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## Child Witnesses of Domestic Violence: Third Party Recovery for Intentional Infliction of Emotional Distress

Mary Kate Kearney

# CHILD WITNESSES OF DOMESTIC VIOLENCE: THIRD PARTY RECOVERY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

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## I. INTRODUCTION

A child who resides in a home in which one adult abuses another is a victim of domestic violence. Even if the child is not the direct target of the abuse, he absorbs the emotional impact of living in a violent household.<sup>1</sup> The effect on the child of exposure to such violence may be severe, both in the short- and long-term.<sup>2</sup>

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1. Often children in homes in which domestic violence takes place are the direct targets of the abuse. Lynn G. Karl, *Show Looks at Family Violence's Impact on Kids*, HARRISBURG PATRIOT-NEWS, Nov. 6, 2000, at D3. Studies show that up to seventy percent of men who abuse their female partners also abuse their children. *Id.* They also show that children are fifteen times more likely to be abused in homes where domestic violence occurs than in non-violent households. *Id.*

2. Studies further show that children raised in violent homes are six times more likely to commit suicide, twenty-six more times likely to commit sexual assault, and seventy-four times more likely to commit crimes against other people. *Id.* See also G. Steven Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 693 (2000) (discussing "the serious psychological damage which results from any form of abuse which poses 'the most disruptive effect on the child's short- and long-term functioning'" (quoting JAMES GARBARINO & GWEN GILLIAM, UNDERSTANDING ABUSIVE FAMILIES 8-10 (1980))).

The situation arises when a woman's husband or partner abuses her.<sup>3</sup> Often, the woman has at least one child who resides with her and who witnesses the abuse. That child may or may not also be the abuser's offspring. Sometimes, the situation involves a mother, father, and child; other times, the mother, her boyfriend, and her child are the involved parties.<sup>4</sup> In either situation, the child is not the primary target of the abuse, but the abuser knows that the child is present in the home. The child may be in the room where the abuse takes place. Alternatively, he is in the house and is aware of the ongoing abuse, but does not see it. As a result of being aware of this abuse, the child suffers extreme emotional distress.<sup>5</sup> That distress might take the forms of depression, insomnia, bedwetting, or the inability to function in school.<sup>6</sup>

This article considers whether such a child, who is exposed to domestic violence, should be able to recover from the abuser for intentional infliction of emotional distress. Allowing a child to recover for intentional infliction of emotional distress is not meant to preclude him or her from maintaining other causes of action. For example, the child might also seek redress against the abuser for the negligent infliction of emotional distress.<sup>7</sup> An intentional

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3. Commentators have examined the right of a victim of domestic violence to sue her abuser for the intentional infliction of emotional distress. See, e.g., Leonard Karp & Cheryl L. Karp, *Beyond the Normal Ebb and Flow . . . Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389 (1994); Ira M. Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268 (1996).

4. See Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405, 408, 440 (1994) (discussing instances in which a mother's boyfriend, who is not the child's biological father, physically abuses a child).

5. In an analogous situation, one commentator discusses the devastating psychological effect on a child when one parent wrongfully acquires HIV-AIDS because of the other parent's extramarital sexual transgressions. Josette M. LeDoux, *Interspousal Liability for the Wrongful Transmission of HIV-AIDS: An Argument for Broadening Legal Avenues for the Injured Spouse and Further Expanding Children's Rights to Sue Their Parents*, 34 NEW ENG. L. REV. 392, 435, 436 (2000). The commentator explains that the child's resulting emotional injuries may go "untreated and uncompensated." *Id.* at 436.

6. See, e.g., *Courtney v. Courtney*, 413 S.E.2d 418, 424 (W. Va. 1991) (involving a child who observes his stepfather assaulting his mother and sues for intentional infliction of emotional distress alleging that the resulting emotional distress led him to seek psychiatric care and caused him to be unable to "communicate and socialize with his mother").

7. Although a full discussion of a negligent infliction of emotional distress claim is beyond the scope of this article, it has certain advantages and disadvantages over an intentional infliction claim. For example, a plaintiff might recover damages more easily under a negligent infliction theory because the negligent conduct would be covered under a defendant's homeowners' insurance policy. See, e.g., *Johnson v. Scott*, 528 S.E.2d 402, 403 (N.C.



infliction claim, however, is the best way for the courts to acknowledge the child's injury and to send a message to the abuser and others similarly situated that the law will not tolerate this kind of conduct.

The requirements for intentional infliction of emotional distress are well-established and have been set forth in the Restatement (Second) of Torts, § 46: "(1) One who by extreme and emotional 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."<sup>8</sup> The Restatement further recognizes the right of another to recover for his emotional distress when the outrageous conduct has been directed toward a family member: "(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress, (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm."<sup>9</sup> Section 2a of the Restatement applies to the abuse that the child has witnessed because the extreme and outrageous conduct has been directed at the child's mother.<sup>10</sup> The abuser is subject to liability because he has intentionally or recklessly caused severe emotional distress to the child.<sup>11</sup>

This article analyzes the requirements for a third party family member to recover in an intentional infliction of emotional distress claim. It focuses on the requirement that the plaintiff must be "present at the time"<sup>12</sup> of the outrageous conduct and argues in favor of a relaxed interpretation of that element. The article concludes that children who live in a home in which abuse takes

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Ct. App. 2000) (involving a settlement providing that claims of negligent infliction of emotional distress were covered under the defendants' homeowners' policy). Of course, this assumes that a defendant has such coverage. However, recovery under negligence might be more difficult because of the ambiguities and inconsistencies of a negligent infliction of emotional distress claim. See David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 471 (1992).

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

9. *Id.*

10. See *id.*

11. See *id.*

12. *Id.*

place and who are aware of ongoing abuse should be able to recover damages for the emotional distress intentionally caused by the abuser.

## II. THRESHOLD CONSIDERATIONS

### A. Immunities

As a threshold matter, the defendant might argue that he is immune from liability if he is the child's father. Historically, a child could not sue his parent for any tortious act regardless of whether it was intentional or negligent.<sup>13</sup> That doctrine has been altered to allow children to sue parents for intentional torts in almost every jurisdiction.<sup>14</sup> The rationale is that the injured child should not be precluded from recovering against the wrongdoer simply because that person is his parent.<sup>15</sup> Therefore, even if the abuser is the child's father, the parent-child relationship should not insulate the abuser from liability.

### B. Statute of Limitations

The statute of limitations should not bar a child from recovering against a parent because it can be tolled during the child's minority. Courts have tolled these statutes when an adult who was sexually abused as a minor later brings a cause of action

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13. Geoffrey A. Vance, Note, *Rock-a-Bye Lawsuit: Can a Baby Sue the Hand that Rocked the Cradle?*, 28 J. MARSHALL L. REV. 429, 430 (1995). See also Sandra L. Haley, Comment, *The Parental Tort Immunity Doctrine: Is It a Defensible Defense?*, 30 U. RICH. L. REV. 575, 575-604 (1996) (discussing and criticizing the parental tort immunity doctrine); *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891) (using the doctrine of parental immunity to bar a child's claim for false imprisonment against her mother after her mother involuntarily committed her to an insane asylum), *abrogated by Glaskox v. Glaskox*, 614 So. 2d 906, 907 (Miss. 1992) (abolishing the doctrine of parental immunity for negligent injury to children).

14. See Vance, *supra* note 13, at 429. In negligence cases, many jurisdictions have either abrogated the parental immunity doctrine or have carved out exceptions to it. See, e.g., *Anderson v. Stream*, 295 N.W.2d 595, 601 (Minn. 1980) (abolishing parental immunity and adopting the reasonable parent standard); *Broadwell v. Holmes*, 871 S.W.2d 471, 477 (Tenn. 1994) (creating an exception to parent-child immunity in automobile accident cases). See also Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161, 1166 (1991) (stating that "[n]o uniform rule now exists within the United States on the issue of parental tort immunity").

15. Haley, *supra* note 13, at 575, 602.



against the abuser.<sup>16</sup> One issue that might arise in conjunction with a later lawsuit is the accuracy of the plaintiff's recollection of childhood events. Professor Lucy McGough has discussed the reliability of children's memory of traumatic events and concluded that there is "no general acceptance in the scholarly community of hypothesis that trauma distorts children's memory."<sup>17</sup> In fact, children's memories of traumatic events may be stronger and more reliable than other recollections because of the impact of these events.<sup>18</sup> Because there is no conclusive proof that trauma either destroys or improves childhood memories, the time lapse should not preclude an adult who witnessed abuse as a child from bringing a claim later in life.

### C. Outrage, Intent, Injury, and Immediate Family Member

A child should be able to satisfy the elements for third party recovery in an intentional infliction of emotional distress case. To establish a cause of action, the child must demonstrate that there was outrageous conduct directed at his mother, that the abuser intentionally or recklessly caused him severe emotional distress, that he is an immediate family member, and that he was present at the time of the incident.<sup>19</sup>

The outrageousness of the defendant's conduct is not at issue. The Restatement has defined conduct which is extreme and outrageous as "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."<sup>20</sup> Courts have distinguished between conduct which is merely annoying, uncivil, and mean-spirited from that which is "so severe that no reasonable [person] could be expected to endure it."<sup>21</sup> Courts have had no difficulty in determining that abuse, in

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16. *Doe v. Shults-Lewis Child & Family Servs., Inc.*, 718 N.E.2d 738, 751-52 (Ind. 1999).

17. LUCY S. MCGOUGH, *CHILD WITNESSES* 50 (1994).

18. *Id.* at 49 (citation omitted).

19. RESTATEMENT (SECOND) OF TORTS § 46 (1)(2) (1965).

20. *Id.* § 46 cmt. d (1965).

21. *Courtney v. Courtney*, 413 S.E.2d 418, 423 (W. Va. 1991) (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965)).

all of its forms, qualifies as outrageous conduct.<sup>22</sup> For example, the Supreme Court of West Virginia differentiated between a child witnessing his step-father assault his mother from situations in which defendants engaged in less egregious conduct.<sup>23</sup> The court determined that the step-father's conduct easily met the standard for outrageousness, while the defendants' conduct in other situations did not rise to the level of outrageousness.<sup>24</sup> Based on the court's analysis in that case and other decisions, it is safe to conclude that domestic violence constitutes extreme and outrageous conduct.

Some commentators have argued that the requirement of outrageous conduct is the critical element in an intentional infliction of emotional distress claim.<sup>25</sup> Under this interpretation, the egregiousness of the defendant's conduct reflects the level of the defendant's intent.<sup>26</sup> Furthermore, the more outrageous the defendant's conduct, the less severe the injury that should be required.<sup>27</sup> Given the outrageous nature of domestic violence, the more likely the other elements of intentional infliction of emotional distress are satisfied.<sup>28</sup>

Moreover, the defendant must have acted intentionally or recklessly to cause emotional distress to the child.<sup>29</sup> The Restatement standard for intent requires that the defendant act with either a willful purpose or knowledge that severe emotional distress is substantially certain to be produced by his conduct.<sup>30</sup> The in-

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22. See, e.g., *Johnson v. Caparelli*, 625 A.2d 668, 672 (Pa. Super. Ct. 1993) (finding that a priest's sexual abuse of a minor constituted extreme and outrageous conduct); *Croft v. Wicker*, 737 P.2d 789, 793 (Alaska 1987) (stating that abuser's behavior "was not a simple annoyance or insult. . . . It was, rather, the very brand of behavior which our society labels 'outrageous'").

23. *Courtney*, 413 S.E.2d at 423.

24. *Id.* at 424.

25. Daniel M. Givelber, *The Right to Minimum Social Decency and the Limits of Even-handedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 47 (1982); see also *Crump*, *supra* note 7, at 450 (discussing the same).

26. See *Crump*, *supra* note 7, at 450.

27. See Givelber, *supra* note 24, at 47-48; *Crump*, *supra* note 7, at 450 (stating that the "outrageousness" of the conduct can be sufficient to satisfy the "seriousness" element); RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (noting that the intensity and duration of the stress should be considered in determining its severity).

28. See *infra* notes 56-57 and accompanying text.

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

30. *Id.* § 46 cmt. i (1965).



tent standard is met because the abuser must have known that a child who is present when his mother is abused is substantially certain to suffer extreme emotional distress. Alternatively, the reckless standard demands that there is a high degree of probability, and the defendant acts in conscious disregard of it.<sup>31</sup> Here, there is a high probability that the child will suffer extreme emotional distress from witnessing his mother being abused, and the abuser acted in conscious disregard of that fact. Therefore, the child could probably demonstrate that the abuser acted either intentionally or recklessly toward him.

Next, the abuser's conduct must cause severe emotional distress to the child.<sup>32</sup> That emotional distress might take the form of bodily harm, but it need not to meet the injury requirement.<sup>33</sup> This is distinguishable from a situation in which the third party seeking recovery is not an immediate family member. In that situation, the person must show that he suffered bodily harm to sustain a cause of action for intentional infliction of emotional distress.<sup>34</sup> A child's emotional distress caused by his or her presence in a violent household may take a number of forms.<sup>35</sup> The injury requirement is met if the child suffers a severely disabling emotional response.<sup>36</sup>

Finally, the child must be an immediate family member.<sup>37</sup> Courts have determined that the parent-child relationship satis-

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31. RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965) (stating that when "the extreme and outrageous conduct is directed at a third person, as where, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the plaintiff").

32. One court has interpreted the injury requirement to mean a "severely disabling emotional response." *Harris v. Jones*, 380 A.2d 611, 616 (Md. App. 1977).

33. See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

34. Restatement § 46(2)(b) provides: "Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress . . . to any other person who is present at the time, if such distress results in bodily harm." *Id.* § 46(2)(b) (1965).

35. See, e.g., *Courtney v. Courtney*, 413 S.E.2d 418, 424 (W. Va. 1991) (explaining that the child's distress from witnessing his step-father assault his mother was so severe that he had to seek psychiatric care). Commentators have also suggested that the emotional injuries that a child sustains can have devastating short- and long-term consequences. See Neeley, *supra* note 2, at 691-97.

36. *Courtney*, 413 S.E.2d at 421.

37. *Id.* at 422.



fies the immediate family member requirement.<sup>38</sup> Therefore, a child who is present when his mother is abused qualifies as an immediate family member for third-party recovery.<sup>39</sup> Because the elements of act, intent, injury, and immediate family member are met, the outstanding issue is whether the child was present at the time of the abuse.

### III. THE MEANING OF PHYSICAL PRESENCE

#### A. A Narrow Interpretation

##### 1. Case law

The presence requirement needs further interpretation. Most courts interpret presence to require the plaintiff to be physically present at the time of the outrageous conduct.<sup>40</sup> The physical presence requirement has been interpreted further to require that the plaintiff witness the event, and that the defendant know that the plaintiff is present.<sup>41</sup> A court could conclude that the defendant, therefore, has the requisite intent because he must know that the plaintiff, who is physically present, will suffer severe emotional distress. In our situation, this would mean that physical presence requires the child to witness the abuse of his mother and that the abuser know that the child is witnessing it. A court could conclude that the abuser, therefore, must know that the child will suffer severe emotional distress from being present.

In the most factually analogous case to our situation, the Supreme Court of West Virginia, in *Courtney v. Courtney*,<sup>42</sup> allowed a

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38. See, e.g., *Courtney*, 413 S.E.2d at 422 (allowing a child to recover for intentional infliction of emotional distress after witnessing his stepfather assault his mother).

39. *Id.*

40. See, e.g., *Christensen v. Superior Court*, 820 P.2d 181, 202 (Cal. 1991); *Homer v. Long*, 599 A.2d 1193, 1198-1200 (Md. Ct. Spec. App. 1992); *Carlson v. Chain*, 490 N.W.2d 469, 473-74 (Neb. Ct. App. 1992); *M.M. v. M.P.S.*, 556 So. 2d 1140, 1140-41 (Fla. Dist. Ct. App. 1989); *H.L.O. v. Hossle*, 381 N.W.2d 641, 644 (Iowa 1986); *Lund v. Caple*, 675 P.2d 226, 228-29 (Wash. 1984); *Lauver v. Cornelius*, 446 N.Y.S.2d 456, 457 (N. Y. App. Div. 1981); *Calliari v. Sugar*, 435 A.2d 139, 142 (N.J. Super. Ct. ch. Div. 1980); *Miller v. Cook*, 273 N.W.2d 567, 569-70 (Mich. Ct. App. 1978) (denying, in each case, recovery for emotional distress because the plaintiffs were not present at the time of the conduct).

41. WILLIAM PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* § 12, at 65-66 (5th ed. 1984).

42. 413 S.E.2d 418 (W. Va. 1991).

child to proceed with his intentional infliction of emotional distress claim after he witnessed his mother's husband verbally and physically assault her.<sup>43</sup> The court noted that the child had stated a cause of action because the parent-child relationship made him an immediate family member, he witnessed the attack on his mother, and he became severely emotionally disabled as a result.<sup>44</sup> In addition, the court determined that the child was physically present when the extreme and outrageous conduct took place.<sup>45</sup> Because all of the elements of third party recovery for intentional infliction of emotional distress were met, the court reversed the lower court's dismissal of the case and remanded it to the trial court.<sup>46</sup>

## 2. Policy Considerations

The Restatement and courts that deny recovery because the plaintiff was not physically present to witness the outrageous conduct<sup>47</sup> offer the same policy justifications for the requirement. Most support the physical presence requirement with two related considerations about judicial efficiency.<sup>48</sup> Those considerations are encapsulated in comments to the Restatement. Comment 1 provides that recovery should be limited to those who are physically present because of: "the practical necessity of drawing the line somewhere, since . . . the distress of a woman who is informed of her husband's murder ten years afterward may lack the guarantee of genuineness which her presence on the spot would afford."<sup>49</sup> The first consideration focuses on the need to limit the number of people who can sue to prevent a flood of claims.<sup>50</sup> The second consideration represents a desire to guarantee the genuineness of the

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43. *Courtney*, 413 S.E.2d at 420-21.

44. *Id.* at 424.

45. *Id.*

46. *Id.* at 429.

47. See sources cited *supra* note 40.

48. See, e.g., *H.L.O. v. Hossle*, 381 N.W.2d 641, 642 (Iowa 1986) (denying recovery to parents who learned of children's sexual abuse two months after the crime); *Johnson v. Caparelli*, 625 A.2d 668, 673 (Pa. Super. Ct. 1993) (noting that emotional effects are generally lessened when the plaintiff learns of the outrageous conflict long after the conflict occurred); *Lund v. Caple*, 675 P.2d 226, 227 (Wash. 1984) (observing that the plaintiff husband did not learn of his wife's adultery until seven months after it occurred).

49. RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965).

50. See *id.*



claim by precluding people who were not present for the outrageous act from recovering.<sup>51</sup>

Courts have offered both justifications for enforcing the physical presence requirement. One court commented on how the relaxation of that requirement would spawn a significant number of lawsuits:

If courts were to allow relatives of torts victims compensation for the distress they suffer when they receive bad news about family members when there is no attendant intentional or reckless conduct directed toward them, an avalanche of litigation would ensue. Compensation is available for actual harm to the victim; only in carefully prescribed circumstances is compensation permitted for relatives who suffer emotional distress. It is not lack of compassion, but necessity, that restricts relief to the immediate victim.<sup>52</sup>

This court and others have concluded that the best way to delineate those carefully prescribed circumstances is by interpreting presence literally.<sup>53</sup>

Another court further explained how relaxing the presence requirement would lead to more lawsuits.<sup>54</sup> In *Homer v. Long*, the Court of Appeals of Maryland did not allow a husband to recover from his wife's therapist for intentional infliction of emotional distress after he learned several months later that his wife and her therapist had an affair.<sup>55</sup> While acknowledging the outrageous nature of the defendant's conduct and the resulting harm to the plaintiff, the court reiterated the importance of the plaintiff's presence during the outrageous conduct.<sup>56</sup> The court explained that allowing recovery without that presence would create a slip-

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51. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965).

52. *M.M. v. M.P.S.*, 556 So. 2d 1140, 1141 (Fla. Dist. Ct. App. 1989) (per curiam).

53. See *id.*

54. *Homer v. Long*, 599 A.2d 1193, 1199-1200 (Md. Ct. Spec. App. 1992).

55. *Id.* at 1198-1200.

56. See *id.*

pery slope of liability in which anyone who abused the plaintiff's trust could be sued.<sup>57</sup> The court explained that:

[T]he emotional and economic trauma likely to arise from the seduction of one's spouse is not limited to the case where the seducer is the spouse's therapist. The conduct may be just as outrageous and the harm may be just as great where the seducer is a neighbor, a good friend, a relative, an employee or business associate of the plaintiff, or indeed anyone in whom the plaintiff has imposed trust or for whom he or she has special regard. To relax or abrogate the presence requirement in such cases would greatly expand the scope of the tort. . . .<sup>58</sup>

Therefore, the court interpreted presence narrowly to require the plaintiff's presence at the time of the outrageous conduct.<sup>59</sup>

The second concern, guaranteeing the genuineness of a claim, is based on allowing recovery when a plaintiff learns about outrageous conduct directed at an immediate family member long after the event has occurred.<sup>60</sup> In the Restatement's example of the wife who learns of her husband's murder ten years later, recovery should be denied because the severity of the emotional distress that she suffers would probably be far less than if she had been present at the murder.<sup>61</sup> The concern is that those family members whose distress is attenuated over time will seek recovery years later.

Many courts, which require presence at the time, share the Restatement's concern about the difference between witnessing the traumatic event and learning about it later. As one court observed: "[P]resence is a crucial element of the tort because an individual who witnesses outrageous or shocking conduct directed at a third-party has no time in which to prepare himself/herself for the immediate emotional impact of such conduct."<sup>62</sup> Those courts correctly conclude that it is less traumatic to learn about

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57. *Homer*, 599 A.2d at 1200.

58. *Id.* at 1199-1200.

59. *See id.*

60. RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1, illus. 21 (1965).

61. *Id.*

62. *Johnson v. Caparelli*, 625 A.2d 668, 673 (Pa. Super. Ct. 1993).



outrageous conduct directed at a family member years later than to be present while it occurs.<sup>63</sup>

Other courts have expressed similar reluctance to allow recovery when the plaintiff learns about the outrageous conduct later. For example, in *Miller v. Cook*,<sup>64</sup> the Court of Appeals of Michigan held that parents who later learned that their son had been beaten up at school had no cause of action against the perpetrator of the abuse.<sup>65</sup> The court discussed that the parents might have been able to state a claim for intentional infliction of emotional distress, even though they had not witnessed their son's beating, if their shock had occurred at about the same time as their son's injury.<sup>66</sup> Because the parents had been informed of the beating at a later time, they could not recover for the mental distress "sustained upon learning of an intentional tort committed at a noncontemporaneous time upon an immediate family member."<sup>67</sup> For the *Miller* court and others, the delayed time between the actual event and learning of it adversely affected the plaintiffs' ability to recover.<sup>68</sup> The courts assumed that the longer the time span, the less likely the plaintiff was to suffer severe emotional distress.<sup>69</sup> The contemporaneousness requirement ensures that the emotional distress is severe and that the resulting claim is genuine.<sup>70</sup>

### 3. Responses to Policy Considerations

These concerns about judicial efficiency are not well-founded in the context of claims brought by children who were present in the home when abuse takes place. First, it is unlikely that interpreting presence to mean that the child is present in the home even if he does not witness the abuse will produce a flood of lawsuits. This slight relaxation of the meaning of presence still re-

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63. See *Johnson*, 625 A.2d at 673.

64. 273 N.W.2d 567 (Mich. Ct. App. 1978).

65. See *id.* at 569.

66. *Id.* at 568 (citing *Gustafson v. Faris*, 241 N.W.2d 208, 211 (Mich. Ct. App. 1976) (holding that the plaintiffs' case failed because they did not allege that their injury was contemporaneous with their son's accident)).

67. *Id.* at 569.

68. See *id.*

69. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965).

70. See *id.*

quires the child to be present in the home when the abuse takes place. Therefore, other plaintiffs who are far from the scene of the outrageous conduct would not be eligible to recover under this interpretation of the rule.

Second, courts can still assure themselves of the genuineness of a child's claim even if the child is not physically present when the abuse occurs. The court can protect against fraudulent claims by looking at the outrageousness of the defendant's conduct and the severity of the child's emotional distress.<sup>71</sup> In this context, the violence that the defendant perpetrates easily qualifies as extreme and outrageous conduct, and the resulting serious emotional consequences to the child should help convince the court that the claim is genuine.

Furthermore, the close connection in time between the abuse taking place and the child's awareness of it should reassure the court of the legitimacy of the cause of action. The time frame is quite unlike the situation cited in the Restatement in which a woman learns about her husband's murder ten years later. In that situation, courts and commentators rightly suggested that the delay in time between the outrageous conduct and the plaintiff's awareness of it is too great to warrant recovery. The woman's emotional distress would be far less if she learned about it ten years later than if she had witnessed her husband's murder. In this situation, however, no such time has elapsed between the outrageous conduct and the child's awareness of it. Because the child is a member of a household where abuse takes place, he may hear the abuse or witness its immediate aftermath even if he does not actually see it.

Finally, although physical presence might be an easy rule to apply, it ignores relevant factors. Those factors include the similarities between the abuser's conduct and the resulting harm to the child regardless of whether the child is in the same room or in another part of the house when the abuse takes place. Even

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71. See Givelber, *supra* note 25, at 45-51 (arguing that recovery in intentional infliction of emotional distress cases is predicated on the outrageousness of the defendant's conduct). But see *Johnson v. Caparelli*, 625 A.2d 668, 673-74 (Pa. Super. Ct. 1993) (denying recovery despite the defendant's extreme and outrageous conduct of molesting the plaintiffs' son because the plaintiffs were not present when the conduct occurred).



courts that have denied recovery because the plaintiff is not present have acknowledged the arbitrariness of drawing the line at physical presence. A Michigan Court of Appeals discussed the inconsistency in *Gustafson v. Faris*.<sup>72</sup>

It would seem that there could be no argument that a rule which allows recovery for emotional suffering and resulting physical injury to a mother who witnesses the death of her child, but would deny recovery for emotional suffering and resulting physical injury to a mother who does not witness the death of her child but arrives on the scene of the accident shortly thereafter is nothing but a poor arbitrary rule at best.<sup>73</sup>

As the *Gustafson* court implies, courts are well-equipped to sort out meritorious claims for children recovering as third parties for intentional infliction of emotional distress from non-meritorious ones.<sup>74</sup> They should not be precluded from doing so simply because the child does not meet the presence requirement under a narrow interpretation of that rule.

## B. A Relaxed Standard

### 1. Compelling Circumstances

Although most courts interpret presence to mean that the plaintiff is present at the time and witnesses the outrageous act, the authors of the Restatement and a few courts have suggested that physical presence may not be required in certain extreme cases. The authors of the Restatement noted that they wished "to leave open the possibility of situations in which presence at the time may not be required."<sup>75</sup> Courts have followed suit and have expressed their willingness to relax the presence requirement "in particularly compelling circumstances, as, for example, where a parent sued the defendant for sexually molesting or kidnapping the plaintiff's child."<sup>76</sup> Given the outrageousness of an abuser's

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72. 241 N.W.2d 208 (Mich. Ct. App. 1976).

73. *Id.* at 210.

74. *See id.* at 210-11.

75. RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965).

76. *Homer v. Long*, 599 A.2d 1193, 1199 (Md. Ct. Spec. App. 1992) (citations omitted).

conduct and the resulting trauma to a child present in an abusive home, our situation reflects the kind of compelling circumstances that call for relaxation of the presence requirement.

The more outrageous the defendant's conduct, the more likely courts are to loosen their interpretation of the other requirements for an intentional infliction of emotional distress claim.<sup>77</sup> In this instance, a court should relax the presence requirement because of the nature of the defendant's conduct. The fact that the defendant is engaged in domestic violence by abusing the child's mother should be sufficient to enable the child to sustain a cause of action. The determinative factor should not be whether the child was physically present at the time of the abuse to witness it. Instead, the dispositive issue is whether the outrageousness of the defendant's conduct affected the child because he is a member of that household. If the child was exposed to such violence, regardless of whether he was physically present at the time, he should be able to recover from the abuser.

Furthermore, the traumatic impact of the abuse is the same on the child whether or not he is physically present to watch the domestic violence. A child who lives in a home where domestic violence takes place, may be just as traumatized by the outrageous conduct as if he had been physically present. He may hear the sounds of the abuse and will witness its aftermath. Both during and after the event, he is concerned about his mother's well-being and frightened for his own safety. In addition, he suffers the psychological consequences of living in an abusive home. Therefore, the severe injury to the child mitigates in favor of a broad interpretation of presence.

## 2. Different Meanings of Presence

Arguably, the child in our situation satisfies the physical presence requirement. The Restatement test for presence has been interpreted to mean that the plaintiff witnesses the event, and the defendant knows that the plaintiff is present.<sup>78</sup> In this

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77. See *supra* notes 19–27 and accompanying text.

78. *Taylor v. Valletunga*, 339 P.2d 910, 911 (Cal. Dist. Ct. App. 1959). See also *supra* notes 41–46 and accompanying discussion.



situation, the child witnesses the outrageous conduct in one of three ways. First, he may be in the same room and see the defendant abusing his mother. Second, he may be in the house and hear the ongoing abuse. Third, he may live in the violent house and become aware of an incident of abuse immediately afterwards by seeing the effect on his mother.

Under any of these circumstances, a court should find that presence is satisfied because the child has witnessed the conduct, and the abuser knows of the child's presence. In the first situation, presence is met because the child was in the room when the abuse occurred, and the abuser must be aware of that. In the second scenario, the child has witnessed the abuse because, even though he did not see it, he heard it while it was taking place. In fact, the child may be hiding in another room because he is frightened and trying to escape the abuser's wrath. The abuser knows that the child is in the home so he is aware of the child's presence. In the third case, although the child does not actually witness the incident, he is a member of the violent household. Therefore, he is aware of ongoing abuse in the home and sees its immediate consequences. Because the abuser knows that the child resides in the home, he must know of the child's presence. Therefore, the child meets the presence standard in all of those situations.

### 3. Case law

Courts that have adopted a less restrictive reading of presence have considered the physical closeness of the plaintiff to the outrageous conduct as well as the emotional impact of that conduct on the child. In *Croft v. Wicker*,<sup>79</sup> the Supreme Court of Alaska held that parents could recover for intentional infliction of emotional distress against a guest who sexually abused their daughter at their home.<sup>80</sup> The parents were at home when the abuse occurred, and although they did not see the abuse, they witnessed their daughter's emotional distress immediately afterwards.<sup>81</sup> In concluding that the parents had stated a cause of action, the court emphasized that the defendant had engaged in out-

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79. 737 P.2d 789 (Alaska 1987).

80. *Id.* at 792-93.

81. *Id.* at 790.

rageous conduct "with full knowledge that [the parents] were in close proximity of the incident."<sup>82</sup>

Similarly, a child who is in the home where abuse takes place is in close proximity of the incident. The abuser knows that the child is present in the home and, therefore, must know that the child will be traumatized by witnessing the aftermath of the abuse. The outrageousness of the defendant's conduct coupled with the child's proximity to that conduct should satisfy the presence test enunciated in *Croft*.

In addition, our situation presents a more compelling case than *Croft* for meeting the presence test in one important respect. In *Croft*, the parents recovered for a single, isolated instance of abuse against their daughter when they learned of it immediately afterward.<sup>83</sup> The court determined that their physical closeness to the incident coupled with its heinous nature satisfied the presence requirement.<sup>84</sup> In our situation, the child seeks recovery not merely for one incident of abuse against his mother, but for a pattern of ongoing abuse in the home. Given the fact that the child is most likely to be aware of the abuse while it takes place, the child in this instance may be more eligible than the parents in *Croft* to establish his presence.

#### **4. Negligent Infliction of Emotional Distress**

Courts have allowed immediate family members to recover for negligent infliction of emotional distress even when they have not been present.<sup>85</sup> In those cases, the courts allow recovery if there is a "fairly contemporaneous" perception of the event giving rise to the cause of action.<sup>86</sup> For example, the mother who hears but does not see the car accident that injures her child may be able to recover for negligent infliction of emotional distress as long

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82. *Croft*, 737 P.2d at 792-93.

83. *Id.* at 790, 793.

84. *Id.* at 793.

85. See, e.g., *Christensen v. Superior Court*, 820 P.2d 181, 201 (Cal. 1991); *Marlene F. v. Affiliated Psychiatric Med. Clinic Inc.*, 770 P.2d 278, 283 (Cal. 1989); *Archibald v. Braverman*, 79 Cal. Rptr. 723, 724-25 (Cal. Ct. App. 1969).

86. *Gustafson v. Faris*, 241 N.W.2d 208, 211 (Mich. Ct. App. 1976) (quoting WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* § 54, at 335 (4th ed. 1971)).



as too much time does not elapse between the outrageous conduct and her awareness of it.<sup>87</sup> Those courts, which have allowed recovery for negligent infliction of emotional distress when the plaintiff is not physically present, have emphasized the outrageousness of the defendant's conduct and the traumatic effect on the family member who learns of it.<sup>88</sup> They reason that the negligent conduct and its effect on the family member are the same in both instances.<sup>89</sup>

One court has even suggested that a stronger case can be made for relaxing the physical presence requirement in intentional infliction of emotional distress cases than in negligent infliction of emotional distress cases. In *Nancy P. v. D'Amato*,<sup>90</sup> the Supreme Court of Massachusetts ultimately rejected on procedural grounds a mother's negligent and intentional infliction of emotional distress claims against a neighbor who had sexually abused her nine-year-old daughter.<sup>91</sup> In dicta, the court noted, however, that a parent's physical presence need not be an element of the negligent infliction claim:

[T]his court has recognized the possibility of liability for harm caused to a parent who was not present at the time of negligent conduct causing injury to a child. Where the wrongful conduct is intentional or reckless, we might be even less inclined to make a parent's physical presence an essential element of liability.<sup>92</sup>

The interests of compensating the injured party and holding the wrongdoer accountable for his outrageous conduct are similar in negligent and intentional infliction of emotional distress claims. Because similar interests should be treated similarly, courts

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87. Courts discussing the meaning of "fairly contemporaneous" have found, for example, that a mother who saw her injured daughter thirty to sixty minutes after an accident had not met the contemporaneousness standard. *Gustafson*, 241 N.W.2d at 211 (citing *Powers v. Sissoev*, 114 Cal. Rptr. 868, 874 (Cal. Ct. App. 1974)). In contrast, a mother who saw her son moments after he had been injured in an explosion had satisfied the contemporaneousness requirement. *Gustafson*, 241 N.W.2d at 211 (citing *Archibald*, 79 Cal. Rptr. at 725).

88. *Christensen*, 820 P.2d at 196-200.

89. *Id.*

90. 517 N.E.2d 824 (Mass. 1988).

91. *Id.* at 828.

92. *Id.*

should relax the physical presence requirement in a child's intentional infliction of emotional distress claim against an abuser to allow the child to be compensated by the wrongdoer.

## 5. Policy Considerations

Policy considerations also dictate a more relaxed interpretation of the presence requirement. A child has a reasonable expectation of safety within the home. When the child's mother is abused by her partner, this reasonable expectation of safety is violated in two ways. First, the child feels unsafe because he too could be the target of the abuser's violence. If the child's mother, who is an adult, can be beaten up, the child faces at least as great a threat of violence. Moreover, the child feels unsafe because he cannot turn to his mother for protection. Children rely on their parents for physical safety and emotional stability. When his mother is the target of the abuse, the child has nowhere to turn. If the abuser is the child's father, the child knows that he cannot turn to him for protection. If the child's mother is being abused, then she cannot protect herself, and the child therefore knows that she cannot protect him either. Because the child does not feel safe physically or emotionally, he has no reasonable expectation of safety.<sup>93</sup>

Second, fairness considerations have led courts to relax the presence requirement in extreme situations. When a person has been injured by outrageous conduct, courts want the wrongdoer to compensate that person.<sup>94</sup> For example, the Supreme Court of

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93. One court discussed the reasonable expectations of the defendant and concluded that it would not be reasonable for him to anticipate the effect of his outrageous conduct on someone who was not present. In *Johnson v. Caparelli*, 625 A.2d 668 (Pa. Super. Ct. 1993), the Superior Court of Pennsylvania determined that parents who were not present when their son was sexually molested by a Catholic priest could not recover on their intentional infliction of emotional distress claim against the priest and his archdiocese. *Id.* at 673-74. In distinguishing cases in which the plaintiff is present from those in which the plaintiff is not, the court stated that a defendant "can reasonably be expected to know of the emotional effect which his or her conduct is likely to produce where the person is present." *Id.* at 673. In contrast, a defendant should not expect that the plaintiff would suffer a severe emotional effect when the plaintiff learns about the outrageous conduct later or from something other than his own observations. *Id.*

94. *Schurk v. Christensen*, 497 P.2d 937, 942 (Wash. 1972) (Finley, J., dissenting) (stating that "[t]he . . . reason assigned for a public policy not allowing recovery for emotional damages is that allowing such damages will increase litigation. The answer to this reasoning



Washington allowed a mother to recover on her claim of intentional infliction of emotional distress against a babysitter who sexually abused her five-year-old daughter.<sup>95</sup> In that case, the mother required medical attention for her emotional distress when she learned of the abuse after it had taken place.<sup>96</sup> Other courts which have allowed recovery absent the plaintiff's physical presence have involved claims of spouses or parents seeking to recover for their emotional distress upon learning of some abuse inflicted on their spouse or child.<sup>97</sup> In those situations, the egregiousness of the defendant's conduct coupled with the severe emotional distress that it causes to the immediate family member when he learns of it are sufficient to warrant recovery.

Finally, a relaxation of the presence requirement furthers important social goals. First, it sends a message that the law will not tolerate the outrageous conduct of those who abuse their partners and, in so doing, inflict emotional distress on children in the home. Furthermore, it enables courts to recognize the devastating short-term and long-term impact of domestic violence on children. Ultimately, it places responsibility on perpetrators of domestic abuse for all of the consequences of their abuse. They need not strike a blow to injure a child irreparably.

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is simple; the courts exist to provide a means of obtaining redress for injuries, not to restrict litigation.").

95. *Schurk*, 497 P.2d at 940 (Wash. 1972).

96. *Id.* at 938.

97. See, e.g., *Bishop v. Callais*, 533 So. 2d 121, 123 (La. App. 4th Cir. 1988). In his dissenting opinion in *Johnson v. Caparelli*, Judge McEwen explained why he believed that parents whose son had been sexually molested by a Catholic priest should have recovered for their emotional distress. *Johnson v. Caparelli*, 625 A.2d 668, 674-75 (Pa. Super. Ct. 1993). Judge McEwen discussed how the parents had unwittingly assisted in the abuse by encouraging their son's relationship with the priest despite the boy's vague objections. *Id.* at 675. Judge McEwen stated that the priest had taken advantage of their respect for the Church and had "impelled them into the role of accomplice" to the abuse. *Id.* According to Judge McEwen, the priest's deception toward them had made the parents "more than present" for the abuse. *Id.*