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INTENTIONAL INFLICTION OF MENTAL DISTRESS IN MONTANA

Carl Tobias*

I. INTRODUCTION

The independent cause of action for the intentional infliction of mental distress (IIMD) in substantive tort law has enjoyed a short, somewhat confused history in the United States and in Montana. California became the first state to recognize this freestanding cause of action in the landmark 1952 decision of *State Rubbish Collectors Ass'n v. Siliznoff*.¹ Virtually all jurisdictions in the United States now recognize the intentional infliction cause of action.

In several recent opinions, the Montana Supreme Court indicated its willingness to recognize the independent tort, even as the court stated that no plaintiff had presented a factual situation which would satisfy the elements of the cause of action.² In the 1995 case of *Sacco v. High Country Independent Press, Inc.*,³ the Montana Supreme Court held that an "independent cause of action for intentional infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission."⁴

The Montana Supreme Court's *Sacco* opinion improved, principally by clarifying, the law of IIMD in Montana in several important respects. For example, the court correctly recognized the existence of an independent cause of action and properly clarified the meaning of the severe emotional distress element of the claim by relying substantially on the definition included in comment j, Section 46 of the Restatement (Second) of Torts. Notwithstanding the Montana Supreme Court's comprehensive treatment of the intentional infliction of mental distress tort and

* Professor of Law, University of Montana. I wish to thank Bari Burke, Peggy Sanner, Justin Stark, and the first year torts class at the University of Montana for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and Ann and Tom Boone and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. 240 P.2d 282 (Cal. 1952).

2. See, e.g., *Foster v. Albertsons, Inc.*, 254 Mont. 117, 835 P.2d 720 (1992); *Doohan v. Bigfork Sch. Dist. No. 38*, 247 Mont. 125, 805 P.2d 1354 (1991); see also *Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 896 P.2d 411, 426-27 (1995).

3. 271 Mont. 209, 896 P.2d 411 (1995).

4. *Sacco*, 271 Mont. at 237, 896 P.2d at 428.

its careful attempt to clarify the applicable law, some confusion remains.

With all due respect for the valuable efforts of the court, I believe that there is a preferable approach to this complicated area of substantive tort law. The solution that I proffer is the recognition of an independent cause of action for IIMD which relies on the elements of the tort that comprise the cause of action in the majority of American jurisdictions: the plaintiff would be required to show that the defendant engaged in unpermitted, intentional, extremely outrageous conduct which caused the plaintiff severe emotional distress.

The two critical constituents of the cause of action should be articulated in terms of the concepts prescribed in the Restatement (Second) of Torts, which courts in the overwhelming majority of states have elaborated and made more specific when applying the cause of action to particular cases. For instance, a useful starting point for enunciating extremely outrageous conduct is the Restatement and many courts' articulation of conduct which exceeds all bounds that could be tolerated by a reasonable society.⁵ A valuable point of departure for defining severe mental distress would correspondingly be the ideas included in comment j, Section 46 of the Restatement (Second), some aspects of which the *Sacco* court reproduced verbatim and apparently adopted.⁶

The alternative proposed would simultaneously be clearer, easier for appellate and trial judges to apply, and more precise, while it would resemble more closely the legal standards that govern the tort in many other states. The option would also be more responsive to certain public policy problems, namely protecting defendants against unlimited liability and those parties and courts against a possible flood of fraudulent or fictitious claims, which have made some judges reluctant to recognize the IIMD tort. Indeed, the Montana Supreme Court expressed concern about these very policy difficulties, even as the requirements relating to the cause of action that the court enunciated could ironically encourage the complications.

Because the Montana Supreme Court has substantially clarified the law pertaining to the independent cause of action for IIMD in the *Sacco* opinion, but some problems remain, the

5. See, e.g., *Harris v. Jones*, 380 A.2d 611, 613 (Md. 1977); *Siliznoff*, 240 P.2d at 284-86; RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1964); see also *Foster*, 254 Mont. at 128-29, 835 P.2d at 728.

6. See *Sacco*, 271 Mont. at 234, 237, 896 P.2d at 426, 428.

Sacco decision warrants analysis. This essay undertakes that effort. I first briefly examine relevant historical information. The paper then evaluates *Sacco*. Finding that the Montana Supreme Court has greatly improved the law governing IIMD, I afford suggestions which should additionally clarify this complex cause of action.

II. A BRIEF HISTORY OF THE INTENTIONAL INFLICTION OF MENTAL DISTRESS TORT

A. National Developments

The American Law Institute (ALI), when drafting the First Restatement of Torts, stated that the interest in emotional and mental tranquillity alone was not significant enough to warrant recognition of a cause of action for its violation.⁷ The ALI adopted a 1948 Supplement to the Restatement in which it recognized an independent cause of action for IIMD.⁸ The Institute reversed its earlier position, finding that the "interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it."⁹ The ALI, when prescribing the Restatement (Second) in 1965, retained liability for extreme and outrageous conduct and left open the possibility of the tort's additional expansion.¹⁰

The California Supreme Court, in the landmark *Siliznoff* case, became the first jurisdiction in the United States to recognize the independent cause of action in 1952.¹¹ A clear majority of states in the nation now recognizes the independent cause of action.¹² Most do not require that physical consequences attend the mental distress that plaintiffs suffer, although some states have restricted the tort's application to circumstances in which

7. See RESTATEMENT OF TORTS § 46 cmt. c (1934); see also *Siliznoff*, 240 P.2d at 285; see generally Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982) (considering the definition of outrageousness and the practical difficulty of the IIMD cause of action and supplying the relevant history of the tort).

8. See RESTATEMENT OF TORTS § 46 (Supp. 1948); see also JOHN W. WADE ET AL., PROSSER, WADE & SCHWARTZ'S CASES AND MATERIALS ON TORTS 51 n.7 (9th ed. 1994); *Siliznoff*, 240 P.2d at 285-86.

9. See RESTATEMENT OF TORTS § 46 cmt. d (Supp. 1948).

10. See RESTATEMENT (SECOND) OF TORTS § 46 caveat (1964).

11. *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

12. See *Harris v. Jones*, 380 A.2d 611, 613 & n.1 (Md. 1977); Givelber, *supra* note 7, at 43 & n.9.

plaintiffs could prove physical harm¹³ and other jurisdictions have seemed more comfortable when physical injuries accompanied the mental suffering.¹⁴

Most states articulate the cause of action in terms of two principal elements—extremely outrageous conduct and severe mental distress—which are elevated. Many jurisdictions define extremely outrageous conduct as behavior that exceeds all bounds tolerated by a reasonable society. Numerous courts also recognize two major types of cases which satisfy this definition. One category of suits implicates “abuse of relation,” usually respecting economic or physical power; much of this litigation is between employees and employers, tenants and landlords, and insured individuals and insurers.¹⁵ The other classification involves a plaintiff who is particularly vulnerable to suffering mental distress and a defendant who knows of, and plays upon, that special susceptibility.¹⁶

The facts in *Harris v. Jones*¹⁷ afford a classic illustration of these two categories. In that case, the plaintiff was a twenty-six year old assembly-line worker with a high school education who had stuttered all of his life.¹⁸ Defendants were General Motors and its supervisory employee, Jones, who taunted Harris by mimicking his stuttering some thirty times in a five-month period, even though Jones knew that his actions would exacerbate Harris’ condition.¹⁹ Beyond these two relatively clear classifications, courts have encountered considerable difficulty in defining with specificity what constitutes extremely outrageous conduct. This means that the standard can be a highly generalized one which judges and juries may interpret differently in specific states and even within particular jurisdictions.

Severe mental distress, the second major element of the cause of action, is also rather difficult to define. Most courts treat the standard as an elevated one, and many states apply

13. See, e.g., *Duty v. General Fin. Co.*, 273 S.W.2d 64, 65 (Tex. 1952).

14. See, e.g., *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939).

15. See, e.g., *Harris v. Jones*, 380 A.2d 611 (Md. 1977) (employer-employee); *Kaufman v. Abramson*, 363 F.2d 865 (4th Cir. 1966); see also RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1964).

16. See, e.g., *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216 (Cal. 1970); *Korbin v. Berlin*, 177 So. 2d 551 (Fla. Dist. Ct. App. 1965); see also RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1964).

17. 380 A.2d 611 (Md. 1977).

18. *Harris*, 380 A.2d at 612.

19. *Id.*

formulations which draw on the language in comment j, Section 46 of the Restatement (Second). This comment and many courts agree that the distress must be extreme, out of the ordinary, or so serious that reasonable people could not endure it.²⁰ The Restatement and courts also speak in terms of severely disabling distress²¹ and of "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."²²

B. Montana Developments

The origins and development of the independent cause of action for IIMD warrant relatively limited treatment in this essay for several reasons. Other writers in earlier issues of this journal have examined considerable, relevant background.²³ Moreover, the Montana Supreme Court has addressed the concept of mental distress in numerous contexts. A small number of the cases, however, involved IIMD, and the court only recognized the independent cause of action in a few recent cases, while it deemed the facts in none of them sufficient to support a cause of action.

*Johnson v. Supersave Markets*²⁴ technically involved negligent, not intentional, infliction of mental distress, but the decision warrants analysis because subsequent cases, including *Sacco*, which involve IIMD specifically mention or allude to *Johnson*. In *Johnson*, the Montana Supreme Court primarily treated mental distress as an element of damages, stating that plaintiff could recover when "tortious conduct results in a substantial invasion of a legally protected interest and causes a significant impact upon the person of the plaintiff."²⁵ In several subsequent cases, the Montana Supreme Court recognized the

20. See, e.g., *Deitsch v. Tillary*, 833 S.W.2d 760, 762 (Ark. 1992); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 155 (Me. 1979); RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964).

21. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964); *Harris v. Jones*, 380 A.2d 611, 616 (Md. 1977).

22. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964); *Sacco*, 271 Mont. at 234, 896 P.2d at 426.

23. Randy J. Cox & Cynthia H. Shott, *Boldly Into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress*, 53 MONT. L. REV. 197 (1992); Francis X. Clinch & Jodie L. Johnson, *Compensation of Emotional Distress in Montana: Distinctions Between Bystanders and Direct Victims*, 47 MONT. L. REV. 479 (1986).

24. 211 Mont. 465, 686 P.2d 209 (1984).

25. *Johnson*, 211 Mont. at 473, 686 P.2d at 213.

existence of an independent cause of action of IIMD;²⁶ however, the factual circumstances presented in those lawsuits would not substantiate a finding of liability.²⁷

III. ANALYSIS OF SACCO

A. *Descriptive Analysis*

In the *Sacco* case, plaintiff alleged that defendants, who were her former employers, had falsely supplied to the local police information claiming that she had "stolen proof sheets and photographs from" the defendant newspaper's offices.²⁸ Plaintiff also asserted that defendants conspired to bring a criminal prosecution against her, swore out a complaint against her which they knew was false, and falsely informed plaintiff's new employer that she had stolen from defendants.²⁹ Plaintiff claimed that defendants had harmed her reputation and caused her mental anguish. One of the five counts included in plaintiff's complaint alleged that defendants had intentionally caused her emotional distress.

The *Sacco* opinion comprehensively treated the independent causes of action for negligent and intentional infliction of mental distress. The Montana Supreme Court initially examined the factual and procedural background of the case and then considered the count alleging a civil rights violation. The court next evaluated the tort of mental distress, discussing first the negligent infliction and secondly the intentional infliction cause of action. The Montana Supreme Court recognized both claims as independent causes of action. Because the focus of this essay is IIMD, I only explore the court's treatment of negligent infliction of mental distress, insofar as it informs understanding of judicial application of the IIMD tort. For example, certain public policy concepts and the examination of severe mental distress which the Montana Supreme Court included in its discussion of the negligent infliction cause of action are equally applicable to IIMD. When those ideas can fairly be applied to the intentional infliction tort, I attempt to do so.

In specifically treating IIMD, the court first reviewed three recent cases which it found to "stand for the proposition that in-

26. See *supra* note 2 and accompanying text.

27. See *supra* note 2 and accompanying text.

28. *Sacco*, 271 Mont. at 214, 896 P.2d at 414.

29. *Id.* at 214, 896 P.2d at 414.

tentional infliction of emotional distress is recognized and *can* be pled as a separate cause of action in the courts of Montana.³⁰ The Montana Supreme Court then explained the respective responsibilities of the judge and jury in mental distress suits. It stated that the trial judge must initially ascertain whether the "plaintiff has introduced sufficient evidence to support a prima facie case for" IIMD.³¹ The jury must subsequently decide whether the defendant in fact committed the mental distress tort by consulting the evidence introduced.³²

The Montana Supreme Court next found that the traditional approach to IIMD could not be harmonized with the new standard which it had enunciated in recognizing the negligent infliction cause of action.³³ The court, therefore, determined that it was preferable to require that plaintiffs prove the identical basic elements in both torts; there will be an independent cause of action for IIMD when "serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission."³⁴

The Montana Supreme Court rationalized in several ways its decision to impose the same essential proof requirements on plaintiffs who pursue both causes of action. The court stated that demanding an intentionally injured plaintiff to show that defendant's behavior was extreme and outrageous would place the justices in the "untenable position of requiring a higher standard of proof by plaintiffs" who pled intentional, than who pled negligent, infliction.³⁵ The court derived support for its determination to impose identical proof demands in the two types of mental distress cases from *Johnson v. Supersave Market*.³⁶ The Montana Supreme Court repeated the rule that it gleaned from

30. *Id.* at 235-36, 896 P.2d at 426-27; *see also supra* note 2; *Lence v. Hagadone Invest. Co.*, 258 Mont. 433, 444-45, 853 P.2d 1230, 1237-38 (1993); *Davis v. Church of Jesus Christ*, 258 Mont. 286, 293-94, 852 P.2d 640, 644-45 (1993); *Lueck v. UPS*, 258 Mont. 2, 11, 851 P.2d 1041, 1046-47 (1993). It is interesting that nearly all of these cases involved the employment relationship, a phenomenon that was apparently driven by passage of the Wrongful Discharge From Employment Act. *See* MONT. CODE ANN. § 39-2-901 to -915 (1995); *see generally* D. P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994).

31. *Sacco*, 271 Mont. at 236, 896 P.2d at 427 (quoting *Doochan v. Big Fork Sch. Dist. No. 38*, 247 Mont. 125, 142, 805 P.2d 1354, 1365 (1991)).

32. *Sacco*, 271 Mont. at 236, 896 P.2d at 427.

33. *Id.* at 236, 896 P.2d at 427-28.

34. *Id.* at 237, 896 P.2d at 428.

35. *Id.* at 237, 896 P.2d at 427-28.

36. 211 Mont. 465, 686 P.2d 209 (1984); *Sacco*, 271 Mont. at 237-38, 896 P.2d at 428.

Johnson:

[D]amages for emotional distress are compensatory and therefore, the focus should be on the reasonable foreseeability that plaintiff's serious or severe emotional distress was the consequence of the defendant's act or omission The defendant's culpability for intentionally inflicting emotional distress is "more properly considered when addressing the subject of punitive damages."³⁷

The court concluded that the possibility of awarding punitive damages is the proper way to address the culpability and intentional character of the defendant's behavior in an IIIMD case.³⁸

The Montana Supreme Court's decision to require identical proof in negligent and intentional infliction cases departs significantly from the approach that the vast majority of jurisdictions in the United States and the Restatement follow. Most courts and the Restatement require a plaintiff to prove that a defendant's intentional "extreme and outrageous conduct 'going beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'"³⁹ caused plaintiff's severe mental distress. These jurisdictions and the Restatement have imposed this requirement principally to serve as a guarantee that the plaintiff has suffered actual harm and as a safeguard against fraudulent and frivolous claims.

The Montana Supreme Court partially responded to these ideas and defended its decision to delete the extremely outrageous conduct element by enunciating the severe mental distress element of the tort. The court imposed on a plaintiff the requirement to "prove that the emotional distress suffered is 'serious' or 'severe' in order to warrant recovery."⁴⁰ It defined serious or severe distress by using and ostensibly adopting the explanation in comment j, Section 46 of the Restatement (Second).

This articulation essentially states that the distress must be so severe that reasonable individuals could not be expected to endure it.⁴¹ The Restatement provides that severe mental dis-

37. *Sacco*, 271 Mont. at 238, 896 P.2d at 428 (quoting *Johnson*, 211 Mont. at 472, 696 P.2d at 213).

38. *Sacco*, 271 Mont. at 238, 896 P.2d at 428.

39. *Foster v. Albertsons, Inc.*, 254 Mont. 117, 128-29, 835 P.2d 720, 728 (1992); see also *supra* notes 5, 14-16 and accompanying text; *Sacco*, 271 Mont. at 236-37, 896 P.2d at 427 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1964)).

40. See *Sacco*, 271 Mont. at 233, 896 P.2d at 426.

41. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964); see also *Sacco*, 271 Mont. at 234, 896 P.2d at 426.

trass "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."⁴² The Restatement makes the intensity and duration of the distress "factors to be considered in determining its severity."⁴³ The Restatement adds that the distress must be reasonable and that recovery for unreasonable or exaggerated distress will only be permitted when it results from a special susceptibility of which defendant was aware.⁴⁴

The Montana Supreme Court responded to the ideas about insuring that plaintiff has suffered real injury and guarding against false or frivolous lawsuits with the assertion that the requirement of *serious or severe* mental distress "alleviates any concern over a floodgate of claims, particularly fraudulent claims."⁴⁵ The court correspondingly stated that limiting recovery to situations in which "plaintiff's serious or severe emotional distress was the reasonably foreseeable consequence of the defendant's intentional act or omission alleviates the concern that defendants will be exposed to unlimited liability."⁴⁶

The Montana Supreme Court concluded the section of the *Sacco* opinion which articulated the IIIMD cause of action with a brief summary. The court reiterated the elements of the mental distress tort which it had enunciated, that serious or severe mental distress would be defined by reference to comment j of Section 46 of the Restatement (Second), and the respective responsibilities of the judge and jury in these cases.⁴⁷

The Montana Supreme Court also elaborated upon certain ideas relevant to IIIMD in the summary. The court explained that the difference between the intentional and negligent causes of action is in the "nature and culpability of the defendant's conduct" not in the torts' elements.⁴⁸ The Montana Supreme Court stated that this distinction meant that a plaintiff who pleads

42. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964); see also *Sacco*, 271 Mont. at 234, 896 P.2d at 426.

43. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964); see also *Sacco*, 271 Mont. at 234, 896 P.2d at 426.

44. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1964); see also *Sacco*, 271 Mont. at 234, 896 P.2d at 426; *Davis v. Church of Jesus Christ*, 258 Mont. 286, 306-07, 852 P.2d 640, 652-53 (1993) (Trieweiler, J., dissenting); *First Bank (N.A.) - Billings v. Clark*, 236 Mont. 195, 206, 771 P.2d 84, 91 (1989).

45. See *Sacco*, 271 Mont. at 237, 896 P.2d at 428.

46. *Id.*

47. See *id.* at 239, 896 P.2d at 429.

48. *Id.* at 238-39, 896 P.2d at 429.

IIMD might request punitive damages under the Montana Code section providing therefor to "address the culpability of the defendant's conduct."⁴⁹

B. Commentary

1. Improvements

Several significant aspects of the Montana Supreme Court's decision in *Sacco* constitute improvements in the Montana law of IIMD. The court properly recognized that plaintiffs can plead and prove an independent cause of action for IIMD. It also correctly articulated the severe mental distress element of the claim by relying substantially on comment j of Section 46 of the Restatement (Second). Moreover, the Montana Supreme Court accurately delineated the roles of the trial judge and the jury in IIMD litigation. Furthermore, the court appropriately evinced concern about a floodgate of suits, especially fraudulent cases, and about the possibility of exposing defendants to unlimited liability by suggesting that its articulation of the severe mental distress element would be responsive to these potential problems.

2. Areas of Potential Confusion

A few important features of the *Sacco* opinion remain unclear or could be difficult for the Montana Supreme Court, Montana district judges and juries to apply. Perhaps most significant is the Montana Supreme Court's unnecessary omission of the extremely outrageous conduct element. Courts in the overwhelming majority of jurisdictions include this element and treat it as the gravamen of the cause of action. The requirement's elevated nature provides reasonable assurance that the defendant's behavior is egregious or at least out of the ordinary; that the conduct is sufficiently blameworthy to deserve punishment, an important purpose of the tort; that courts will not be inundated by a flood of claims, especially fraudulent suits; and that defendants will not be exposed to unlimited liability.

The elevated character of the severe mental distress element affords similar assurance. Placing exclusive dependence on this element, however, relies too substantially on the degree of harm that the plaintiff has suffered, rather than the egregiousness of

49. *Id.*; see also MONT. CODE ANN. § 27-1-220 (1995).

the defendant's behavior. Moreover, such dependence appears inadequate to treat the broad range of conduct that is at issue in IIMD claims and seems to afford insufficient protection against the possibility of a flood of suits and against the risk that defendants will be exposed to open-ended liability. Depending solely on the severe mental distress element may also be inadequate to resolve cases which are brought by plaintiffs who are very vulnerable to suffering emotional harm. The articulation of this element by the Montana Supreme Court and in the Restatement (Second) does provide for such parties with the reasonable person standard and by stating that individuals who are unduly sensitive as to their dignity will be unable to recover.⁵⁰

The omission of the extremely outrageous conduct element could also undercut important purposes of the IIMD cause of action. Significant objectives of this tort are to punish, deter, and ostensibly prevent the repetition of, certain kinds of behavior that the society considers intolerable, particularly by affording notice to individuals who might otherwise engage in such activity. The deletion of the extremely outrageous conduct element potentially deprives actors of guidance about what type of behavior will expose them to liability for commission of the IIMD tort.

The Montana Supreme Court stated that a defendant can be found liable for any intentional act or omission which this party could reasonably foresee would cause the plaintiff severe mental distress. That articulation lacks adequate rigor. The court correspondingly deleted the intentional element of the cause of action—the requirement that a defendant know with substantial certainty that defendant's act or omission will cause some result which the law regards as inappropriate. Nearly all jurisdictions include this as a significant element of IIMD, and intent is a fundamental prerequisite of intentional torts to persons and to property. For example, a plaintiff can only hold a defendant liable for battery, if the plaintiff shows that the defendant knew with substantial certainty that defendant's behavior would lead to offensive or harmful bodily contact with plaintiff. The *Sacco* court, in requiring only that a defendant reasonably foresee, rather than know with substantial certainty, that defendant's conduct would cause the plaintiff severe mental distress, imported a concept traditionally applied to negligence and substituted it for a concept traditionally applied to intentional torts.

A related area of confusion involves the Montana Supreme

50. See *supra* note 44 and accompanying text.

Court's attempt to justify its assimilation of the IIMD cause of action to the negligent infliction tort. This confusion arises partly from the court's statements that the difference between the two versions lies in the "nature and culpability of the defendant's conduct," so that plaintiffs alleging IIMD may request punitive damages to address culpability, and that mental distress damages are compensatory and, therefore, the focus should be on reasonable foreseeability.⁵¹ With all due respect, courts have traditionally stated that compensatory and punitive damages may be awarded for either intentionally or negligently inflicted mental distress when the elements of the respective torts or the requirements of applicable punitive damages statutes are satisfied. Plaintiffs will more frequently recover punitive damages in intentional, than negligent, infliction cases because the traditional judicial articulation of the extremely outrageous conduct element of IIMD more closely resembles the type of behavior which supports punitive damage awards.

The extremely outrageous conduct element as traditionally applied and the kind of activity identified as deserving punishment in the Montana punitive damages statute, however, are not identical. Considerable behavior that could satisfy the extremely outrageous conduct element might not constitute actual fraud or actual malice as required by the Montana legislation.⁵² In comparison, the behavior of a defendant which is at issue in negligent infliction of mental distress cases may occasionally support punitive damages awards. For example, the drunk driver who seriously injures schoolchildren by speeding through a school zone or by striking a school bus could be liable to parents who witnessed these accidents for negligent infliction of mental distress and perhaps for punitive damages.

It is easy to understand why numerous courts and commentators have confused the concepts examined above. This area of substantive law is relatively nascent, complex and unclear. The Montana Supreme Court was apparently exhibiting a laudable concern for facilitating recovery by plaintiffs who have suffered mental distress that defendants have negligently or intentionally inflicted. There is also a sense in which compensatory damages seem to implicate reasonable foreseeability and punitive damages appear to implicate intent because negligent behavior is gen-

51. See *Sacco*, 271 Mont. at 239, 896 P.2d at 429.

52. See MONT. CODE ANN. § 27-1-221(1) (1995).

erally less reprehensible than intentional conduct.⁵³ Moreover, the extremely outrageous conduct element of IIMD is quite general and has defied very precise definition, leading numerous courts to express or evince discomfort with the open-ended character of this aspect of the tort.

I believe, however, that the preferable approach is to maintain distinct causes of action, and to articulate different elements, for negligent and intentional infliction of mental distress. It is also advisable to retain the intent, rather than foreseeability, and the extremely outrageous conduct elements of IIMD which the vast majority of courts in the country have traditionally applied. Moreover, plaintiffs should be able to recover punitive damages in negligent as well as intentional infliction cases when the defendant's behavior satisfies the requirements imposed in the punitive damages statute.

The Montana Supreme Court should continue relying on the severe mental distress element of the tort as articulated in *Sacco*, which the court principally derived from the Restatement (Second). The Montana Supreme Court may want to afford additional guidance on those aspects of the Restatement formulation which trial judges should apply in particular situations, while district judges must concomitantly decide what features of the Restatement enunciation apply to specific cases, pending the receipt of additional instruction. For example, highly unpleasant mental reactions, such as horror, differ substantially from chagrin and worry.⁵⁴

The broad range of factual circumstances that can be at issue in IIMD causes of action, however, could complicate efforts to supply greater specificity. It may also be advisable for district judges to have the flexibility that a multifaceted standard affords. For instance, when a defendant has participated in very egregious conduct, judges might require less by way of the severity of mental distress which the plaintiff has suffered.

In sum, the Montana Supreme Court has significantly improved the application of the law of IIMD in Montana with issuance of the *Sacco* opinion. The court correctly recognized the independent cause of action, properly articulated the severe mental distress element, and appropriately delineated the respective roles of the judge and jury in IIMD cases. There is some remaining confusion in the jurisprudence of IIMD, particularly

53. See Givelber, *supra* note 7, at 54-55.

54. See *supra* note 42 and accompanying text.

regarding deletion of the intent and extremely outrageous conduct elements and treatment of the concept of punitive damages. The final section of this essay, therefore, affords several suggestions which are principally intended to clarify ideas that could lead to confusion in the future. The recommendations warrant relatively brief examination here because most of the proposals have been specifically mentioned or implicitly addressed above. Nonetheless, a number of the concepts require additional substantiation and some deserve elaboration.

IV. SUGGESTIONS FOR THE FUTURE

The Montana Supreme Court should retain those features of the *Sacco* decision which the above analysis suggested are clear and appropriate. These aspects include the court's articulation of the respective roles of the trial judge and the jury in IIMD cases and its enunciation of the severe mental distress element of the tort. They also encompass the Montana Supreme Court's apparent subscription to important underlying public policy reasons for the independent cause of action, such as facilitating plaintiffs' recovery of compensatory and punitive damages and punishing and deterring defendants' egregious behavior and the court's expression of concern about a flood of fraudulent claims and about exposing defendants to unlimited liability.

The Montana Supreme Court and district judges might want to refine the articulation of the severe mental distress element of the IIMD tort. For instance, they could identify precisely which aspects of the multifaceted Restatement (Second) formulation should apply. Nonetheless, the preferable approach may be to retain the enunciation in *Sacco*, with sensitive case-by-case district judge application of the specific factors which seem most appropriate in particular cases. This could be better because trial judges might need the flexibility afforded by those features of the Restatement that the *Sacco* court reproduced and seemingly adopted.

The Montana Supreme Court should modify the aspects of the *Sacco* opinion which the above evaluation indicated are unnecessary or confusing. Most important, the court should include the intent and extremely outrageous elements of the cause of action in the Montana articulation. The Montana Supreme Court can rely substantially on those elements as enunciated in the Restatement (Second) and by many other state supreme courts. For example, extremely outrageous conduct could be defined in terms of behavior that exceeds all bounds tolerated in a civilized

society. If that articulation is overly broad, the Montana Supreme Court can derive greater specificity from the two major categories, abuse of relation and special susceptibility, into which numerous IIMD cases fit. Reliance on the intent element enunciated in terms of the classic formulation of knowledge with substantial certainty means that the court should delete the concept of reasonable foreseeability because it more properly applies to negligence.

The Montana Supreme Court should also clarify the treatment of punitive damages in the *Sacco* decision. It ought to state clearly that a plaintiff may seek and recover punitive damages for intentionally and negligently inflicted harm when the plaintiff proves that the defendant participated in conduct which satisfies the standards of actual malice or actual fraud prescribed in the Montana punitive damages statute.

The Montana Supreme Court should clarify the jurisprudence of IIMD in these ways for all of the reasons specifically expressed and implicitly stated already. Several ideas treated above deserve elaboration, while additional concepts support the recommendations that I have offered. One important justification is that the modifications proposed would align the Montana jurisprudence of IIMD more closely with the law applied by most other jurisdictions in the United States and with the Restatement (Second).

I am not suggesting that Montana subscribe to the national articulation of IIMD merely because many states have done so. I simply believe that the jurisprudence suggested will be clearer, and easier for the Montana Supreme Court, district judges and juries to apply, than the enunciation in *Sacco*. Moreover, the recommendations afforded will yield similar substantive results in that deserving plaintiffs should be able to recover with nearly equal facility.

The changes suggested will also afford protection against the possibility of a flood of litigation, especially involving fraud, and the prospect that plaintiffs and their counsel will rely too substantially on the IIMD tort. Indeed, the cause of action as articulated in *Sacco* appears so open-ended and so easy to prove that plaintiffs and their attorneys may be tempted to include a count alleging IIMD in many cases in which the allegation would probably not be warranted under the cause of action as traditionally enunciated. This possibility could confuse the law, lead to the pursuit of unjustifiable claims, unnecessarily complicate cases, and waste the resources of judges, lawyers, parties and juries.

Finally, certain of these recommendations should also clarify and make more cohesive the law of intentional torts and the broader substantive area of torts in Montana.

V. CONCLUSION

The Montana Supreme Court has properly recognized the independent cause of action for intentional infliction of mental distress in the important *Sacco* case. The court has appropriately treated numerous aspects of the law of the mental distress tort; however, certain features of the decision are unclear. The court should promptly clarify those dimensions of the opinion which remain confused, thereby facilitating application of the IIMD cause of action in Montana.