

The Highly Sensitive Person’s Redress for Intentional Infliction of Emotional Distress: Utilizing Experts in the Courtroom

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I. INTRODUCTION	533
II. HSPs AS INDIVIDUALS AND THEIR BASIS IN PSYCHOLOGY	537
III. CHALLENGING COMMENT J AS OUTMODED	548
A. <i>Comment j’s Promulgation at a Time of Psychological Uncertainty</i>	550
B. <i>Comment j’s Relationship with NIED and the Reasonably Sensitive Person</i>	555
C. <i>Comment j’s (Limited) Role in Judicial Analyses</i>	563
IV. A SOLUTION FOR COMMENT J’S PROBLEM	568
V. CONCLUSION	574

I. INTRODUCTION

Daniel is a senior partner at a large, internationally recognized law firm. Patricia recently passed the state bar exam and accepted a job with this law firm. Daniel asks Patricia to draft a memorandum on a complex area of law for a group of senior partners. Patricia works long hours completing her first assignment, attempting to impress the senior partners. Daniel presented the memorandum to the

* Symposium Editor, Volume 49 *The University of Memphis Law Review*; Juris Doctor Candidate, May 2019, The University of Memphis Cecil C. Humphreys School of Law. Thank you to Professor Andrew J. McClurg for the indefatigable assistance and invaluable contributions to the development of this Note. To Whitney Robinson, for acting as a sounding board over the past year, and to Page Smith, Meghan Barlow, and Zachary Mead for listening to me talk about this topic for the better part of two years.

other senior partners, who rejected the memorandum's conclusions. The senior partners found a slight omission in the memorandum and requested a new draft. Infuriated, Daniel goes to Patricia's office. Daniel publicly berates Patricia in front of all the junior associates. Daniel screamed at Patricia, "A lobotomized first-year law student would have done a better job! I cannot believe the state bar would have licensed someone with such diminished brain capacity like you! How did you get hired here? Don't you know it's a privilege to be part of this firm? It's a good thing you didn't send this to a client and bring any more shame onto our office than you already have! Don't come back into my office again until you can put logical sentences together!" Daniel leaves Patricia standing in the office with twenty other people in shock of what they witnessed. Staff members whisper when Patricia walks by. Other attorneys ostracize Patricia the rest of the day because the entire office heard she does not have any "brain capacity." When Patricia leaves for the day, she is in tears, visibly upset. She does not return for work the rest of the month.

Patricia sees a psychologist regularly for treatment because she has previously been diagnosed as highly sensitive.¹ She makes an appointment to see her psychologist. Patricia fears she is not a qualified attorney. She experiences panic attacks and severe anxiety, she does not eat, cannot leave her bed, fears any of the emails she receives from senior partners, and sinks into a deep depression because she feels she cannot practice law competently anymore. Patricia brings an action against Daniel in state court for intentional infliction of emotional distress. Daniel's attorney files a motion to dismiss because Patricia failed to state a claim. Daniel's attorney argues that even though the conduct was extreme and outrageous, because Patricia's harm was unforeseeable as a result of a non-apparent mental condition (her previous diagnosis as highly sensitive), a reasonable person would not experience severe emotional distress from Daniel's conduct. The judge grants this motion because a person of reasonable sensitivities would not undergo such emotional distress from being publicly berated.

A highly sensitive person ("HSP") is someone predisposed to higher emotional responses to external stimuli from their environ-

1. See *infra* Part II.

ment.² These responses include observable tendencies such as overwhelming arousals, negative emotionality, and lower levels of sociability, while also being acutely aware of subtle environmental details.³ Under current tort law, a plaintiff seeking compensation for emotional distress resulting from intentionally cruel conduct would claim intentional infliction of emotional distress (“IIED”).⁴ Yet, to determine if a plaintiff suffered severe emotional distress, the law assumes that there exists a person of reasonable sensitivities. “The law intervenes only where the distress inflicted is *so severe that no reasonable [person] could be expected to endure it.*”⁵ Courts construe this widely accepted rule to mean a person of “ordinary sensitivities.”⁶ HSPs, let alone anyone else in society, can hardly have their emotional status judged against a person of ordinary sensitivities.

At first glance, IIED seems intimately connected to HSPs because the tort serves as a vehicle of recovery for the HSP’s severe emotional distress. HSPs are predisposed to a higher level of emotional harm than non-HSPs.⁷ HSPs can be equated to some degree of

2. David E. Evans & Mary K. Rothbart, *Temperamental Sensitivity: Two Constructs or One?*, 44 PERSONALITY & INDIVIDUAL DIFFERENCES 108, 108–09 (2008).

3. *Id.*

4. The *Restatement (Second) of Torts* provides that the elements for Intentional Infliction of Emotional Distress are an intentional or reckless act that constitutes extreme and outrageous conduct, which causes severe emotional distress. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

5. *Id.* § 46 cmt. j (emphasis added).

6. See, e.g., *White v. Monsanto Co.*, 585 So. 2d 1205, 1210 (La. 1991) (“[T]he actor’s conduct should be judged in the light of the effect such conduct would ordinarily have on a person of ordinary sensibilities.”); *Knierim v. Izzo*, 174 N.E.2d 157, 165 (Ill. 1961) (“The ‘reasonable man’ seems to be well known to jurors and we expect that they will also be acquainted with the ‘man of ordinary sensibilities.’”); *Slocum v. Food Fair Stores of Fla., Inc.*, 100 So. 2d 396, 398 (Fla. 1958) (“The unwarranted intrusion must be calculated to cause ‘severe emotional distress’ to a person of ordinary sensibilities, in the absence of special knowledge or notice.”).

7. See Jadzia Jagiellowicz et al., *The Trait of Sensory Processing Sensitivity and Neural Responses to Changes in Visual Scenes*, 6 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 38, 38 (2011) (noting that sensory processing sensitivity, the underlying condition causing high sensitivity, results in a highly active behavioral inhibition system “associated with a strategy of taking time to process stimuli more thoroughly, especially in novel situations”).

neuroticism, elevated anxiety, depression, post-traumatic stress disorder, and some forms of Autism-Spectrum Disorders.⁸ Conversely, HSPs cannot be equated, nor compared, to a person of “ordinary sensitivities.” If this were so, the individual would not be highly sensitive. Foreclosing IIED to only those of reasonable sensitivities has introduced an unintentional discriminatory nature into tort law.⁹

This Note argues that courts should recognize that there is no such thing, in isolation, as a “reasonable” or “unreasonable” reaction to intentional cruelty that rises to the level of extreme and outrageous conduct. More specifically, in light of almost a quarter century of research on HSPs and recognition that as many as one in five persons are highly sensitive, courts should permit plaintiffs to present expert testimony about HSP temperament traits and instruct jurors to consider and decide how a “reasonable HSP” would have reacted to the particular defendant’s conduct. Part II explores the almost quarter century of HSP research, focusing on HSP temperament traits indicative to diagnosis and showing a HSP’s predisposition to a greater risk of suffering severe emotional distress from an external stimulus. Part III analyzes the virtually universal rule and central cause of the foreclosure to recovery for the HSP, arising from comment j to section 46 of the *Restatement (Second) of Torts* (“*Restatement (Second)*”), requiring an IIED claimant to effectively show that their emotional distress was “reasonable” and was not simply an “unreasonable” form of emotional distress. Part III will challenge this rule as outmoded as applied in three ways: (1) in the context of the historical psychological research alongside ongoing HSP and psychological research; (2) that a “reasonable” emotional person is a legal fallacy; and (3) by courts regularly affording little or no analysis after finding the conduct to be extreme and outrageous. Part IV proposes that allowing a HSP-plaintiff in an IIED action to call expert witnesses to aid the court in determining whether the HSP-plaintiff’s emotional distress is

8. For a detailed analysis of the psychological research on HSPs, see *infra* Part II.

9. Currently, the judicial system is available to one class of people to litigate their case for recovery, non-HSPs, while closed to others, HSPs, before having a chance to present their case on the merits. This stems from comment j’s standard for determining severe emotional distress. The standard is based on a person of reasonable sensitivities, rather than a person of similar sensitivities. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965).

reasonable for a HSP is a solution to the problem HSP-plaintiffs currently face. Part V, the conclusion, offers brief closing remarks.

II. HSPs AS INDIVIDUALS AND THEIR BASIS IN PSYCHOLOGY

Studies show that nearly one in five of the human population is highly sensitive.¹⁰ A HSP is someone predisposed to higher emotional responses to external stimuli, resulting in observable tendencies in an individual to experience overwhelming arousals, negative emotionality, and lower levels of sociability, while also being acutely aware of subtle environmental details.¹¹

In 1997, Elaine and Arthur Aron published their groundbreaking work on HSPs. This research began by summarizing the preceding scientific research on the cause and origin of differences in personality types of individuals.¹² Aron and Aron changed the psychological landscape by understanding HSP temperament in the context of sensory processing sensitivity.¹³ They found sensory processing sensitivity to be the underlying cause of psychobiological personality differences.¹⁴ But psychobiological differences across various individuals is not a new concept.¹⁵

10. E.g., Bianca P. Acevedo et al., *The Highly Sensitive Brain: An fMRI Study of Sensory Processing Sensitivity and Response to Others' Emotions*, 4 *BRAIN & BEHAVIOR* 580, 580 (2014); Alessandra Suuberg, What Does it Mean to be Sensitive? Serotonin, Stress, and the Highly Sensitive Person (HSP) (June 13, 2018) (unpublished manuscript) (on file with Harvard University's Division of Continuing Education).

11. Evans & Rothbart, *supra* note 2, at 108–09 (summarizing previous research including analysis of environmental details such as “aesthetic sensitivity” and “bright lights [and] strong smells”) (internal citations omitted).

12. Elaine N. Aron & Arthur Aron, *Sensory-Processing Sensitivity and Its Relation to Introversión and Emotionality*, 73 *J. PERSONALITY & SOC. PSYCHOL.* 345, 346–49 (1997) (discussing the historical conceptualizations of the differences in psychological traits in individuals).

13. *Id.*

14. *Id.*

15. One of the first primal attempts to characterize psychobiological differences came from Hans J. Eysenck (“Eysenck”) in 1957. Aron & Aron, *supra* note 12, at 346. His theory focused on introverts as a class of individuals whose personality seeks to balance the competing traits of inhibition and excitation. *Id.* Inhibition means a numbness to repeated environmental stimuli, boredom, or a satiation of the senses due to overexposure of a certain stimuli. See *Inhibition*, OXFORD

Aron and Aron based their model on the concept of sensory processing sensitivity, which is easy to mistake for shyness. Nonetheless, sensory processing sensitivity is starkly different from simple social introversion and extraversion.¹⁶ Sensory processing is the fundamental way individuals understand and react to their external surroundings.¹⁷ It varies with the specific individual.¹⁸ Sensory pro-

ENGLISH DICTIONARY (3d ed. 2013) (defining inhibition in the context of its psychological use). The basis of the theory for introversion as the cause of the psychobiological difference called upon the temperamental trait that introverts are slow to inhibit, as compared to extraverts, and thus needed to “protect themselves from overexcitation [sic].” Aron & Aron, *supra* note 12, at 346 (noting the basis for Eysenck’s theory by comparing sociability with impulsivity in introverts and extraverts). Further research and theories rejected Eysenck, instead preferring a distinction between extraversion and neuroticism. *Id.* For a critique of the original, early research believing that introversion was a cause of sensory processing sensitivity, see J.A. Gray, *A Critique of Eysenck’s Theory of Personality*, in *A MODEL FOR PERSONALITY* 246, 246–47 (H.J. Eysenck ed., 1981) (making a distinction from understanding *what* causes difference in emotionality with *why* there is a difference in emotionality across each individual). This new theory, developed out of Eysenck’s, focused on two brain pathways: the behavioral activation system and the behavioral inhibition system. Kathy A. Smolewska et al., *A Psychometric Evaluation of the Highly Sensitive Person Scale: The Components of Sensory-Processing Sensitivity and Their Relation to the BIS/BAS and “Big Five,”* 40 *PERSONALITY & INDIVIDUAL DIFFERENCES* 1269, 1269 (2006). The behavioral activation system can be equated to the fight or flight response. *Id.* at 1270. The behavioral activation system has been found to be responsive to opportunities to be rewarded for emotional reactions, while also responsive to finding an escape from negative reaction for emotional reactions. *Id.*; Aron & Aron, *supra* note 12, at 346. This escape mechanism is also the source of goal-oriented behavior and positive feelings when a stimulus presents opportunity of a forthcoming reward. Aron & Aron, *supra* note 12, at 346. The behavioral activation system is less active in introverts. *Id.* The behavioral inhibition system is sensitive to “punishment, nonreward, and novelty; affected by medications alleviating anxiety; influenced more by serotonin; especially active in neurotic introverts” and “less active in . . . extraverts.” *Id.*

16. Shyness is related to sensory processing sensitivity, as this sensory processing is likely to be inherited; however, shyness most likely results from an unsatisfactory home during the developmental years, namely during childhood or adolescence. *See, e.g.*, Aron & Aron, *supra* note 12, at 355; Suuberg, *supra* note 10, at 5.

17. Kaitlyn Bakker & Richard Moulding, *Sensory-Processing Sensitivity, Dispositional Mindfulness and Negative Psychological Symptoms*, 53 *PERSONALITY & INDIVIDUAL DIFFERENCES* 341, 341 (2012) (citing Elisabeth M. Jerome & Miriam Liss, *Relationships Between Sensory Processing Style, Adult Attachment, and Coping*, 38 *PERSONALITY & INDIVIDUAL DIFFERENCES* 1341, 1341–52 (2005)) (introduc-

cessing sensitivity “is proposed to be a genetically determined trait involving a deeper . . . cognitive processing of stimuli that is driven by higher emotional reactivity.”¹⁹ Cognitive processing refers to the transmissions of sensory information from the body to the brain and the processing of this information once received by the brain.²⁰ Within the brain, there are two previously proposed “pathways” attributed to the cause of these psychobiological differences: the behavioral inhibition system and the behavioral activation system.²¹ The behavioral inhibition system is strongly linked²² to what Aron

ing the concept of sensory processing); see Aron & Aron, *supra* note 12, at 347 (defining sensory processing as “a difference not in the sense organs per se but to something that occurs as sensory information is transmitted to or processed in the brain”).

18. Bakker & Moulding, *supra* note 17 (citing Winnie Dunn, *The Sensations of Everyday Life: Empirical, Theoretical, and Pragmatic Considerations*, 55 AM. J. OCCUPATIONAL THERAPY 608, 608–20 (2001)); see also Jagiellowicz, *supra* note 7, at 38 (defining sensory processing sensitivity as a sensitivity to all forms of stimuli, “including social and emotional” aspects of the specific individual’s environment).

19. Elaine N. Aron et al., *Sensory Processing Sensitivity: A Review in the Light of the Evolution of Biological Responsivity*, 16 PERSONALITY & SOC. PSYCHOL. REV. 262, 262 (2012); see also Arthur Aron et al., *Temperament Trait of Sensory Processing Sensitivity Moderates Cultural Differences in Neural Response*, 5 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 219, 220 (2010) (discussing Sensory Processing Sensitivity as sharing an “underlying genetic basis” with certain behavioral traits); Jagiellowicz, *supra* note 7, at 38 (“[Sensory Processing Sensitivity] is closely related behaviorally to traits characterized by pausing before acting.”).

20. Aron & Aron, *supra* note 12, at 347.

21. For a historical analysis of the research attributing these psychobiological differences to the brain pathways, see *supra* note 15 and accompanying text.

22. Smolewska, *supra* note 15, at 1276 (stating the findings from their study show a strong correlation between the behavioral inhibition system and Aron & Aron’s HSP scale, whereas the behavioral activation system showed a statistically insignificant association with the HSP scale). HSPs are likely highly inhibited due to sensory processing sensitivity. Aron & Aron, *supra* note 12, at 348. Inhibited, in this context, means a numbness to repeated environmental stimuli or when the sensory abilities become over satiated because of an overexposure to stimulation. See *id.* at 349. HSPs have a high behavioral inhibition system functionality. *Id.* This is because the behavioral inhibition system is particularly applicable to HSPs. Smolewska, *supra* note 15, at 1276. Individuals with a high functioning behavioral inhibition system show observable temperament traits such as anxiety, fearfulness, and neuroticism. *Id.*; see also Arthur Aron et al., *supra* note 19 (discussing that sensory processing sensitivity is closely tied to “introversion, neuroticism, shyness, and behavioral inhibition”); Jagiellowicz, *supra* note 7, at 38–39 (describing the differ-

and Aron call HSPs,²³ or those with sensory processing sensitivity.²⁴ The second pathway, the behavioral activation system, has only a small association with HSPs.²⁵ Because of the insignificant association to HSPs, this Note will disregard the behavioral activation system.

HSPs have been linked to other mental disorders like post-traumatic stress disorder and Autism-Spectrum Disorders.²⁶ HSPs

ent temperament traits of individuals that have a highly functioning behavioral inhibition system, including a greater awareness of subtle stimuli, neuroticism, greater sensitivity to pain or punishment, and an increased time of thoroughly processing sensory stimulation). An example of this has been shown through research on novelty within newborns: nine-month-old infants born with sensory processing sensitivity showed a predisposition to “a sense of threat and fearfulness” when responding to novel situations. Aron & Aron, *supra* note 12, at 348 (citing Megan R. Gunnar, *Psychoendocrine Studies of Temperament and Stress in Early Childhood: Expanding Current Models*, in *TEMPERAMENT: INDIVIDUAL DIFFERENCES AT THE INTERFACE OF BIOLOGY AND BEHAVIOR* 175 (J. E. Bates & T. D. Wachs eds., 1994)) (applying their own sensory processing sensitivity analysis to prior research dealing with inhibition in early experiences with environmental stimuli).

23. Aron & Aron, *supra* note 12, at 349. Other researchers have referred to this in other terms. For instance, individuals with a sensory processing sensitivity have been referred to as “nondisinhibited individuals.” *Id.* (citing C. Mark Patterson & Joseph P. Newman, *Reflectivity and Learning from Aversive Events: Toward a Psychological Mechanism for the Syndromes of Disinhibition*, 100 *PSYCHOL. REV.* 716, 718 (1993)).

24. Aron & Aron demonstrated that sensory processing sensitivity is partially independent from both introversion specific to an individual and that individual’s emotionality. Aron & Aron, *supra* note 12, at 365. Sensory processing sensitivity can be explained by each person’s different thresholds of either reacting, interpreting, or becoming overcome by stimuli. Smolewska, *supra* note 15, at 1276. The result of sensory processing sensitivity on the individual manifests itself in observable tendencies to experience overwhelming arousals, negative emotionality, and lower levels of sociability, some of the key temperament traits of HSPs. Evans & Rothbart, *supra* note 2.

25. Smolewska, *supra* note 15, at 1276 (“The [behavioral activation system] . . . was found to have an association with . . . the [HSP] . . . albeit a relatively small one.”).

26. Grant Benham, *The Highly Sensitive Person: Stress and Physical Symptom Reports*, 40 *PERSONALITY & INDIVIDUAL DIFFERENCES* 1433, 1438 (2006) (discussing the results of the study and research, which focused on determining whether sensory processing sensitivity is linked with subjective levels of stress and an individual’s health); see Bakker & Moulding, *supra* note 17, at 343 (“The results of the

have a heightened stimuli response: HSPs process their responses to stimuli much more elaborately than the non-highly sensitive individual.²⁷

It is apparent that HSPs have sensory processing sensitivity, comparable to neuroticism,²⁸ elevated anxiety, depression, and some forms of Autism-Spectrum Disorders.²⁹ HSPs are similar to those

current study supported the hypothesis that higher [sensory processing sensitivity] scores correspond to greater levels of depression, anxiety, and stress . . .”).

27. Acevedo et al., *supra* note 10.

28. Neuroticism is defined as causing individuals to be “highly anxious, irritable, pessimistic, uncertain, and generally negative in their thoughts . . . and feelings” BERNARDO J. CARDUCCI, *THE PSYCHOLOGY OF PERSONALITY: VIEWPOINTS, RESEARCH, AND APPLICATIONS* 174 (2d ed. 2009). It has been linked as a strong indicator of common mental disorders, such as anxiety, depression, and post-traumatic stress disorder. Johan Ormel et al., *Neuroticism and Common Mental Disorders: Meaning and Utility of a Complex Relationship*, 33 *CLINICAL PSYCHOL. REV.* 686, 687–88 (2013) (stating that neuroticism is the “single strongest predictor” of common mental disorders in individuals, such as anxiety and mood disorders, further explaining that “[a]nxiety disorders typically include . . . post-traumatic stress disorder . . .”).

29. Aron & Aron, *supra* note 12, at 361 (“The correlation of the HSP Scale with emotionality as measured by Big Five Neuroticism was .41 ($p < .05$), a figure generally consonant with the level of association found between sensitivity and the measure of emotionality”); Bakker & Moulding, *supra* note 17, at 341–43 (finding sensory processing sensitivity is utilized explaining Autism, elevated depressive states, higher levels of anxiety, and stress); *see also* Smolewska, *supra* note 15, at 1275 (“In view of the moderate association of both [n]euroticism and [behavioral inhibition system] with [HSP Scale] total and subscale scores, regression analyses were conducted to examine the relative contribution of these two variables, which are both conceptually related to anxiety.”). Recent work in the area has linked HSP characteristics to a genetic variation as compared to non-HSPs. Arthur Aron et al., *supra* note 19, at 220 (discussing the temperamental traits associated with sensory processing sensitivity “ha[ve] been shown to be partly heritable and may share some underlying genetic basis”); Suuberg, *supra* note 10, at 2 (noting that “genetic variation . . . may contribute to the emergence of traits described by the HSP Scale”). This genetic linkage further disqualifies HSPs as simply shy or socially introverted. Suuberg, *supra* note 10, at 5–6 (discussing that shyness comes from environmental stress, whereas sensory processing sensitivity, which can cause an individual to be highly sensitive, is intimately associated with brain development). This genetic variation influences the serotonergic system, which is responsible for the transportation of serotonin in the brain. *Id.* The serotonergic system is part of the neurotransmission that occurs in the brain, including the transmission and reception of serotonin. D.I. Zafeiriou et al., *The Serotonergic System: Its Role in Patho-*

that suffer from post-traumatic stress disorder and other non-apparent mental disorders, such as anxiety and depression, because sensory processing sensitivity and neuroticism are common to these mental disorders.³⁰ Sensory processing differs with each individual, depending on the individual's threshold for processing and reacting to stimuli.³¹

To determine if a person with sensory processing sensitivity is highly sensitive, Aron and Aron developed a twenty-seven item HSP self-reporting scale in the form of various questions.³² Each question

genesis and Early Developmental Treatment of Autism, 7 CURRENT NEUROPHARMACOLOGY 150, 150 (2009). The serotonergic system innervates the entire brain and is responsible for the early development of the brain and personality. *Id.* If there is any aberration with the serotonergic system, it can cause developmental problems, ranging from personality differences to an Autism-Spectrum Disorder. *Id.* This genetic linkage—a shorter variant of the 5-HTTLPR allele—predisposes an individual to sensory processing sensitivity because the variance is believed to reduce serotonin transporter production in the brain. Suuberg, *supra* note 10, at 5–8 (citations omitted). With this dearth of serotonin, an individual is expected to experience: augmented emotional stress, startled responses, autonomic reactivity, sensory self-protective nature, and anxiety. *See* Benham, *supra* note 26, at 1439; Suuberg, *supra* note 10, at 7. These symptoms are consistent with sensory processing sensitivity. However, there is still ongoing research to definitively link causation of HSPs to a genetic variation. Despite the tenuous linkage to genetics, HSPs are not just more worrisome or more nervous than non-HSPs, they suffer from a perceived greater amount of stress and recurrent indications of malaise. Benham, *supra* note 26, at 1438 (discussing the results of the study and research, which focused on determining whether sensory processing sensitivity is linked with subjective levels of stress and an individual's health); *see* Bakker & Moulding, *supra* note 17, at 343 (“The results of the current study supported the hypothesis that higher [sensory processing sensitivity] scores correspond to greater levels of depression, anxiety, and stress . . .”).

30. *See infra* notes 44, 49, and accompanying text.

31. *See* Aron & Aron, *supra* note 12, at 347, 365 (discussing sensory processing sensitivity and each specific individual's different thresholds of either reacting, interpreting, or becoming overcome by stimuli); Bakker & Moulding, *supra* note 17, at 341.

32. Aron & Aron, *supra* note 12, at 351–52 (describing the method used to develop such a scale and showing the twenty-seven-item table used, linking each question to various studies performed on each question's validity); *see also* Evans & Rothbart, *supra* note 2, at 109 (describing the development of Aron and Aron's HSP scale). The full questionnaire asks the following questions:

1. Are you easily overwhelmed by strong sensory input?
2. Do you seem to be aware of subtleties in your environment?

-
3. Do other people's moods affect you?
 4. Do you tend to be more sensitive to pain?
 5. Do you find yourself needing to withdraw during busy days into bed or into a darkened room or any place where you can have some privacy and relief from stimulation?
 6. Are you particularly sensitive to the effects of caffeine?
 7. Are you easily overwhelmed by things like bright lights, strong smells, coarse fabrics, or sirens close by?
 8. Do you have a rich, complex inner life?
 9. Are you made uncomfortable by loud noises?
 10. Are you deeply moved by the arts or music?
 11. Does your nervous system sometimes feel so frazzled that you just have to get off by yourself?
 12. Are you conscientious?
 13. Do you startle easily?
 14. Do you get rattled when you have a lot to do in a short amount of time?
 15. When people are uncomfortable in a physical environment do you tend to know what needs to be done to make it more comfortable (like changing the lighting or the seating)?
 16. Are you annoyed when people try to get you to do too many things at once?
 17. Do you try hard to avoid making mistakes or forgetting things?
 18. Do you make a point to avoid violent movies and TV shows?
 19. Do you become unpleasantly aroused when a lot is going on around you?
 20. Does being very hungry create a strong reaction in you, disrupting your concentration or mood?
 21. Do changes in your life shake you up?
 22. Do you notice and enjoy delicate or fine scents, tastes, sounds, works of art?
 23. Do you find it unpleasant to have a lot going on at once?
 24. Do you make it a high priority to arrange your life to avoid upsetting or overwhelming situations?
 25. Are you bothered by intense stimuli, like loud noises or chaotic scenes?
 26. When you must compete or be observed while performing a task, do you become so nervous or shaky that you do much worse than you would otherwise?
 27. When you were a child, did parents or teachers seem to see you as sensitive or shy?

Aron & Aron, *supra* note 12, at 352.

was based on the previous theories and research relevant to sensory processing sensitivity.³³ The questions posed by the HSP scale get to the heart of the temperament traits that indicate sensory processing sensitivity, such as:

1. Are you easily overwhelmed by strong sensory input?

...

4. Do you tend to be more sensitive to pain?

...

7. Are you easily overwhelmed by things like bright lights, strong smells, coarse fabrics, or sirens close by?

...

9. Are you made uncomfortable by loud noises?

...

13. Do you startle easily?

14. Do you get rattled when you have a lot to do in a short amount of time?

...

18. Do you make a point to avoid violent movies and TV shows?³⁴

33. Aron & Aron, *supra* note 12, at 352 (“The items were based on observations from Study 1 and previous theory and research that seemed relevant to the construct of sensory-processing sensitivity.”).

34. *Id.* This scale, based solely on prior research and what the Arons deemed “relevant,” may seem to be unreliable at first glance. Yet the HSP scale has been subject to further research that supports and substantiates the items’ validity to diagnose an individual as a HSP. *See, e.g.,* Bakker & Moulding, *supra* note 17, at 342 (citations omitted) (“The [HSP Scale has] been demonstrated to have good content

These questions, posed to a potential HSP, seek to show whether the individual is socially inhibited or subject to emotionality more so than a non-HSP.³⁵ The scale seems to examine whether there is a connection between the individual and any inhibition(s) that the individual may be experiencing.³⁶ Inhibitions could include the interaction of the individual with strong stimuli, like violent depictions within cinema or broadcast mediums up to a full day after viewing the film.³⁷

HSPs have been shown to be averse to sensation,³⁸ demonstrated by the subject matters tested by the HSP Scale.³⁹ This means that HSPs require a low threshold of stimulus to have a higher emotional reaction.⁴⁰ HSPs also incur lower neurological thresholds, meaning that these individuals experience discomfort with almost any sensation.⁴¹ Because HSPs have a higher emotional reaction to stimuli and have a lower neurological threshold for sensation discomfort, any sensation will result in a higher level of emotional distress that otherwise may not provoke such a response to a non-HSP.

validity and good reliability.”); Stefan G. Hofmann & Stella Bitran, *Sensory-Processing Sensitivity in Social Anxiety Disorder: Relationship to Harm Avoidance and Diagnostic Subtypes*, 21 J. ANXIETY DISORDERS 944, 947 (2007) (“The 27-item [HSP Scale] showed adequate internal consistency, Cronbach’s $\alpha = .87 \dots$ ”); Smolewska, *supra* note 15, at 1276 (stating that the HSP Scale scores were strongly associated with the behavioral inhibition system and ease of excitation).

35. See Aron & Aron, *supra* note 12, at 353 (discussing adding sensory related variables into the questionnaire to determine independence of emotionality and introversion from a medically diagnosable condition).

36. See generally *id.* (noting that some potential association with a sensitivity of the variables included in the study reflects a deeper understanding of sensory processing sensitivity).

37. *Id.* at 352–53.

38. Batya Engel-Yeger et al., *Extreme Sensory Processing Patterns and Their Relation with Clinical Conditions Among Individuals with Major Affective Disorders*, 236 PSYCHIATRY RES. 112, 113 (2016) (reflecting on previous studies and their findings of temperament traits for the hypersensitive, including sensory processing sensitivity, which includes HSPs) (citing L.J. Miller et al., *Concept Evolution in Sensory Integration: A Proposed Nosology for Diagnosis*, 61 AM. J. OCCUPATIONAL THERAPY 135, 135–40 (2007)).

39. See *supra* note 34 and accompanying text.

40. Engel-Yeger et al., *supra* note 38.

41. *Id.*

In short, due to this observed tendency to have a higher level of emotional distress from any sort of discomfort with sensory processing and neurological perception, HSPs “can have aggressive and negative reactions to sensory stimuli that they experienced as intense, overwhelming, and invasive.”⁴² HSPs are intimately linked to higher levels of emotional distress through arousal from their environment, including responses to interactions with others.⁴³

Emotional harm is any harm that “impair[s] or injur[es] . . . a person’s emotional tranquility.”⁴⁴ When an individual is intentionally exploited, increasing her anxiety or her acute awareness of stimuli, it logically follows that she incurs more chronic stress. Thus, the individual has experienced emotional harm. As previously established, HSPs are prone to higher levels of inhibition and show observable temperament traits, similar to neuroticism and high levels of anxiety and depression.⁴⁵ Neuroticism is a temperamental characteristic,⁴⁶

42. *Id.*

43. *See id.*; *see also* Aron & Aron, *supra* note 12, at 348 (finding that HSPs are highly inhibited and noting the resulting temperamental traits associated with these individuals because of this); *supra* note 22 and accompanying text (discussing the inhibition of HSPs and the results of these individuals being highly inhibited).

44. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 (AM. LAW INST. 2012) (defining emotional harm for subsequent sections that discuss torts dealing with emotional distress, such as Intentional Infliction of Emotional Distress).

45. *See supra* notes 22–29 and accompanying text.

46. As shown previously, neuroticism is a strong indicator of temperamental characteristics such as common mental disorders. *See supra* note 29 and accompanying text. These mental disorders, such as anxiety and depression, can manifest themselves in a specific individual in various ways. *See* Ormel et al., *supra* note 28, at 687–88 (explaining that an anxiety disorder in an individual can include and manifest itself as post-traumatic stress disorder). One such form of a mental disorder manifesting itself in an individual, anxiety as post-traumatic stress disorder, results in an individual, like a HSP, being prone and predisposed to emotional harm, as defined by the *Restatement (Third)*. *Id.* Post-traumatic stress disorder can be characterized by feelings such as “hyperarousal” and strong negative reactions to ordinary events, such as a loud noise. PTSD: Nat’l Ctr. for PTSD, *PTSD Basics*, U.S. DEP’T OF VETERANS AFF., https://www.ptsd.va.gov/understand/what/ptsd_basics.asp (last visited Nov 5, 2018); *What is Posttraumatic Stress Disorder*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd> (last visited Nov. 5, 2018). This is very similar to what Aron & Aron tested for in their HSP questionnaire because both show that there has been a propensity and predisposition for these individuals to experience emotional harm in a way that is different and

when present in an individual, that can make the individual highly anxious, pessimistic, negative in both thought and feeling, and generally irritable.⁴⁷ This disrupts the emotional tranquility of the individual. Because of all of this, HSPs are predisposed to emotional harm, simply by being hypersensitive. This is logical because HSPs are subject to sensory processing sensitivity, which has been defined as “a genetically determined trait involving a deeper . . . cognitive processing of stimuli that is *driven by higher emotional reactivity*.”⁴⁸ Reactivity means distress because those highly inhibited experience discomfort from emotional sensations.⁴⁹ As such, HSPs process stimuli more sensitively from their environment, which causes these individuals to experience much more discomfort than the non-HSP would to the exact same stimuli.

HSPs face obstacles to respond “reasonabl[y]”⁵⁰ to their environment and its stimuli.⁵¹ Because of this, psychological experts have noted that HSPs can “[be] too emotionally reactive prior to or during a response to the environment. But there too emotional reactivity has its advantages, provided it does not lead to overarousal.”⁵² This statement, as applied to intentional torts, is partially correct. There are currently no advantages to being too emotionally reactive, namely, an unreasonable emotional distress, when the standard for severe emotional distress requires that “the distress inflicted is *so severe that no reasonable [person] could be expected to endure it*.”⁵³ When the reaction is outsized, courts, basing the analysis off of a rea-

outsized, when compared to a non-HSP. *See supra* notes 32–34 and accompanying text.

47. CARDUCCI, *supra* note 28, at 174.

48. Elaine Aron et al., *supra* note 19, at 262 (emphasis added); *see also* Arthur Aron et al., *supra* note 19, at 220; Jagiellowicz, *supra* note 7, at 38.

49. *See supra* notes 22–25, 27–29, and accompanying text.

50. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965).

51. Elaine Aron et al., *supra* note 19, at 271 (discussing the emotional and physiological responses of HSPs and more broadly those with sensory processing sensitivity); *see also supra* notes 38–45 and accompanying text (discussing the temperamental traits of HSPs, such as neuroticism and the traits of sensory processing sensitivity and comparing them to the non-HSP).

52. Elaine Aron et al., *supra* note 19, at 271.

53. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) (emphasis added).

sonable person of “ordinary”⁵⁴ sensitivities,⁵⁵ view this kind of conduct as unreasonable. Once emotional distress is found to be unreasonable, courts dismiss complaints alleging IIED for failure to state a claim,⁵⁶ because the plaintiff cannot prove severe emotional distress.⁵⁷ This standard, however, for determining severe emotional distress is outmoded, and in light of the foregoing psychological research, needs to be interpreted differently for the twenty percent of the human population who is highly sensitive.⁵⁸

III. CHALLENGING COMMENT J AS OUTMODED

HSPs cannot recover for severe emotional distress under current tort law. The American Law Institute issued elements for IIED and comments interpreting these elements, found in section forty-six, with case law examples and hypotheticals. Yet, at the time of drafting and publication of section forty-six, little psychological research contributed to the understanding of the individual or mental disorders. Despite the lack of psychological research to support its proposition, comment j assumes a person of reasonable and ordinary sensi-

54. *E.g.*, *Biagas v. St. Landry Par. Sheriff Office*, 2013-642 p. 3–8 (La. App. 3 Cir. 12/11/13); 132 So. 3d 971, 974–76 (quoting *White v. Monsanto Co.*, 585 So. 2d 1205, 1209–10 (La. 1991)); *Honaker v. Smith*, 256 F.3d 477, 490 (7th Cir. 2001) (quoting *Knierim v. Izzo*, 174 N.E.2d 157, 164 (Ill. 1961)); *Jones v. Lenear*, No. 17-cv-0302-SMY, 2017 U.S. Dist. LEXIS 66007, at *15 (S.D. Ill. May 1, 2017) (quoting *Knierim*, 174 N.E.2d at 164); *Borg v. Town of Westport*, No. 3:15-cv-1380(AWT), 2016 U.S. Dist. LEXIS 109841, at *20 (D. Conn. Aug. 18, 2016) (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. j (AM. LAW INST. 2012)); *Slocum v. Food Fair Stores of Fla., Inc.*, 100 So. 2d 396, 398 (Fla. 1958).

55. *See Biagas*, 132 So. 3d at 974; *Honaker*, 256 F.3d at 490; *Lenear*, 2017 U.S. Dist. LEXIS 66007, at *15; *Borg*, 2016 U.S. Dist. LEXIS 109841, at *20.

56. *See generally* *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)) (discussing that the heightened pleading standard to survive a motion to dismiss for failure to state a claim in a complaint requires more than legal conclusions and recitation of elements, such as facts, taken as true, allowing a reasonable person to infer there was plausible wrongdoing).

57. The elements of a successful IIED cause of action occur when “[o]ne who by [(1)] extreme and outrageous conduct [(2)] intentionally or recklessly [(3)] causes [(4)] severe emotional distress to another” RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

58. *Acevedo*, *supra* note 10, at 580; *Suuberg*, *supra* note 10, at 1.

tivities.⁵⁹ As of today's medical knowledge, this is wrong because psychological research has advanced to where it is generally accepted that there are different personality types with distinct temperamental traits. But the law remains steadfast to the standard of a reasonable person of ordinary sensitivities.⁶⁰ Finally, comment j has little judi-

59. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965). Comment j provides that:

The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. *The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.* The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.

Id. (emphasis added).

60. See *Harrelson v. R.J.*, 882 So. 2d 317, 322 (Ala. 2003) (citing *Am. Rd. Serv. Co. v. Inmon*, 394 So. 2d 361, 365 (Ala. 1980)); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985); *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987) (citing *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 716 P.2d 1013, 1015–16 (Ariz. 1986)); *M.B.M. Co. v. Counce*, 596 S.W.2d 681, 687–88 (Ark. 1980); *Cervantez v. J.C. Penney Co.*, 595 P.2d 975, 983 (Cal. 1979) (citations omitted); *Rugg v. McCarty*, 476 P.2d 753, 756 (Colo. 1970); *Petyan v. Ellis*, 510 A.2d 1337, 1342 (Conn. 1986) (citations omitted); *Hunt ex rel. DeSombre v. State*, 69 A.3d 360, 367 (Del. 2013); *Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278–79 (Fla. 1985); *Morgan v. Morgan*, 347 S.E.2d 595, 596 (Ga. 1986) (citing to *E. River Sav. Bank v. Steele*, 311 S.E.2d 189 (Ga. Ct. App. 1983)); *Lee v. Aiu*, 936 P.2d 655, 670 (Haw. 1997); *Hatfield v. Max Rouse & Sons Nw.*, 606 P.2d 944, 953–54 (Idaho 1980); *Knierim v. Izzo*, 174 N.E.2d 157, 165 (Ill. 1961); *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991); *Amsden v. Grinnell Mut. Reinsurance Co.*, 203 N.W.2d 252, 255 (Iowa 1972); *Dawson v. Assocs. Fin. Servs. Co.*, 529 P.2d 104, 111 (Kan. 1974); *Craft v. Rice*, 671 S.W.2d 247, 251 (Ky. 1984); *White v. Monsanto Co.*, 585 So. 2d 1205, 1209 (La. 1991); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154–55 (Me. 1979); *Jones v. Harris*, 371 A.2d 1104, 1108 (Md. Ct. Spec. App. 1977); *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 318–19 (Mass.

cial analysis in case law. The lack of definition for the severe emotional distress element, separate from the direct language as stated by the *Restatement (Second)*, has led courts to sometimes assume away severe emotional distress because of the presence of extreme and outrageous conduct. Due to all of this, comment j has created a framework for the judicial system to deny HSPs access to litigate their IIED claims, despite the HSP's intimate connection with the purpose of the tort as a vehicle for compensation for intentionally cruel conduct that causes severe emotional distress.

A. Comment j's Promulgation at a Time of Psychological Uncertainty

Emotional distress is a general term that includes "mental suffering, mental anguish, mental or nervous shock . . . fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."⁶¹ Even though an intentional tortfeasor may cause a victim any combination of these distresses, the tort-

1976); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438–39 (Minn. 1983); *Pretsky v. Sw. Bell Tel. Co.*, 396 S.W.2d 566, 568–69 (Mo. 1965); *Gall v. Great W. Sugar Co.*, 363 N.W.2d 373, 376 (Neb. 1985); *Star v. Rabello*, 625 P.2d 90, 91–92 (Nev. 1981); *Morancy v. Morancy*, 593 A.2d 1158, 1158–59 (N.H. 1991); *Buckley v. Trenton Sav. Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988); *Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 41 P.3d 333, 342–43 (N.M. 2001); *Fischer v. Maloney*, 373 N.E.2d 1215, 1217 (N.Y. 1978); *Dickens v. Puryear*, 276 S.E.2d 325, 332 (N.C. 1981); *Sec. Nat'l Bank v. Wald*, 536 N.W.2d 924, 927 (N.D. 1995); *Yeager v. Local Union 20, Teamsters*, 453 N.E.2d 666, 670–71 (Ohio 1983); *Kraszewski v. Baptist Med. Ctr. of Okla.*, 916 P.2d 241, 248–49 (Okla. 1996); *Delaney v. Clifton*, 41 P.3d 1099, 1106 (Or. Ct. App. 2002); *Hoy v. Angelone*, 720 A.2d 745, 753–54 (Pa. 1998); *Vallinoto v. DiSandro*, 688 A.2d 830, 839 (R.I. 1997); *Upchurch v. N.Y. Times Co.*, 431 S.E.2d 558, 561 (S.C. 1993); *Petersen v. Sioux Valley Hosp. Ass'n*, 491 N.W.2d 467, 468–69 (S.D. 1992); *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 66–68 (Tex. 1998); *Retherford v. AT&T Commc'ns of the Mountain States, Inc.*, 844 P.2d 949, 970–71 (Utah 1992); *Crump v. P & C Food Mkts., Inc.*, 576 A.2d 441, 448–49 (Vt. 1990); *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974); *Reid v. Pierce Cty*, 961 P.2d 333, 337–38 (Wash. 1998); *Travis v. Alcon Labs., Inc.*, 504 S.E.2d 419, 425 (W. Va. 1998); *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 378 (Wis. 1978); *Worley v. Wyo. Bottling Co.*, 1 P.3d 615, 628 (Wyo. 2000).

61. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965).

feasor is only liable for IIED when these distresses are severe.⁶² As defined by comment j, emotional distress becomes severe when “no reasonable [person] could be expected to endure it.”⁶³ This comment assumes a reasonable person but with a caveat: the reasonable person for the purposes of IIED is a person of reasonable emotion. Said differently, there is the assumption of a person of “ordinary” sensitivities.⁶⁴ This language of “ordinary” sensitivities was drafted during a time of little understanding of mental disorders and personality temperament traits.⁶⁵

During comment j's drafting, the American Psychiatric Association had already endeavored to classify mental and personality disorders into a system for diagnosing patients.⁶⁶ To highlight the fundamental misgivings of the psychiatric knowledge at the time, the first edition of the *Diagnostic and Statistical Manual of Mental Disorders*—a guidebook containing a standard classification system for mental and behavioral health professionals—contained roughly 150 pages.⁶⁷ This manual attempted to give practitioners enough infor-

62. *Id.*; see also *Santino v. Columbus Pub. Schs.*, 833 F. Supp. 2d 780, 801 (S.D. Ohio 2011) (citing *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983)) (noting that the distress complained of must go beyond a “trifling disturbance” and must be severe, rather than plain emotional distress). This proposition assumes that the intentional tortfeasor's conduct is extreme and outrageous.

63. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) (emphasis added).

64. *E.g.*, *Biagas v. St. Landry Par. Sheriff Office*, 2013-642, p. 4 (La. App. 3 Cir. 12/11/13), 132 So. 3d 971, 974 (quoting *White*, 585 So. 2d at 1210); *Honaker v. Smith*, 256 F.3d 477, 490 (7th Cir. 2001) (quoting *Knierim*, 174 N.E.2d at 164); *Jones v. Leneer*, No. 17-cv-0302-SMY, 2017 U.S. Dist. LEXIS 66007, at *15 (S.D. Ill. May 1, 2017) (quoting *Knierim*, 174 N.E.2d at 164)).

65. See *supra* notes 6, 15, 64, and accompanying text (noting the early attempts at understanding the psychobiological reasons for personality differences and further citing present-day case law that quotes opinions from the 1960s to define the standard for determining severe emotional distress).

66. See generally J. Stanley McQuade, *The Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in the Law of Torts*, 24 CAMPBELL L. REV. 1, 30 (2001) (noting that although the World Health Organization had published the *International Classification of Diseases*, the American Psychiatric Association published the *Diagnostic and Statistical Manual of Mental Disorders* in 1952, thirteen years prior to the ALI's *Restatement (Second)*).

67. THE COMM. ON NOMENCLATURE & STATISTICS, AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (1st ed. 1952)

mation and guidance on every mental disorder that an individual may be diagnosed with. This brevity—every known mental disorder contained in under 150 pages—shows how the psychological field fundamentally misunderstood individual personality due to the limitations of medical knowledge at the time. Today, the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* totals over 900 pages,⁶⁸ with more detailed descriptions and guidelines for practitioners to follow when evaluating a patient.

The first *Diagnostic and Statistical Manual of Mental Disorders* opens with the statement that the revision to previous psychiatric sources came at the “perfect[] time[] to include the experiences of psychiatrists of World War II.”⁶⁹ Compared to its predecessor, the fifth edition came from thirteen working groups supervised by the DSM-5 Task Force in conjunction with other reviewing organizations and the American Psychiatric Association, which collaboratively worked to improve and prepare the edition.⁷⁰ While seemingly insignificant, it is important to note that the first manual came as a knee-jerk response to veterans returning from war with mental illnesses, whereas the fifth edition took a much more practical approach. Most importantly, over time, the manual has incorporated empirical research⁷¹ and a comprehensive harmonization with the World Health Organization’s *International Classification of Diseases*, which is the official coding system for causes of mortality and morbidity in the United States.⁷² This is striking because it suggests that previous edi-

[hereinafter DIAGNOSTIC AND STATISTICAL MANUAL FIRST EDITION] (containing 145 pages); see also McQuade, *supra* note 66.

68. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DIAGNOSTIC AND STATISTICAL MANUAL FIFTH EDITION] (containing 946 pages).

69. DIAGNOSTIC AND STATISTICAL MANUAL FIRST EDITION, *supra* note 67, at 1.

70. DIAGNOSTIC AND STATISTICAL MANUAL FIFTH EDITION, *supra* note 68, at xliii. The fifth edition lists the numerous advisors and other professionals who contributed to the updated edition. *Id.* at 897–916.

71. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xviii (4th ed. 1994) (“[t]he third edition of the [manual] . . . greatly facilitated empirical research,” suggesting that the previous editions did not incorporate empirical research in defining mental disorders).

72. DIAGNOSTIC AND STATISTICAL MANUAL FIFTH EDITION, *supra* note 68, at xli.

tions, as exemplified by the reaction to veterans returning from World War II, were largely unfounded in psychological research and data,⁷³ whereas the current edition is based primarily in generally accepted psychological research.⁷⁴

This can be shown as the first edition makes reference to a “senile brain disease,” something that today may be attributed to a wide variety of issues, such as Alzheimer’s disease or a traumatic brain injury.⁷⁵ Additionally, at the same time of the *Restatement (Second)*’s drafting and publication,⁷⁶ the American Psychiatric Associa-

73. DIAGNOSTIC AND STATISTICAL MANUAL FIRST EDITION, *supra* note 67, at 52 (“There is an increasing need for adequate statistical data on the mental hospital population of the country.”).

74. The first edition of the manual vaguely characterized observable differences in personalities broadly while the fifth edition relied upon empirical research, globally available standards, and a large group of contributing psychiatrists. *See* DIAGNOSTIC AND STATISTICAL MANUAL FIFTH EDITION, *supra* note 68, at xliii, 897–916. For example, the first edition broadly encompassed sexual deviation as a personality disorder, while by the time of the fifth edition’s publication, medical knowledge advanced to the point where sexual deviation is no longer a distinct disorder nor is it a personality disorder. *Compare* DIAGNOSTIC AND STATISTICAL MANUAL FIRST EDITION, *supra* note 67, at 38–39 (naming sexual deviation as a form of a personality disorder, suggesting any sexual act outside of a traditional marriage could be diagnosable as a disorder), *with* DIAGNOSTIC AND STATISTICAL MANUAL FIFTH EDITION, *supra* note 68, at 685–705 (classifying paraphilic disorders, such as pedophilic disorders, sexual masochism, and sexual sadism disorder, as distinct from a personality disorder).

75. *Compare* DIAGNOSTIC AND STATISTICAL MANUAL FIRST EDITION, *supra* note 67, at 22 (naming “[c]hronic [b]rain [s]yndrome associated with senile brain disease” as a form of a “childish emotionality” that may require institutionalization), *with* DIAGNOSTIC AND STATISTICAL MANUAL FIFTH EDITION, *supra* note 68, at 591 (discussing neurocognitive disorders, beginning with delirium, followed by major neurocognitive disorders, mild neurocognitive disorders, and their distinct etiological subtypes, such as the types of Alzheimer’s diseases, Parkinson’s disease, major brain injury, HIV infection, and Huntington’s disease).

76. The American Law Institute published the *Restatement (Second)* at a time limited by the medical knowledge of its day, when mental disorders were fundamentally misunderstood and plain wrong when analyzed against today’s medical advancements. At the time of publication, psychological research was based on the thinking of the era. The *Restatement (Second)* was first published in 1965. RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1965). Highlighting the societal attitude and major public policy initiatives of the time, in 1965 the Voting Rights Act became law in an attempt to ensure that African Americans could freely vote without any infringement by the federal, state, or local governments. *See* Voting

tion categorized homosexuality as a mental disorder.⁷⁷ Within the fifth edition, “sexual orientation is removed because the distinction is no longer considered clinically useful.”⁷⁸ This is because medical knowledge has advanced past the first edition. The fifth edition’s elimination of sexual orientation then makes sense because today’s society is not limited by its medical understanding of the 1950s. Recent research indicates there may be a link between sexual orientation and genetics.⁷⁹ Despite these few instances where the editions differ significantly, the implication remains the same: the *Restatement (Second)* developed at a time of uncertainty and has not yet caught up to the current medical knowledge and understanding of today’s society.

Notwithstanding attempts to standardize the medical diagnoses of mental illnesses by psychologists in the United States, the first edition of the *Diagnostic and Statistical Manual for Mental Disorders* was limited by its time. In turn, any legal principle developed out of reliance or guidance from this early manual is equally as limited. The *Restatement (Second)* section forty-six, with its comment j, was written during the same time as the first edition of the *Diagnostic and Statistical Manual for Mental Disorders*.⁸⁰ Given the *Restatement (Second)*’s publication at a time when psychological research was very new and misunderstood, it could be expected that by the time of

Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101, 10301–10314, 10501–10508, 10701–10702 (2018)). Despite 1965 being the publication year for the first two volumes of the *Restatement (Second)*, the American Law Institute started drafting the new *Restatement (Second)* prior to 1965. RESTATEMENT (SECOND) OF TORTS VIII (AM. LAW INST. 1965) (explaining that drafting the *Restatement (Second)* began in 1954). This goes to show that at the time of drafting, the psychological scholarly understanding could be said to range from the mid-to-late 1950s through the 1960s.

77. DIAGNOSTIC AND STATISTICAL MANUAL FIRST EDITION, *supra* note 67, at 38–39 (naming homosexuality and transvestism as forms of sexual deviancy personality disorders and analogizing these types of conduct to pedophilia).

78. DIAGNOSTIC AND STATISTICAL MANUAL FIFTH EDITION, *supra* note 68, at 814 (noting differences in the fourth and fifth edition in relation to gender and sexual disorders).

79. Alan R. Sanders et al., *Genome-Wide Association Study of Male Sexual Orientation*, SCI. REP. 2–3 (Dec. 7, 2017), <https://www.nature.com/articles/s41598-017-15736-4.pdf> (finding a possible link between genetics and male sexual orientation, however also noting that this study is not conclusive).

80. See *supra* notes 67, 76.

publication for the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (“*Restatement (Third)*”), changes would be made to reflect an adapting society with a more enlightened basis of social science. But the *Restatement (Third)* made no substantive changes to any elements of IIED, nor to any comments.⁸¹ Because of this, comment j still holds the universal unreasonable position that there is a person of reasonable, ordinary emotional sensitivities.

B. Comment j's Relationship with NIED and the Reasonably Sensitive Person

Stand-alone emotional harm was originally recoverable only for negligent mishandling of corpses or failure to deliver a telegraphic message announcing a loved one's death.⁸² These cases turned on the duty owed to the emotional well-being of the potential plaintiff.⁸³

The *Restatement (Second)* attempted to solve the problem of judging individualistic emotional harm by categorizing the harm into two buckets: harm that is reasonable and harm that is unreasonable. Only a reasonable emotional reaction is recoverable under the current law. One may presume that with this flawed approach, the *Restatement (Third)* may have revised comment j. It did not.

The *Restatement (Third)*, however, did make a material change to negligence. Prior to the *Restatement (Third)*, a negligent

81. Compare RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. LAW INST. 1965) (“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.”), with RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW INST. 2012) (“An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.”).

82. Constance Frisby Fain, Annotation, *Civil Liability of Hospital for Negligent Handling, Transportation, and Disposition of Corpse*, 86 A.L.R. 5th 693, 701–02 (2001).

83. See *id.* at 703 (“In cases involving the wrongful treatment of a corpse or a dead body, courts . . . requir[e] . . . proof in a cause of action for . . . negligent infliction of emotional distress: the existence of a duty of care owed by the defendant to the plaintiff, and a breach of that legal duty that is a proximate cause of the plaintiff's injury.”).

actor was only liable for reasonably foreseeable harm because of a physical condition.⁸⁴ A negligent actor was not liable for unforeseeable harm caused by a non-apparent mental condition, such as high sensitivity.⁸⁵ This is the eggshell plaintiff rule.⁸⁶ The eggshell plaintiff rule is simple: the defendant takes the victim as the defendant finds her, regardless of the defendant's lack of prior knowledge of any conditions the plaintiff may have.⁸⁷ In limited circumstances, a plaintiff litigating an intentional tort may be able to invoke the rule.⁸⁸

The *Restatement (Third)* proposes expanding the eggshell plaintiff rule to include liability for unforeseeable harm due to a non-apparent mental condition.⁸⁹ It appears no jurisdiction has extended this provision to IIED because the *Restatement (Second)* already provides an eggshell plaintiff rule for IIED.⁹⁰

84. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 cmt. a (AM. LAW INST. 2010) (discussing the history of the traditional *Restatement (Second)* approach, recognizing only liability for harm that was greater than foreseeable harm due to a physical condition, whereas the *Restatement (Third)* adopted the *Restatement (Second)*, expanding it to include mental conditions); see also RESTATEMENT (SECOND) OF TORTS § 461 (AM. LAW INST. 1965).

85. See RESTATEMENT (SECOND) OF TORTS § 461 cmt. a (AM. LAW INST. 1965).

86. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 cmt. a (AM. LAW INST. 2010).

87. See *Freeman v. Busch*, 349 F.3d 582, 590 (8th Cir. 2003) (citing *Becker v. D&E Distrib. Co.*, 247 N.W.2d 727, 730 (Iowa 1976)). For instance, if a defendant negligently causes a minor car accident, and the plaintiff has a medical condition where her bones are very fragile, the defendant may be liable for the entire injury to the plaintiff, even when it was not foreseeable that this plaintiff had a rare medical condition and the injuries were very severe. See RESTATEMENT (SECOND) OF TORTS § 461 cmt. a, illus. 1–2 (AM. LAW INST. 1965).

88. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) (allowing for recovery by a plaintiff on an IIED claim for peculiar susceptibilities, such as being a HSP, but only when the defendant has prior knowledge of the susceptibility); see also *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 506 (1st Cir. 1996) ((first citing *Therault v. Swan*, 558 A.2d 369 (Me. 1989); then citing *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282 (Me. 1987); and then citing *Lovely v. Allstate Ins.*, 658 A.2d 1091 (D. Me. 1995)).

89. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 (AM. LAW INST. 2010).

90. RESTATEMENT (SECOND) OF TORTS § 461 (AM. LAW INST. 1965); cf. *id.* § 46 cmt. f (explaining that IIED defendants may be liable for unforeseeable mental or

The eggshell plaintiff rule does little for the HSP plaintiff. The eggshell plaintiff rule imposes liability on a defendant for her actions that caused unforeseeable injury to a plaintiff. Only negligence claimants may use the eggshell plaintiff rule for non-apparent physical conditions causing unforeseeable harm.⁹¹ Because of this limited application to negligence actions, the law actually treats negligent tortfeasors more harshly than intentional tortfeasors.⁹²

Generally speaking, the law aims to hold intentional actors more culpable for their conduct than negligent actors because intentional actors actually seek to harm another.⁹³ When viewed from the

physical peculiarities but only when the intentional actor had knowledge of the peculiarity).

91. See, e.g., *Mays v. Bd. of Comm'rs Port of New Orleans*, No. 14-1014, 2015 WL 4097109, at *8 (E.D. La. July 6, 2015) (“The Fifth Circuit has instructed this principle has been applied only to pre-existing physical injuries, not to pre-existing mental conditions.”).

92. Intentional actors are subject to liability for emotional harm to a peculiarly susceptible plaintiff only when the intentional actor has actual knowledge of the peculiar susceptibility; whereas the negligent actor is liable for emotional harm to a peculiarly susceptible plaintiff, regardless of actual prior knowledge of the susceptibility. Compare RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (AM. LAW INST. 1965) (stating that when a defendant acts with knowledge of a plaintiff's peculiar susceptibility, the conduct could arise to extreme and outrageous behavior—“becom[ing] heartless, flagrant, and outrageous”—but it “would not be so if [the actor] did not know” of the susceptibility), with Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375, 385 (2013) (first citing AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 258 (2d ed. 2008); then citing Candice E. Renka, Note, *The Presumed Eggshell Plaintiff Rule: Determining Liability When Mental Harm Accompanies Physical Injury*, 29 T. JEFFERSON L. REV. 289 (2007)) (“When it comes to psychological harm, plaintiffs in most jurisdictions may now invoke the eggshell plaintiff rule to recover for . . . emotional harms resulting from preexisting psychological conditions.”).

93. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 33(b) (AM. LAW INST. 2010) (“An actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently.”); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS CASES AND MATERIALS 322 n.5 (Robert C. Clark et al. eds., 13th ed. 2015) (discussing the tendency in the law to find even remote causation for intentional actors, whereas negligent actors are held to a reasonable causal connection). See generally *Landry v. Bellanger*, 2002-1443, pp. 14–15 (La. 5/20/03); 851 So. 2d 943, 954 (stating that intentional actors should not benefit from a reduction in culpability like a negligent actor would in a com-

lens of a HSP-plaintiff, it is the negligent actor who is held more culpable than intentional actors.⁹⁴ Although the distress must be “reasonable and justified under the circumstances,” when an individual has a non-apparent mental condition and a negligent tortfeasor causes the plaintiff severe emotional distress, liability for inflicting severe distress may result.⁹⁵ Yet when there is no knowledge of the non-apparent mental condition, the law’s purpose in holding intentional actors more culpable than mere negligent actors becomes muddled.

An immediate knee-jerk solution to this issue may be to simply extend the eggshell plaintiff rule to IIED. This would allow HSPs to invoke the rule when the tortfeasor claims to have no knowledge of the HSP’s condition. This is a fruitless effort to solve the problem. The eggshell plaintiff rule permits establishing liability— notwithstanding the victim’s peculiar condition—even when the

parative fault system); *Holder v. Shelby Cty.*, No. W2014-01910-COA-R3-CV, 2015 Tenn. App. LEXIS 228, at *15 (Tenn. Ct. App. Apr. 21, 2015) (citing 57A AM. JUR. 2D *Negligence* § 30 (2002)) (discussing the stark difference in culpability of intentional and negligent actions); *Kritter v. Willis*, No. 87-0581, 1987 Wisc. App. LEXIS 4353, at *11 (Wis. Ct. App. Dec. 29, 1987) (citing *Fleming v. Threshermen’s Mut. Ins. Co.*, 388 N.W.2d 908, 910 (Wis. 1986)) (disallowing a comparison of negligent and intentional conduct because of the vast culpability differences); William L. Prosser, *Intentional Infliction of Emotional Suffering: A New Tort*, 37 MICH. L. REV. 874, 878 (1939) (“One reason, of course, . . . which has been apparent elsewhere in the field of torts, [is] to extend liability as the moral guilt of the defendant increases.”).

94. For instance, imagine a person negligently inflicts emotional harm onto a person suffering from being classified as highly sensitive. Once this person is sued by the HSP, the person would not be able to claim that he or she was unaware of the HSP’s condition, due to the eggshell plaintiff rule. Now, imagine the same situation, only the person intentionally inflicts the emotional harm onto the HSP. If the person claims that he or she did not know of the HSP’s condition, then this is enough to release the tortfeasor of liability. Thus, the negligent actor is held liable where the intentional actor is not, even though the conduct is the same and results in harm to both plaintiffs.

95. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. j (AM. LAW INST. 2010); *see id.* § 31; *see also* *Yanes v. Maricopa Cty.*, No. 1 CA-CV 11-0274, 2012 Ariz. App. Unpub. LEXIS 1456, at *13–14 (Ariz. Ct. App. Nov. 8, 2012) (“Although the distress must be ‘reasonable and justified under the circumstances,’ when an individual is unusually susceptible to severe emotional reaction, and the Defendants knew about this susceptibility, liability for inflicting severe distress may result.”) (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965)).

harm is not foreseeable.⁹⁶ Said otherwise, per comment j, a HSP-plaintiff cannot establish severe emotional distress—an essential element of proving IIED—because there is no standard to judge reasonable emotional reactions.⁹⁷ What are ordinary sensitivities?⁹⁸ The current standard is arbitrary at best and discriminatory at worst.

An example of this arbitrary and discriminatory nature is seen in Carl Bailey, Sr.'s (“Bailey”) lawsuit against his former employer, Bayer CropScience (“BCS”). Bailey’s supervisor called him into an office to inform Bailey of a sexual assault allegation against him from a male co-worker.⁹⁹ This accusation led to the observable and noticeable emotional distress Bailey suffered.¹⁰⁰ The sexual assault allegation had been falsified: the employee who “filed” the complaint had no knowledge of the complaint.¹⁰¹ After actions resulted in Bailey allegedly experiencing post-traumatic stress disorder, severe panic attacks, depression, fear, flashbacks, nightmares, memory loss, confusion, and psychotic episodes, the trial court granted summary judgement to BCS.¹⁰² Stating “there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional dis-

96. See generally J. Gregory Sidak, *Two Economic Rationales for Felony Murder*, 2016 CORNELL L. REV. ONLINE 51, 55 (citing *McCahill v. New York Transp. Co.*, 94 N.E. 616, 617 (N.Y. 1911)) (discussing the beginning of the egg-shell plaintiff rule).

97. The *Restatement (Second)* requires the emotional distress to be “so severe that no reasonable man could be expected to endure it.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965); see also *White v. Monsanto Co.*, 585 So. 2d 1205, 1210 (La. 1991) (“[T]he actor’s conduct should be judged in the light of the effect such conduct would ordinarily have on a person of ordinary sensibilities.”); *Knierim v. Izzo*, 174 N.E.2d 157, 165 (Ill. 1961) (“The ‘reasonable man’ seems to be well known to jurors and we expect that they will also be acquainted with the ‘man of ordinary sensibilities.’”).

98. *Adams v. Aidoo*, No. 07C-11-177 (MJB), 2012 Del. Super. LEXIS 135, at *47 (Del. Super. Ct. Mar. 29, 2012) (quoting DEL. CIV. PATTERN JURY INSTRUCTION § 22.10 (2000)) (“The law does not prescribe any definite standard by which to compensate an injured person for . . . severe emotional distress . . .”).

99. *Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 306 (8th Cir. 2009).

100. *Id.* (describing a severe panic attack suffered while at work causing Bailey to take a leave of absence until he sought further psychiatric treatment).

101. *Id.* (“Shipley submitted an affidavit in which he denied ever making a complaint of sexual harassment against Bailey.”).

102. *Id.* at 305–07.

trespass,”¹⁰³ the Eighth Circuit held Bailey’s emotional reaction was not congruent to that of a reasonable person and affirmed the trial court’s order for summary judgment in favor of BCS.¹⁰⁴ Even if the egg-shell plaintiff rule is extended to IIED, because Bailey could not under these facts prove severe emotional distress, Bailey still would not have recovered. This is because, as a matter of law, Bailey’s emotional distress was “exaggerated and unreasonable,” thus precluding any finding of an essential element of the tort.¹⁰⁵

More recently, a court succinctly demonstrated the problem HSPs face by requiring a plaintiff to show a person “normally constituted” would have been severely emotionally distressed by his co-employees’ and employer’s conduct.¹⁰⁶ The plaintiff, Nick Santino (“Santino”) brought an employment discrimination claim and an IIED claim against his employer, the Columbus City Schools.¹⁰⁷ Santino, a naturalized U.S. citizen of Iranian origin, drove school buses for the Columbus City Schools, where he was subject to continued and repeated derogatory and hostile comments based on his ethnicity.¹⁰⁸ Such comments included calling Santino a “terrorist, gangster and other SOB[,]” and accusations that Santino drove his bus on longer routes because he had “[a] bomb in the bus for suicide [bombing] purposes.”¹⁰⁹ On some occasions, co-workers threatened to physically assault Santino, on one occasion with a crow bar.¹¹⁰ All of this conduct occurred continuously from 2007 through 2008, when Santino requested a medical leave from work because of the high

103. *Id.* at 311 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965)).

104. *Id.*

105. *Id.*

106. *Santino v. Columbus Pub. Sch.*, 833 F. Supp. 2d 780, 801–02 (S.D. Ohio 2011) (holding that although the defendant was civilly immune against IIED claims, the plaintiff could not state a claim absent the immunity).

107. *Id.* at 785, 800.

108. *Id.* at 785–88.

109. *Id.* at 786–87.

110. *Id.*

stress, overwhelming feelings, loss of appetite, and extreme depression.¹¹¹

Santino likely mimicked what a HSP-plaintiff would experience. He experienced an extreme overwhelming feeling of depression with anxiety from this conduct, even though the conduct did not meet the high bar for extreme and outrageousness.¹¹² In the alternative, if this had been extreme and outrageous, the court found that Santino did not suffer from severe emotional distress.¹¹³ The court perfectly illustrated comment j's problematic standard for HSPs: "The emotional injury must be so severe and debilitating that 'a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.'"¹¹⁴

Substituting a HSP into the place of Santino, the HSP would still experience the same type of emotional responses to these environmental stimuli, the epithets and threats that caused Santino depression and anxiety.¹¹⁵ It is reasonable for a school bus driver to become severely distressed from comments about a bomb on the children's bus. Coupled with the racist comments regarding unfounded generalities, Santino could not have been more inapposite to the "reasonable person, normally constituted."¹¹⁶ Despite this, the law requires him to be "normally constituted" to litigate his IIED claim and survive a motion for summary judgement.¹¹⁷

Revisiting the substitution of a HSP in place for Santino, the HSP could not litigate the claim and would be subject to the same re-

111. *Id.* at 788 (noting that Santino was prescribed an anti-depressant based on a diagnosis of "depression with anxiety" and further referred for psychological counseling and therapy).

112. *Id.* at 801 ("There is also no evidence to support a finding that defendant engaged in extreme or outrageous conduct.").

113. *Id.*

114. *Id.* (emphasis added).

115. *Id.* at 788; *see also supra* notes 51–55 and accompanying text (discussing the emotional and physiological responses of HSPs, and more broadly those with sensory processing sensitivity).

116. *Santino*, 833 F. Supp. 2d at 801.

117. *Id.* at 802 (granting defendant's motion for summary judgment); *see also* RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965); *supra* notes 64–65 (noting that reasonable person in comment j has been interpreted to mean "ordinary sensitivities.").

sult. HSPs, by their very natures cannot be “ordinarily”¹¹⁸ or “normally”¹¹⁹ situated.¹²⁰ The law judges a reasonable person as a normal emotional person thus HSPs are precluded from potential compensation due to intentional tortious conduct against them because HSPs, by definition, cannot be “ordinarily” or “normally” situated. The reaction that Santino, or the hypothetical HSP substitute, produced as a response, while unreasonable for the “normal” person, is not unreasonable for similarly sensitive reasonable HSPs.¹²¹ If comment j placed emphasis on the individual and the context surrounding the tortious conduct rather than focusing on broad generalities of one type of reasonableness, HSPs could have a vehicle for recovery.

Virtually all jurisdictions have adopted and maintained all or a large majority of the *Restatement (Second)*’s elements and commentary to IIED.¹²² The *Restatement (Second)* provides that if a plaintiff meets the elements of intent, extreme and outrageous conduct, and causation, the plaintiff cannot succeed without demonstrating and proving emotional distress “so severe that no reasonable man could be expected to endure it.”¹²³ HSPs currently have no recourse under IIED law because they are judged by this objective standard of a reasonable person of *ordinary* sensitivities, rather than a reasonable person of *similar* sensitivities.

118. See *supra* notes 64–65.

119. *Santino*, 833 F. Supp. 2d at 801.

120. See *supra* notes 51–55 and accompanying text (reporting the temperament traits of HSPs and comparing these traits with non-HSPs).

121. See *supra* notes 27–31 (discussing the similar temperament traits that HSPs and others with personality disorders linked to sensory processing sensitivity may experience just by being a HSP).

122. *Supra* note 60.

123. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) (discussing issues courts must analyze for the severe emotional harm element); see also *Borg v. Town of Westport*, No. 3:15-cv-1380(AWT), 2016 U.S. Dist. LEXIS 109841, at *20 (D. Conn. Aug. 18, 2016) (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. j (AM. LAW INST. 2012)) (replacing the language of the *Restatement* with a standard to gauge severity of emotional harm inflicted based upon whether a person of “ordinary sensitivities” would incur such emotional harm).

Presently, emotional distress is recognized as a standalone form of harm,¹²⁴ yet the focus of the law has strayed from the duty of the emotional well-being of the potential plaintiff. By straying from the duty to the emotional well-being of the potential plaintiff, the law has actually foreclosed recovery for potential plaintiffs in the name of protecting the tort and court system from frivolous claims.¹²⁵ Protecting the tort has focused on the arbitrary line of an ordinarily sensitive plaintiff, whereas the proper protection is already present in extreme and outrageous conduct.

C. Comment j's (Limited) Role in Judicial Analyses

One problem in case law that helps explain the lack of direct authority on the meaning of severe emotional distress is the current symbiosis¹²⁶ between the elements of extreme and outrageous conduct with severe emotional distress.¹²⁷ A court will not proceed past

124. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § Scope (AM. LAW INST. 2012) (“This chapter addresses further limits on and rules about liability in cases involving emotional distress not itself caused by or causing physical harm.”).

125. See Prosser, *supra* note 93, at 877 (recognizing the balance of concerns regarding opening the floodgates of litigation because it is “easy to lie about what goes on inside the plaintiff’s own head” despite the need to litigate true and genuine claims of IIED).

126. Symbiosis is used in this manner to reflect the judicial treatment of the two distinct and separate elements of IIED—extreme and outrageous conduct and severe emotional distress—being blended into each other during analysis of IIED claims, primarily during summary judgment or appellate review. From language found in case law, one gleans that the two elements have been used to define each other, even when both are wholly separate and different elements, used for different means to measure potential liability for alleged tortious conduct. See, e.g., *State Rubbish Collectors Ass’n v. Siliznoff*, 240 P.2d 282, 286 (Cal. 1952) (“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.”); *Wiehe v. Kukul*, 592 P.2d 860, 863 (Kan. 1979) (“[T]he extreme or outrageous character of the conduct complained of may arise from the actor’s knowledge that the other is particularly susceptible to emotional distress”); 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, 47 (1982).

127. A possible rationale for this symbiotic treatment of the two elements could be that courts use extreme and outrageous conduct as a judicial safeguard for

the element of extreme and outrageous conduct if there is not sufficient evidence to establish the element.¹²⁸ Thus, courts have treated IIED as a single element tort.¹²⁹ It is for the judge, in the first in-

the tort. This built in protection from frivolous claims—the high bar to establish the first element—reinforces the original need for recovery for those that suffer actual severe emotional distress not just reasonable severe emotional distress. Dean Prosser recognized this conflicting interest of affording a remedy to all those that have actual legal need for recovery without overburdening the judicial system with false claims of emotional harm, however, it is the duty of the judicial system to protect the emotional well-being of plaintiffs that have true claims:

But this is a poor reason for denying recovery for any genuine, serious mental injury. It is the business of the law to remedy wrongs that deserve it, even at the expense of a “flood of litigation”; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do. And, in words which Chief Justice Holt made famous in another connection, “it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense.”

Prosser, *supra* note 93, at 877 (citations omitted).

128. If a plaintiff cannot establish an essential element of a cause of action, the court can dismiss the cause of action because there cannot be a dispute over this material fact. *See, e.g.*, FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

129. It is for the court to determine first that there has been enough evidence introduced to support a prima facie case for IIED. *E.g.*, *Sacco v. High Country Indep. Press, Inc.* 896 P.2d 411, 427 (Mont. 1995) (citations omitted); RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965). However, courts treat IIED as almost a tort of one element on a motion to dismiss or for summary judgment. “Despite [a] fact-intensive analysis, it is only when reasonable minds could differ *in determining whether conduct is sufficiently extreme or outrageous* that an IIED claim should survive summary judgment.” *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1209 (9th Cir. 2016) (citing *Mintz v. Bell Atl. Sys. Leasing Int’l, Inc.*, 905 P.2d 559, 563 (Ariz. Ct. App. 1995)) (emphasis added); *see Givelber, supra* note 126, at 46 (discussing that extreme and outrageous conduct limits the tort’s reach and also controls the other three elements’ analyses); John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 802 (2007) (discussing the practical implications of judicial interpretations of extreme and outrageous conduct); *see also* Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 Vand. L. Rev. 983, 1019–20 (2008) (describing the extreme and outrageous conduct element through its official commentary).

stance, to determine if the conduct complained of is extreme and outrageous.¹³⁰

If the conduct is not extreme and outrageous, there cannot be recovery.¹³¹ Extreme and outrageous conduct and severe emotional distress are not mutually exclusive, even though courts and the *Restatement (Second)* believe so.¹³² For example, by their own subjective belief, a HSP will experience severe emotional distress to certain everyday stimuli that a non-HSP would brush off because the HSP is highly inhibited compared to the non-HSP.¹³³ These everyday stimuli could be anything from “violent movies and TV shows” to having “a lot to do in a short amount of time.”¹³⁴ Certainly, no reasonable person would consider a violent TV show, movie, or extremely busy schedule to be extreme and outrageous conduct by its legal definition.¹³⁵ But even still, this non-extreme and non-outrageous conduct can make a HSP experience a serious emotional disturbance.

130. See, e.g., *Meminger v. Ohio State Univ.*, 102 N.E.3d 642, 646 (Ohio Ct. App. 2017) (holding the existence of extreme and outrageous conduct as a question of law) (citing *Jones v. Wheelersburg Local Sch. Dist.*, No. 12CA3513, 2013 WL 4647645, at ¶ 41 (Ohio Ct. App. Aug. 19, 2013); *Murray v. Justice*, 385 S.E.2d 195, 200 (N.C. Ct. App. 1989) (same) (citing *Briggs v. Rosenthal*, 327 S.E.2d 308, 311 (N.C. Ct. App. 1985)).

131. Givelber, *supra* note 126, at 46 (“[T]hose whose conduct is not outrageous but merely inattentive will not be liable for this tort.”) (internal citations omitted).

132. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) (“Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant’s conduct is in itself important evidence that the distress has existed.”); see also *State Rubbish Collectors Ass’n v. Siliznoff*, 240 P.2d 282, 286 (Cal. 1952).

133. See *supra* notes 23–27, 43, 49 (discussing HSPs and sensory processing sensitivity as making an individual highly inhibited, causing certain temperamental traits).

134. See *supra* note 32 (utilizing Aron & Aron’s HSP scale to show the types of stimuli that can cause a HSP to undergo emotional distress).

135. The nature of the first element requires “the conduct [to be] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be . . . utterly intolerable in a civilized community.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965).

To protect the tort from frivolous claims,¹³⁶ courts have cabined IIED claims by narrowly interpreting both elements of extreme and outrageous conduct and severe emotional distress. In doing so, courts take literal readings of the *Restatement (Second)*'s comments, explaining how to manage the elements of the tort without reading the elements in their practical sense.¹³⁷ Further, courts have used the language of comment j to create a circular definition of extreme and outrageous conduct and severe emotional distress. "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."¹³⁸ The comment suggests that when there is extreme and outrageous conduct then there is little left to be done to find sufficient evidence of severe emotional distress.¹³⁹ Said otherwise, "[g]reater proof that mental suffering occurred is found in the

136. Givelber, *supra* note 126, at 51–53 (discussing that extreme and outrageous conduct limits the tort's reaches); Kircher, *supra* note 129, at 802 (discussing the extreme and outrageous conduct element as an adequate safety valve for the tort); Prosser, *supra* note 93, at 876–77 (discussing judicial hesitations and the reasoning for delaying recognizing IIED as a new tort).

137. See, e.g., *Boutte v. United Parcel Serv., Inc.*, No. 17-787, 2017 WL 3917144, slip op. at *5 (E.D. La. Sept. 7, 2017) (quoting another decision that cites directly to the language of the *Restatement (Second)*'s commentary and IIED elements) (citing *White v. Monsanto Co.*, 585 So. 2d 1205, 1209 (La. 1991); *Steinken v. Sears, Roebuck and Co.*, No. 16 CV 7903, 2017 WL 2506426, at *2 (N.D. Ill. June 8, 2017) (internal citations omitted) (quoting from prior opinions that directly quote the *Restatement (Second)* elements and comments to IIED); *Doe v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00793-APG-GWF, 2016 WL 4432683, at *10 (D. Nev. Aug. 18, 2016) (citing previous decisions that quote the *Restatement (Second)*'s language directly as rule statements).

138. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965).

139. This suggested assumption that when there is no extreme and outrageous conduct there is no severe emotional distress leaves a dearth of authority on IIED claims for HSPs. As previously discussed, HSPs have larger and more substantial emotional responses to environmental stimuli because they are highly inhibited. *Supra* notes 22–23, 44, 49. Conduct that would create severe emotional distress in a non-HSP would likely be extreme and outrageous because these individuals are not highly inhibited. But HSPs may incur severe emotional distress from conduct that is less than extreme and outrageous. Without finding the presence of extreme and outrageous conduct, courts routinely dismiss actions for IIED, so when a HSP brings this cause of action and cannot show extreme and outrageous conduct, even if there is severe emotional distress, the court will refuse to hear the case, granting a motion for summary judgment or motion to dismiss.

defendant's conduct designed to bring it about than in . . . injury that may or may not have resulted therefrom."¹⁴⁰

This symbiosis and scant judicial analysis is exemplified by *Armstrong v. Shirvell*.¹⁴¹ The court, upon review of the jury award for severe emotional distress caused by the defendant who had continuously posted derogatory blog messages, protested any activity the plaintiff held or participated in, gave live national cable news interviews regarding the plaintiff's sexuality, and spread other falsehoods about the plaintiff, found that this conduct arose to the level of extreme and outrageousness.¹⁴² After finding extreme and outrageous conduct, the court's analysis took merely sentences to affirm a jury verdict against the defendant for IIED.¹⁴³ The court, in affirming the jury verdict, found that there was extreme and outrageous conduct and that there was severe emotional distress, due to this symbiotic self-defining nature of the two elements: "[a] reasonable person could certainly find this conduct extreme and outrageous, such that a reasonable person should not be expected to endure it."¹⁴⁴ The language used by the court, "a reasonable person should not be expected to endure it,"¹⁴⁵ almost mirrors comment j's definition of severe emotional distress. The court then affirmed the jury verdict with no analysis on the plaintiff's severe emotional distress.¹⁴⁶

Absence of a substantive judicial analysis of all an IIED claim's elements leaves future litigants with a lack of authority. It also creates an unwieldy tort, where there is no notice to know what conduct may result in liability. Without notice and without concrete authority defining the elements of IIED claims, HSPs will continue to be subjected to the same misperceived conceptions of the *Restatement (Second)*. But if courts utilize experts to aid the judicial analysis of the HSP's reasonable severe emotional distress, HSPs and other

140. *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 286 (Cal. 1952).

141. 596 F. App'x 433 (6th Cir. 2015).

142. *Id.* at 438–40, 452.

143. *Id.* at 452 (devoting two paragraphs of an approximately thirty-page opinion to discussing the extreme and outrageous conduct of the defendant and whether to affirm or reverse a jury decision finding defendant liable for IIED).

144. *Id.* at 452.

145. *Id.*

146. *See id.*

similarly sensitive plaintiffs will have access to the courts to litigate an IIED claim.

IV. A SOLUTION FOR COMMENT J'S PROBLEM

Calling an expert witness to establish that the plaintiff is a HSP and the reasonableness of the HSP's acute emotional distress will solve comment j's problem. Courts and judges are keenly aware of the legal determination of the *presence or absence* of evidence establishing an element of IIED. But courts and judges are not qualified, nor familiar with the medical and scientific *causes* of this evidence, such as responses within the brain, the chemical interactions in an individual's brain, the different brain pathways, or the reasons for stark differences in personalities. Nor are judges and courts familiar with a cause's effect on the specific individual, such as acute responses from stimuli that sensory processing sensitivity in HSPs is expected to influence.

In staying true to virtually all jurisdictional approaches¹⁴⁷ to determine severe emotional distress, an expert witness can aid in the initial judicial determination of sufficiency of evidence. Expert witnesses aid a fact finder in establishing a fact or create a basis for finding a fact could exist.¹⁴⁸ An expert witness is qualified to give testimony on the nature of a set of facts if the expert meets the standard set forth by the United States Supreme Court and Federal Rules of Evidence.¹⁴⁹

147. See *supra* note 60 (listing the jurisdictions that have adopted the *Restatement (Second)* elements as necessary elements to establish a cause of action for IIED).

148. An expert could aid a fact finder in an IIED claim as a psychiatrist or psychologist testifying whether the plaintiff's emotional reaction was reasonable as compared to similarly sensitive plaintiffs.

149. This standard was announced by the court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). That standard has been incorporated into the Federal Rules of Evidence:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court overruled the long-standing expert witness evaluation.¹⁵⁰ The trial court judge must now find that the evidence is “reliable” and “relevant to the task at hand.”¹⁵¹ Also, the trial court judge may use inexhaustive factors to determine whether the expert evidence is reliable: (1) whether the technique has been tested; (2) whether it has been subjected to peer review and publication; (3) the potential error rate in using the technique; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has been generally accepted in the scientific community.¹⁵² Subsequently, the Federal Rules of Evidence incorporated *Daubert*'s factors into Rule 702.¹⁵³

The rule permitting expert testimony can be utilized to solve comment j's problem for HSPs. When a HSP brings an action for IIED, the expert psychologist can establish that the plaintiff is a HSP and that the plaintiff's emotional reaction was reasonable for a HSP. The expert psychologist would first need to give testimony grounded in methods and practices generally accepted by the scientific community.¹⁵⁴ The trial court judge would also need to evaluate the type of testimony about to be given to determine the relevance to the

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- (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods; and
 - (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

150. 509 U.S. at 579, 587–89, 597. Prior to *Daubert*, the majority rule for admission of scientific evidence was the “general acceptance” standard. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (“[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”).

151. *Daubert*, 509 U.S. at 597.

152. *Id.* at 593–94.

153. *See* FED. R. EVID. 702.

154. *Daubert*, 509 U.S. at 590 (“The adjective ‘scientific’ implies a grounding in the methods and procedures of science.”).

pending issue¹⁵⁵: whether the HSP-plaintiff's severe emotional distress was reasonable for a similarly sensitive plaintiff.

In considering the expert testimony, the judge can utilize the scientific opinion and findings to weigh the reasonableness of the emotional distress. Rather than the assumption of a reasonable person of ordinary sensitivities, the judge would consider other individuals with similar psychological conditions before ruling on a motion to dismiss or a motion for summary judgment. By adopting this solution, judicial analysis would then align with comment j, even though this solution is overlooked by most jurisdictions.¹⁵⁶

The *Restatement (Second)* indicates the law bars recovery unless the harm is such that a reasonable person of ordinary sensitivities could not sustain the emotional distress.¹⁵⁷ But a person of ordinary sensitivities is a legal fiction: severe emotional distress is not capable of a precise legal definition.¹⁵⁸ The *Restatement (Second)* seems to have taken this acknowledgement into account. Comment j suggests that severe emotional distress should be considered in light of the circumstances of the specific case.¹⁵⁹ This means courts should look to the specific plaintiff to determine if the harm is reasonable.

Courts can consider these specific circumstances for HSP-plaintiffs by permitting expert psychologists to determine that the alleged severe emotional distress was reasonable to a person of *similar*¹⁶⁰ sensitivities to the plaintiff. As the person of ordinary sensitivi-

155. *Id.* at 592–93 (“This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”).

156. The *Restatement (Second)* informs those who adopt its provisions that when determining if severe emotional distress can be established, such “distress must be reasonable and justified under the circumstances.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965).

157. *See id.*

158. *EEOC v. GLC Rests., Inc.*, No. CV 05-0618 PCT-DGC, 2006 WL 3052224, at *9 (D. Ariz. Oct. 26, 2006) (stating Arizona courts use a case-by-case determination for severe emotional distress in IIED claims, as it is difficult to pin down the definition of what constitutes severe emotional distress in a plaintiff).

159. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) (“The distress must be reasonable and justified under the circumstances . . .”).

160. *See generally* *Kennedy v. Town of Billerica*, 617 F.3d 520, 530 (1st Cir. 2010) (“Massachusetts recognizes that children and other particularly susceptible

ties is a legal fiction and severe emotional distress has befuddled courts, expert psychologists can inform the court that there is indeed severe emotional distress.¹⁶¹

Experts would cut down on any threat of arbitrary decisions stemming from an unworkable ordinary sensitivities standard. For instance, Rhode Island recognized the value of expert witnesses in IIED cases and requires the use of expert witnesses when bringing a claim for IIED.¹⁶² These cases all involve some varying degree of estimating harm, which is unknowable to anyone but the plaintiff. This type of harm can manifest itself physically, but even still, there is an element of judicial uncertainty—how much compensation does a broken bone, depression, severe anxiety, or post-traumatic stress disorder each require? Rhode Island answered this question in the most judicially economic way possible. Utilizing an expert psychiatrist or psychologist can—and should—be a model for other jurisdictions adjudicating IIED claims for HSPs. Using expert witnesses in IIED litigation with a HSP-plaintiff will solve the three problems arising from comment j, previously identified and discussed.¹⁶³

This approach is consistent with avoiding turning IIED into a one-element tort.¹⁶⁴ By requiring an expert, courts will avoid a determination that severe emotional distress is present solely because the conduct was extreme and outrageous. Experts keep the extreme and outrageous conduct element separate and distinct from the severe

persons are likely to be more vulnerable to emotional harm”) (citing *Boyle v. Wenk*, 392 N.E.2d 1053, 1056 (Mass. 1979)).

161. Rhode Island is a jurisdiction that requires expert testimony on the grounds of proving harm for purposes of a claim for IIED. *Forest v. Pawtucket Police Dep't*, 290 F. Supp. 2d 215, 232 (D.R.I. 2003) (“Plaintiffs must support claims of mental and physical injury with competent expert medical opinion as to origin, existence and causation.”) (citing *Norton v. Hoyt*, 278 F. Supp. 2d 214, 220 (D.R.I. 2003)). This approach to severe emotional distress can be easily adopted by other jurisdictions, increases judicial efficiency, and reduces any implicit discrimination that has entered IIED law.

162. *Forest*, 290 F. Supp. 2d at 232.

163. See *supra* Part III for a discussion on how the *Restatement (Second)* comment j was published at a time of psychological uncertainty, the inverted relationship between NIED and IIED, and how courts summarily find the absence of severe emotional distress.

164. See *supra* Part III.C, for a discussion on extreme and outrageous conduct being treated as the single element of the tort and its implication on HSP-plaintiffs.

emotional distress element, giving each equal opportunity to be analyzed appropriately.¹⁶⁵ As the expert precludes courts from combining elements, HSPs have an opportunity to litigate their claims on the set of circumstances that produced the emotional distress.

Experts also solve the issue of determining what a reasonable, ordinarily sensitive person is without restricting access to the tort to HSPs. While it is true that a reasonably sensitive person is a legal fallacy, this does not make this standard incorrect. Holding every single plaintiff to the same standard without consideration of their specific sensitivities coupled with psychobiological differences from sensory processing sensitivity creates an unworkable standard.

Under current law, it is possible and efficient for a qualified expert to establish whether the plaintiff suffers from sensory processing sensitivity and if the plaintiff is a HSP. While it would be left to the discretion of the judge to determine if the method to evaluate HSP status complied with Rule 702, Aron and Aron's HSP Scale¹⁶⁶ could be employed. After determining that the plaintiff is a HSP, the next step would be to inform the court that the HSP-plaintiff had a reasonable emotional reaction for someone who is *similarly sensitive*. This is already within the confines of comment j, albeit a different interpretation of the comment than almost all jurisdictions use.¹⁶⁷ Keeping the same standard as the comment requires but fram-

165. For instance, expert testimony—from both the plaintiff and defendant—could make a court treat the extreme and outrageous conduct element wholly separate from the severe emotional distress element because it would not only force a court to qualify the expert's credibility and scientific knowledge but also would draw out more factual support for finding the plaintiff either is or is not a HSP.

166. *Supra* note 32 and accompanying text.

167. Severe emotional “distress must be reasonable and justified *under the circumstances* [of the case at bar, rather than in a vacuum].” RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) (emphasis added). Further, Massachusetts lowers this standard from a reasonable person of ordinary sensitivities to a reasonable child standard if the IIED plaintiff is a child. *Kennedy v. Town of Billerica*, 617 F.3d 520, 530 (1st Cir. 2010) (“Massachusetts recognizes that children and other particularly susceptible persons are likely to be more vulnerable to emotional harm.”) (citing *Boyle v. Wenk*, 392 N.E.2d 1053, 1056 (Mass. 1979)). This premise is already accepted within negligence. For instance, when the tortfeasor has a physical disability, e.g., blindness, the standard of care is lowered from a reasonable person standard to a reasonable person with the same physical disability standard. *See Roberts v. State*, 404 So. 2d 1221, 1226 (La. 1981) (holding that a blind employee did not owe a duty to the plaintiff because there is a duty to act ac-

ing it in the context of a reasonable person of similar similarities, would not be judicially inefficient nor open the floodgates of litigation. This can be done because the expert witness(es) would testify to the medical justifications for finding the plaintiff is a HSP and is predisposed to higher levels of emotional harm. The expert would be able to readily determine and offer a written report on how this plaintiff either experienced reasonable emotionality for a HSP or that the reaction was unreasonable for a HSP and thus unrecoverable. Either way, the expert witness can aid courts in finding a precise legal definition for a person of reasonable sensitivities.

Finally, the expert witness would solve the problem that comment j is outmoded given ongoing psychological research. The expert psychologist would be well versed and current on continuing medical education and have access to newly discovered techniques and studies of the human personality and psychobiological differences. Comment j, rather than have it beholden to the thinking of the 1960s, would have an expert psychologist interpret the reasonable person standard in light of specialized and current medical knowledge—something completely unknown to most, if not all, judges and juries.

Seeing the shortcomings of the current interpretation and judicial analysis of comment j and how experts can take comment j and make it beneficial for HSPs without opening the floodgates of litigation to frivolous claims, this proposal advances the original purpose of the tort. This proposal redirects attention away from an arbitrary line of reasonableness of individualistic emotional distress and towards the duty to compensating the emotional well-being of the plaintiff for intentional tortious actions.¹⁶⁸ Giving a class of people access to the courts through the permissible use of expert witnesses removes the pseudo-discriminatory nature of the current law. HSPs would be able to at the very least litigate their claim in court without fear of a motion to dismiss or motion for summary judgment before even seeing a jury.

ording to a standard of care of a person in like circumstances, in this case, the standard of care of a blind person).

168. See *supra* notes 82, 125, and accompanying text (discussing the origins of the tort for negligent mishandling of corpses, failure to deliver telegrams announcing the death of a loved one, and the need to litigate true and genuine claims of IIED).

V. CONCLUSION

Comment j currently makes litigating an IIED claim nearly impossible for most HSP-plaintiffs. This comment is outmoded because of medical knowledge advancements. Thus, a consequential development of modern law is needed. There is no such thing, in isolation, as a “reasonable” or “unreasonable” reaction to intentional cruelty that rises to the level of extreme and outrageous conduct. This Note’s proposal—permitting HSPs to call an expert witness to establish that the plaintiff is a HSP and his emotional distress is reasonable for someone of *similar* sensitivities, as opposed to ordinary sensitivities—further the original goal¹⁶⁹ of recognizing IIED as its own separate tort. This tort can be meaningful when used properly by those who need it.

Psychologists agree that nearly one in five suffers from being highly sensitive.¹⁷⁰ With this large percentage, alongside ongoing and developing psychological research, a new and meaningful approach to IIED is needed.

HSPs should be permitted to call expert witnesses to establish whether they are a HSP. The expert would also be able to inform the court that the emotional reaction was reasonable for someone of similar sensitivities and that the HSP-plaintiff suffered severe emotional distress. Using experts in this way is not inapposite to legal opinions; it is actually something courts seem to welcome. “Had there been any competent medical evidence to establish the required causal connection between . . . [the] alleged [severe emotional distress] and [defendant’s] conduct, we would not hesitate to uphold the . . . intentional infliction of emotional distress count to the jury. However, the absence of such evidence was fatal to [plaintiff’s] claim.”¹⁷¹ This Note’s proposal is the meaningful and modern approach because it cures the three major problems with comment j as it is currently interpreted for all plaintiffs, rather than just those who are “reasonable.”

169. See *supra* note 125 and accompanying text (“the duty to the emotional well-being of the potential plaintiff.”).

170. See *supra* note 10 and accompanying text.

171. *Vallinoto v. DiSandro*, 688 A.2d 830, 839 (R.I. 1997).