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BORDEN, J., concurring. I agree with and join the majority opinion. I write separately only to highlight what seems to me to be an anomaly in our law regarding the difference between the “conduct” element of the twin torts of intentional infliction of emotional distress and negligent infliction of emotional distress. Because this issue was not raised in the trial court or in either party’s brief in this court, however; see footnote 13 of the majority opinion; this appeal does not properly present it. I raise it, nonetheless, so that it might be considered in some future case.

In order to establish the tort of intentional infliction of emotional distress, the plaintiff must prove that the defendant’s conduct was “extreme and outrageous.” (Internal quotation marks omitted.) *Appleton v. Board of Education*, 254 Conn. 205, 210, 757 A.2d 1059 (2000); *Petyan v. Ellis*, 200 Conn. 243, 253, 510 A.2d 1337 (1986). In order to establish the tort of negligent infliction of emotional distress, the plaintiff must prove that the defendant’s conduct “involved an unreasonable risk of causing emotional distress . . . that . . . might result in illness or bodily harm.” (Internal quotation marks omitted.) *Scanlon v. Connecticut Light & Power Co.*, 258 Conn. 436, 446, 782 A.2d 87 (2001); *Montinieri v. Southern New England Telephone Co.*, 175 Conn. 337, 345, 398 A.2d 1180 (1978). Thus, it seems apparent to me that, with respect to proof of the defendant’s tortious conduct, the plaintiff has a more difficult burden when the defendant’s state of mind is intentional, rather than negligent. Put another way, where the defendant’s state of mind is purposefully to inflict emotional distress on the plaintiff, the plaintiff may not recover unless the defendant’s conduct in pursuance of that intent is also extreme and outrageous; but where the defendant did not have such a malevolent state of mind, but merely was negligent, the plaintiff may recover without having to prove that the conduct engaged in by the defendant was extreme and outrageous.

This means, it seems to me, that the more culpable the defendant’s state of mind, the more difficult the plaintiff’s burden of persuasion will be on the conduct element of the tort, and, therefore, the less likely it is that the defendant will be held liable. By contrast, the less culpable the defendant’s state of mind, the less difficult the plaintiff’s burden of persuasion will be on the conduct element of the tort, and, therefore, the more likely it is that the defendant will be held liable. This result strikes me as anomalous.

I do not know how or why our law regarding these two torts has developed as it has. There may be a rational explanation. Perhaps some future case will present us with the opportunity to explore and resolve

this apparent anomaly.

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