A.2d 1101 (1986) (employer's disclosure of union business agent's criminal conviction to union members and infidelities to wife in retaliation for his activities was not actionable as an invasion of privacy), *cert. denied*, 107 S. Ct. 574 (1986); Patton v. J.C. Penney Co., 301 Or. 117, 719 P.2d 854 (1986) (supervisor fired for fraternizing with subordinate: no tort action allowed). *Cf.* Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791 (D. Utah 1984) (church employer not barred from inquiring about sexual activities, contributions to church, and obedience and allegiance to church leaders to determine fitness for employment), *rev'd on other grounds*, 107 S. Ct 2862 (1987).

27. *See, e.g.*, Cornblith v. First Maintenance Supply Co., 268 Cal. App. 2d 564, 74 Cal. Rptr. 216 (1968) (injured employee denied assistance of co-workers during absence from work and upon return); Burgess v. Chicago Sun-Times, 132 Ill. App. 3d 181, 476 N.E.2d 1284 (1985) (delivery driver fired for persisting in request for route reassignment after being robbed); Frye v. CBS Inc., 671 S.W.2d 316 (Mo. Ct. App. 1984) (design artist assigned to job of cameraman). Nor will loyalty to the employer or actions taken in reliance on the prospect of continued employment support an outrage claim. *See* Pudil v. Smart Buy, Inc., 607 F. Supp. 440 (N.D. Ill. 1985); Cautilli v. GAF Corp., 531 F. Supp. 71 (E.D. Pa. 1982); Widdifield v. Robertshaw Controls Co., 671 P.2d 989 (Colo. Ct. App. 1983); *see also* Crawford v. ITT Consumer Fin. Corp., 653 F. Supp. 1184 (S.D. Ohio 1986) (twenty-three year employee has performance rating lowered and is threatened with demotion and discharge because she refuses to accept firm's promotion/relocation policy from which she thought she was exempt).

28. Hall v. May Dep't Stores, 292 Or. 131, 139, 637 P.2d 126, 132 (1981); *see also* Lynn v. Smith, 628 F. Supp. 283 (M.D. Pa. 1985) (changing supervisor, headquarters, and assignments of employee active in union does not give rise to emotional distress claim); Howard University v. Best, 484 A.2d 958 (D.C. 1984) (preventing department chairperson from attending workshops, recalling proposals to the board of trustees, and dismissing faculty without consultation constituted disagreement over administration, not actionable outrageous conduct; sexual harrassment, however, was actionable outrageous conduct).

within . . . it is not the type of action to arouse resentment, by the a' age member of the community . . . ."[29]

The courts recognize that emotional disturbance is an inherent pect of being reprimanded, demoted, or discharged. But they allow victim no cause of action if the emotional harm is an unintended incidental result of an exercise of legitimate workplace authority, ci' undertaken.[30] The courts are particularly wary of attempts to use S tion 46 to evade the rules sanctioning the summary discharge of at- employees.[31] Assertions to the effect that "if the firing of . . . [plain' was done in an outrageous manner, then every firing that occurs wo be considered outrageous," are quite common.[32]

Liability does not always follow, even when the supervisor is rud insensitive in carrying out a personnel action.[33] For example, a sal man complained that his supervisor cursed him, took over s presentations, and otherwise embarrassed him in the presence of c tomers and fellow workers.[34] The court condoned the behavior; supervisor's "intentions, much as any supervisor's in a similar situati were pretty clearly to motivate a recalcitrant employee."[35] In anot case, the head of an employer's legal department cursed, hollered and fired a secretary for taking the initiative in contacting a per:

29. Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151, 1155 (E.D. 1984); *see also* Petersen v. First Fed. Sav. & Loan Ass'n, 617 F. Supp. 1039 (D. St. Croix 1 (employer not guilty of outrageous conduct where bank branch manager worked late at n without assistance, used her personal car for bank business, was not paid for overtime, lost the opportunity to be with her family).

30. *See, e.g.*, Pelizza v. Readers' Digest Sales & Serv., Inc., 624 F. Supp. 806 (N.D. 1985); Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480 (E.D. Mich. 1983); Crai Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983); Ray v. Edwards, 557 F. Supp. 664 (N Ga. 1982), *modified*, 725 F.2d 655 (5th Cir. 1984); Harrell v. Reynolds Metals Co., 495 So 1381 (Ala. 1986); Harris v. Arkansas Book Co., 287 Ark. 353, 700 S.W.2d 41 (1985); Le Quik Pik Food Stores, 133 Mich. App. 583, 349 N.W.2d 529 (1984); McKnight v. Simps Beauty Supply, Inc., 86 N.C. App. 451, 358 S.E.2d 107 (1987); Elias v. Youngken, 493 A 158 (R.I. 1985); Bringle v. Methodist Hosp., 701 S.W.2d 622 (Tenn. Ct. App. 1985); A strong v. Richland Clinic, Inc., 42 Wash. App. 181, 709 P.2d 1237 (1985); *see also* RESTA MENT (SECOND) OF TORTS § 46 comment g, comment i (1965).

31. *See, e.g.*, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive E cise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

32. Meierer v. E.I. Dupont De Nemours & Co., 607 F. Supp. 1170, 1182 (D.C.S 1985); *see also* Givens v. Hixson, 275 Ark. 370, 631 S.W.2d 263 (1982); Santa Monica Hosp Superior Court, 218 Cal. Rptr. 543 (1985), *review granted*, 711 P.2d 520, 222 Cal. Rptr. : (1986); Heying v. Simonaitis, 126 Ill. App. 3d 157, 466 N.E.2d 1137 (1984); Richey v. Am can Auto. Ass'n, Inc., 380 Mass. 835, 406 N.E.2d 675 (1980); Sperber v. Galigher Ash (747 P.2d 1025 (Utah 1987).

33. *See, e.g.*, Corum v. Farm Credit Servs., 628 F. Supp. 707 (D. Minn. 1986); Moy Gary, 595 F. Supp. 738 (S.D.N.Y. 1984); Cushing v. General Time Corp., 549 F. Supp. : (N.D. Ala. 1982); Magruder v. Selling Areas Mktg., Inc., 439 F. Supp. 1155 (N.D. Ill. 19 Harris v. First Fed. Sav. & Loan Ass'n., 129 Ill. App. 3d 978, 473 N.E.2d 457 (1984); Witk ski v. St. Anne's Hosp., 113 Ill. App. 3d 745, 447 N.E.2d 1016 (1983); Reihmann v. Foerst 375 N.W.2d 677 (Iowa 1985). *But see Intentional Infliction of Emotional Distress in the Employmen Will Setting: Limiting the Employee's Manner of Discharge*, 60 IND. L.J. 365 (1984-1985) (arguing a motive versus methods distinction) (student author).

34. Byrnes v. Orkin Exterminating Co., 562 F. Supp. 892, 895 (E.D. La. 1983).

35. *Id.* at 896.

whose qualifications suggested that she might fulfill a personnel need and passing the pertinent information on to another lawyer in the office.[36] Although the supervisor's conduct was "not above reproach," the court would not characterize it as "so extreme and outrageous as to be tortious."[37]

In lieu of the relatively straightforward, aboveboard forms of discipline, supervisors sometimes engage in indirect methods of disapproval that take their toll on the employee's psyche because they are insidious and underhanded. Instead of firing an employee, supervisors may undertake a campaign to make the job so unbearable that she or he will resign.[38] The law of outrage poses little or no impediment to the indirect, "constructive discharge" approach. The plaintiff in *Beidler v. W. R. Grace, Inc.*[39] was subjected to such treatment. He was allegedly excluded from meetings necessary to his job performance and given an assistant without his consultation. Moreover, he found materials and papers on his desk rearranged, received no information on his job performance except through nonsupervisory employees and rumors, and was denied a meeting with his superiors. The plaintiff, who was ultimately fired, thought this conduct atrocious, but the court did not.[40]

In addition, the outrage cases suggest that an employer generally has the right to demand obedience to commands, and loyalty to the enterprise when threatened by outside forces. Notwithstanding the new wisdom that lauds the benefits of dissent and whistleblowing for the health of productive enterprises,[41] management can deal harshly with subordinates who challenge supervisory authority or otherwise impede the work of the firm, however principled their objections.[42] The

36. Rooney v. National Super Mkts., 668 S.W.2d 649, 650-51 (Mo. Ct. App. 1984).

37. *Id.* at 651.

38. *See, e.g.*, Well v. Thomas, 569 F. Supp. 426 (E.D. Pa. 1985) (hospital personnel director lost job title, private office, and secretary; was given first poor performance rating in 25 years; and was told that others would have resigned under similar circumstances); Shewmaker v. Minchew, 504 F. Supp. 156 (D.D.C. 1980), *aff'd*, 666 F.2d 616 (D.C. Cir. 1981); Snyder v. Sunshine Dairy, 87 Or. App. 215, 742 P.2d 57 (1987).

39. 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd*, 609 F.2d 500 (3d Cir. 1979).

40. *Id.* at 1016.

41. *See, e.g.*, D. EWING, "DO IT MY WAY OR YOU'RE FIRED!": EMPLOYEE RIGHTS AND THE CHANGING ROLE OF MANAGEMENT PREROGATIVES 23-25 (1983). *But see id.* at 30 (noting that bosses are justified in firing whistleblowers).

42. Kirwin v. N.Y. State Office of Mental Health, 665 F. Supp. 1034 (E.D.N.Y. 1987) (psychologist reassigned after cooperating with investigation of hospital unit about which she had complained); Polson v. Davis, 635 F. Supp. 1130 (D. Kan. 1986) (discharge of employment supervisor who objected to city's failure to abide by anti-discrimination laws and guidelines); Collins v. Gulf Oil Corp., 605 F. Supp. 1519 (D. Conn. 1985) (insurance accountant discharged for nonparticipation in concealment of funds); Avallone v. Wilmington Medical Center, Inc., 553 F. Supp. 931 (D. Del. 1982) (head nurse disciplined after pointing out dangers in patient treatment procedure); Sossenko v. Michelin Tire Corp., 172 Ga. App. 771, 324 S.E.2d 593 (1984) (employee reported alleged defects in experimental tires); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983) (company officer and assistant treasurer fired after reporting illegal accounting practices); *see also* Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (1980) (foreman fired when he indicated intention to proceed with malpractice action against company-owned hospital de-

few exceptions involve employee disobedience or disloyalty in respon to management fraud or breach of statute.[43]

When investigating theft and dishonesty, employers frequently u emotionally distressful techniques. The courts have often condoned i terrogation techniques and summary dismissals that the employe have felt to be arbitrary, insulting, humiliating, embarrassing, and pai ful.[44] But they have also given victims a few victories.[45] The success claimants have been almost uniformly innocent, and most have be young female service workers. It may be that courts are somewh more sympathetic to workers in this context, but a more likely explar tion is that they consider the female plaintiffs especially deserving

spite warning that it would be bad for employee relations); Beye v. Bureau of Nat'l Affairs, Md. App. 642, 477 A.2d 1197 (1984) (employee who informed on co-workers not given ass ance of safety and forced to resign). On the issue of loyalty in the context of federal labor l see J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 84-86 (1983).

43. Pollard v. City of Chicago, 643 F. Supp. 1244 (N.D. Ill. 1986) (harassment of bl male who reported racial and sexual harassment of co-workers supports cause of actio Maggio v. St. Francis Medical Center, 391 So.2d 948 (La. Ct. App. 1980) (employee haras for reporting superior's illegal transfer of funds; summary judgment for defendant reverse Beasley v. Affiliated Hosp. Prods., 713 S.W.2d 557 (Mo. Ct. App. 1986) (fired employee v refused to predetermine winner of advertised raffle stated claim); *see also* Kassel v. U.S. Ve ans Admin., 682 F. Supp. 646 (D.N.H. 1988) (psychologist threatened with firing, transfer because misquoted in paper; claim upheld). *But see* Pratt v. Caterpillar Tractor Co., 149 App. 3d 588, 500 N.E.2d 1001 (1986) (discharge in retaliation for refusal to violate fede statutes regulating foreign trade does not implicate state public policy and will not sustain outrage claim), *appeal denied*, 506 N.E.2d 959 (1987).

44. *See, e.g.*, McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D.W. Va. 1986) (six investigation of shortage in layaway receipts ends with interrogator calling plaintiff "a li and banging his hands on table; not outrageous); Jackson v. J.C. Penney Co., 616 F. Supp. (E.D. Pa. 1985) (accusation in the presence of two security guards, followed by summary missal, not outrageous); American Road Serv. Co. v. Inmon, 394 So. 2d 361, 367 (Ala. 19 (no cause of action although evidence showed that plaintiff was "harassed, investigated w out cause, accused of improper dealings, treated uncustomarily, and terminated without ju fication"); Food Fair, Inc. v. Anderson, 382 So. 2d 150 (Fla. Ct. App. 1980) (cajo confessions and consents to polygraphing based on threats of discharge); Gibson v. Chem Card Serv. Corp., 157 Ill. App. 3d 211, 510 N.E.2d 37 (1987) (assistance given Secret Ser agent who threatened employee with accusations against husband within employer's le mate right); Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985) (employee v passed lie detector test nonetheless fired pursuant to policy of discharging all employees shift on which shortfall occurs); Gibson v. Hummel, 688 S.W.2d 4, 6 (Mo. Ct. App. 19 (employee unable to control foot tapping or deep breathing during polygraph session, ened machine to an "octopus" that she feared would shock or electrocute her); Todd v. Sc Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984) (insura agent falsely accused of conspiracy fails illegally administered voice stress test; no outra

45. *See* Shipkowski v. U.S. Steel Corp., 585 F. Supp. 66 (E.D. Pa. 1983) (26-year ployee fired for theft one month before retirement benefits vested: court refuses to dis claim); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980) (employee fired on su cion of stealing and paycheck withheld: court overturns summary judgment); Moniodi Cook, 64 Md. App. 1, 494 A.2d 212 (1985) (employee forced to undergo polygraph claim is stated); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976) (wait fired in alphabetical order upon discovery of theft: claim is stated); Kaminski v. United Pa Serv., 120 A.D.2d 409, 501 N.Y.S.2d 871 (1986) (employee fired for theft not reinstated; actual thief was discovered: claim is stated); Hall v. May Dep't Stores, 292 Or. 131, 637 126 (1981) (employee accused of stealing and interrogated by security officers: clai stated); Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 657 (1981) (employee force undergo strip-search).

compassion because of the emotional vulnerability that is associated with their sex and age.

B. *Abuse and Status Group Distinctions*

The nature of the employee's work setting, the color of her or his collar, and the employee's age, sex, race, or ethnicity can explicitly affect the kind and amount of abuse the employee is expected to bear. In general, the claims that are most likely to survive court review are those attacking harassment based on race,[46] ethnicity,[47] national origin,[48] and sex.[49] The cases involving minority group members generally involve overt racist or ethnocentric slurs. Similarly, the suits of the successful female plaintiffs have included conduct that falls squarely within the definition of sexual harassment developed by the Equal Employment Opportunity Commission[50] under Title VII.[51] The courts will act positively when there is blatant conduct, but do not extend protection against forms of discriminatory abuse that are less explicit or demonstrative.[52]

46. Robinson v. Hewlett-Packard Corp., 183 Cal. App. 3d 1108, 228 Cal. Rptr. 591 (1986); Alcorn v. Anbro Eng'g, Inc., 2 Cal.3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970). *See also* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Denis, *Race Harassment Discrimination: A Problem That Won't Go Away?*, 10 EMPLOYEE REL. L.J. 415 (1984); Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267 (1982).

47. Gomez v. Hug, 7 Kan. App. 2d 603, 645 P.2d 916 (1982); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977).

48. Agarwal v. Johnson, 25 Cal.3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979); Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (1981); Gulati v. Burlington N.R.R., 364 N.W.2d 446 (Minn. Ct. App. 1985), *cert. denied*, 107 S.Ct. 1616 (1987).

49. *See, e.g.*, Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984); Bowersox v. P.H. Glatfelter Co., 677 F. Supp. 307 (M.D. Pa. 1988); Clay v. Quartet Mfg. Co., 644 F. Supp. 56 (N.D. Ill. 1986); Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986); Shaffer v. National Can Corp., 565 F. Supp. 909 (E.D. Pa. 1983); Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983); Stewart v. Thomas, 538 F. Supp. 891 (D.D.C. 1982); Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981); Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987); Howard Univ. v. Best, 484 A.2d 958 (D.C. 1984); McCalla v. Ellis, 341 N.W.2d 525 (Mich. Ct. App. 1983); O'Reilly v. Executone of Albany, Inc., 121 A.D.2d 772, 503 N.Y.S.2d 185 (1986); Hogan v. Forsyth Country Club, 79 N.C. App. 483, 340 S.E.2d 116 (1986). *See also* Hart v. National Mtg. & Land Co., 189 Cal. App. 3d 1420, 235 Cal Rptr. 68 (1987) (male encounters harassment of a sexual nature from a male supervisor).

50. Guidelines of Sexual Harassment, 29 C.F.R. § 1604.11 (1986).

51. 42 U.S.C. §§ 2000(e)(1)-2000(e)(17) (1982).

52. *See, e.g.*, Oldfather v. Ohio Dep't of Transp., 653 F. Supp. 1167 (S.D. Ohio 1986) (female fired for immoral behavior while supervisor with whom she had extramarital affair was retained; not outrageous); Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D. Pa. 1984) (verbal disparagement and work overload of employee who was a wife and mother not actionable outrage); Kersul v. Skulls Angels, Inc., 130 Misc. 2d 345, 495 N.Y.S.2d 886 (Sup. Ct. 1985) (employee discharged for complaining about special treatment accorded employer's lover; court allows claim for sexual discrimination but not outrage); Belanoff v. Grayson, 98 A.D.2d 353, 471 N.Y.S.2d 91 (App. Div. 1984) (allegation of poor evaluations and termination following announcement of impending marriage did not satisfy egregiousness standard); Lewis v. Oregon Beauty Supply Co., 302 Or. 616, 733 P.2d 430 (1987) (employer's tolerance of his son's harassment of employee-plaintiff not sufficiently oppressive). *See also A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1481-85 (1986) (student author). With regard to race and ethnicity, *compare* Patterson v. Mc-

The courts' formalistic perspective means that employees of the same race or sex who work together and see themselves as similarly abused may be accorded different degrees of legal protection. *Hogan v. Forsyth Country Club Co.*,[53] for example, involved three female plaintiffs who worked in the defendant's dining room. While all were verbally harassed by superiors,[54] one was also subjected to suggestive remarks and physical sexual contact.[55] The second was given assignments she could not perform because she was pregnant.[56] The third had menus thrown in her face and her duties were interfered with, but there was no specific explanation given for this treatment.[57] The intentional infliction of emotional distress claim of the first plaintiff withstood defendant's motion for summary judgment because it was easily identified as "sexual harassment."[58] The claims of the remaining two plaintiffs did not.[59] The court suggested that it could not draw a connection between the harassment they encountered and impermissible sex discrimination in the absence of explicit allegations.[60]

Status group characteristics can sometimes increase the amount of abusive behavior a worker must tolerate. More endurance is expected from males in general and from blue-collar employees in particular than from women, for example. This point is well illustrated by *Harris v. Jones*.[61] A supervisor mimicked and harassed the plaintiff, an automobile assembly line worker who stuttered severely.[62] Trial testimony revealed that others at the plant imitated the plaintiff's speech impediment and that life there included "profanity, namecalling and roughhousing among the employees."[63] The court stated that "[i]n determining whether conduct is extreme and outrageous, it should not be considered in a sterile setting, detached from the surroundings in which it occurred."[64] Moreover, it suggested that an employee's sex

Lean Credit Union, 805 F.2d 1143 (4th Cir. 1986) (directed verdict against plaintiff who alleged close supervision, lack of promotions, assignment of domestic duties, public criticism and disparaging remarks about blacks by supervisor) *cert. granted*, 108 S.Ct. 65, *rearg. sched.* 108 S.Ct. 1419 (1987) (on whether to reconsider Runyon v. McCrary, 427 U.S. 160 (1976) *and* Bradley v. Consolidated Edison Co., 657 F. Supp 197 (S.D.N.Y. 1987) (summary judgment against plaintiff who alleged negative evaluations, harassment, job reassignments, and disparaging statements) *with* Robinson v. Vitro Corp., 620 F. Supp. 1066 (D. Md. 1985) (plaintiff states claim by alleging unfair complaints, harassment, and discharge in retaliation for filing state racial discrimination complaint).

53. 79 N.C. App. 483, 340 S.E.2d 116 (1986).

54. *Id.* at 490-94, 340 S.E.2d at 121-23.

55. *Id.* at 490, 340 S.E.2d at 121.

56. *Id.* at 494, 340 S.E.2d at 123.

57. *Id.* at 493, 340 S.E.2d at 122-23.

58. *Id.* at 491, 340 S.E.2d at 121.

59. *Id.* at 493-94, 340 S.E.2d at 122-23.

60. *Id.* at 500, 340 S.E.2d at 126-27.

61. 281 Md. 560, 380 A.2d 611 (1977).

62. *Id.* at 562, 380 A.2d at 612.

63. *Id.* at 563, 380 A.2d at 612.

64. *Id.* at 568, 380 A.2d at 615; *see also* Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986) ("The outrageous and extreme nature of the conduct to be examined should not be consid-

and occupation were indications of her or his emotional vulnerability. It quoted approvingly from an article by William Prosser to the effect that " '[t]here 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.' "[65]

However, where the abuse is racial in form, the rough nature of the work and the workplace may not suffice to insulate an employer from liability. That the plaintiff in *Alcorn v. Anbro Engineering, Inc.*,[66] was a truck driver (and a Teamster shop steward)[67] did not deprive him of a cause of action stemming from the behavior of a supervisor who apparently objected to a person of plaintiff's race being in a position of authority.[68] The plaintiff informed the supervisor that a nonunion member could not drive a certain truck from the job site, and the supervisor responded with a string of racial insults uttered "in a rude, violent, and insolent manner" and summarily fired plaintiff.[69] The Supreme Court of California reversed the lower court's dismissal of the plaintiff's outrage claim.[70] It rejected the "defendants' contention that plaintiff, as a truckdriver must have become accustomed to such abusive language."[71] It instead directed the trier of fact to consider plaintiff's particular sensitivity to racial insult.[72]

In granting relief to employees, the courts sometimes make reference to the weaker bargaining power of employees as a group, the special nature of the employment relationship, and the limitations on the free mobility of labor.[73] Said the court in *Blong v. Snyder*,[74] "[p]laintiff's status as an employee entitled him to more protection from insultive or abusive treatment than would be expected in interactions between two strangers."[75] *Hall v. May Department Stores Co.*[76] carried the compari-

ered in a sterile setting, detached from the milieu in which it took place. [footnote omitted]. The salon of Madame Pompadour is not to be likened to the rough-and-tumble atmosphere of the American oil refinery.").

65. *Harris*, 281 Md. at 568, 380 A.2d at 615 (quoting Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 887 (1939)). This same language was invoked in *Moniodis v. Cook*, 64 Md. App. 1, 17, 494 A.2d 212, 220 (1985), on behalf of a female clerk who was described as being "a middle-aged lady who did not have the hardened character of a 'butte miner' or a 'United States Marine.' "

66. 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

67. *Id.* at 496, 468 P.2d at 217, 86 Cal. Rptr. at 89.

68. *Id.* at 498-99, 468 P.2d at 219, 86 Cal. Rptr. at 91.

69. *Id.* at 496, 468 P.2d at 217, 86 Cal. Rptr. at 89.

70. *Id.* at 499, 468 P.2d at 219, 86 Cal. Rptr. at 91.

71. *Id.* at 498 n.4, 468 P.2d at 219 n.4, 86 Cal. Rptr. at 91 n.4.

72. *Id.*

73. *See, e.g.*, Norman v. General Motors Corp., 628 F. Supp. 702 (D. Nev. 1986). The generally cited source of this line of reasoning is comment e to section 46 which indicates that "[t]he 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." RESTATEMENT (SECOND) OF TORTS § 46 comment e.

74. 361 N.W.2d 312 (Iowa Ct. App. 1984).

75. *Id.* at 316.

76. 292 Or. 131, 637 P.2d 126 (1981)

sons further in distinguishing outrage claims arising in other contex "In our view, the duty to refrain from abusive behavior in the empl ment relationship comes closer to that of the physician toward a pati [in need of immediate emergency treatment] than to that of the pol officers toward a citizen not in custody and free to terminate the counter."[77] Drawing on language from a wrongful discharge case, court in *Milton v. Illinois Bell Telephone Co.*[78] argued that, " 'relatively i mobile workers who often have no other place to market their skills,' not stand on equal footing with the large corporations which empl them. . . . It is the alleged abuse of power by a large corporation o one of its front line employees which aggravates the outrageousness the conduct alleged in this case."[79]

The language in these cases was invoked to justify minor reforms The dominant view is still that "in many respects employment rema an arm's length, adult relationship between parties intent on securi divergent rather than joint interests."[81] Worker powerlessness is co sidered the exception and not the rule. The abuse that is not declar tortious, then, seems to bear the imprimatur of the victim's consent

C. *Severe Harm and the Implicit Requirement of Surrender*

Whether they agree or not, workers are by and large expected develop the fortitude and stamina to endure intentionally inflicted d tress on the job. Their best protection is their own emotional mett In the courts' view, learning to accept abuse is necessary because p sonal liberty and good mental health require that employers, like individuals, have the "freedom to get mad or be impolite."[83] Furth more, a certain amount of rudeness simply has to be tolerat "[I]ncivility is so pervasive in our society that it is inappropriate for t law to attempt to provide a remedy for it in every instance. . . . Pub adjudication of common irritations and arguments would dignify m

77. *Id.* at 138, 637 P.2d at 131; *see also* Bodewig v. K-Mart, Inc., 54 Or. App. 480, 4 635 P.2d 657, 661 (1981).

78. 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981).

79. *Id.* at 79, 427 N.E.2d at 832 (quoting Palmateer v. International Harvester Co., Ill. 2d 124, 129, 421 N.E.2d 876, 878 (1981)). *See also* Contreras v. Crown Zellerbach Co 88 Wash. 2d 735, 741, 565 P.2d 1173, 1176-77 (1977) (employee "not free to leave [forced to] remain in physical proximity to others who continually make racial slurs and c ments" has cause of action).

80. *See generally* Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law,* *Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 614 (1982).

81. Hall v. May Dep't Stores, 292 Or. 131, 141-42, 637 P.2d 126, 132-33; *see also* B shaw v. General Motors Corp., 805 F.2d 110 (3d Cir. 1986) (employment relationship special like that between landlord and tenant or parent and child); Aquino v. Sommer M Creamery, Inc., 657 F. Supp. 208 (E.D. Pa. 1987) (nothing about the employment relations justifies relaxation of the outrageousness standard).

82. Kennedy, *supra* note 80, at 620-22.

83. Givelber, *supra* note 23, at 57.

disputes far beyond their social importance."[84] It is best to leave the "minor annoyances" that are a part of "the field of bad manners" to "instruments of social control other than the law."[85]

In order to recover under Section 46, the plaintiff must show that the extent of her or his harm is exceptional.

> The tort of outrage was not developed to provide a person with a remedy for the trivial emotional distresses that are common to each person in his everyday life. Such distress is the price of living among people. [citation omitted] . . . Thus, in order to prevent the tort of outrage from becoming a panacea for all of life's ills, recovery must be limited to distress that is severe.[86]

In the words of the *Restatement*, "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it."[87]

The severe harm requirement presents formidable obstacles to recovery. As one court indicated, "[i]f the claimed distress is of the type that people commonly encounter and endure in their lives, the claim should not even be submitted to the jury."[88] The result of this reasoning is that the more pervasive the form of abuse, the more ordinary it is, and the more it must be tolerated. The humiliation and embarrassment endured by the many who are disciplined or dismissed simply will not be considered sufficiently egregious to warrant relief.[89] Furthermore, the injury of the plaintiff who survives without seeking treatment by doctors or psychiatrists and gets on with her or his life may not satisfy the standard.[90] If the employee reasonably suffers more than normal psychic harm because of a pre-existing condition, she or he may be stymied in establishing a causal connection between even a part of it and the employer's abuse.[91] Finally, the employee whose suffering ex-

84. *Id.*

85. Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

86. U.S.A. Oil, Inc. v. Smith, 415 So. 2d 1098, 1101 (Ala. Civ. App. 1982).

87. RESTATEMENT (SECOND) OF TORTS § 46 comment j.

88. Cafferty v. Garcia's of Scottsdale, Inc., 375 N.W.2d 850, 853 (Minn. Ct. App. 1985); *see also* Polk v. Yellow Freight Systems, 801 F.2d 190, 196 (6th Cir. 1986) (being offended, crying, and going to church more are consistent with common reactions to "an unhappy or unpleasant work situation"; not evidence of severe distress).

89. *See, e.g.*, Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371, 379 (Minn. Ct. App. 1984).

90. *See* George v. Hilaire Farm Nursing Home, 622 F. Supp. 1349 (S.D.N.Y. 1985); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985); Leese v. Baltimore County, 64 Md. App. 442, 497 A.2d 159 (1985); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428 (Minn. 1983); Evrard v. Jacobson, 117 Wis. 2d 69, 342 N.W.2d 788 (Ct. App. 1983).

91. *See, e.g.*, Green v. American Broadcasting Cos., 647 F. Supp. 1359, 1363-64 (D.D.C. 1986); U.S.A. Oil, Inc. v. Smith, 415 So. 2d 1098, 1101 (Ala. Civ. App. 1982); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977); *see also* Givelber, *supra* note 23, at 49 (the suffering attributable to the employer in such cases may not be considered severe). The employer's or supervisor's obligations may be increased if she or he knows that the employee "is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." RESTATEMENT (SECOND) OF TORTS § 46 comment f. *See, e.g.*, Priest v. Rotary, 634 F.

ceeds that which the hypothetical reasonable person would incur will b adjudged maladjusted or supersensitive and denied a recovery.[92] Th psychological frailty of such a person may even be advanced as the ex planation for the supervisor's behavior.[93]

Moniodis v. Cook[94] illustrates how anomalous the results justified b the severe harm requirement can be. Plaintiff Cook was one of fou employees required to submit to illegal polygraph testing by their em ployer Rite-Aid, a drugstore chain.[95] A jury found that all four ha been the victims of intentionally inflicted emotional distress, but on ap peal the court concluded that only Cook's claim should have survive defendants' motions for a directed verdict because only she suffere severe emotional distress.[96] Plaintiff Torres, for example, told her ab sent husband in letters that "she was going through the worst times o her life during the period when Rite-Aid was forcing her out," yet sh managed "by herself an entire household including several childre and her father-in-law, as well as tend[ed] to renovations to the famil home." Ms. Cook, by contrast, was so "deeply disturbed" by her em ployer's conduct that she cried, wrung her hands, took medication, an slept most of the time. A pre-existing condition worsened. Her rela tives did the housework and she became a recluse. The court did no find her reaction unreasonable; in fact, her reaction "was in part attrib utable to her laudable (though in retrospect misplaced) devotion t Rite-Aid. Further, the jury properly may have inferred that Moniodi Rite-Aid's agent, was aware of her dedication when he chose the work ing conditions that would cause her to leave."[97]

Notwithstanding *Moniodis*, the law will not generally protect worker who are so unquestioning and obedient that they court psychic collaps if they are abused. Although *Moniodis* penalizes the worker who di played greater resourcefulness and adaptability, her resilience was c the sort the law generally seeks to encourage through the requiremen that the distress experienced be both severe and reasonable. The cou in *Moniodis* seems torn between the need to encourage functional forti tude and the contradictory desire to compensate those individuals wh are truly injured.

Contentious assertiveness and counteraggression are clearly n preferred reactions. Plaintiffs who immediately replied to their superv

Supp. 571, 582-83 (N.D. Cal. 1986); Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 31 315-17 (1984).

92. RESTATEMENT (SECOND) OF TORTS § 46 comment j; *see, e.g.*, *Cafferty*, 375 N.W.2d 853-54.

93. *See, e.g.*, Continental Casualty Co. v. Mirabile, 449 A.2d 1176, 1180, 1187 (Md. C Spec. App. 1982).

94. 64 Md. App. 1, 494 A.2d 212 (1985).

95. *Id.* at 6, 494 A.2d at 214.

96. *Id.* at 15-16, 494 A.2d at 219.

97. *Id.* at 16-17, 494 A.2d at 220.

sors' abuse did not fare well in their subsequent tort actions.[98] For example, a cashier who was accused by her employer's security supervisor of giving unauthorized discounts became angry and hysterical during the course of a polygraph session, and she responded with "strong language."[99] In denying her claim the court concluded that her "language and tone of voice were at least as bellicose and lacking in delicacy as [the supervisor's]."[100] It appears that the law encourages employees to adopt a stance of emotional detachment from their jobs and the supervisory mistreatment they may incur.

D. *Conventional Wisdom and Unconventional Warfare in The Workplace*

The gist of the story the courts tell about abuse in the workplace can be summarized as follows: Only the extraordinary, the excessive, and the nearly bizarre in the way of supervisory intimidation and humiliation warrant judicial relief through the tort of intentional infliction of emotional distress. All other forms of supervisory conduct that cause workers to experience emotional harm are more or less "trivial" in the terminology of the *Restatement of Torts*. The very ordinariness of such conduct and the ubiquity of the experience of pain at the hands of supervisors are justification enough for the law's refusal to intervene. At the same time, the genesis of the problem makes it largely inescapable. Little can be done about the vagaries of human nature. Moreover, the efficient operation of the workplace depends on employers' having broad privileges with regard to discipline and control of the work force. Thus, abuse is a predicament that is not susceptible to, let alone demanding of, a more thoroughgoing legal remedy.

Rather, the solution lies principally in individual workers shrugging off petty insults. Worker self-reliance and stamina are repeatedly touted in the outrage cases. Courts see toughness and strength as such positive attributes that they simply assume that the capacity to tolerate abuse, and the propriety of dishing it out, vary with the nature of the work, the workplace, and the characteristics of the workers. Males and blue-collar workers, for example, may be subjected to harsher supervision than females or white-collar workers because of the acceptability of sex and class distinctions and the implications of group pride that underlie the disparate treatment.

In other respects, however, self-assertiveness and collective perspectives among workers are discouraged. For example, just as the employers themselves denigrate whistleblowers and employees expressing preferences as to assignments, the opinions too seem to discourage a worker's affective engagement with her or his work. Furthermore, as

98. *See, e.g.*, McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D. W.Va. 1986); Bridges v. Winn-Dixie Atlanta, Inc., 176 Ga. App. 227, 335 S.E.2d 445 (1985); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116, 123 (1986).
99. *Bridges*, 176 Ga. App. at 228, 335 S.E.2d at 446.
100. *Id.* at 231, 335 S.E.2d at 448.

Hogan v. Forsyth Country Club[101] and *Moniodis v. Cook*[102] illustrate, the distinction between the outrageous and the mundane in the way of supervision and between the severe and the mild in the way of emotional reaction leads to anomalous legal results, and apparently contradicts the experiences of workers who view their plight as a common one. Furthermore, the cases give little indication of how employees as individuals are supposed to achieve and maintain emotional distance and passivity.

While the legal community customarily thinks about the impact of the law on workers and of workers on the law in vague and global terms, such an analysis ignores the role that real, ordinary working people play in perpetuating and attacking abuse on the job. Where do the workers I know fit into the courts' ideal of workplace rapprochement? "Labor-management conflict" is too abstract and generic a term to provide a full and nuanced description of what occurs on the shopfloors and in the offices where abuse is actually meted out and experienced. Although the law may structure the employment relationship and help to contain worker dissatisfaction with supervision, it does not control life in the workplace in a static and absolute way. Submission, talking back, and bringing a civil suit do not exhaust the arsenal of responses available to unorganized workers.

Workers are not a monolith, united in interest without regard to color of collar or color of skin. Neither they nor their bosses are mere tools instrumentally driven to fulfill assigned roles in a capitalist economy. Crass economic concerns do not dictate their perceptions of and reactions to abuse any more than they explain the legal story.[103] Furthermore, sweeping pronouncements of workers' interests are of questionable authenticity. If workers are responsible agents of social change and not simply stick figures driven by necessity or commanded by elites, a detailed analysis is required to explain both how their opposition is organized and how their legally sanctioned oppression is maintained.[104] Consideration must be given to the actual consciousness and behavior of workers in the face of abuse. Only after such an examination will it be possible to speculate about the impact law and other sources of ideology and legitimated coercion have on what workers think and do, and vice versa.

There are many versions of the workers' story of abuse. The next section provides an elaboration of one of them. It shows how in some work environments the legitimating impact of the more or less formal conventional wisdom is mediated by informal practices and vernacular discourse and how, despite the economic necessity that keeps some workers tied to bad jobs with bad supervisors, mistreatment is met with local resistance.

101. *See* notes 53-60 *supra* and accompanying text.
102. *See* notes 94-97 *supra* and accompanying text.
103. *See generally* Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).
104. H. GUTMAN, POWER AND CULTURE: ESSAYS ON THE AMERICAN WORKING CLASS 344-45 (1987).

Material omitted from Epstein's version of Crisci

[6] The trial court found that defendant "knew that there was a considerable risk of substantial recovery beyond said policy limits" and that "the defendant did not give as much consideration to the financial interests of its said insured as it gave to its own interests." That is all that was required. The award of $91,000 must therefore be affirmed.

We must next determine the propriety of the award to Mrs. Crisci of $25,000 for her mental suffering. [7] In *Comunale* v. *Traders & General Ins. Co., supra*, 50 Cal.2d 654, 663, it was held that an action of the type involved here sounds in both contract and tort and that "where a case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract. (*Eads* v. *Marks*, 39 Cal.2d 807, 811 [249 P.2d 257].) An exception to this rule is made in suits for personal injury caused by negligence, where the tort character of the action is considered to prevail [citations], but no such exception is applied in cases, like the present one, which relate to financial damage [citations]."[3] Although this rule was applied in *Comunale* with regard to a statute of limitations, the rule is also applicable in

[3]*Comunale* v. *Traders & General Ins. Co., supra*, 50 Cal.2d 654, was mainly concerned with the contract aspect of the action. This may be due to the facts that the tort duty is ordinarily based on the insurer's assumption of the defense and of settlement negotiations (see Keeton, *Liability Insurance and Responsibility for Settlement* (1954) 67 Harv.L.Rev. 1136, 1138-1139; Note (1966), *supra*, 18 Stan.L.Rev. 475), and that in *Comunale* the insurer did not undertake defense or settlement but denied coverage. In any event *Comunale* expressly recognizes that "wrongful refusal to settle has generally been treated as a tort." (50 Cal.2d at p. 663.)

determining liability. (*Weaver* v. *Bank of America*, 59 Cal.2d 428, 432 [30 Cal.Rptr. 4, 380 P.2d 644]; *Lucas* v. *Hamm*, 56 Cal.2d 583, 589, fn. 2 [15 Cal.Rptr. 821, 364 P.2d 685]; *Acadia, California, Ltd.* v. *Herbert*, 54 Cal.2d 328, 336 [5 Cal. Rptr. 686, 353 P.2d 294].) Insofar as language in *Critz* v. *Farmers Ins. Group, supra*, 230 Cal.App.2d 788, 799, might be interpreted as providing that the action for wrongful refusal to settle sounds solely in contract, it is disapproved.

[8] Fundamental in our jurisprudence is the principle that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer. Although we recognize exceptions from these fundamental principles, no departure should be sanctioned unless there is a strong necessity therefor.

[9] The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. (Civ. Code, § 3333; see *Hunt Bros. Co.* v. *San Lorenzo etc. Co.*, 150 Cal. 51, 56 [87 P. 1093, 7 L.R.A. N.S. 913].) [10] In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain. The commonest example of the award of damages for mental suffering in addition to other damages is probably where the plaintiff suffers personal injuries in addition to mental distress as a result of either negligent or intentional misconduct by the defendant. (*DiMare* v. *Cresci, supra*, 58 Cal.2d 292, 300-301; *Deevy* v. *Tassi*, 21 Cal.2d 109, 120 [130 P.2d 389]; *Dryden* v. *Continental Banking Co.*, 11 Cal.2d 33, 39-40 [77 P.2d 833].) Such awards are not confined to cases where the mental suffering award was in addition to an award for personal injuries; damages for mental distress have also been awarded in cases where the tortious conduct was an interference with property rights without any personal injuries apart from the mental distress. (*Acadia, California, Ltd.* v. *Herbert, supra*, 54 Cal.2d 328, 337; *Kornoff* v. *Kingsburg Cotton Oil Co.*, 45 Cal.2d 265, 271 et seq. [288 P.2d 507]; *Herzog* v. *Grosso*, 41 Cal.2d 219, 225 [259 P.2d 429]; *Emden* v. *Vitz*, 88 Cal.App.2d 313, 316 et seq. [198 P.2d 696].)

[11] We are satisfied that a plaintiff who as a result of a defendant's tortious conduct loses his property and suffers mental distress may recover not only for the pecuniary loss

but also for his mental distress. No substantial reason exists to distinguish the cases which have permitted recovery for mental distress in actions for invasion of property rights. The principal reason for limiting recovery of damages for mental distress is that to permit recovery of such damages would open the door to fictitious claims, to recovery for mere bad manners, and to litigation in the field of trivialities. (Prosser, Torts (3d ed. 1964) § 11, p. 43.) Obviously, where, as here, the claim is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced, and we are not here concerned with mere bad manners or trivialities but tortious conduct resulting in substantial invasions of clearly protected interests.[4]

Recovery of damages for mental suffering in the instant case does not mean that in every case of breach of contract the injured party may recover such damages. Here the breach also constitutes a tort. Moreover, plaintiff did not seek by the contract involved here to obtain a commercial advantage but to protect herself against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing liability insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss, and recovery of damages for mental suffering has been permitted for breach of contracts which directly concern the comfort, happiness or personal esteem of one of the parties. (*Chelini* v. *Nieri*, 32 Cal.2d 480, 482 [196 P.2d 915].)

It is not claimed that plaintiff's mental distress was not caused by defendant's refusal to settle or that the damages awarded were excessive in the light of plaintiff's substantial suffering.

The judgment is affirmed.

Traynor, C. J., McComb, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

[4]Nor are we here concerned with the problem whether invasion of the plaintiff's right to be free from emotional disturbance is actionable where there is no injury to person or property rights in addition to the inflicted mental distress. (Cf. *Amaya* v. *Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295 [29 Cal.Rptr. 33, 379 P.2d 513].)

Paul Samuelson, Economics (5th ed. 1960)

The purpose of this chapter is to show how supply and demand work themselves out in the competitive market for one particular good. We shall define a demand curve and then a supply curve. Finally, we shall see how the market price reaches its competitive equilibrium, where these two curves intersect—where the forces of demand and supply are just in balance.

A demand schedule relates quantity demanded and price:

	Price per bu. P (1)	Quantity demanded, million bu. per month Q (2)
A	$5	9
B	4	10
C	3	12
D	2	15
E	1	20

Table 1. Demand schedule for wheat. At each market price, there will at any time be a definite quantity of wheat demanded. At lower prices, quantity demanded will go up as more people substitute this food for other goods and feel they can afford to gratify their less important wants for this good.

▶ THE DEMAND SCHEDULE

Let us start with demand. Everyone has observed that how much people will buy at any one time depends on price: the higher the price charged for an article, the less the quantity of it bought; and other things being equal, the lower its market price, the more units people buy.

▶ Thus there exists at any one time a definite relation between the market price of a good (such as wheat) and the quantity demanded of that good. This relationship between price and quantity bought is called the "demand schedule" or "demand curve."

The hypothetical Table 1 gives an example of a demand schedule. At any price, such as $5 per bushel, there is a definite quantity of wheat that will be bought by all the consumers in the market—in this case 9 (million) bushels per month. At a lower price, such as $4, the quantity bought is even greater, being 10 (million) units. From Table 1 we can determine the *quantity bought at any price,* by comparing Column (2) with Column (1).

▶ THE DEMAND CURVE

The numerical data of Table 1 can also be given a graphic interpretation. On the vertical scale in Fig. 1, we represent the various alternative prices of wheat, measured in dollars per bushel. On the horizontal scale, we measure the quantity of wheat (in terms of bushels) that will be bought per month.

Just as a city corner is located as soon as we know its street and avenue, so is a ship's position located as soon as we know its latitude and longitude. Similarly, to plot a point on this diagram, we must have two coordinate numbers:

A downward-sloping curve portrays demand:

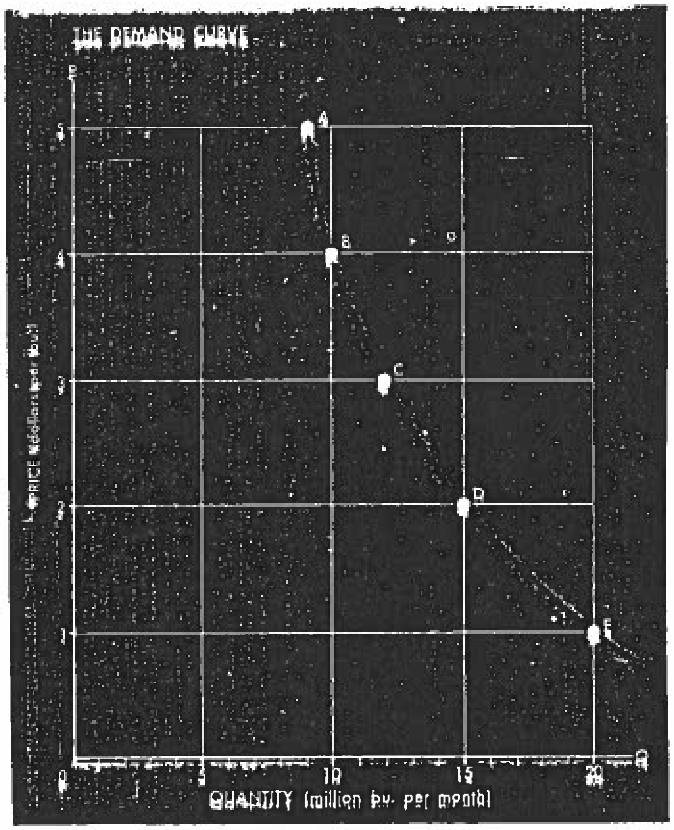

Fig. 1. Prices are measured on the vertical axis and quantities demanded on the horizontal axis. Each pair of Q,P numbers from Table 1 is plotted here as a point, and a smooth curve passed through the points gives us the demand curve. The fact that *dd* goes downward and to the right portrays the very important "law of downward-sloping demand."

a price and a quantity. For our first point *A*, corresponding to \$5 and 9 million bushels, we move upward 5 units and then over to the right 9 units. A circle marks the spot *A*. To get the next circle, at *B*, we go up only 4 units and over to the right 10 units. The last circle is shown by *E*. Through the circles we draw a smooth curve, marked *dd*.

This picturization of the demand schedule is called the "demand curve." Note how quantity and price are *inversely* related, quantity going up when price goes down. The curve slopes downward, going from northwest to southeast. This important property is given a name: the *law of downward-sloping demand*. This law is true of practically all commodities: wheat, electric razors, cotton, ethyl gasoline, cornflakes, and theater tickets.

► *The law of downward-sloping demand: When the price of a good is raised (at the same time that all other things are held constant), less of it will be demanded.* Or, what is the same thing: *If a greater quantity of a good is thrown on the market, then—other things being equal—it can be sold only at a lower price.*

▶ REASONS FOR DOWNWARD-SLOPING DEMAND

This law is in accordance with common sense and has been known in at least a vague way since the beginning of recorded history. The reasons for it are not hard to identify. When the price of wheat is sky high, only rich men will be able to afford it; the poor will have to make do with rye bread, just as they still must do in the poorer lands of Eastern Europe. When the price is still high but not quite so high as before, persons of more moderate means who also happen to have an especially great liking for white bread will now be coaxed into buying some wheat. So it is evident that a first important reason for the validity of the law of downward-sloping demand comes from the fact that *lowering prices brings in new buyers.*

Not quite so obvious is a second, equally important, reason for the law's validity; namely, *each reduction of price may coax out some extra purchases by each one of the good's consumers,* and—what is the same thing—a rise in price may cause any one of us to buy less. Why does my quantity demanded tend to fall as price rises? For two main reasons. When the price of a good rises, I naturally try to *substitute* other goods for it (tea for coffee, for example). Also, when a price goes up, I find myself really poorer than I was; and I will naturally cut down on my consumption of most normal goods when I feel poorer and have less real *income.*

Here are examples of cases where I buy more of a good as it becomes more plentiful and its price drops. When water is very dear, I demand only enough of it to drink. Then when its price drops, I buy some to wash with. At still lower prices, I resort to still other uses; finally, when it is really very cheap, I water flowers and use it lavishly for any possible purpose. (Note once again that someone poorer than I will probably begin to use water to wash his car only at a lower price than that at which I buy water for that purpose. Since market demand is the sum of all different people's demands, what does this mean? It means that even after my demand stops expanding very much with price decreases, the total bought in the market may still expand as new uses for new people come into effect.)

To confirm your understanding of the demand concept, imagine there is an increase in demand for wheat brought about by a boom in people's incomes or by a great rise in the market price of the competing rye, or simply by an increased desire of people to spend their money on wheat. Show that this shifts the whole demand curve rightward, and hence upward; pencil in such a new curve and label it *d'd'* to distinguish it from the old *dd* curve. Note that such an increase in demand means that more will now be bought at *every* different price—as can be verified by carefully reading off points from the new curve and filling in a new column for Table 1 to show how much higher the new quantities demanded at each price will be.

The supply schedule relates price and quantity supplied:

Table 2. Supply schedule for wheat. At each *P*, there is listed the *Q* that producers will want to supply.

	Possible prices per bu.	Quantity sellers will supply, million bu. per month
A	$5	18
B	4	16
C	3	12
D	2	7
E	1	0

The supply schedule can be plotted as a curve:

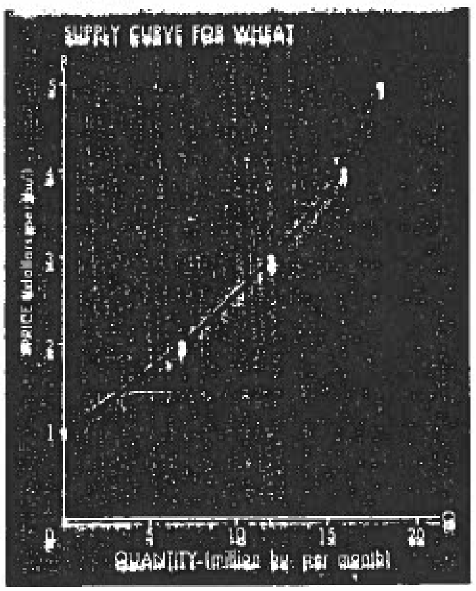

Fig. 2. Each *Q,P* pair of Table 2 is here plotted as a point. A smooth curve passed through them gives the upward-sloping supply curve *ss*.

▶ THE SUPPLY SCHEDULE

Enough has been said of demand. Let us now turn briefly to the sellers' side, or to the supply schedule. The demand schedule related prices and the amounts consumers wish to buy. How is the supply schedule defined?

▶ **By the *supply schedule or curve* we naturally mean the relation between market prices and the amounts that producers are willing to produce and sell.**

Table 2 illustrates the supply schedule for wheat, and Fig. 2 plots it as a supply curve. Unlike the demand curve, the supply curve for wheat normally rises upward and to the right, from southwest to northeast. At a higher price of wheat, farmers will take acreage out of corn cultivation and put it into wheat. In addition, each can now afford the cost of more fertilizer, more labor, more machinery, and can even afford to grow extra wheat on poorer land. All this tends to increase output at higher prices.[1]

To depict an increase in supply, recall that this means an increase in the amounts that will be supplied at each different price. Now the new supply curve penciled into Fig. 2 will be seen to be shifted *rightward;* but for an upward-sloping supply curve, this change means the new *s's'* curve will have been shifted rightward and downward rather than rightward and upward as in the case of a shifted downward-sloping demand curve. To verify that *s's'* does depict an increase in supply, fill in a new column in Table 2 by reading off points from the diagram carefully.

▶ EQUILIBRIUM OF SUPPLY AND DEMAND

Let us now combine our analysis of demand and supply to see how competitive market price is determined. This combining is done in Table 3. Thus far we have been considering all prices as possible. We have said, "If price is so and so, sales will be so and so; if price is such and such, sales will be such and such; and so forth." But to which level will price *actually* go? And how much will then be produced and consumed? The supply schedule alone cannot tell us.

Let us do what an auctioneer would do, *i.e.,* proceed by trial and error. Can situation *A* in Table 3, with wheat selling for $5 per bushel, prevail for any period of time? The answer is a loud and clear, No. At $5, the producers will be bringing 18 (million) bushels to the market every month [Column (3)]. But the amount demanded by consumers will be only 9 (million) bushels per month [Column (2)]. As stocks of wheat pile up, competitive sellers will cut the price a little. Thus, as Column (4) shows, price will tend to fall; but it will not fall indefinitely to zero.

To further understand this, let us try the point *E* with price equal to only $1 per bushel. Can that price persist? Again, obviously not, for a comparison of Columns (2) and (3) shows that consumption will exceed production *at that price*. Storehouses will begin to be emptied; disappointed demanders who cannot get wheat will tend to bid the price up. This upward pressure on price is indicated in Column (4) by the rising arrow. We could go on to try other prices, but by now the answer is obvious.

[1] While the exceptions to the law of downward-sloping demand are so few as to make them unimportant in practice, in Part Two we shall encounter some interesting exceptions to the upward-sloping supply curve. Thus, suppose that a family farmer produces wheat and its price rises so much as to give him a much higher income. With wheat so lucrative, he is at first tempted to *substitute* some of his leisure time to produce more of it. But might there not reasonably come a time when he feels comfortable enough at his higher *income* to be able to afford to take things a little easier and work less than before? When that point has been reached, his production goes down, and his *ss* curve begins to bend back toward the northwest.

Equilibrium market price is at the point where supply and demand match:

	Possible prices per bu. (1)	Quantity demanded, million bu. per month (2)	Quantity supplied, million bu. per month (3)	Pressure on price (4)
A	$5	9	18	↓ Falling
B	4	10	16	↓ Falling
C	3	12	12	Neutral
D	2	15	7	↑ Rising
E	1	20	0	↑ Rising

Table 3. Supply and demand schedules for wheat. Only at $3 will quantity demanded by consumers equal quantity supplied by producers. At any lower price, demand would exceed supply; at any higher price, supply would exceed demand.

▶ The only equilibrium price—*i.e.*, the only price that can last—is that at which the amount supplied and the amount demanded are equal. Competitive equilibrium is always at the intersection point of the supply and demand curves.

Only at *C*, with a price of $3, will the amount demanded, 12 (million) bushels per month, exactly equal the amount supplied, 12 (million). Price is at equilibrium, just as an olive at the bottom of a cocktail glass is at equilibrium, because there is no tendency for it to rise or fall. Of course, this stationary price may not be reached at once. There may have to be an initial period of trial and error, of oscillation around the right level, before price finally settles down and supply balances demand.

Figure 3 shows the same result in pictorial form. The supply and demand curves are superimposed on the same diagram and cross at only one intersection point. This point *C* represents the equilibrium price and quantity.

At a higher price, the white bar shows the *excess* of supply over demand. The arrows point downward to show the direction in which price will move because of the competition of *sellers*. At a price lower than the $3 equilibrium price, the white bar shows that demand surpasses supply. Consequently the eager bidding of *buyers* requires us to point the arrow indicators upward to show the pressure that they are exerting on price. Only at the point *C* will there be a balancing of forces and a stationary maintainable price.

Such is the essence of the doctrine of supply and demand.

▶ EFFECT OF A SHIFT IN SUPPLY OR DEMAND

Now we can put the supply and demand apparatus to work. Gregory King, an English writer of the seventeenth century, noticed that when the harvest was

The equilibrium market price is where demand and supply curves intersect:

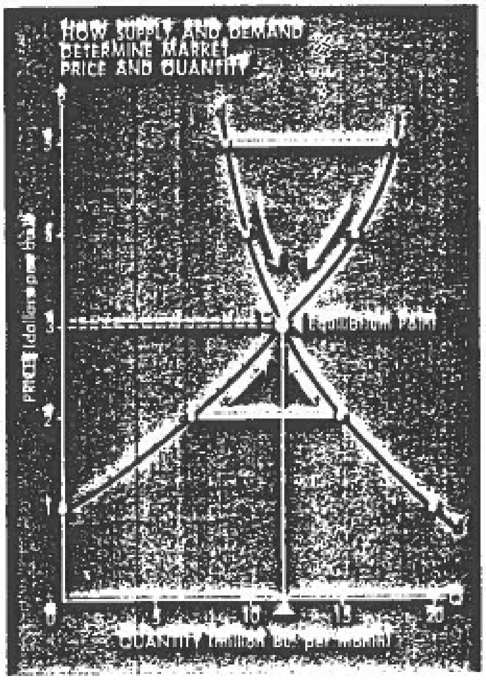

Fig. 3. At the C intersection, the amount supplied just matches the amount demanded. At any lower *P*, the excess of demand will force *P* back up; and at any *P* higher than the equilibrium, the amount supplied will be excessive and *P* will be forced back down to the equilibrium level.

bad, food rose in price, and when it was plentiful, farmers got a lower price. Let us try to explain what happens by our diagrams.

Figure 4 shows how a spell of bad weather reduces the amount that farmers will supply at each and every market price and thereby displaces the equilibrium point *E*. The *ss* curve has shifted to the left and has become *s′s′*. The demand curve has not changed. Where does the new supply curve *s′s′* intersect *dd*? Plainly at *E′*, the new equilibrium price where demand and the new reduced supply have again come into balance. Naturally, *P* has risen. And because of the law of downward-sloping demand, what has happened to *Q*? It has gone down.

Suppose the supply curve had instead increased because of good weather and new fertilizers. Draw in a new equilibrium *E″* with lower *P* and higher *Q*.

Our apparatus will also help us analyze the effect of an increase in demand. Suppose that rising family incomes make everyone want more wheat. Then at each unchanged *P*, greater *Q* will now be demanded. The demand curve will shift rightward to *d′d′*. The right-hand part of Fig. 4 shows the resulting travel up the supply curve as enhanced demand raises competitive price.

Diagrams show effects on price of demand and supply shifts:

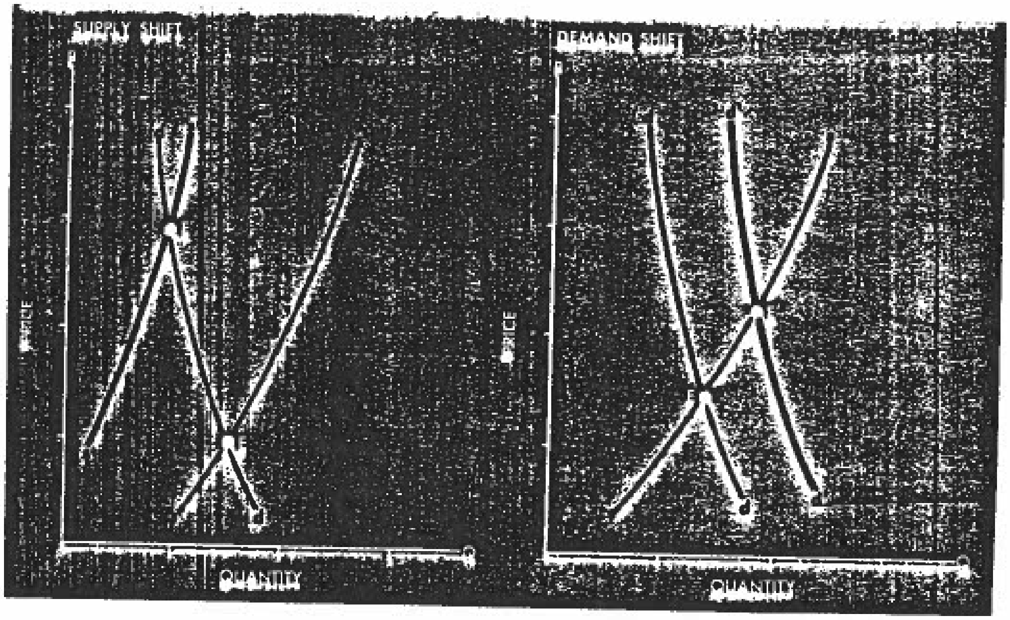

Fig. 4. If supply shifts leftward for any reason, the equilibrium price intersection will travel up the demand curve, giving higher *P* and lower Q.

If demand shifts rightward, the equilibrium will travel up the supply curve.

X X X X X X

▶ INCIDENCE OF A TAX

We can illustrate the case of a shift in the entire curve by referring back to Table 3 and Fig. 3 of Chapter 4, which portrayed hypothetical supply and demand schedules for wheat. These resulted in an equilibrium price of $3 per bushel.

Let us now introduce a new factor which will disturb this equilibrium. In particular, let us assume that the government imposes a sales tax on wheat. On each and every sale, the producer is required to pay a tax of $1 per bushel of wheat. What is the final effect, or what economists call the "incidence," of the tax? Does its burden fall back completely on the producer who must in the first instance pay it? Or may it be shifted forward in part to consumers? The answer can be derived only by the use of our supply and demand curves.

There is no reason for the demand curve of the consumers to have changed at all. At $3, consumers will still be willing to buy only 12 (million) bushels; they neither know nor care that the producers must pay a tax.

But the whole supply curve is shifted upward and leftward: leftward because at each market price the producers will now supply less as a result of the tax; upward because to get the producers to bring any given quantity to market, say, 12 (million) units, we must give them a higher market price than before —$4 rather than $3, which is higher by the exact amount of the $1 tax.

The student should be able to fill in a new supply column, resembling Column (3) in Table 3 of Chapter 4, but with each price raised by $1. Here in Fig. 4, the demand curve *dd* is unchanged, but the supply curve *ss* has been shifted up everywhere by $1 to a new parallel supply curve *s′s′*.

Where will the new equilibrium price be? The answer is found at the inter-

A tax on wheat falls both on consumer and producer:

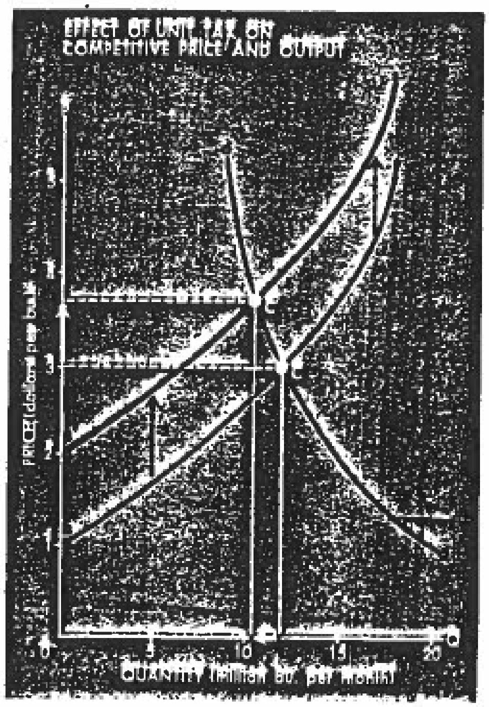

Fig. 4. A $1 tax shifts *ss* up $1 everywhere to give *s's'*. This intersects *dd* in new equilibrium at C' where price to consumer has risen $⅔ above old C equilibrium and where price to producer has fallen by $⅓. The thick white arrows show change in P and Q. (Had *dd* been very elastic and flat relative to *ss*, most of the $1 tax would have fallen on the producer.)

section of the new demand and supply curves, or at *C'*, where *s's'* and *dd* meet. Because supply has decreased, the price is higher. Also the amount bought and the amount sold are less. If we read the graph carefully, we find that the new equilibrium price has risen from $3 to about $3⅔. The new equilibrium output, at which purchases and sales are in equilibrium, has fallen from 12 (million) per month to about 10.6 (million) bushels.

Who pays the tax? Well, the wheat farmers do in part because now they receive only $2⅔, ($3⅔ − $1), rather than $3. But the consumer also shares in the burden, because the price received by the producer has *not* fallen by as much as the tax. To the consumer, the wheat now costs $2⅔ plus the $1 tax, or $3⅔ all told. Because the consumers need wheat so badly, they pay ⅔ of the tax, and the producers pay ⅓ of the tax.[1]

To check his understanding of the above reasoning, the student should consider the case of an opposite shift in supply. Let the government pay producers a subsidy of $1 per bushel of wheat instead of taxing them this amount.

[1] There is another and important way to handle this tax problem. If the consumer were thought of as paying the tax in the first instance, you could subtract $1 everywhere from his *dd* curve. The new *d'd'* will intersect *ss* at the same new *Q*, and the same $2⅔ and $3⅔ price will prevail. It goes without saying that all these figures are hypothetical.

Shift *ss* down to the new curve *s″s″*. Where is *C″*, its intersection with *dd*? What is the new price? The new quantity? How much of the benefit goes to the producer? How much to the consumer?

► A COMMON FALLACY

By now the student has mastered supply and demand. Or has he? He knows that a tax will have the effect of raising the price that the consumer will have to pay. Or does he know this? What about the following argument of a kind often seen in the press and heard from the platform:

> The effect of a tax on a commodity might seem at first sight to be an advance in price to the consumer. But an advance in price will diminish the demand; and a reduced demand will send the price down again. Therefore it is not certain, after all, that the tax will really raise the price.[3]

Well, what about it? Will the tax raise the price or not? According to the editor's written word and the senator's oratory, the answer is "no." Evidently, we have here an example of the treachery of words. One of the four sentences in the quotation is false because the word "demand" is being used in the wrong sense. The student has already been warned against confusing a movement *along* an unchanged curve with a shift in the curve.

Actually, the correct answer would be more or less as follows:

> A tax will raise the price to the consumer and will lower the price received by the producer, the difference going to the government. At the higher price a smaller quantity will be bought by consumers. This is as it should be, because producers are also supplying a smaller quantity at the lower price which they receive. Thus the amounts bought and sold are in balance where the new supply and demand schedules intersect, and there will be no further change in price.

JEANETTE SIMON, executrix, *vs.* CELESTE SOLOMON.

Suffolk. September 18, 1981. — January 18, 1982.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, NOLAN, & LYNCH, JJ.

Emotional Distress. Landlord and Tenant, Habitability, State Sanitary Code, Quiet enjoyment. *Statute*, Construction. *Due Process of Law*, Public welfare offense. *Evidence*, Expert opinion, Collateral matter. *Damages*, For emotional distress, Breach of implied warranty of habitability, Breach of convenant of quiet enjoyment, Attorney's fees.

On a claim by a tenant seeking to recover damages from her former landlord for reckless infliction of emotional distress, the evidence warranted findings that the landlord had recklessly failed to make repairs necessary to prevent repeated flooding of the tenant's apartment, that its long and repetitious course of conduct toward the tenant was outrageous, and that the landlord's conduct was the proximate cause of the tenant's severe emotional distress. [97-98]

A tenant may properly bring a civil action against a landlord to recover damages under G. L. c. 186, § 14, for interference with quiet enjoyment of residential premises without first seeking criminal charges against the landlord under that statute's criminal provisions. [100]

Malicious intent is not a condition of liability under G. L. c. 186, § 14, which prohibits a landlord's interference with a tenant's quiet enjoyment of residential premises, and a landlord's reckless conduct was within the scope of § 14. [101-103]

Where a landlord, by failing to prevent repeated flooding, interfered with a tenant's quiet enjoyment of her apartment, it was liable to the tenant under G. L. c. 186, § 14. [103]

A statement by a psychiatrist, in the course of his testimony as to the cause of a tenant's emotional distress, that the tenant "appeared sincere and honest," was admissible, in the discretion of the judge, as an explanation of the basis of his opinion. [105-106]

At the trial of a claim by a tenant against her former landlord for injuries caused by unsanitary conditions in her apartment, no error appeared in the admission in evidence of two tenant complaint slips prepared after commencement of the action, dated several months after the tenant had moved out of her apartment and taken from the landlord's telephone records, for the limited purpose of showing that the landlord's maintenance supervisor had notice of a flood, and thereby impeaching his testimony on cross-examination. [107]

An award of damages against a landlord under G. L. c. 186, § 14, for interference with a tenant's quiet enjoyment of residential premises could not stand where it necessarily duplicated amounts of actual damages recovered by the tenant for breach of the landlord's implied warranty of habitability and for infliction of emotional distress. [107-109]

A tenant proceeding under G. L. c. 186, § 14, for interference with quiet enjoyment of residential premises may recover from his landlord one award equal to three months' rent covering all claims that the tenant raised or reasonably could have raised in the suit or, alternatively, may recover his actual damages if they exceed this amount. [109-111]

Under G. L. c. 186, § 14, allowing a tenant to recover actual and consequential damages from a landlord who has interfered with her quiet enjoyment of residential premises, a judge properly considered legal services related to the tenant's claim for emotional distress in his assessment of attorneys' fees against the landlord, where not only were the tenant's injuries foreseeable, but also the jury found specifically that the landlord knew or should have known that if it permitted floods to occur, the tenant would suffer emotional harm. [111-113]

An award of attorneys' fees under G. L. c. 186, § 14, in favor of a tenant following litigation against her former landlord was, in the circumstances, neither excessive nor unreasonable. [113]

Civil action commenced in the Municipal Court of the Roxbury District on December 29, 1976.

Upon transfer to the Housing Court of the City of Boston, the case was tried before *King*, J.

The Supreme Judicial Court granted a request for direct appellate review.

Robert Snider for Jeanette Simon, executrix.

Richard W. Cole (*James H. Wexler* with him) for Celeste Solomon.

Hennessey, C.J. In this appeal, a landlord challenges a judgment entered after trial to a jury in the Housing Court Department of the Trial Court, awarding damages and attorneys' fees to a tenant for injuries caused by unsanitary conditions in her apartment.

Gem Realty Company (Gem)[1] managed a large number of apartment buildings in Boston. It rented many of its

[1] The company was controlled by Maurice Simon, since deceased, who was the original plaintiff in this action. For purposes of brevity, we refer

apartments to low income tenants under a Federal rent supplement program. From December, 1973, to November, 1977, Celeste Solomon and her two young sons lived in the basement apartment of a building managed by Gem. In December, 1976, Gem began summary process proceedings to evict Solomon for nonpayment of rent. Solomon, citing floods, trash, rats, roaches, and more, denied that she owed rent. She also filed a counterclaim in four counts, claiming that Gem had (1) broken its implied warranty of habitability; (2) violated its implied covenant of quiet enjoyment; (3) caused Solomon emotional distress through its negligent failure to maintain her apartment; and (4) intentionally inflicted emotional distress.

Solomon's counterclaims are based primarily on her allegations of flooding in her apartment. She testified at trial that water and sewage, flowing from an adjoining basement area, flooded her apartment approximately thirty times during her tenancy. Solomon could not recall the date of any of the floods, but was able to name the months in which floods had occurred. She testified that each flood had occurred between twelve and two o'clock in the morning; she described stepping from bed into ankle deep water and slime. Each time this happened, Solomon would spend the night in her kitchen, drinking coffee, and waiting for the morning to call Gem. According to Solomon, a Gem cleanup crew would arrive several hours after her call to pump the water from her apartment. Solomon's testimony concerning the flooding was corroborated by photographs showing water damage, and by witnesses who had seen water or evidence of water in Solomon's apartment.

Solomon did not suffer bodily injury as a result of the flooding. She testified, however, that the floods caused her great emotional anguish. The recurrent water and sewage left her "withdrawn," "depressed," and "ashamed," unable to work or to care for her children. She began to spend much

to the owner-landlord as Gem. No question is raised as to Gem's control of the premises.

of her time in a darkened bedroom, crying, and on two occasions she sent her children to stay with relatives, so that they might escape the conditions in her apartment. Two psychiatric experts testified that Solomon had suffered serious emotional injury as a result of her living conditions, and was in need of substantial psychiatric treatment.

Gem admits that water entered Solomon's apartment on several occasions, but denies that thirty "floods" occurred. At trial, Gem's employees described in detail Gem's maintenance procedures and its answering service for tenants' complaints, and testified that they had no memory or record of repeated reports of flooding in Solomon's apartment. Gem also gave evidence concerning the structure of Solomon's building and the possible cause of flooding, and argued that third persons were responsible for any floods that occurred.

The judge granted summary judgment for Gem on Solomon's count for negligent maintenance, reasoning that a claim of negligence could not support recovery for purely emotional harm unaccompanied by physical injuries. The judge submitted the remaining three counts to the jury.[2] The jury returned verdicts for Solomon on each count, awarding her $35,000 for recklessly inflicted emotional distress, $10,000 for breach of the covenant of quiet enjoyment, and $1,000 for breach of the warranty of habitability. The judge subsequently awarded Solomon counsel fees, as permitted by the "quiet enjoyment" statute, G. L. c. 186, § 14, in an amount of slightly more than $40,000. Gem has appealed the judgments entered on the verdicts and fee award. Solomon asserts that she is entitled to recover the total of the three verdicts, and the counsel fees, and has appealed the summary judgment for Gem on her count for negligently-caused emotional distress.

[2] The jury were asked to return a separate verdict on each count, and to answer ten specific questions. In the answers to these questions, the jury found that Gem had broken its implied warranty of habitability and its implied covenant of quiet enjoyment. They also found that Gem had not intended to cause Solomon emotional distress, but had engaged in outrageous conduct, and had known, or should have known, that this conduct would cause emotional distress. Finally, they found that Gem's conduct caused Solomon's distress, and that her distress was severe.

We affirm the judgments entered for Solomon on her claims for breach of the warranty of habitability, reckless infliction of emotional distress, and attorneys' fees. We also affirm the judgment entered for Gem on Solomon's claim of negligence. We vacate the $10,000 award for interference with quiet enjoyment.

1. *Reckless infliction of emotional distress*. Our decisions in recent years have firmly established that a plaintiff may recover for emotional distress inflicted recklessly or intentionally. *Agis* v. *Howard Johnson Co.*, 371 Mass. 140 (1976). *George* v. *Jordan Marsh Co.*, 359 Mass. 244 (1971). See Restatement (Second) of Torts § 46 (1965). In *Agis*, we listed four elements necessary to a recovery on this theory. The plaintiff must show "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; . . . (2) that the conduct was 'extreme and outrageous' . . . ; (3) that the actions of the defendant were the cause of the plaintiff's distress; . . . and (4) that the emotional distress sustained by the plaintiff was 'severe' . . . ." *Agis, supra* at 144-145. If each of these elements is proven, the plaintiff can recover for purely emotional suffering unaccompanied by physical injury. *Id.*

Gem does not seriously challenge the finding of the jury that Solomon suffered severe emotional distress as a result of the floods in her apartment. Instead, Gem stresses that Solomon did not identify a specific "defect" in the apartment building that Gem, as landlord, should have repaired. On this basis Gem argues that it did not act recklessly, did not engage in outrageous conduct, and did not cause Solomon's floods.

The central thrust of Gem's contentions appears to be that its conduct was not the proximate cause of Solomon's injuries — that it was not legally responsible for her misfortune. As Gem points out, the source of the floods was not clear. The water appears to have entered Solomon's apartment primarily from an adjoining basement area. Two waste stacks, admittedly very old, extended from roof to basement collecting waste from the bathrooms, and on occasion may have backed up through a drain in the basement. Gem's plumber, however, testified that the plumbing system and stacks were in good repair and complied with State plumbing regulations. He also stated that backups in the waste stacks were probably caused by objects that other tenants had introduced through the toilets or roof vents. On the basis of this uncontroverted testimony, Gem argues that it acted reasonably in its plumbing maintenance and therefore was not responsible for the flooding.

Gem's legal responsibility, however, depends on the duties it owed to Solomon, and Gem's arguments concerning plumbing misstate the scope of a landlord's duty to its tenants. We have held that every landlord that rents residential property warrants to its tenants that the premises will be delivered and maintained in a habitable condition. *Boston Hous. Auth.* v. *Hemingway*, 363 Mass. 184 (1973). At a minimum, this warranty imposes on the landlord a duty to keep the dwelling in conformity with the State Sanitary Code. *Id.* at 200 n.16. *Crowell* v. *McCaffrey*, 377 Mass. 443, 451 (1979). See also *Hemingway*, *supra* at 215-219 (Quirico, J., concurring in part and dissenting in part). A landlord's breach of this duty abates the tenant's obligation to pay rent, even when the landlord is not at fault and has no reasonable opportunity to make repairs. *Berman & Sons* v. *Jefferson*, 379 Mass. 196 (1979). Further, a landlord that fails to maintain a habitable dwelling for its tenant is liable for resulting personal injuries, at least when the landlord has failed to exercise reasonable care in maintenance. *Crowell*, *supra* at 450-451.

There was evidence at trial that the wall between Solomon's apartment and the adjoining basement area was extremely porous. There was also testimony suggesting that Gem may have considered cementing the wall to prevent floods, but never carried out this plan. The jury could reasonably conclude that Gem's failure to do so caused Solo-

mon's injuries — that but for Gem's inaction, no floods would have occurred.[3] See *Williams* v. *Fontes*, 383 Mass. 95, 97-98 (1981); W. Prosser, Torts § 41, at 237 (4th ed. 1971). Further, a section of the State Sanitary Code (received in evidence), provides that apartments must be watertight. 105 Code Mass. Regs. § 410.000 (1978). In light of our decisions holding landlords responsible for injuries resulting from breaches of sanitary code provisions, Gem's behavior was a sufficiently "proximate" cause to justify the imposition of liability. W. Prosser, *supra* at 244. *Crowell*, *supra* at 450-452.

Having recognized that an inference was warranted that Gem failed in its duty to prevent the flooding, we find ample evidence in the record from which the jury could conclude that the remaining elements of an action for reckless infliction of emotional distress — recklessness, outrageous conduct, and severe emotional distress[4] — were present. See *Agis* v. *Howard Johnson Co.*, 371 Mass. 140 (1976). Solomon testified that she had repeatedly complained to Gem of floods. She stated that Gem on each occasion sent a clean-up crew to pump out the water, but never took permanent action. The jury, if they believed this testimony, could find that Gem knew or should have known that unless it fixed the porous wall flooding would occur, and that floods of sewage water were very likely to cause emotional harm. See *Agis*, *supra* at 144-145; Restatement (Second) of Torts § 46, Comment i (1965) (recklessness). The jury could also find that Gem had displayed, over a long and repetitious course, such a pattern of indifference that its conduct was outrageous, "beyond all possible bounds of decency." *Agis*, *supra* at 145 (quoting from Restatement [Second] of Torts § 46, Commend d [1965]). See *Boyle* v. *Wenk*, 378 Mass. 592, 595-596 (1979).

[3] Gem's arguments focus on the causal connection between its conduct and the flooding, rather than that between the flooding and Solomon's injuries.

[4] The severity of Solomon's injury is not an issue on this appeal.

In sum, it could be found that Gem violated its duty to Solomon recklessly, by outrageous omission to act, and thereby caused Solomon severe emotional harm. Therefore, the jury were warranted in holding Gem liable for reckless infliction of emotional distress.

2. *Negligence and strict liability.* Solomon has appealed the summary judgment against her on her count for negligent maintenance. As the trial judge noted in his order, we have not recognized a cause of action for negligently inflicted emotional distress unaccompanied by physical injury. *Dziokonski* v. *Babineau*, 375 Mass. 555, 560 n.6, 561 n.7 (1978). *McDonough* v. *Whalen*, 365 Mass. 506, 517-518 (1974). Cf. *Spade* v. *Lynn & Boston R.R.*, 168 Mass. 285, 290 (1897) (limited on other grounds, *Dziokonski, supra* at 561). See *Ferriter* v. *Daniel O'Connell's Sons*, 381 Mass. 507, 517-518 (1980). Solomon asks us to abandon the requirement of physical injury in actions brought by direct victims of negligence. See *Molien* v. *Kaiser Foundation Hosps.*, 27 Cal. 3d 916, 925-932 (1980); *Rodrigues* v. *State*, 52 Haw. 156, 169-174 (1970). She also suggests that in the landlord-tenant context, proof of negligence should not be necessary. She argues that the warranty of habitability imposes strict liability on landlords for injuries to tenants caused by unsanitary apartment conditions, including emotional injuries. See *Berman & Sons* v. *Jefferson*, 379 Mass. 196, 200-203 & n.9 (1979); *Crowell* v. *McCaffrey*, 377 Mass. 443, 450-451 (1979). Compare *Kaplan* v. *Coulston*, 85 Misc. 2d 745 (N.Y. Civ. Ct. 1976), with *Segal* v. *Justice Court Mut. Hous. Coop.*, 105 Misc. 2d 453 (N.Y. Civ. Ct. 1980). Cf. *Back* v. *Wickes Corp.*, 375 Mass. 633 (1978).

We need not decide whether a tenant could recover for purely emotional harm on a theory of negligence or strict liability, or whether the Legislature intended to authorize such recovery as "consequential" damages under G. L. c. 186, § 14. We have affirmed Solomon's sizeable recovery for reckless infliction of emotional distress, and she has not demonstrated that she would be entitled to additional compensation if permitted to recover under a lesser standard

of fault. It is perhaps conceivable that the verdict for recklessly inflicted emotional distress did not cover all of Solomon's suffering. If the jury based their findings of recklessness and outrageous conduct on the repetitious nature of Gem's conduct, see *Boyle* v. *Wenk*, 378 Mass. 592, 595-596 (1979), they may have calculated damages from a point sometime after Solomon first began to suffer distress. Solomon, however, has not argued this point, and the possibility of a marginally enhanced recovery is too speculative to warrant our reaching beyond the arguments presented.

POSNER, "STRICT LIABILITY.. A COMMENT"
2 J. LEG. STUD. 205, 207, 210-211
(1973)

At least as a first approximation, then, a strict liability standard with a defense of contributory negligence is as efficient as the conventional negligence standard, but not more efficient. This conclusion would appear to hold with even greater force where, as in a products liability case, there is (or can readily be created) a seller-buyer relationship between injurer and victim. Indeed, it can be shown that in that situation an efficient solution is likely to be reached not only under either strict liability (plus contributory negligence) or negligence, but equally with no tort liability at all.

The cost of a possibly dangerous product to the consumer has two elements: the price of the product and an expected accident cost (for a risk-neutral purchaser, the cost of an accident if it occurs multiplied by the probability of occurrence). Regardless of liability, the seller will have an incentive to adopt any cost-justified precaution, because, by lowering the total cost of the product to the buyer, it will enable the seller to increase his profit.[7] Where, however, the buyer can prevent the accident at lower cost than the seller, the buyer can be counted on to take the precaution rather than the seller, for by doing so the buyer will minimize the sum of the price of the product (which will include the cost of any precautions taken by the seller) and the expected accident cost.[8]

* * * * * *

[7] Suppose the price of a product is $10 and the expected accident cost 10¢; then the total cost to the (risk-neutral) consumer is $10.10. If the producer can reduce the expected accident cost to 5¢—say at a cost of 3¢ to himself—then he can increase the price of the product to $10.05, since the cost to the (risk-neutral) consumer remains the same. Thus his profit per unit is increased by 2¢. (In fact, he will be able to increase his total profits even more by raising price less.) The extra profit will eventually be bid away by competition from producers but that is in the nature of competitive advantages.

[8] This is actually a more efficient solution than either negligence or strict liability, since it avoids the problem we noted earlier of the law's economically incorrect definition of contributory negligence.

The economics of products liability is debated at length in Symposium, Products Liability: Economic Analysis and the Law, 38 U. Chi. L. Rev. 1 (1970). See in particular Roland N. McKean, Products Liability: Trends and Implications, *id.* at 3.

Additional considerations come into play where there is a buyer-seller relationship between victim and injurer; but they relate primarily to the question whether sellers' liability (either strict liability or negligence) has different consequences from no liability (*i.e.*, buyers' liability). There are two reasons for believing that there might be different safety consequences. First, if the buyers of a product are risk preferring, they may be unwilling to pay for a safety improvement even if the cost is less than the expected accident cost that the improvement would eliminate. Under a rule of no liability, the improvement will not be made; under a rule either of strict liability or of negligence liability, the improvement will be made.[13] But the higher level of safety is not optimum in the economic sense, since it is higher than consumers want.

Second, consumers may lack knowledge of product safety. Criticisms of market processes based on the consumer's lack of information are often superficial, because they ignore the fact that competition among sellers generates information about the products sold. There is however a special consideration in the case of safety information: the firm that advertises that its product is safer than a competitor's may plant fears in the minds of potential consumers where none existed before. If a product hazard is small, or perhaps great but for some reason not widely known (*e.g.*, cigarettes, for a long time), consumers may not be aware of it. In these circumstances a seller may be reluctant to advertise a safety improvement, because the advertisement will contain an implicit representation that the product is hazardous (otherwise, the improvement would be without value). He must balance the additional sales that he may gain from his rivals by convincing consumers that his product is safer than theirs against the sales that he may lose by disclosing to consumers that the product contains hazards of which they may not have been aware, or may have been only dimly aware. If advertising and marketing a safety improvement are thus discouraged, the incentive to adopt such improvements is reduced. But make the producer liable for the consequences of a hazardous product, and no question of advertising safety improvements to consumers will arise. He will adopt cost-justified precautions not to divert sales from competitors but to minimize liability to injured consumers.

In principle, we need not assume that the only possible sources of information about product safety are the manufacturers of the product. Producers in other industries would stand to gain from exposing an unsafe product, but if their products are not close substitutes for the unsafe product, as is implicit in our designation of them as members of other industries, the gain will be small and the incentive to invest money in investigating the safety of the product and disseminating the results of the investigation slight. Firms could of course try to sell product information directly to consumers; the problem is that because property rights in information are relatively undeveloped, the supplier of information is frequently unable to recover his investment in obtaining and communicating it.

[redacted]

The information problem just discussed provides an arguable basis for rejecting *caveat emptor* in hazardous-products cases, but not for replacing negligence with strict liability in such cases, which is the trend of the law. The traditional pockets of strict liability, such as respondeat superior and the liability of blasters and of keepers of vicious animals, can be viewed as special applications of negligence theory.[14] The question whether a general substitution of strict for negligence liability would improve efficiency seems at this stage hopelessly conjectural; the question is at bottom empirical and the empirical work has not been done. Finally, it is interesting to note that in the area of tort law that is in greatest ferment, liability for automobile accidents, the movement appears to be from negligence to no liability![15]

[15] Most no-fault auto compensation plans involve (1) compulsory accident insurance and (2) exemption from tort liability.

[redacted]

G. CALABRESI, THE COSTS OF ACCIDENTS 162-67 (1970)

[redacted]

It is often asserted that where two parties stand in a bargaining relationship with each other it does not matter which one is initially charged with accident losses arising out of that relationship because the market will allocate the losses in the best way possible regardless of initial allocations.' . . .

This kind of argument can be made with varying degrees of realism in any bargaining situation. Should the cost of industrial accidents be put on workers or on their employers? Should the accident costs of rotary lawn mowers be borne by manufacturers or users? Theoreticians such as Blum and Kalven insist that in terms of general deterrence of accident-prone activities it should make no difference either way.[19] But as we have seen, in theory it would make no difference who bears accident costs even among parties that do *not* stand in a bargaining relationship with each other. In reality, of course, it can make a great deal of difference in the bargaining situation, just as it does in the nonbargaining one. And the reasons it does make a difference are merely concrete examples of the guidelines for picking the cheapest cost avoider I have already outlined.

The first reason for the difference is that one of the two parties may, in practice, be far more able than the other to evaluate the accident risk, i.e. the expected accident costs. And if this is the case, his activity is better suited (in terms of deterrence of accident-prone activities) to bear the initial loss. If individual purchasers are made to bear the costs of rotary mower accidents and invariably underestimate their likelihood, they will tend not to purchase a substitute mower that seems to be more expensive but is relatively cheaper if accident costs are adequately taken into account. Presumably the rotary mower industry knows more accurately the expected cost of using mowers in any given year; and if the cost is put directly on the industry, individuals will be made aware of these costs through the prices of mowers and be better able to make the appropriate choice for or against accidents. To the extent that they choose against accidents (against the now higher priced mowers, reflecting the accident costs), pressure will exist on the mower companies to develop safer mowers. Conversely, if we are dealing with allergies that result from eating strawberries, it may well be true that the consumer is in the best position to value the risk. The same may not be true, however, of any allergy that causes death the first time it appears in any individual. Thus, quite apart from spreading motives, a reason may exist for making distinctions between these situations in products liability cases. This reason is, in fact, simply a concrete case of the guideline that externalization due to inadequate knowledge should be avoided.

The second reason is that it may not cost the two parties the same amount to insure against the loss. If the loss is placed on the party for whom insurance is less available or more expensive, a false cost —the excess cost of his insuring—will in effect be made a part of the price of the goods. The possibility of self-insurance does not affect this; it only suggests that occasionally one of the parties is sufficiently large so that noninsurance is the cheapest alternative. Once again, the choice of loss bearers depends on which of the two parties to the bargain can inject the cost into the price of the goods or service most cheaply. This is a more specific example of the guideline that unnecessary avoidance costs should be avoided.[20]

The third reason is nothing more than externalization by transfer. If placing the loss on one of the two parties to the bargain results in all or part of the loss being removed from both of the parties and placed on unrelated parties that would be excluded from loss bearing under any of our general deterrence criteria, such a placement is undesirable. For example, if placing the cost of rotary mower accidents on the users ultimately resulted, for political or social reasons based on a desire to compensate, in the loss being paid for by the government out of general social insurance, such a loss allocation would tend to prevent the appropriate choice for or against rotary mowers. If placing the loss on the mower company instead did not result in such an externalization, there would be a clear reason for placing the loss on the mower company.

The classic example of this is industrial accidents, although product liability law provides nearly as classic an instance. It did make a difference in terms of accident deterrence (despite the analysis of theoreticians at the time) whether industrial accidents were initially charged to workers or to industry. This was not because industry always was more the "cause" of the accidents than workers, but because industry could insure more cheaply than the workers and was better informed on what the costs of accidents would be, and because placing the loss on the workers was most likely to result in externalizing part of it from both workers and industry. Therefore placing the loss on industry better enabled us to minimize accident losses by an appropriate choice for or against accidents.

All this would seem fairly obvious and perhaps not worth spending time on but for the fact that Blum and Kalven have recently argued that while generally economic theory shows that it makes no difference which of two bargaining parties initially bears accident costs, there is one, and only one, reason why the theory does not work perfectly.[21] Their reason is a little different from any of my three arguments. Both the implicit rejection of my suggestions and the proposal of another criterion warrant additional discussion.

Their argument is as follows: "Placing liability on the [manufacturer rather than the consumer-victim in a product liability or other bargaining case] is tantamount to compelling [potential victims] to buy insurance against the loss through paying a higher price."[22] • • •

The fact of the matter is simply that whenever we determine which of two bargaining parties will bear the initial undivided cost of an accident and forbid the shifting of that liability to the other in exchange for a fee, we are compelling the party not held liable to insure against the loss with the party that is liable.[20] This is not to say that we are indifferent as to which party we wish to compel to insure or as to whether we wish to compel insurance at all or to make it optional by allowing exculpatory or indemnificatory clauses. The point is simply that the argument about compulsory insurance is false, for whether compulsory insurance results from a liability scheme depends not on which party is held liable in the first instance, but on whether once we decide to hold one party liable we let that party exculpate itself by shifting the risk of undivided loss to the other for a price. Nor does the fact that we are more likely to let one party exculpate itself than the other change the point at all. This fact merely suggests that other reasons for assigning liability in a bargaining situation (such as unequal awareness of risks) are sufficiently strong to impel compulsory insurance of the nonliable party.

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-66-

Calabresi, The Costs of Accidents, p. 50-60

Why Private Insurance May Give Inadequate Loss Spreading

The preceding discussion raises the question of why free individual decisions about insurance are not likely to bring about the amount and type of loss spreading we collectively want. To the extent that we are concerned with deep pocket—that is, with type rather than amount of spreading—no further discussion is needed, for private insurance without compulsion or control cannot make the choice of who pays depend on who is most able, from a collective point of view, to bear the burden. Accordingly, the following discussion will be concerned only with the amount of spreading that voluntary insurance affords. I believe that there are five principal reasons, whose significance and acceptance vary, why many critics feel that private insurance gives inadequate risk spreading.

Paternalism

The first and most controversial reason is simply the old paternalistic one—that people do not know what is best for themselves. In its most extreme form, it calls into question the very notion of a free market. Stated blatantly, it is a belief that people are likely to be happier if a central authority makes decisions for them than if they make decisions for themselves. I shall have more to say about this notion later, when I discuss the economic and ethical postulates of the general deterrence approach to primary accident cost avoidance. Here it is enough to say that while this notion has always had some adherents, and has perhaps gained more in recent years, in its extreme form it still does not command much assent in our society.

Inability to Value the Risk Properly

A more measured, more acceptable version of the paternalistic notion is at the root of the second reason. This approach does not question the general proposition that people know what is best for themselves by and large but is based instead on the view that in the area of accidents they often do not. This notion is three-sided.

First, individuals choosing between insurance and taking their chances often do not have the data necessary to determine how great the risk is, how large the losses are apt to be if they occur, and how serious the secondary results of such losses would be. If they had that data, their decision whether to buy insurance might be different. A concomitant of this view is that there are others more aware of the financial implications of the risk and therefore better able to make the choice whether to insure. Thus, some individuals who buy particular products will not know how risky they are, while the manufacturer, because he can view the risk as a statistic, can evaluate it clearly.[24]

Second, even if individuals had adequate data for evaluating the risk, they would be psychologically unable to do so. The contention is that people cannot estimate rationally their chances of suffering death or catastrophic injury. Such things always happen to "the other guy," and no amount of statistical information can convince an individual that they could happen to him. Whether people know what is best for themselves in other areas is, therefore, irrelevant to the conclusion that they do not know what is best in deciding between insuring themselves and bearing the risk of an unspread accident cost. Some adduce evidence of this psychological truth from the fact that people are much more likely to carry liability insurance (for injuries "the other guy" may receive) than personal accident insurance (for injuries they may receive).[25] Others just say it is a self-evident fact.[26] Either way, this notion implies that someone other than the individual, someone who *can* make a rational evaluation of the risk involved, is better suited to decide the optimal degree of loss spreading. This someone can be thought of as "society," which represents our collective judgment when we view accidents as a whole and therefore are not confused by the individual's inability to conceive of serious accidents happening to himself.

The third aspect of this semipaternalistic approach is somewhat harder to define. It is not based solely on the psychological inability to conceive of oneself as gravely injured, nor solely on the lack of data on accident risks. Instead, it is a more generally paternalistic view. We do not need to deny that there are many areas where people do know best for themselves in order to affirm that there are some where they do not. In general, the areas where individuals do not know best for themselves are those where the choice is between immediate cost and long-range cost. In such cases, people tend to choose the immediate "good life" and regret it later. This may be termed the "Faust attitude." A correlate of this view is that people as a group, or people when they set up general or collective norms, are less likely to view only the short run than are people deciding individually. They are less likely to yield to temptation collectively. Thus, it is argued, people do not save up for doctors' bills, do not provide for their retirement, do not insure adequately, and yet are basically happy if they are forced to do so.[27] It is easy to see that this attitude implies that a fair degree of "collectively self-imposed" compulsion is needed to achieve optimal loss spreading.

24. In strictly economic terms, we might express the individual's lack of awareness of the risk as a high information cost.

25. This point is made in *AACP* at 128: "the threat of having all one's wealth taken by the arm of the law seems somehow more persuasive than the threat of losing it all in an uncompensated accidental injury."

26. Occasionally, this psychological inability to view rationally the chances of one's own death or catastrophic accident operates to overemphasize the risk. There seems to be little doubt that people think airplanes more dangerous than they in fact are. But the people who fear flying so much are not usually those for whom not flying involves any real cost. Those who must fly, for whom not flying would be a real burden, probably view their chances of having an accident in the same underestimated manner in which most of us view the risk of car accidents.

27. Other examples of self-imposed restrictions which force us to forgo short-run temptations for long-run benefits come readily to mind. Perhaps the most dramatic is the Bill of Rights, which reflects a societal decision not to yield to certain temptations of the moment, even if backed by a majority, because of their long-run undesirability.

-67-

All three of these facets of the semipaternalistic thesis share the notion that someone other than the individual can best determine the present value of his accident loss risks and, therefore, the amount of insurance that is best for him. In theory, they may differ as to who is best suited to make this choice. In practice, however, the three coalesce into one and, combined with other reasons for thinking that individuals cannot, without outside help, choose best for themselves, create dissatisfaction with purely private insurance as a system of loss spreading. This dissatisfaction usually results in support for systems that involve some collectively decided compulsion and some placing of the choice on more likely insurers and on groups who have better access to risk data, with some individual choice at the edges.

The Individual May Not Bear the Costs of Failing to Insure

A third general reason why we may feel that individual choices concerning insurance do not give us the degree of loss spreading we desire lies in the fact that often the individual does not have to bear all the costs that result if he chooses to leave losses unspread. The most obvious example of this is the case of the judgment-proof driver.[29] If he buys liability insurance, he pays approximately the costs of accidents that, statistically speaking, he will "cause". If he does not buy insurance he will not pay for the accident costs he causes, since blood cannot be gotten from a stone. His choice between insuring and not insuring does not take into account the costs his choice may entail for others and therefore would not, even under the least paternalistic outlook, result in the degree of loss spreading society wants.[29] In order to achieve the desired loss spreading the individual must be made either to bear costs equivalent to those he causes (a rather difficult thing to do without offending other justice type goals), or to insure. It is not hard to see why society, which bears the costs of his noninsurance, frequently compels insurance.[30]

There are more complex examples of the same situation. An individual may fail to insure against injury to himself because he expects society to pick up at least part of the tab if he is left destitute. A choice between insuring and not insuring predicated on such expectations would not take into account all the costs involved. In effect, the man is a Faust who chooses the good life now, *knowing* that Marguerite's hard work will save him in the end. Society can react to such an attitude in two ways. It can either refuse to pick up the tab at the end or compel insurance in the first place. The first is out of style, in part because things are not always as neat as our analysis would make them; it is often difficult to separate cases where—failing society's intervention—the unspread loss would fall on Faust alone, from cases where it would fall in part on innocent parties, such as his family. It is also out of style because notions of justice make us feel sorry for Faust (the legend would not have the appeal it does if this were not so). The result is that Faust can be pretty sure that he will be saved in the end, and that society, to protect itself, must exact the cost of that salvation from him early in the game. In other words, some degree of compulsion in determining the degree of loss spreading is again necessary.

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28. The judgment-proof driver is the individual who has no money to pay for damages he causes or whose assets would be unavailable to satisfy a judgment against him because of bankruptcy laws.

29. There remains the possibility that those who end up paying could bargain with the judgment-proof driver to insure. However, this would still result in a less than optimal degree of loss spreading, as it would entail needless transaction costs. See Calabresi, "Transaction Costs." And wherever the costs of compelling the judgment-proof driver to insure are less than the transaction costs of such bargains, we are likely to opt for compulsion.

30. Analogously, part of the explanation for public housing programs lies in society's unwillingness to bear the secondary costs of inadequate housing. Unlike compulsory insurance, however, the cost of public housing is borne out of general taxes, so that an income redistribution effect is added to the secondary cost avoidance effect. Any primary cost avoidance lost is presumably not worth the redistribution effect gained.

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March 28, 1979

Duncan Kennedy
Harvard Law School
Cambridge, MA 02138

Dear Duncan,

Enclosed are the materials in the <u>Berman</u> case I mentioned. We need a brief memo laying out the economics arguments:

(a) We must meet;
(b) We can assert.

Be careful, I'll have you in court once you start doing this slippery slope.

I wish I'd heard the first part of your talk on Saturday. The part I heard was really fine.

Thanks for the help.

Sincerely,

Gary Bellow

GB/sm

[redacted]

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

May 14, 1979

Gary Bellow
Greater Boston Legal Services
Jamaica Plain Office
470 Centre Street
Jamaica Plain, Ma. 02130

Dear Gary:

Here are two paragraphs presenting economic arguments on the issue of strict liability for landlord breach of an implied covenant to keep rented premises up to code standards. This is a rhetorical exercise, in which it is important to keep in mind that the actual convincingness of the arguments is totally dependent on what the underlying facts are. No one knows what the facts are, and it would be impossibly expensive to find out (if, indeed, it is possible to construct studies that would yield reliable answers).

The Landlord's Argument

The imposition of strict liability rewrites the parties' contract ex post facto and amounts to giving tenants something they didn't pay for. Either the landlord (LL) will shoulder the burden, or he will pass it on to the tenants in the form of higher rents. If LLs dont or cant pass on the burden, (a) they will be penalized, unfairly, for conduct involving no fault on their part. (b) They will be forced to take needless and undesirable precautions to attain a level of perfection in the delivery of maintenance services that no one really wants. (c) The higher costs of doing business as a LL will lead to abandonment of buildings rendered unprofitable by judicial fiat, with consequent intensification of the housing shortage (especially for the poorest tenants), reduction in new construction, and higher rents for everybody. To the extent that LLs pass on higher costs in the form of higher rents, (a) there will be no "redistribution" from LLs to tenants, so the decision will not "help the poor." (b) Some tenants will be forced to buy compulsory "breakdown insurance" through higher rents, even if they dont want it, and would rather pay a lower rent and take the chance of an occassional failure, through no fault of the LL, to maintain the premises at code level. This is paternalism at its worst. (c) Other tenants, the poorest, will be unable to pay the added cost of this compulsory insurance, and will be forced to double up or move into worse quarters, thereby increasing shortages for the least well off and driving up their rents relative to those of the better off.

The Tenant's Argument

Given the prior state of the law, LLs could have had no valid expectations that they would escape liability for code violations. Everyone agrees that the LL has some duty to maintain. Even if the ideal were a negligence standard, it would make sense to achieve it through strict liability here, since the problems of proving negligence case by case make it unworkable, in effect an invitation to massive LL non-compliance. But strict liability is not unfair here: if someone must suffer as a result of non-negligent code violations, it should be the LL rather than the tenant, since the LL is responsible for the condition of the premises and is in the best position to minimize violations in the future. The LL will not take excessive precautions under strict liability. If it would cost more to make repairs than the tenant can collect in damages, LL will forego the repairs and pay the damages, rather than "overinvesting" in compliance.

Keeping buildings up to code and compensating tenants for violations does of course cost the LL money, but this is a real cost of being in the LL business. Profits LL makes by failing to maintain or to compensate are illegitimate profits. Making the LL bear these costs may lead to abandonment of some buildings that cant be kept up to code and still yield a profit. But the legislature in enacting the code clearly expressed its intention that such structures be put out of operation. Moreover, there is no reason to believe that there are a substantial number of buildings that are really unprofitable if properly maintained. Many LLs make handsome profits on sub-code buildings. Others scrape by on such buildings because they are over-capitalized. Given high mortgage payments, these LLs can make a profit only if tney violate the law and exploit their tenants. Refinanced at a value reflecting the LLs' legal duty to maintain, there is no reason to believe such structures would not be economically viable.

Some of the costs of strict liability will be passed on to tenants, but it is impossible to say how much. Very likely, the tenants will receive the benefit of insurance against non-negligent violations at somewhat less than its cost, since LLs will have to bear some of the burden. This is desirable on equity grounds. Many tenants would gladly have contracted for this kind of protection at the modest cost involved. As to those who would rather take their chances of living in sub-code conditions, the passage of the code by the legislature had already unequivocally overridden their preferences--if housing code violations could be waived by tenant contracts, the codes would be a complete dead letter.

Caveat: I assumed throughout that the landlord's duty is non-disclaimable.

Yrs. Duncan Kennedy