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Foreseeability in Chains: Towards a Rational Analytical Framework for Accident and Medical Malpractice Cases of Negligent Infliction of Emotional Distress in California

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FORESEEABILITY IN CHAINS: TOWARDS A RATIONAL ANALYTICAL FRAMEWORK FOR ACCIDENT AND MEDICAL MALPRACTICE CASES OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN CALIFORNIA

I. INTRODUCTION

Imagine these scenarios:[1] (1) a man witnesses the death of his long-term live-in lover when she is thrown from the car in which they are riding;[2] (2) a mother observes the staff in a reformatory infirmary ignore her son's ultimately fatal illness;[3] (3) a man on a railroad work crew sees his very close friend die of a heart attack and is forced to work in full view of the covered body;[4] (4) a mother and father arrive a few minutes after an accident involving a car in which their daughters were riding and find their daughters' lifeless bodies still inside.[5] In all of these cases, the people saw someone close to them die as a direct result of the negligence of a third party; it was arguably foreseeable that they would suffer severe emotional distress as a result. In these cases, the witnesses' emotional trauma was arguably as much a part of the horror of the accident as the victims' physical injuries. Yet under California law some would recover damages and others would not.

This Comment will concentrate on "third-party" negligent infliction of emotional distress (NIED) cases in which a person[6] suffers a severe physical injury as the result of the negligence of the tortfeasor, and another person[7] suffers severe emotional distress as a result of the injury to the victim.

California's approach to NIED recovery divides third-party claims into two general categories. First are "bystander" cases, which arise when the plaintiff suffers severe emotional distress as a result of observing the injury or death of another person negligently caused by a tortfeasor.[8] To recover in bystander cases, a non-physically-injured plaintiff needs to meet three requirements: The plaintiff must observe and be physically near the accident, be aware that the accident caused

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1. Many of the cases in this Comment are cited to offer examples of fact-based scenarios involving injuries and their effect on people who are close to the victim. While many of these cases turn on issues other than negligent infliction of emotional distress (NIED), their facts provide a useful tool to analyze actual facts under the proposed NIED standard advanced by this Comment.

2. Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

3. Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

4. Gottshall v. Consolidated Rail Corp., 114 S. Ct. 2396 (1994).

5. Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

6. Hereinafter called "victim."

7. Hereinafter called "plaintiff."

8. *E.g.*, Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985); Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

physical injury to the victim, and be closely related by blood or marriage to the victim.[9] Second are "direct victim" cases in which the plaintiff was a "direct victim" of the defendant's conduct in which the defendant breached a duty not to cause emotional distress.[10] Plaintiffs in both types of cases can recover for emotional distress without suffering any physical injury.[11]

The courts are confused about when to apply each of these tests.[12] In an attempt to balance competing—and contradictory—policy concerns, courts over time have expanded and then constricted both the bystander test[13] and the direct victim test.[14]

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9. Thing v. La Chusa, 48 Cal. 3d 644, 667-68, 771 P.2d 814, 829-30, 257 Cal. Rptr. 865, 880-81 (1989).

10. Marlene F. v. Affiliated Psychiatric Medical Clinic, 48 Cal. 3d 583, 590, 770 P.2d 278, 282, 257 Cal. Rptr. 98, 102 (1989); Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

11. *See Molien*, 27 Cal. 3d at 924-30, 616 P.2d at 817-21, 167 Cal. Rptr. at 835-39; *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. Damages for negligent infliction of emotional distress can also be "parasitic" to physical injury suffered by the plaintiff. Potter v. Firestone Tire and Rubber Co., 6 Cal. 4th 965, 981, 863 P.2d 795, 805, 25 Cal. Rptr. 2d 550, 560 (1993); *see also* Easton v. United Trade Sch. Contracting Co., 173 Cal. 199, 203, 159 P. 597, 599 (1916) (holding that "mental suffering and mental anguish" are "element[s] of damage[s]" which aggravate physical injuries).

12. *Ochoa*, 39 Cal. 3d at 182, 703 P.2d at 17, 216 Cal. Rptr. at 676-77 (Bird, C.J., dissenting) ("What has followed in *Dillon*'s wake is confusion rather than clarity."). Chief Justice Bird also noted that the *Molien* direct victim test "has spawned confusion." *Id.* at 187, 703 P.2d at 20, 216 Cal. Rptr. at 680 (Bird, C.J., dissenting).

13. Soon after *Dillon* was decided, a court of appeal allowed a mother to recover when she arrived a few minutes after her son was maimed by a gunpowder explosion. Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969). However, in 1980 another court of appeal denied recovery to a mother and father who arrived at the scene of their son's fatal electrical accident a few minutes after it occurred. Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980). In 1985 the California Supreme Court recognized a mother's right to recover when her son died because the staff in a reformatory infirmary ignored his fatal illness, even though the mother might not have seen the son's death or the events that actually caused it. Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985). In 1988 the court denied recovery to a man who witnessed the death of his long-term live-in lover. Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988). In 1989 the court denied recovery to a mother who arrived at the scene of an accident to find her son seriously injured. Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

14. *E.g.*, Marlene F. v. Affiliated Psychiatric Medical Clinic, 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989) (expanding NIED by recognizing cause of action of mothers whose sons were sexually molested by a therapist); Wiggins v. Royale Convalescent Hosp., 158 Cal. App. 3d 914, 206 Cal. Rptr. 2 (1984) (constricting NIED by denying recovery to the wife of a nursing home patient who fell out of bed because the rails on the patient's bed were negligently left lowered).

This Comment will analyze NIED claims caused by accidents and medical malpractice in which the victim suffers a grave physical injury because of the defendant's negligence.[15] Part II argues that there is a need to continue awarding NIED damages.[16] Part III provides a brief history of NIED jurisprudence. Part IV.A proposes a new test that properly values the complexities and interests at stake in an NIED claim and Part IV.B compares the proposed test with other tests.

II. TORT DAMAGES PLAY IMPORTANT SOCIAL ROLE

Tort damages in general serve important societal functions.[17] Our political and economic system does not "provide assurances that each of our injured citizens will have the appropriate health care and money for necessary living expenses."[18] NIED damages compensate people for the very real harm they suffer as a result of emotional trauma resulting from death or terrible injury to someone close to them, which can be as devastating to a person's well-being as a physical injury.[19] Moreover, a court's refusal to allow damages for a harm effectively grants the person who caused the injury a legal right to do so.[20]

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15. Other forms of professional malpractice are beyond the scope of this discussion. *See, e.g.*, Joseph J. Kelleher, Note, *An Attorney's Liability for Negligent Infliction of Emotional Distress*, 58 FORDHAM L. REV. 1309 (1990) (arguing that attorneys should be liable when their negligence causes injury to a personal interest).

16. Some courts have openly criticized awarding NIED damages to bystanders. *Thing*, 48 Cal. 3d at 673, 771 P.2d at 833, 257 Cal. Rptr. at 884 (Kaufman, J., concurring). Justice Kaufman called for a "wholesale reappraisal of the wisdom" of allowing third party NIED damages because the majority opinion was unjustly rigid and the *Dillon* test had spawned "confusion and inconsistency of results." *Id.* at 670, 771 P.2d at 833, 257 Cal. Rptr. at 882 (Kaufman, J., concurring).

17. *See* Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848. Monetary damages can make up lost wages, which are not covered by medical insurance. *Id.* at 873. While concededly falling short of the mark, tort damages may also help somewhat in restoring an injured person's dignity by sending a societal message that their suffering matters to society as a whole. *Id.* at 873-74. Bender sharply criticizes the way in which the law "monetarizes" and "commodifies" people's injuries, *id.* at 864-78, but she also notes that "the legal system has been silent about alternatives" to money damages, *id.* at 875.

18. *Id.* at 872-73. If people had access to health care and income while they were disabled or in need of treatment, tort litigation for injuries to a person's health could be rendered superfluous. *Id.*

19. Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 933, 616 P.2d 813, 823, 167 Cal. Rptr. 831, 841 (1980).

20. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 781 (1985).

The reasons advanced for categorically refusing NIED damages in which plaintiffs were not physically injured are outmoded.[21] Scholars have found Americans' often-bemoaned "litigiousness"[22] to be more anecdotal than real.[23] In spite of widely held perceptions about doctors' need to practice so-called "defensive medicine" to avoid lawsuits,[24] there is no medical malpractice liability crisis.[25]

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21. *See* Bosley v. Andrews, 142 A.2d 263 (Pa. 1958), *overruled by* Niederman v. Brodsky, 261 A.2d 84 (Pa. 1970). The *Bosley* court denied NIED recovery because "[i]n most cases, it would be impossible for medical science to prove that these subjective symptoms could not possibly have resulted from . . . fright or nervous shock." *Bosley*, 142 A.2d at 267. The *Bosley* court also feared a "tremendous number" of false claims. *Id.* In overruling *Bosley*, the *Niederman* court noted that "advancement in the medical arts should and could be legitimately reflected in changes in the legal field." *Niederman*, 261 A.2d at 86. As for the concern over false claims, the *Niederman* court noted "we are unable to accept the proposition that our courts and the judicial system in general cannot deal with fraudulent claims when they arise." *Id.* at 88.

22. Americans' alleged litigiousness has been blamed for inhibiting the development of small business, Charles Burck, *Fighting His Way Back*, FORTUNE, Oct. 18, 1993, at 172; loss of the United States' competitiveness in international sports, John J. Fialka, *Faster. Higher. Stronger. But With a Bit Less Risk.*, WALL ST. J., Feb. 10, 1992, at A13; the decline of the virtues of individualism and common sense, Jesse Birnbaum, *Crybabies: Eternal Victims*, TIME, Aug. 12, 1991, at 16; and making Americans overly risk-averse, *American Competitiveness*, WALL ST. J., Aug. 14, 1991, at A6.

23. *See, e.g.*, Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 10-11 (1983) (expressing skepticism that an increase in federal court suits, "monster cases," "atrocity stories," and "war stories" provide reliable evidence of American litigiousness); Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479, 481-83 (1987) (observing that tort claims for most commonly filed cases, such as auto accidents, have long been and continue to be relatively stable both in amounts of damages and frequency of filing while "mass toxic" and other sensational cases have grown in number but represent a small fraction of the total number of cases filed).

24. Defensive medicine is the practice in which doctors perform unnecessary procedures to cover themselves in the event they are later sued for malpractice. James P. Driscoll & William Summers, *What We Need Is Real Tort Reform—Not Snake Oil*, L.A. TIMES, Dec. 28, 1993, at B7. Defensive medicine has been blamed for increasing the cost of medical care in the United States; *see, e.g.*, Ann R. Dowd, *Fixing Clinton's Health Care Plan*, FORTUNE, Apr. 4, 1994, at 83, 85 (commenting that tens of billions of dollars a year are added to health costs by unnecessary procedures).

25. Kenneth Jost, *Still Warring Over Medical Malpractice*, A.B.A. J., May 1993, at 68. Some commentators argue that the costs of malpractice are manageable. *See, e.g.*, Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 52 (noting medical malpractice claims constitute only 10% of lawsuits); *Wasted Health Care Dollars*, 57 CONSUMER REP., 435, 443 (1992) (discussing American Medical Association study in mid-1980s that determined that total cost of medical malpractice, "including premiums and defensive medicine, was about 17 percent of physicians' earnings").

Courts should continue to award NIED damages. Since fears of unlimited liability and a litigation crisis are largely illusory, refusal to award NIED damages amounts to a heartless unwillingness to make tortfeasors accept responsibility for their actions.

III. BACKGROUND: NIED HISTORY

A. The Old Common Law

Historically, common law courts generally shunned damage awards for emotional distress.[26] Courts feared that juries "may well become bewildered, take refuge in the terms of their own experience, and simply deliver a verdict according to their liking."[27]

Courts developed the impact rule which allowed a plaintiff damages for NIED if that plaintiff suffered some kind of physical harm.[28] By the 1930s courts awarded non-physically-injured plaintiffs damages for NIED if they were in a zone of danger close to the accident.[29] The plaintiffs' reasonable fear for their personal safety would ensure the genuineness of their claim and NIED damages were therefore reasonable.[30]

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26. *See, e.g.*, Cleveland, C., C. & St. L. Ry. v. Stewart, 56 N.E. 917, 920 (Ind. App. 1900) (refusing recovery for fright or its consequences because damages were too remote and speculative); Mitchell v. Rochester Ry., 45 N.E. 354, 354-55 (N.Y. 1896), *overruled by* Battalla v. State, 176 N.E.2d 729 (N.Y. 1961) (fearing "flood of litigation" from awarding damages for emotional distress); Bosley v. Andrews, 142 A.2d 263, 267 (Pa. 1958), *overruled by* Neiderman v. Brodsky, 261 A.2d 84 (Pa. 1970) ("For every wholly genuine and deserving claim, there would likely be a tremendous number of illusory or imaginative or 'faked' ones.").

27. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 308, 379 P.2d 513, 521, 29 Cal. Rptr. 33, 40 (1963), *overruled by* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

28. *See* Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2406 & n.6 (1994) (the earliest of three major limiting tests in NIED cases was the "physical impact" test (citing Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896))).

29. Cook v. Maier, 33 Cal. App. 2d 581, 584, 97 P.2d 434, 435 (1939). Some courts continue to adhere to the zone of danger rule. *E.g.*, Keck v. Jackson, 593 P.2d 668, 670 (Ariz. 1979); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983); Stadler v. Cross, 295 N.W.2d 552, 553-55 (Minn. 1980); Asaro v. Cardinal Glennon Memorial Hosp., 799 S.W.2d 595, 599 (Mo. 1990); Bovsun v. Sanperi, 461 N.E.2d 843, 847-49 (N.Y. 1984); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861, 864-66 (Tenn. 1978); Boucher v. Dixie Medical Ctr., 850 P.2d 1179, 1181-82 (Utah 1992); Garrett v. City of New Berlin, 362 N.W.2d 137, 141-43 (Wis. 1985).

30. *See* Claudia Wrazel, Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases*, 54 S. CAL. L. REV. 847, 852 (1981).

B. *The Corpse Cases: Defining Inherently Sensitive Situations*

An exception to courts' usual reluctance to award NIED damages arose in cases where plaintiffs suffered emotional distress from the negligent delivery of death notification telegrams[31] and from the negligent mishandling of a corpse when the plaintiff was a close relative of the deceased.[32] Courts appeared to have justified their holdings in such cases based on "respect for the dead."[33]

Courts also awarded NIED damages to people who received negligently delivered telegrams if the telegram informed the plaintiff of a close relative's death. For example, in *Stuart v. Western Union Telegraph Co.*,[34] the defendants were negligently late in delivering a telegram informing the plaintiff of his brother's impending death.[35] This delay prevented the plaintiff from being with his brother in the last hours of the brother's life.[36]

A recent decision illustrates the California courts' present deference towards the relatives of the deceased.[37] In *Queseda v. Oak Hill Improvement Co.*,[38] the court found that a sister and a niece of the decedent had a cause of action for NIED when the

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31. Stuart v. Western Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885).

32. *See, e.g.*, Christensen v. Superior Court, 54 Cal. 3d 868, 876, 820 P.2d 181, 183, 2 Cal. Rptr. 2d 79, 81 (1991) (holding that a funeral director's duty not to mishandle human remains extends only to close family members "on whose behalf or for whose benefit the services were rendered").

33. *E.g.*, Kyles v. Southern Ry., 61 S.E. 278, 281 (N.C. 1908) (noting that "[r]espect for the dead is an instinct that none may violate" and ordering a new trial on the issue of emotional distress suffered when 15 or more trains operated by railroad negligently ran over plaintiff's husband's body).

34. Stuart v. Western Union Tel. Co., 18 S.W. 351 (Tex. 1885).

35. *Id.* at 353.

36. *Id.*

37. Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 261 Cal. Rptr. 769 (1989). Other jurisdictions are also sympathetic. *See, e.g.*, Tomasits v. Cochise Memory Gardens, Inc., 721 P.2d 1166, 1167 (Ariz. Ct. App. 1986) (awarding damages to family members when cemetery moved relatives' remains without plaintiff's permission); Contreraz v. Michellotti-Sawyers, 896 P.2d 1118, 1123 (Mont. 1995) (finding relatives of decedent had standing to sue for NIED when embalming fluid leaked through the decedent's clothes during the funeral); Jacobs v. Calvary Cemetery & Mausoleum, 756 P.2d 334, 335-36 (Wash. Ct. App. 1988) (upholding a $200,000 NIED award to parents whose five-year-old daughter's body was removed from its burial crypt before a capstone was installed); Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 443 (W. Va. 1985) (holding plaintiff had a cause of action for NIED when defendant negligently lost relatives' remains as result of disinterment for highway construction).

38. Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 261 Cal. Rptr. 769 (1989).

defendant funeral home and county allegedly replaced the corpse of their relative with that of another person.[39] The court found that it was "not only foreseeable but inevitable" that "close friends and family members" present at a funeral would be emotionally traumatized by negligent mishandling of the decedent's corpse.[40]

The courts' rationale for NIED damages in the corpse cases is easily justified. First, the contractual relationship imposes a duty on the funeral director to the plaintiff. Thus, the harm and the damages were limited to the people who entered into the contract, which limited the payouts of damages to close relatives of the decedent. But the corpse cases suggest something more. The death of a relative is an emotionally charged time, which eliminates any doubt as to the genuineness of the NIED claim. This unusual, highly emotional scenario with limited participants precludes endless liability.

C. Dillon *Allowed Bystander Recovery*

When it decided *Dillon v. Legg*[41] in 1968, the California Supreme Court repudiated the zone of danger rule.[42] The court awarded damages to a woman outside the zone of danger who saw the defendant's car roll over her infant child.[43]

Though the plaintiff mother in *Dillon* was in no danger herself, the court found that the grief she suffered for her child was "as likely to cause physical injury as concern over [her] own well-being."[44] This caused her to suffer a "shock which resulted in physical injury."[45] The court did not consider fraudulent claims to be a serious problem.[46] But the *Dillon* court was still concerned about limiting liability,[47] so it articulated a three-prong test to provide guidelines to determine NIED liability on a case-by-case basis.[48] The first prong examined the plaintiff's proximity to the scene of the accident.[49] The second examined whether or not the plaintiff had

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39. *Id* at 599, 261 Cal. Rptr. at 770.
40. *Id.* at 606, 261 Cal. Rptr. at 775.
41. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
42. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.
43. *Id.*
44. *Id.* at 736, 441 P.2d at 917, 69 Cal. Rptr. at 77.
45. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
46. *Id.* at 736, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78.
47. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.
48. *Id.* at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80.
49. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

contemporaneous sensory perception of the accident.[50] The third prong required the plaintiff to have a close relationship with the victim.[51]

The *Dillon* court deliberately left determination of the parameters of the prongs open to further interpretations by courts.[52] This resultant lack of a coherent analytical framework left potential litigants with "no means short of suit" to determine liability in cases that did not exactly match *Dillon*'s fact pattern.[53]

Another downfall of the *Dillon* test was its flexibility.[54] While it provided general analytical guidelines, *Dillon* failed to articulate ways to flesh them out. For example, the court's "requirement" of considering the plaintiff's contemporaneous observance of the accident begged more questions than it answered. Did contemporaneous mean presence at the exact scene of the accident, or did it mean arrival a moment, ten minutes, an hour, or a day afterward?[55] Plaintiffs in a wide range of cases tried to invoke the *Dillon* reasoning in a variety of imaginative arguments.[56]

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50. *Id.* at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80.

51. *Id.* at 741, 441 P.2d at 920-21, 69 Cal. Rptr. at 80.

52. *Id.*, 441 P.2d at 921, 69 Cal. Rptr. at 81.

53. Thing v. La Chusa, 48 Cal. 3d 644, 655, 771 P.2d 814, 821, 257 Cal. Rptr. 865, 872 (1989).

54. *See, e.g., id.* at 654, 771 P.2d at 819, 257 Cal. Rptr. at 870 (calling standards in *Dillon* "amorphous").

55. *See, e.g.*, Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) (holding that plaintiff need not visually perceive the victim's injury); Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980) (denying recovery to parents whose child was electrocuted by touching a cooler because the child was not touching the cooler at the time they came on the scene); Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978) (denying parents recovery when they arrived at an accident scene a few minutes after their daughters had died); Archibald v. Braverman, 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723, 725 (1969) (allowing recovery for mother arriving after an explosion that mangled her son's hands). Many jurisdictions declined to adopt the *Dillon* test. Williams v. Baker, 572 A.2d 1062, 1070 (D.C. 1990); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983); Stadler v. Cross, 295 N.W.2d 552, 553-55 (Minn. 1980); Asaro v. Cardinal Glennon Memorial Hosp., 799 S.W.2d 595, 599 (Mo. 1990); Bovsun v. Sanperi, 461 N.E.2d 843, 847-49 (N.Y. 1984); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861, 864-66 (Tenn. 1978); Boucher v. Dixie Medical Ctr., 850 P.2d 1179, 1181-82 (Utah 1992); Garrett v. City of New Berlin, 362 N.W.2d 137, 141-43 (Wis. 1985).

56. Most attempts by plaintiffs to invoke the *Dillon* test were futile. *See, e.g.*, Wynne v. Orcutt Sch. Dist., 17 Cal. App. 3d 1108, 1110, 95 Cal. Rptr. 458, 459 (1971) (holding that parents of fatally ill child had not alleged any duty on the part of a teacher not to tell the child's classmates about his illness). *But see* Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39, 45 (1970) (holding that plaintiff's emotional distress when jeweler lost her heirloom rings was the type of injury to the "nervous system . . . held to be

D. Molien *Allowed "Direct Victim" Recovery*

In *Molien v. Kaiser Foundation Hospitals*,[57] the court allowed recovery for NIED to plaintiffs who were not present at the scene of the injury to the victim.[58] The plaintiff's wife had been erroneously diagnosed with syphilis by the defendant hospital.[59] The plaintiff's wife believed that the plaintiff was having an extramarital affair and had given her the disease.[60] Mr. Molien suffered no physical injury.[61] Rather, he sued for NIED caused by the defendant's negligent diagnosis.[62] Mr. Molien was not present when the doctor told Mrs. Molien that she had syphilis.[63] Nevertheless, the risk of harm was "reasonably foreseeable"[64] because the defendant doctor's conduct was "directed to him" as well as his wife.[65]

Like the corpse cases, *Molien* involved a particularly emotion-laden subject: venereal disease.[66] Also, like the corpse cases, *Molien* involved a relationship of trust which was disrupted when the doctor made the erroneous diagnosis.

E. Thing *Constricts* Dillon *Test*

In *Thing v. La Chusa*,[67] the California Supreme Court tried to narrow the *Dillon* test. After a highly critical recital of "post-*Dillon* decisions"[68] the court announced that it had an "opportunity to meet its obligation to create a clear rule" for NIED liability.[69]

In *Thing*, the plaintiff mother neither saw nor heard the defendant's car strike her son, John.[70] She failed *Dillon*'s require-

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compensable in . . . *Dillon*").

57. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

58. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

59. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

60. *Id.* at 920, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.

61. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

62. *Id.* at 920, 616 P.2d at 815, 167 Cal. Rptr. at 833. Mr. Molien also sought damages for loss of consortium. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

63. *Id.* at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.

64. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

65. *Id.*

66. *Id.* at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839 (citing Schessler v. Keck, 125 Cal. App. 2d 827, 271 P.2d 588 (1954)).

67. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

68. *Id.* at 656-61, 771 P.2d at 821-25, 257 Cal. Rptr. at 872-76.

69. *Id.* at 664, 771 P.2d at 827, 257 Cal. Rptr. at 878.

70. *Id.* at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866.

ments of proximity and contemporaneous awareness of the accident.[71] She only satisfied the close relationship prong of the *Dillon* test.[72] She had learned of the accident from her daughter after John had been hit by a car and found him in the road, unconscious and bloody.[73] She thought John had died.[74] The mother alleged that she suffered "great emotional disturbance, shock, and injury to her nervous system."[75]

The California Supreme Court denied recovery.[76] The court imposed a very strict reading of *Dillon*'s sensory awareness prong.[77] Because Mrs. Thing had been in the house at the time of the accident, she failed that requirement and could not recover.[78]

In *Thing*, the court did more than merely decide that Mrs. Thing could not collect NIED damages because she had not observed the accident to her son. It also stated in dicta that only people "closely related by blood or marriage" to a victim could recover for NIED.[79]

The *Thing* decision provoked two stinging dissents by Justices Mosk[80] and Broussard,[81] and a highly critical concurrence by Justice Kaufman.[82] Justice Kaufman stated that neither the dissent's desire to keep the more liberal standard in *Dillon* nor the majority's opinion had "articulated a genuinely 'principled' rule of law."[83]

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71. *Id.* at 648, 771 P.2d at 815, 257 Cal. Rptr. at 866.
72. *Id.* at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881.
73. *Id.* at 647-48, 771 P.2d at 815, 257 Cal. Rptr. at 866.
74. *Id.* at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866.
75. *Id.* at 648, 771 P.2d at 815, 257 Cal. Rptr. at 866.
76. *Id.* at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881.
77. *Id.*
78. *Id.*
79. *Id.* at 666, 771 P.2d at 828, 257 Cal. Rptr. at 879. Close relatives by blood or marriage were more likely to suffer a severe degree of emotional distress than a "disinterested witness." *Id.*
80. *Id.* at 677, 771 P.2d at 836, 257 Cal. Rptr. at 887 (Mosk, J., dissenting) (arguing that the majority misperceived the authorities it cited).
81. *Id.* at 682, 771 P.2d at 839, 257 Cal. Rptr. at 890 (Broussard, J., dissenting). Justice Broussard argued that a flexible *Dillon* test is a "principled basis for determining [NIED] liability." *Id.* at 689, 771 P.2d at 844, 257 Cal. Rptr. at 895 (Broussard, J., dissenting).
82. *Id.* at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881 (Kaufman, J., concurring) ("[H]istory and experience have shown . . . that the quest for sensible and just limits on bystander liability is 'an inherently fruitless one.' " *Id.* at 676, 771 P.2d at 835, 257 Cal. Rptr. at 886 (Kaufman, J., concurring) (quoting Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 313, 379 P.2d 513, 524, 29 Cal. Rptr. 33, 44 (1963), *overruled by* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).
83. *Id.* at 670, 771 P.2d at 831, 257 Cal. Rptr. at 882 (Kaufman, J., concurring). Justice Kaufman proposed a return of the zone of danger test. *Id.* at 676, 771 P.2d at 835, 257 Cal. Rptr. at 886.

In this Comment, I argue that one of the problems with a flexible "test of reasonable foreseeability"[84] is that such a test may make a court willing to adopt a rigid test to avoid imposing limitless liability on defendants.[85] I propose a test that will provide the flexibility of foreseeability while avoiding the pitfall of causing a fear of limitless liability.

IV. ANALYSIS

Dillon and *Thing* have generated criticism from scholars[86] and courts alike.[87] I will try to find a middle ground between the amor-

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84. *See* Ochoa v. Superior Court, 39 Cal. 3d 159, 191, 703 P.2d 1, 23, 216 Cal. Rptr. 661, 683 (1985) (Bird, C.J., dissenting) ("*Dillon* and *Molien* compel the conclusion that reasonable foreseeability *is* the appropriate test for determining whether a defendant is liable for the negligent infliction of emotional distress.").

85. *See Thing*, 48 Cal. 3d at 656, 771 P.2d at 821, 257 Cal. Rptr. at 872. "Little consideration has been given in post-*Dillon* decisions to the importance of avoiding the limitless exposure to liability that the pure foreseeability test of 'duty' would create and towards which these decisions have moved." *Id.* For example, they justified limiting recovery to plaintiffs closely related to the victim "by blood or marriage" even though "[s]uch limitations are indisputably arbitrary since it is foreseeable that in some cases unrelated persons have a relationship to the victim or are so affected . . . that they suffer equivalent emotional distress." *Id.* at 666, 771 P.2d at 828, 257 Cal. Rptr. at 879.

86. *See, e.g.*, Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 336-40 (1984) (arguing that restrictions on *Dillon* test cost society more in the long run by not adequately redressing people's harms); John L. Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984) (criticizing amorphous nature of *Dillon* guidelines and suggesting that foreseeability is an inadequate mechanism for measuring damages); Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1982); Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 516 (1982) (criticizing rigid duty requirements for NIED); Timothy M. Cavanaugh, Comment, *A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)*, 41 HASTINGS L.J. 447 (1990) (criticizing California Supreme Court's decision in Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988), restricting recovery only to people related by blood or marriage); Michael A. Sitzman, Note, Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.: *Negligent Infliction of Emotional Distress Bounces Out of Bounds*, 22 PAC. L.J. 189, 219 (1990) ("After *Marlene F.*, the likelihood that the direct victim theory . . . will be read narrowly is remote.").

87. *See Thing*, 48 Cal. 3d at 670, 771 P.2d at 831, 257 Cal. Rptr. at 882 (Kaufman, J., concurring) ("[E]xperience has shown that rigid doctrinal limitations on bystander liability . . . result inevitably in disparate treatment of plaintiffs in substantially the same position . . . . On the other hand, two decades of adjudication under . . . *Dillon* . . . has . . . created a body of case law marked by even greater confusion and inconsistency of result."); *id.* at 685, 771 P.2d at 841, 257 Cal. Rptr. at 892 (Broussard, J., dissenting) ("The majority's strict requirement does not simply comprise a 'bright line' rule that rationally limits liability" but imposes a rule that "is arbitrary and will lead to unjust results."). The New Jersey

phous *Dillon* test and the rigid *Thing* requirements.

A. A New Test

This Comment proposes a three-step analysis.[88] In order to recover for NIED as a non-physically-injured third party, a plaintiff would need to show all of the following: (1) the victim suffered a traumatic physical injury as a result of the defendant's negligence; (2) the plaintiff suffered Post Traumatic Stress Disorder (PTSD) as a result of the victim's traumatic injury; and (3) the plaintiff had a close, affectionate, and enduring relationship (CAER) with the victim that was damaged as a result of the defendant's negligence.

1. Victim's injuries must be either fatal, severe, extremely painful, or permanent[89]

To allow a plaintiff to collect third-party NIED damages under the proposed test, the effect of the victim's injury would need to fall into any one of the following categories: the victim dies; the victim suffers permanent disfigurement; the victim suffers permanent physical or mental crippling; or the victim endures a long recovery period. The injuries required as a threshold in the proposed test would cause death or suffering so terrible that those close to the victim may suffer PTSD as a result.[90]

a. the victim dies

The injury causes the death of the victim. The victim's death can be immediate, or after a long period in which the injury precedes death.[91]

The plaintiff's psychic suffering could likely be worse if the victim died after a long period of suffering from severe burns than if the

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Supreme Court noted that "we are unpersuaded by the concerns of the California court expressed in *Elden* and *Thing* that without a 'bright line' definition of the bystander-victim relationship, courts will not be able to counteract fraudulent and meretricious claims." Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994).

88. Hereinafter called the "proposed test."

89. Many of the cases cited in this section are not cases cited for NIED holdings. In many cases NIED was not even pleaded. Rather, they are cases in which courts took notice of the devastating effects of the injuries suffered by the plaintiffs who would be "victims" in our NIED scenario. Thus, the cases are not cited for their holdings but for their fact patterns.

90. *See infra* part IV.A.2.

91. *See infra* part IV.A.1.b-d.

victim died quickly from blood loss from an automobile accident. This category also includes terminal radiation poisoning,[92] termination of an otherwise normal pregnancy,[93] or the death of a fetus from negligent prenatal care resulting in stillbirth.[94]

b. the victim suffers permanent disfigurement

Permanent damage to a person's physical appearance is often an extremely traumatic form of injury for a victim and can cause extreme emotional pain. A victim can lose self-confidence if the disfigurement is severe enough.[95] Sometimes the disfigured person's friends decrease in number because "it is real hard [for the victim] to be out in the world."[96] Disfigured people can suffer severe depression as a result of their injuries.[97] Additionally, disfigured people can suffer a sharp loss of earning capacity.[98]

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92. Golstein v. Superior Court, 223 Cal. App. 3d 1415, 273 Cal. Rptr. 270 (1990) (observing that child died from accidental overdose of radiation intended as cancer therapy). In *Golstein*, the court denied the parents' NIED claim because the parents did not "perceive the event." *Id.* at 1427, 273 Cal. Rptr. at 278.

93. *See, e.g.*, Henderson v. North, 545 So. 2d 486 (Fla. Dist. Ct. App. 1989) (noting that plaintiff mother may have miscarried as a result of a negligent biopsy).

94. *E.g.*, Kahn v. Hip Hosp., 487 N.Y.S.2d 700 (Sup. Ct. 1985) (allowing mother to recover under "zone of danger" rule); Vaillancourt v. Medical Ctr. Hosp., 425 A.2d 92 (Vt. 1980) (allowing possible NIED damages for mother).

However, the following cases expressly held that fathers could not recover. Justice v. Booth Maternity Ctr., 498 A.2d 950, 953 (Pa. Super. Ct. 1985); *Vaillancourt*, 425 A.2d at 95 (finding husband not within zone of danger). The proposed test would permit the father to recover along with the mother since both parents and the fetus would have a familial relationship. *See infra* part IV.A.3.

95. Wry v. Dial, 503 P.2d 979, 987 (Ariz. Ct. App. 1973) (observing that burn victim "wishe[d] his face was not visible" to other people).

96. *See* Washburn v. Beatt Equip. Co., 840 P.2d 860, 877 (Wash. 1992); *see also Wry*, 503 P.2d at 986 (observing burn victim was "being pointed, stared and laughed at by children and adults"); Hysell v. Iowa Pub. Serv. Co., 559 F.2d 468, 471 (8th Cir. 1977) ("Hysell has suffered serious mental distress, including a reluctance to go out in public. . . .").

97. *Washburn*, 840 P.2d at 877 (noting that clinical psychologist who examined burn victim testified that the victim's appearance may have resulted in a "pretty powerful reactive depression"); Faulk v. Power Rig Drilling Co., 348 So. 2d 219, 222 (La. Ct. App. 1977) (finding man who suffered crushed skull was extremely depressed because of severe scarring).

98. *See, e.g.*, New York Cent. R.R. v. Bianc, 250 U.S. 596, 601 (1919) ("[A] serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power. . . ."); Griffin v. General Motors Corp., 403 N.E.2d 402, 405 (Mass. 1980) (upholding opinion of trial judge who observed, "it is susceptible of common knowledge that with [her] massive scars [the victim's] future opportunities for employment are going to be impaired"); Dietrick v. Kemper Ins. Co., 556 N.E.2d 1108,

Injuries that can cause permanent disfigurement include but are not limited to severe burns[99] and severe head injuries.[100]

c. the victim suffers permanent physical crippling

Permanent physical injuries can render a person unable to work,[101] enjoy activities the victim once enjoyed,[102] or live independently.[103] Some victims suffer partial[104] or total loss of their ability to speak.[105] Bedridden victims can require special care for bladder and lung infections[106] and "pressure sores."[107] Permanent-

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1110 (N.Y. 1990) (finding that facial disfigurement has a tendency to impair earning capacity of victims); Matthews v. Falvey Linen Supply, 294 A.2d 398, 402 (R.I. 1972) (holding that burn on victim's arm reduced earning capacity).

99. Drayton v. Jiffee Chem. Corp., 591 F.2d 352, 355 (6th Cir. 1978); *Wry*, 503 P.2d at 985; *Washburn*, 840 P.2d at 877.

100. *Faulk*, 348 So. 2d at 222.

101. *See, e.g.*, Davis v. FMC Corp., 771 F.2d 224, 226 (7th Cir. 1985) (noting that a woman whose hand was mangled in a corn cutter was "denied employment, prevented from being promoted in employment, and threatened with termination, because of her severely limited dexterity"); Johnson v. H.K. Webster, Inc., 775 F.2d 1, 3 (1st Cir. 1985) (awarding foot amputee $300,000 for lost future wages); Higley v. Missouri Pac. R.R., 685 S.W.2d 572, 576 (Mo. Ct. App. 1985) (noting 40-year-old man became virtually unemployable after his limb was crushed in a train coupler because his "education[al] and mental abilities . . . suited [him] only for mechanical . . . work" which he could no longer do); Cavanaugh v. Morris, 640 A.2d 1192, 1194 (N.J. Super. Ct. App. Div. 1994) (finding young woman unable to work as a waitress because of soft tissue injuries); Grammer v. Kohlhaas Tank & Equip. Co., 604 P.2d 823, 833 (N.M. Ct. App. 1979) (finding skull fracture victim unable to work for remainder of life), *cert. denied*, 614 P.2d 545 (N.M. 1980).

102. *See, e.g.*, Flanigan v. Burlington N., Inc., 632 F.2d 880, 885 (8th Cir. 1980) ("[Amputee] can no longer garden, swim, hunt, dance or do maintenance work on his house."); *Wry*, 503 P.2d at 982, 986-87 (finding burn victim unable to be creative or athletic); *Grammer*, 604 P.2d at 833 (observing that skull fracture victim's former recreational, family, and social pleasures were lost for the remainder of his life).

103. McCoy v. Wean United, Inc., 67 F.R.D. 495, 499 (E.D. Tenn. 1975) (finding 20-year-old female college student who lost her right hand and left finger in a punch press had difficulty doing work in her home and dressing herself); Rodriguez v. McDonnell-Douglas Corp., 87 Cal. App. 3d 626, 654, 151 Cal. Rptr. 399, 414 (1978) (finding triplegic unable to care for self).

104. *E.g.*, Morrow v. Greyhound Lines, Inc., 541 F.2d 713, 717 (8th Cir. 1976) (noting that victim's speech was limited and monotone due to brain damage).

105. *E.g.*, Niles v. City of San Rafael, 42 Cal. App. 3d 230, 237, 116 Cal. Rptr. 733, 736 (1974) (noting that injured child was rendered mute); Williams v. State Highway Dept., 205 N.W.2d 200, 205 (Mich. Ct. App. 1975) (finding that victim was "unable to talk in any fashion").

106. *E.g.*, Talcott v. Holl, 224 So. 2d 420, 424 n.1 (Fla. Dist. Ct. App.) (finding that victim would need constant nursing attention for maintenance of lung, bladder, and skin condition), *cert. denied*, 232 So. 2d 181 (Fla. 1969).

107. *E.g.*, *Rodriguez*, 87 Cal. App. 3d at 653-54, 151 Cal. Rptr. at 414 (observing that

ly crippling injuries include, but are not limited to, severe burns,[108] amputation of limbs,[109] partial or total blindness,[110] partial deafness,[111] partial or total paralysis,[112] and brain damage.[113]

Permanently crippling injuries can directly affect other people close to the victim, especially when victims' conditions require that someone else care for them. Crippled victims often need wheelchairs,[114] prosthetic devices,[115] lifelong special medication,[116] or modified vehicles.[117] Severely crippled victims may require constant care at home or in a nursing facility.[118] Providing special care can

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pressure sores can penetrate to bone, leading to osteomyelitis and eventual amputation of the victim's legs).

108. *E.g.*, *Wry*, 503 P.2d at 985 (noting that burn victim will suffer for the rest of his life as a result of the injury); *Washburn*, 840 P.2d at 876 (noting that attending physician described victim's injuries as "[b]eing burned is forever").

109. *E.g.*, *Flanigan*, 632 F.2d at 885 (noting that since the amputation of his left leg, victim can no longer garden, swim, hunt, dance, or do maintenance work on his house).

110. *E.g.*, Reilly v. United States, 655 F. Supp. 976, 983 (D.R.I. 1987) (noting that child blinded at birth because of doctor's negligence will "never be able to walk, talk, feed herself, or take care of herself in any way").

111. *E.g.*, *Grammer*, 604 P.2d at 832 ("[Victim] . . . suffered a moderately severe neurosensory type hearing loss in both ears as a result of damages to the inner organ of the ears . . . ."). The victim in *Grammer* suffered a skull fracture when a compressor tank exploded. *Id.*

112. *E.g.*, Brinegar v. San Ore Constr. Co., 302 F. Supp. 630, 643 (E.D. Ark. 1969); *Rodriguez*, 87 Cal. App. 3d at 654, 151 Cal. Rptr. at 414; *Talcott*, 224 So. 2d at 422; *Williams*, 205 N.W.2d at 205 (noting 16-year-old girl suffered "partial paralysis of all four extremities and the trunk"); Stackiewicz v. Nissan Motor Corp., 686 P.2d 925, 931 (Nev. 1984) (noting auto accident made woman paraplegic).

113. *E.g.*, Caron v. United States, 410 F. Supp. 378, 395 (D.R.I. 1975); *Wry*, 503 P.2d at 986; *Faulk*, 348 So. 2d at 222; Deville v. Budd Constr. Co., 617 So. 2d 570, 577 (La. Ct. App. 1993).

114. *E.g.*, *Brinegar*, 302 F. Supp. at 643 (noting quadriplegic accident victim "must lie face down on surfboard type" wheelchair); *Stackiewicz*, 686 P.2d at 932 (noting paraplegic could not move without wheelchair).

115. *E.g.*, Yassin v. Certified Grocers, 502 N.E.2d 315, 331 (Ill. App. Ct. 1986) (observing that young child who had hand mangled by a meat tenderizer would need 16 prostheses over her lifetime).

116. *See, e.g.*, *Reilly*, 665 F. Supp. at 983 (observing injured child would require $105,837 worth of medication, lab tests, and special products); *Niles*, 42 Cal. App. 3d at 241-42, 116 Cal. Rptr. at 739-40 (observing quadriplegic 11-year-old boy would incur $196,902 worth of future medical expenses).

117. *See, e.g.*, *Reilly*, 665 F. Supp. at 983 (noting modified van for quadriplegic cost over approximately $115,000 plus approximately $68,000 in operating costs).

118. *E.g.*, *Hysell*, 559 F.2d at 471 ("Someone must be constantly in attendance to care for [the victim's] needs."); *Caron*, 410 F. Supp. at 394 (noting that injured child will require "protective care in a pediatric nursing home the remainder of her life"); *Williams*, 205 N.W.2d at 205 (victim of brain stem injury was unable to function "within her family structure" and was subsequently sent to state psychiatric hospital); *Deville*, 617 So. 2d at

cost a great deal of money[119] and strain marriages, friendships, and other relationships.[120] Sometimes people close to a victim may require counseling when the stress is too much to bear.[121]

d. the victim must endure a long recovery period

During a long recovery period, victims are often unable to work[122] or continue their education[123] and often incur high medical bills[124] or require day-to-day care until recovery.[125] Often, the monetary burden of this care falls onto loved ones who must pay, provide services, or both.[126] Injuries requiring this type of care could include moderate burns, multiple fractures, compound fractures, temporary coma, and very large cuts.

Under the proposed test, a long recovery period means that the victim would have to be cared for by the plaintiff and the plaintiff would have to lose something as a result of having to provide that care. There is no time limit requirement. If a victim suffers an injury that takes six months to heal but is able to continue working or

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577 (victim with brain stem injury needed structured, supervised care in nursing facility).

119. *See, e.g.*, *Hysell*, 559 F.2d at 474 (awarding of $578,295 for future nursing care for triple amputee was not excessive); *Niles*, 42 Cal. App. 3d at 242, 116 Cal. Rptr. at 740 (noting lifetime nursing care costs for blinded, paralyzed child exceed $1 million).

120. *See, e.g.*, Robbins v. United States, 593 F. Supp. 634, 638 (E.D. Mo. 1984) (observing biologist husband required to sharply reduce work week to care for wife who suffered crushed legs), *aff'd without op.*, 767 F.2d 930 (8th Cir. 1985); *Brinegar*, 302 F. Supp. at 644 (observing that role of quadriplegic accident victim's wife changed from "loving companion" to "lonely nurse"); *Deville*, 617 So. 2d at 577 (observing parents unable to care for burned, brain-damaged young man).

121. *E.g.*, Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 359-60 (3d Cir. 1992), *rev'd on other grounds*, 114 S. Ct. 2396, 2408 (1994) (observing that man who witnessed friend's death and was forced to view the uncovered body for several hours required hospitalization).

122. *E.g.*, Burnsed v. State Bd. of Control, 189 Cal. App. 3d 213, 215, 234 Cal. Rptr. 316, 317 (1987) (observing that after workplace assault, the victim was unable to work for 23 weeks as a result of injuries); Fletcher v. Dana Corp., 459 S.E.2d 31, 32 (N.C. Ct. App. 1995) (injured worker received workmen's compensation benefits because he was unable to find employment during recovery period).

123. *E.g.*, Klein v. Himbert, 474 So. 2d 513, 516 (La. Ct. App. 1985) (as a result of accident, victim "was forced to forego his education for two semesters").

124. *E.g.*, Tucker v. Pinder, 631 So. 2d 735, 739 (La. Ct. App. 1994) (noting that woman suffering crushed leg and fractured sternum incurred $56,013.20 in medical expenses).

125. *E.g.*, Mercer v. Fruehauf Corp., 492 So. 2d 538, 544 (La. Ct. App.), *cert. denied*, 496 So. 2d 350 (La. 1986) (observing accident victim required day-to-day care by spouse until recovery).

126. *E.g.*, Rodriguez v. Bethlehem Steel, 12 Cal. 3d 382, 386, 525 P.2d 669, 670, 115 Cal. Rptr. 765, 766 (1974) (noting that victim's spouse gave up her job to take care of him "on a 24-hour basis").

attending school, there is far less of a likelihood that people close to the plaintiff will suffer compensable emotional distress. On the other hand, a month-long recovery period where the victim requires constant care, as in a temporary coma, can be much more burdensome and thus potentially traumatic to the plaintiff.

As a general note, whether a particular injury falls into any of the categories described above can vary according to factors such as the victim's age or general health. For example, a victim with a broken leg who is an otherwise healthy young adult will likely heal relatively quickly and probably not require care that would place an undue burden on a plaintiff-caregiver. But that same injury in an elderly person could be quite different; healing might take much longer, and the victim might require much more extensive care that is a far greater burden on the plaintiff.

2. Plaintiff suffers Post Traumatic Stress Disorder

Once a court determines that a victim's injury falls into any of the categories described under Part IV.A.1, the court must examine the severity of the emotional distress suffered by the noninjured third-party plaintiff.[127] Using a catalog of discrete symptoms, psychiatrists can determine that a person is suffering from Post Traumatic Stress Disorder (PTSD).[128]

People have long known that survivors of a traumatic event often pay a heavy physical and mental price.[129] Research showed that survivors of a catastrophe exhibited a particular, definable series of symptoms that could be cataloged and examined.[130] The American Psychiatric Association (APA) included this set of criteria for

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127. If the victim does not die, suffer permanent physical or mental crippling, or endure a long recovery period, it is not reasonably foreseeable that the plaintiff will suffer severe emotional distress and thus the plaintiff should not recover. *See supra* part IV.A.3.

128. Charles R. Figley, *Traumatic Stress: The Role of the Family and Social Support System*, *in* 2 TRAUMA AND ITS WAKE: TRAUMATIC STRESS THEORY, RESEARCH AND INTERVENTION 39, 41 (Charles R. Figley ed., 1986) [hereinafter Figley]. At least one court requires "the use of medical and psychiatric evidence" to determine whether a plaintiff in an NIED case suffered compensably severe emotional distress. Heldreth v. Marrs, 425 S.E.2d 157, 167 (W. Va. 1992).

129. *See* MICHAEL J. SCOTT & STEPHEN G. STRADLING, COUNSELLING FOR POST-TRAUMATIC STRESS DISORDER 1-2 (1992) (observing that both Homer and Shakespeare accurately depicted people suffering from Post Traumatic Stress Disorder (PTSD)).

130. *See id.* at 2. Studies of flood, fire, and concentration camp survivors revealed that victims suffered traumatic stress symptoms very similar to those suffered by soldiers returning from World Wars I and II. *Id.*

diagnosing PTSD into their standard guide for diagnosis and treatment of mental disorders.[131] While not mathematically precise, these criteria provide an objective and rational way to determine the severity of a person's psychic injury.[132]

A person diagnosed with PTSD has experienced or witnessed an event which involved actual or threatened death or severe physical injury and reacted with "intense fear, helplessness or horror."[133] Afterwards, the person persistently reexperiences the traumatic event, avoids stimuli associated with the event, and suffers "increased arousal" because of the event.[134] These symptoms of PTSD continue for more than a month and cause "clinically significant distress or impairment in social, occupational, or other important areas of functioning."[135]

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131. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL (DSM-IV) 427-29 (1994) [hereinafter DSM-IV].

132. *See id.* at xxi ("[N]o definition adequately specifies precise boundaries for the concept of 'mental disorder.' ").

133. *Id.* at 427-28. Another author observed "we may be perfectly safe ourselves, yet still be traumatized when a loved one is in danger." Figley, *supra* note 128, at 42.

134. DSM-IV, *supra* note 129, at 428. In psychology, "arousal" is "a measure of responsiveness or activity in organisms." ENCYCLOPEDIC DICTIONARY OF PSYCHOLOGY 18 (Terry Pettijohn et al. eds., 3d ed. 1986) [hereinafter PSYCHOLOGY]. Degrees of arousal can range from coma at the low end to intense excitement at the high end. *Id.* For symptoms of increased arousal, see *infra* note 135.

135. DSM-IV, *supra* note 131, at 429. The full text of the PTSD criteria are as follows:

> A. The person has been exposed to a traumatic event in which both of the following were present:
>
> (1) the person experienced, *witnessed*, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self *or others*
>
> (2) the person's response involved intense fear, helplessness, or horror. . . .
>
> B. The traumatic event is persistently reexperienced in one (or more) of the following ways:
>
> (1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. . . .
>
> (2) recurrent distressing dreams of the event. . . .
>
> (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). . . .
>
> (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
>
> (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
>
> C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
>
> (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

The exact mechanism that causes psychic trauma has been debated by psychiatrists for over 100 years.[136] But the general manifestations that support a diagnosis of PTSD have been well documented.[137] Traumatic events share a number of elements that allow them to be readily identified.[138] First, they are sudden and allow no warning or time to devise a plan of escape.[139] Second, the event is dangerous for the trauma victim or someone close to that person.[140] Finally, the traumatic event is so overwhelming that it induces "a sense of temporary helplessness," which may cause a person to panic and behave in a way that is "inconsistent with his or her self-concept."[141]

People close to a victim who had the good luck to be spared injury can suffer from "survivor guilt."[142] Thus, people close to a

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(2) efforts to avoid activities, places, or people that arouse recollections of the trauma
(3) inability to recall an important aspect of the trauma
(4) markedly diminished interest or participation in significant activities
(5) feeling of detachment or estrangement from others
(6) restricted range of affect (e.g., unable to have loving feelings)
(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Id. at 427-29 (emphasis added).

136. *See* RICHARD B. ULMAN & DORIS BROTHERS, THE SHATTERED SELF: A PSYCHOANALYTIC STUDY OF TRAUMA 1-2 (1988). Ulman and Brothers argue that trauma is the result of real-world catastrophe ranging from sexual assault to atomic bomb blasts. *Id.* at 2. They seek to refute the "false impression within psychoanalysis" that the disruption of the trauma victim's "world of private fantasy" is more important than terrible real-world events. *Id.*

137. *See id.* at 2-6.

138. Figley, *supra* note 128, at 40-42.

139. *Id.* at 41.

140. *Id.* at 41-42.

141. *Id.* at 42. "Self-concept" is a "person's mental picture of himself or herself." PSYCHOLOGY, *supra* note 134, at 251.

142. Tom Williams, *Diagnosis and Treatment of Survivor Guilt: The Bad Penny Syndrome*, *in* HUMAN ADAPTATION TO EXTREME STRESS: FROM THE HOLOCAUST TO VIETNAM 319, 319-20 (John P. Wilson et al. eds., 1988). The assistance of people close to the victim of a physical injury is seen as vital to that person's psychic recovery. Figley,

victim of traumatic physical injury may be victims themselves and may require care and concern by the community at large.

As well documented as traumatic psychological injury is, there remains a persistent fear of malingering, especially in lawsuits.[143] But symptoms of PTSD show up with great regularity in disaster survivors.[144] It is unreasonable to assume that malingering is a problem in the majority of these cases. Personal tragedies do not usually make the news like great disasters such as those at Three Mile Island[145] and Bhopal.[146] Nevertheless a personal tragedy is still a disaster for the people affected by it, and they will suffer emotional trauma as a result.

Courts often ask whether or not a person claiming NIED underwent psychotherapy.[147] But the exercise of seeking treatment could be limited by a person's income. Psychiatrists use a variety of initial indicators of mental disturbance including "suicidal ideation, severe obsessional rituals, frequent shoplifting, [or] any serious impairment in social, occupational or school functions to determine

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supra note 128, at 40. The key to that success is the empathy that people close to a victim can feel for the victim's sufferings. *Id.* at 48. But empathy also makes people close to a victim "vulnerable to the consequences of their assistance by the very mechanism that makes them so effective." *Id.*

143. *See* DSM-IV, *supra* note 131, at 683.

> Malingering should be strongly suspected if any *combination* of the following is noted:
>
> 1. Medicolegal context of presentation (e.g., the person is referred by an attorney to the clinician for examination)
> 2. Marked discrepancy between the person's claimed stress or disability and the objective findings
> 3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen
> 4. The presence of Antisocial Personality Disorder

Id.

144. DSM-IV, *supra* note 131, at 424; SCOTT & STRADLING, *supra* note 129, at 2.

145. *In re* Three Mile Island Litigation, 87 F.R.D. 433, 434 (M.D. Pa. 1980). On March 28, 1979, a nuclear reactor at the Three Mile Island nuclear plant in the Susquehanna River near Harrisburg, Pennsylvania, released radioactive material into the atmosphere that contaminated the area within 25 miles of the plant. *Id.*

146. *E.g.*, Bradford C. Mank, *Preventing Bhopal: "Dead Zones" and Toxic Death Risk Index Taxes*, 53 OHIO ST. L.J. 761 (1992). On December 5, 1984, a leak of deadly poisonous gas killed more than 2,000 people and injured more than 200,000 others living in the shantytowns of Bhopal, India. *Id.* at 761.

147. *See, e.g.*, Fred W. Alvarez & Elena E. Matsis, *Reductions in Workforce: Legal Rights and Remedies in Downsizing*, 206 ALI-ABA 87, 101 (1991) (observing that if a worker sought psychotherapy after being fired, courts were likely to consider the emotional distress severe).

if a person has suffered from a serious mental disturbance."[148] Some possible indicia of PTSD might include the inability to hold a job and the avoidance of friends or family.[149] PTSD could also manifest itself through nightmares, insomnia, and loss of appetite.[150] People with PTSD could suffer from specific fears related to the traumatic incident,[151] have "difficulty concentrating,"[152] or experience deterioration of interpersonal relationships.[153]

Under the proposed test plaintiffs can introduce evidence that they are suffering from PTSD,[154] and defendants can rebut with evidence to show that the plaintiff's mental disturbance existed before the traumatic event.[155]

3. Plaintiff had a close, affectionate, and enduring relationship with victim

The proposed test examines the value of relationships among the people involved in an NIED case.[156] It values family relationships more highly than nonfamily relationships. This difference is due to the central role the family holds in our society and culture. The proposed test also allows for orderly examination of "nontraditional" and nonfamily relationships and their value to the plaintiff.[157]

A plaintiff who shows that the victim has suffered a severe or fatal injury and who demonstrates severe psychic trauma also needs to show that he or she had a close, affectionate, and enduring

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148. DSM-IV, *supra* note 131, at 32. The "Global Assessment of Functioning" (GAF) scale is often used as a way to track a person's current level of functioning to determine the need for treatment or care. *Id.* at 30.

149. *See id.* at 32.

150. *Id.* at 428.

151. *Id.* In Eyrich v. Dam, 473 A.2d 539 (N.J. Super. Ct. 1984), the plaintiff suffered a fear that he "would be attacked by a cat or other animal" after he attempted to rescue a young child from an attack by a circus leopard. *Id.* at 543.

152. DSM-IV, *supra* note 131, at 425.

153. *See id.* A person with PTSD could suffer a "feeling of detachment or estrangement from others," "restricted range of affect," or "irritability or outbursts of anger" which were "not present before the trauma." *Id.* at 428. If such episodes continued for a long enough time, they could damage relationships between victims and plaintiffs.

154. Evidence could include expert medical testimony. Paugh v. Hanks, 451 N.E.2d 759, 767 (Ohio 1983) (citing Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983)). Lay witnesses, well-acquainted with the plaintiff, could testify as to changes in plaintiff's habits or outlook. *Id.*

155. A defendant could show, for example, that the plaintiff was irritable, angry, or unable to have loving feelings before the traumatic event.

156. *See infra* part IV.A.3.

157. *See infra* part IV.A.3.c.

relationship (CAER) with the victim. The relationship must meet all three criteria to be a CAER under the proposed test.

The dictionary defines "close" as "bound by mutual interests, loyalties, or affections; intimate."[158] The dictionary defines "affectionate" as "having or sharing fond feelings or affections; loving and tender."[159] The dictionary defines "enduring" as "lasting; continuing; durable."[160]

Some relationships will not fit all categories. For example, a relationship can be close and enduring but not affectionate, as with divorced spouses who share visitation rights with respect to their children, yet who also hate each other. On the other hand, relationships can be close and affectionate but not enduring. For example, two people may meet in a bar and become friends but never contact each other when one moves away.

a. presumption with family relationship

Under the proposed test, family relationships are presumed to be CAERs because families serve a central role in inculcating people's values.[161] Also, family relationships have always enjoyed a special deference under the law.[162]

Under the proposed test, families include spouses, children (natural or adopted), siblings, and parents.[163] Under the proposed test, families can also extend beyond the so-called nuclear family to include cousins, aunts, uncles, grandparents, adoptees, step-siblings, and step-parents.[164]

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158. THE AMERICAN HERITAGE DICTIONARY 459 (3d ed. 1992).

159. *Id.* at 29.

160. *Id.* at 609.

161. *See* Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977) (observing that families act to inculcate "cherished values, moral and cultural").

162. Another definition of familial relationships is people "tak[ing] primary responsibility for caring for one another" including, but not limited to, blood relatives. Bender, *supra* note 17, at 873 n.66; *see also infra* note 222.

163. At least one court has found that a fetus was a family member for NIED purposes. *Kahn*, 487 N.Y.S.2d at 706 (quoting *Vaillancourt*, 425 A.2d at 95).

164. Rigid insistence on recovery limited to nuclear family members would not be consistent with customs in some cultures in Hawaii. *See* Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974) ("It is not uncommon in Hawaii to find several parent-children family units, with members of three or even four generations, living under one roof as a single family."). Also, "the custom of giving children to grandparents, near relatives, and friends to raise whether legally or informally remains a strong one." *Id.*

b. presumption rebuttable by preponderance of evidence

Not all family relationships are CAERs. Family members may be widely separated, unknown to each other, or simply hate one another. A defendant faced with NIED damages to a third party plaintiff should have the opportunity to show that the relationship is not worthy of grief.

For example, siblings may have hated one another for many years, and suddenly, one dies in an accident that is witnessed by the other. The defendant to the surviving sibling's NIED claim should be able to rebut the presumption by producing evidence that the siblings did not have a CAER.

c. non-family CAER provable by preponderance of evidence

Although family relationships are important,[165] the law has also recognized the value of other relationships.[166] However, such relationships could lack the objective long-term indicia of commitment that marriages have. Nevertheless, at least one progressive court was willing to examine nonmarital relationships in their totality in another context.[167]

Under the proposed test, a plaintiff claiming a CAER as the unmarried cohabitant of the victim could offer evidence to show a CAER by evidence of their intent to marry, such as a public engagement notice; testimony that they held themselves out as spouses; or attempts to marry.[168] Other evidence could include

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165. *See infra* note 222, and accompanying text.

166. *See, e.g.*, Elden v. Sheldon, 46 Cal. 3d 267, 277, 758 P.2d 582, 588, 250 Cal. Rptr. 254, 260 (1988) (acknowledging that from 1960 to 1970, "cohabitation without marriage" increased 800% and that "some of these couples are bound by emotional ties as strong as those that bind formally married partners"). From 1970 to 1980, the number of unmarried cohabitants nearly tripled again. *Id.* at 273 n.3, 758 P.2d at 585-86 n.3, 250 Cal. Rptr. at 257-58 n.3.

167. *E.g.*, Zimmerman v. Burton, 434 N.Y.S.2d 127, 129 (Civ. Ct. 1980) (holding unmarried cohabitant of deceased tenant had right to continue living in the unit under rent-control laws).

168. Ledger v. Tippitt, 164 Cal. App. 3d 625, 646, 210 Cal. Rptr. 814, 826-27 (1985), *overruled on other grounds by* Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988). In *Ledger*, the young couple tried to marry twice before the would-be husband was stabbed to death—in front of the would-be wife—during a roadside fracas. *Id.* at 630-31, 260 Cal. Rptr. at 816. This analysis would also apply to same-sex couples who either tried to marry but were legally forbidden from doing so or had a nonlegal "marriage" in a church without a marriage license. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (denying same-sex couple the ability to legally marry). Under the proposed test, one

shared checking or savings accounts,[169] estate plans that provided for each other, or even mutually beneficial life insurance policies.[170]

Under the proposed test CAERs can also include quasi-parental relationships such as a child and the child's caretaker[171] or a friendship that has lasted for many years.[172]

A defendant faced with liability could offer evidence showing, for example, that a purportedly affianced couple had a falling out. Evidence may include the return of engagement rings, statements publicly declaring that "the wedding is off," or one person's marriage to a third party before the tort.

Without a family relationship, plaintiff and victim will not have a presumption of CAER in their favor but neither will they have any presumptions against them. They will, therefore, need to adduce some evidence; plaintiffs who fail to bring any evidence that would tend to prove that they had CAERs with the victims should not have a cause of action for NIED.

The proposed test examines the relationship between a plaintiff and a victim in a way that considers the way the people involved view the relationship. Familial relationships will have a presumption in their favor of being valued, but the proposed test recognizes that not all family relationships are CAERs. A defendant should not have to pay for a plaintiff's emotional distress if the defendant can show that the plaintiff did not suffer PTSD as a result of the victim's injury. The lack of a familial relationship with the victim will not be fatal to a plaintiff's case, however.

B. Damages

Severe psychic trauma can aggravate a plaintiff's other problems and thus justify an increase in damages. If a victim requires a great

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of the partners in *Baehr* could have a claim for NIED if the other suffered a fatal, disfiguring, or crippling injury; their attempt to get a marriage license and the lawsuit both could serve as evidence of their CAER.

169. *E.g.*, Dunphy v. Gregor, 642 A.2d 372, 373 (N.J. 1994).

170. *E.g., id.*

171. *See Eyrich*, 473 A.2d at 547 ("In our view when a person who has been entrusted with the temporary care of a child witnesses the child's accidental death or critical injury and knows he cannot return the child safely to his parents, his remorse, no matter how blameless he may have been, necessarily imposes an excruciating and wrenching burden of guilt.").

172. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2415 (1994) (Ginsburg, J., dissenting) (noting that under the bystander test one who knew the decedent for 15 years may have recovered even though there is no blood or marital relation).

deal of care, providing that care can severely strain a caregiver's resources.[173] Some factors that may suggest augmented damages are the plaintiff's long period of care before a victim's death, a family's financial situation made precarious by medical expenses, or a significant loss of income caused by a caregiver's time away from work.[174] In severe cases, caregivers could lose their jobs, their good credit ratings, or their homes.[175]

These factors could aggravate already severe PTSD and justify an augmented award of damages.

C. Unlike Old Formulas, a New NIED Test for Third-Party Plaintiffs Will Effectively Balance Competing Policy Concerns and Provide an Effective Analytical Framework

NIED has generated a great deal of commentary[176] but only a few scholars propose any analyses of their own.[177] One student-

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173. *See supra* notes 117-25 and accompanying text.

174. If a victim is crippled severely enough, a person close to the victim, such as a spouse, may have almost a full-time job caring for the victim. In Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974), the California Supreme Court described the burdens a wife endured in caring for her triplegic husband:

> Each night she must wake in order to turn him from side to side, so as to minimize the occurrence of bedsores. Every morning and evening she must help him wash, dress and undress, and get into and out of his wheelchair . . . . Because he has lost all bladder and bowel control, she must assist him in the difficult and time-consuming processes of performing those bodily functions by artificial inducement. Many of these activities require her to lift or support his body weight, thus placing a repeated physical strain on her.

Id. at 386, 525 P.2d at 670-71, 115 Cal. Rptr. at 766-67; *see also* sources cited *supra* note 120.

Crippled victims may suffer a loss of sexual functions. *See* Stackiewicz v. Nissan Motor Corp., 686 P.2d 925, 932 (Nev. 1984) (observing paraplegic woman suffered total loss of sexual function); Cavanaugh v. Morris, 640 A.2d 1192, 1194 (N.J. Super. Ct. App. Div. 1994) (noting woman suffering soft tissue injuries suffered severely reduced sex life). This could strain an existing marriage or make a person who had been contemplating marriage to the victim have a change of heart.

175. For example, plaintiffs suffering PTSD could experience "irritability or outbursts of anger," alienate themselves from coworkers or supervisors and thus lose their jobs. DSM-IV, *supra* note 131, at 428. Loss of a job could lead to loss of credit or a home.

176. *E.g.*, Richard S. Miller, *The Scope of Liability of Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979); Thomas C. Zaret, Comment, *Negligent Infliction of Emotional Distress: Reconciling the Bystander and Direct Victim Causes of Action*, 18 U.S.F. L. REV. 145 (1983); *see also* sources cited *supra* note 86.

177. However, there are exceptions. *See* Julie A. Greenberg, *Negligent Infliction of Emotional Distress: A Proposal for a Consistent Theory of Tort Recovery for Bystanders and Direct Victims*, 19 PEPP. L. REV. 1283, 1310 (1992). Greenberg proposes that (1) the plaintiff or an injury victim closely related to the plaintiff must have a preexisting

written comment proposed "objective criteria" to determine the nature of the relationships and injuries to victims and plaintiffs.[178] This commentator, John David Burley, proposed a rule that synthesized all of the concerns into one formula.[179] Burley's test first requires the court to determine whether the relationship between the victim and the plaintiff "contain[s] the essence of familial or spousal ties."[180] The jury would determine whether the defendant's conduct caused "severe bodily harm or death to the victim;" whether plaintiff observed the harm; whether plaintiff appreciated the severity of the harm; whether plaintiff suffered severe emotional distress; and whether "the observance of the victim's condition [was] a substantial factor in causing the plaintiff's emotional distress."[181]

Burley's test is a step in the right direction because it begins to deal with the complexity of NIED situations. Like the proposed test, Burley's test examines the relationship between victim and plaintiff and requires a physical injury to the victim in addition to severe emotional distress for the plaintiff. But Burley's test suffers from defects that the proposed test will attempt to remedy.

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relationship with the defendant; (2) one of the primary purposes of the . . . relationship must be to protect the plaintiff's emotional tranquility; *and* (3) as a result of defendant's tortious conduct, the plaintiff must suffer severe emotional distress. *Id.* Other authors are Pearson, *supra* note 86, at 516 (arguing for zone of danger rule); and Zaret, *supra* note 176, at 168-69 (proposing jury instructions describing direct victim and bystander cases with appropriate definitions).

178. John D. Burley, Comment, *Dillon Revisited: Toward a Better Paradigm for Bystander Cases*, 43 OHIO ST. L.J. 931, 948-49 (1982). The rule outlined in Burley's comment will hereinafter be called "Burley's test."

179. *Id.*

180. *Id.*

181. *Id.* The complete text of Burley's test follows:

(1) Question of law: Does the relationship between the plaintiff and the victim contain the essence of familial or spousal ties?
(2) Question of fact:
(a) Did the defendant act negligently to cause severe bodily harm or death to the victim?
(b) Did the plaintiff observe any of the following:
(i) The development or infliction of serious bodily harm or death;
(ii) serious bodily harm or death after its occurrence but without material change in condition and location of the victim?
(c) Did the plaintiff appreciate the severity of the victim's condition at the time of the observance?
(d) Did the plaintiff suffer severe emotional distress?
(e) Was the observance of the victim's condition a substantial factor in causing the plaintiff's emotional distress?

Id.

One problem is that Burley's test appears to require contemporaneous observance and proximity to the scene of the victim's harm. Most worrisome, however, is that Burley's test does not define in detail what certain crucial terms mean. For example, what does "essence of familial or spousal ties" mean in practical terms?

The proposed test focuses on the harm suffered by the plaintiff and the victim. Requiring severe harm to plaintiff and victim provides a way to ensure the genuineness of NIED claims. Rather than merely suggesting analytical criteria, the proposed test provides relatively concrete guideposts for courts to use in determining the severity of the harm.

1. Contemporaneous observation and close proximity abandoned

The proximity requirement and the closely related contemporaneous observance requirement have come under well-justified attack.[182] Courts that favor a strict reading of *Dillon* include the proximity requirement in their tests,[183] as does Burley.[184] Like those who favor a more open-ended foreseeability standard,[185] the proposed test abandons proximity and contemporaneous observance requirements.

Courts have applied both the contemporaneous perception requirement and the proximity requirement arbitrarily.[186] A strict

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182. Ochoa v. Superior Court, 39 Cal. 3d 159, 190, 703 P.2d 1, 22-23, 216 Cal. Rptr. 661, 682 (1985) (Bird, C.J., dissenting) (arguing that "the foreseeability of emotional shock from seeing a loved one die or suffer injury does not always depend on whether the plaintiff observes the defendant's conduct or is 'contemporaneously aware' that such conduct is causing the harm"); Kelley v. Kokua Sales and Supply, Ltd., 532 P.2d 673, 678 (Haw. 1975) (Richardson, C.J., dissenting) (arguing that "[c]onfining liability to a specific sphere of contemporaneity is all too inflexible . . . [r]einstat[ing] a scheme of arbitrary distinctions as to where liability ends").

183. Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983).

184. Burley, *supra* note 178, at 948.

185. *See* Leong v. Takasaki, 520 P.2d 758 (Haw. 1974); Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994); Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983).

186. Some courts apply the requirements relatively strictly. *E.g.*, Fineran v. Pickett, 465 N.W.2d 662, 664 (Iowa 1991) (denying recovery to relatives who arrived two minutes after fatal bicycle accident to young girl because the relatives did not meet the "sensory and contemporaneous observance" requirement); Cameron v. Pepin, 610 A.2d 279, 284 (Me. 1992) (parents of son badly injured in auto accident who arrived at the hospital two hours later denied recovery because they did not "actually witness[]" their son's serious injury); Stockdale v. Bird & Son, Inc., 503 N.E.2d 951, 953-54 (Mass. 1987) (not stating the exact test but denying recovery to a mother who learned of her 21-year-old son's death from industrial accident four hours later from police and viewed his body 20 hours later in a

proximity requirement seems to ignore what happens when a person suffers PTSD because of a loved one's injury. If the loved one's injury is severe enough, it would seem that mere temporal separation from the scene of the injury would not reduce the plaintiff's emotional suffering. NIED arising from medical malpractice may not be properly compensated because the plaintiff may not observe the defendant's conduct.[187] A plaintiff's emotional distress resulting from a message about the injury or death to the victim could possibly be just as great as if the plaintiff were present at the scene and maybe as reasonably foreseeable.

Earlier commentators who proposed a relatively open-ended foreseeability analysis did not have the benefit of hindsight.[188] They did not observe a California Supreme Court, jittery about "unlimited liability," harden the *Dillon* test into an analytical straightjacket.[189] As noted above, the problem is just as much a willingness of courts to construe an NIED test too rigidly as too broadly.[190] The proposed test rejects these analyses.

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funeral home); Wilder v. City of Keene, 557 A.2d 636, 637 (N.H. 1989) (denying recovery to parents who saw their eight-year-old son in a hospital "in extremis" one hour after the son "collided with an automobile" on his bicycle because they did not meet the "contemporaneous sensory exception" requirement); Gain v. Carroll Mill Co., 787 P.2d 553, 557 (Wash. 1990) ("[M]ental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law.").

Other courts are more flexible. *E.g.*, *Kelley*, 532 P.2d at 676 (The plaintiff must be "located within a reasonable distance from the scene of the accident."); Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 570 (La. 1990) ("[The plaintiff] must . . . either view the accident or injury-causing event or come upon the accident scene soon thereafter and before substantial change has occurred in the victim's condition."); *Paugh*, 451 N.E.2d at 766 ("The closer in proximity a plaintiff is to the accident, the more likely it will be that the plaintiff's [emotional] injury is foreseeable" and "it is not necessary for a plaintiff to actually see the accident.").

187. *See* Golstein v. Superior Court, 223 Cal. App. 3d 1415, 1427, 273 Cal. Rptr. 270, 278 (1990) (holding that parents who did not perceive their son's death, caused by negligent medical care, could not recover for NIED).

188. *See, e.g.*, Nolan & Ursin, *supra* note 86, at 620 (arguing that "foreseeability and seriousness . . . [e]mployed together . . . will adequately limit the class of potential claims").

189. *See Thing*, 48 Cal. 3d at 677, 771 P.2d at 836, 257 Cal. Rptr. at 887 (Mosk, J., dissenting) ("[A]lthough the majority do not forthrightly overrule Dillon v. Legg . . . their preference is evident.").

190. *See supra* notes 76-79 and accompanying text.

2. Requires a traumatic injury to victim

The *Dillon* test[191] and the pure foreseeability test[192] do not directly address the severity of the injury suffered by a victim. Some courts have adopted a requirement that a victim suffer from death or serious physical injury before a plaintiff-observer can recover for NIED.[193] They reason that minor injuries do not cause the level of "anguish and disbelief . . . that a plaintiff may experience after witnessing the critical injury to or death of" a loved one.[194]

The proposed test includes a serious injury requirement for the victim. This is the first step in determining, in an objective way, if the emotional distress suffered by a plaintiff was real.[195] If a victim suffers a traumatic injury, it is reasonably foreseeable that persons with close relationships to the victim will suffer from an emotional injury arising out of damage to the relationship.[196] Defining the seriousness of the victim's injury will address concerns of numerous or frivolous claims.[197] It seems more likely that a plaintiff will not suffer PTSD if the victim suffers only a minor injury.

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191. Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920-21, 69 Cal. Rptr. 72, 80-81 (1968).

192. *Ochoa*, 39 Cal. 3d at 190-91, 703 P.2d at 23, 216 Cal. Rptr. at 682-83 (Bird, C.J., dissenting).

193. *E.g.*, Ramirez v. Armstrong, 673 P.2d 822, 826-27 (N.M. 1983) ("The accident must result in physical injury or death to the victim."); Heldreth v. Marrs, 425 S.E.2d 157, 165 (W. Va. 1992) ("[W]e hold that the emotional trauma alleged by a plaintiff must be the direct result of either the critical injury to or death of a person closely related to the plaintiff."); Contreras v. Carbon County Sch. Dist., 843 P.2d 589, 593 (Wyo. 1992) ("[O]nly those plaintiffs could recover . . . whose loved one did, in fact, sustain death or 'serious bodily injury.' ") (citing Gates v. Richardson, 719 P.2d 193, 198-99 (Wyo. 1986)).

194. *Heldreth*, 425 S.E.2d at 165. This should not be confused with a requirement that the *plaintiff* suffer physical injury as a result of the severe emotional distress as required in a small number of jurisdictions. *See* Barnhill v. Davis, 300 N.W.2d 104, 107-08 (Iowa 1981); Reilly v. United States, 547 A.2d 894, 895 (R.I. 1988).

195. *See supra* part IV.A.1.

196. *See supra* part IV.A.1.

197. *See* Bro v. Glaser, 22 Cal. App. 4th 1398, 27 Cal. Rptr. 2d 894 (1994). The plaintiff parents sued the defendant surgeon when he nicked their child's face during a caesarian. *Id.* at 1400, 27 Cal. Rptr. 2d at 895. The parents alleged that the doctor had caused them to suffer NIED when he negligently presented the child to them with a bandage on her face. *Id.* at 1442, 27 Cal. Rptr. 2d at 923. The court denied recovery because it believed the case "border[ed] on the frivolous." *Id.*

3. Requires a serious psychic injury to plaintiff

Most courts require that the plaintiff suffer an objectively serious psychic injury to recover for NIED.[198]

Practitioners can ascertain the severity of a person's psychic trauma because of developments in psychology and psychiatry.[199] Often, in cases of severe psychic trauma, the plaintiff will have required "extensive medical treatment and hospitalization."[200]

But a strict requirement that plaintiffs seek psychotherapy is unwise. Psychotherapy can be very expensive and health insurance often does not cover such medical expenses.[201] A therapy requirement could have the effect of barring the courthouse door to deserving plaintiffs who cannot afford to see a psychiatrist.

Therefore, the proposed test only requires that the plaintiff suffer trauma, not that the plaintiff actually receive treatment.[202]

4. Focus on plaintiff's loss of close relationship to victim

Many courts examine the relationships between plaintiff and victim in NIED cases.[203] The strictest *Dillon* constructionists require

198. *See, e.g., Lejeune*, 556 So. 2d at 570 (emotional injury must be "severe and debilitating"); *Paugh*, 451 N.E.2d at 765 (allowing recovery if the emotional distress is "both severe and debilitating"). One court leans toward requiring a physical manifestation of the emotional distress. *E.g., Barnhill*, 300 N.W.2d at 107-08 ("Compensable mental distress should ordinarily be accompanied with physical manifestations of the distress."). Other courts require a physical manifestation. *E.g.*, Corso v. Merrill, 406 A.2d 300, 308 (N.H. 1979) (allowing recovery if plaintiff's emotional distress accompanied by "objective physical symptoms"); *Reilly*, 547 A.2d at 897 (requiring "objective physical symptomology"). Other courts have recently rejected this requirement. *See, e.g.*, Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433, 438 (Me. 1982) ("Proof of physical manifestations of the mental injury is no longer required."); Folz v. State, 797 P.2d 246, 259 (N.M. 1990) ("Physical manifestation should not be the sine qua non by which to establish damages resulting from emotional trauma.").

199. *Paugh*, 457 N.E.2d at 765 (" 'Advancements in modern science lead us to . . . conclude that psychic injury is capable of being proven despite the absence of a physical manifestation of such injury' ").

200. Nolan & Ursin, *supra* note 86, at 614.

201. Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. 1303, 1307 (citing *MacNeil/Lehrer News Hour* (PBS television broadcast, Sept. 22, 1993)).

202. However, treatment could be useful as evidence of PTSD.

203. *E.g.*, James v. Lieb, 375 N.W.2d 109, 115 (Neb. 1985) ("[O]f the three *Dillon* factors the relationship between the plaintiff and victim is the most valuable in determining foreseeability, and therefore the most crucial.") (citing Portee v. Jaffee, 417 A.2d 521 (N.J. 1986)).

a familial or spousal relationship.[204] Others are willing to draw the line more broadly, usually on a case-by-case basis.[205]

A third-party NIED rule requires a close relationship between a plaintiff and the victim.[206] A properly devised standard can serve the conflicting concerns of limiting liability to negligent defendants and allowing recovery to a psychically traumatized plaintiff.

The problem is that defining the parameters of such relationships in a practical way is difficult. Simply sticking labels on relationships—such as "legal" or "family"—does not help. The label attached to the type of relationship the plaintiff had with the victim should start the analysis, not end it. The loss of a friendship could be just as devastating to a person as the loss of a spouse.[207]

5. Does not predicate recovery on artificially narrow class of relationships

Courts generally impose rigid limits on the class of NIED plaintiffs to include only those related by blood or with family ties to the victim.[208] This familial relationship has the apparent virtue of creating a bright line that discourages frivolous and fraudulent claims.[209] Burley's test requires a court's determination that the victim's and plaintiff's relationship "contain[s] the essence of familial or spousal tie[s]."[210]

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204. *E.g.*, Nugent v. Bauermeister, 489 N.W.2d 148, 150 (Mich. Ct. App. 1992) ("[A] plaintiff may recover . . . only if the plaintiff is an immediate member of the victim's family."); *James*, 375 N.W.2d at 115 ("[W]e will require that there be a marital or intimate familial relationship . . . ."); *see also Ramirez*, 673 P.2d at 825 ("[The] relationship between the victim and the plaintiff [is] limited to husband and wife, parent and child, grandparent and grandchild, brother and sister and to those persons who occupy a legitimate position in loco parentis."); *Gates*, 719 P.2d at 199 (requiring that the plaintiff have the same degree of kinship to victim as that required for a plaintiff in a wrongful death action).

205. *E.g.*, *Leong*, 520 P.2d at 766 ("[T]he absence of a blood relationship between victim and plaintiff-witness [should not] foreclose recovery."); *Dunphy*, 642 A.2d at 379 ("The State's interest in marriage would not be harmed if unmarried cohabitants are permitted to prove on a case-by-case basis that they enjoy a steadfast relationship . . . .").

206. *E.g.*, *Paugh*, 451 N.E.2d at 767 (observing that psychic harm to bystander is more foreseeable if bystander is closely related to the victim).

207. *See* Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 359-60 (3d Cir. 1993), *rev'd on other grounds*, 114 S. Ct. 2396, 2408 (1994).

208. *Thing*, 48 Cal. 3d at 666, 771 P.2d at 828, 257 Cal. Rptr. at 879; *Nugent*, 489 N.W.2d at 150; *Ramirez*, 673 P.2d at 825; *James*, 375 N.W.2d at 115.

209. *Ramirez*, 673 P.2d at 825 (limiting recovery to familial relations "in order to insure that [the plaintiff] is actually foreseeable").

210. Burley, *supra* note 178, at 948.

However, a plaintiff will also likely suffer severe emotional distress if that person's close friend is injured.[211] Some courts have held that the state has a number of interests in denying recovery when the victim has a "functional"—as opposed to actual—family relationship with the plaintiff,[212] such as promoting marriage,[213] limiting the legal consequences of a wrong to predictable and controllable consequences,[214] and relieving courts of the onerous task of dissecting a disputed relationship.[215]

Other courts are not as insistent upon blood or spousal relationships.[216] In *Dunphy v. Gregor*[217] the New Jersey Supreme Court did not find the policy considerations stated in *Elden* to be persuasive.[218] First, denying recovery in NIED cases does not promote marriage because people do not plan their lives around tort recovery for accidents.[219] Second, unmarried cohabitation prior to marriage is a "widespread reality."[220]

The proposed test objectively examines the relationship to determine the value to the parties, in order to determine if it was reasonably foreseeable that the plaintiff would suffer compensable severe emotional distress if the relationship was ended.

6. Permits evidence of nature and closeness of relationship

Familial relationships enjoy a presumption of high value because they are linked together by more than mere biological and legal relationships.[221] Family members and spouses enjoy unique rights in many areas of the law not granted to nonfamily members.[222]

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211. *See Gottshall*, 988 F.2d at 359-60. Plaintiff was hospitalized and suffered from PTSD when his friend died. *Id.*

212. Sollars v. City of Albuquerque, 794 F. Supp. 360, 364 (D.N.M. 1992) (citing with approval Elden v. Sheldon, 46 Cal. 3d 267, 274-76, 758 P.2d 582, 586-88, 250 Cal. Rptr. 254, 258 (1988)).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Leong*, 520 P.2d at 766 ("[T]he absence of a blood relationship between victim and plaintiff-witness [should not] foreclose recovery."); *Dunphy*, 642 A.2d at 379.

217. 642 A.2d 372 (N.J. 1994).

218. *Id.* at 378-79.

219. *Elden*, 46 Cal. 3d at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

220. *Id.* at 280, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

221. *See* Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977) (observing that families act to inculcate "cherished values, moral and cultural").

222. *See, e.g.*, Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 520,

Because family relationships are very highly valued, the proposed test presumes a close, affectionate, and enduring relationship if a plaintiff has a familial relation with the victim. Under the proposed test, family members include spouses, children of the plaintiff born in and out of wedlock, adoptees, stepchildren, siblings, uncles, aunts, cousins, grandparents, and grandchildren.

But families do not always love and care for each other according to the accepted norm.[223] Therefore, a defendant faced with liability for ending or injuring a familial relationship should have the opportunity to prove that the relationship did not cause severe emotional distress because it was not a valued relationship.

The proposed test recognizes that people may also have deeply valued relationships although they are unrelated by blood, marriage, or by law.[224] This example can include longtime friends[225] and unmarried cohabitants.[226]

These relationships do not have the legal rights and obligations that tie families together.[227] Therefore, such relationships should not enjoy a presumption of closeness. But the plaintiff should be able to introduce evidence to show that the relationship at issue was valued enough and its loss caused the plaintiff severe and compensable emotional distress.

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213 Cal. Rptr. 410, 412 (1985) (holding that an insurance policy not covering the gay partner of an insured employee "does not violate the equal protection clause of the California Constitution"); Nieto v. City of Los Angeles, 138 Cal. App. 3d 464, 471, 188 Cal. Rptr. 31, 34-35 (1982) (holding no unlawful discrimination in refusing to allow a surviving unmarried cohabitant to file wrongful death action); People v. Delph, 94 Cal. App. 3d 411, 415, 156 Cal. Rptr. 422, 424-25 (1979) (holding marital communications privilege in evidence not applicable to unmarried couple). Even nonloving families can be held together by very deep and powerful loyalties as manifested by such common expressions as "blood is thicker than water."

223. *See, e.g.*, Lauren E. Goldman, Note, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185, 185 (1994) ("[A] startling ninety percent [of parricides] are cases in which a child ends years of severe and relentless abuse by killing an abusive parent.").

224. *Elden*, 46 Cal. 3d at 281 n.1, 758 P.2d at 591 n.1, 250 Cal. Rptr. at 263 n.1 (Broussard, J., dissenting) (acknowledging that "[s]ome cohabital relationships serve [the same functions] as do marriages, and are thus equally deserving of legal recognition and protection").

225. *Gottshall*, 988 F.2d at 359.

226. *Dunphy*, 642 A.2d at 378-79 (allowing recovery for an unmarried couple).

227. *See* cases cited *supra* note 222.

7. Treats medical malpractice claims as accidents

Medical malpractice in California is treated as a breach of contract.[228] But when a patient suffers a physical injury from malpractice, the results can resemble an accident.[229] These consequences have the inherent potential to cause emotional distress to those close to the victim that goes far beyond mere breach of contract.[230] A fair test should allow plaintiffs to recover for (NIED) flowing from medical malpractice if a victim suffers a terrible physical injury as a result.

V. CONCLUSION

Emotional distress in day-to-day living is foreseeable. But severe, compensable emotional distress is less so because the situations that give rise to it are much more rare. The proposed test will guide courts in determing how foreseeable the plaintiff's negligent infliction of emotional distress (NIED) was in a given situation.

The proposed test will not satisfy those who crave mathematical accuracy. It may expand NIED liability in some cases and contract it in others. Allowing homosexual couples the chance to be treated the same as heterosexual couples, as the proposed test will allow, may offend some people. Other people may stubbornly believe that allowing unmarried cohabitants to recover for NIED will undermine

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228. *See, e.g.*, Newton v. Kaiser Found. Hosp., 184 Cal. App. 3d 386, 392, 228 Cal. Rptr. 890, 894 (1986) (finding "[t]he mother had a contract with [defendant] . . . by which it undertook, for consideration, to provide care and treatment for the delivery of a healthy fetus").

229. *See, e.g.*, Baxter v. Superior Court, 19 Cal. 3d 461, 463, 563 P.2d 871, 872, 138 Cal. Rptr. 315, 316 (1977) (observing that because of negligent administration of anesthesia, plaintiff's 16-year-old son "had been reduced to the mental age of three, suffered total blindness and severe impairment of his hearing, and partial paralysis of his right side"); Mobaldi v. Regents of the Univ. of Cal., 55 Cal. App. 3d 573, 578, 127 Cal. Rptr. 720, 723 (1976) (observing that plaintiff's adopted son "suffered irreversible brain damage and was made permanently blind and quadriplegic, severely retarded, subject to seizures, and generally comatose" from an injection of 50% glucose solution), *overruled on other grounds by* Baxter v. Superior Court, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 15 (1977); Harris v. Tatum, 455 S.E.2d 124, 126 (Ga. Ct. App. 1995) (observing plaintiff lost a foot as a result of blood clot that lodged there after angioplasty); Reager v. Anderson, 371 S.E.2d 619, 622-23 (W. Va. 1988) (finding 13-year-old boy lost a leg because of physicians' failure to treat "compartmental syndrome").

230. *See Mobaldi*, 55 Cal. App. 3d at 578, 127 Cal. Rptr. at 723 (observing plaintiff mother lost 40 pounds and "suffered from insomnia, despair, and futility to the extent that she sometimes became bedridden").

"family values" and make marriage, and the order it imposes, less attractive. Also, critics disposed to worry about the jury's sympathy will continue to worry.

The proposed test only tries to deal with the world as it is. The proposed test provides at least a basic framework for examining such a relationship. It does not answer the question as to whether a plaintiff who had a thirty-year live-in relationship with the victim is any more or less deserving of NIED recovery than a plaintiff who had a three-month-long, stormy marriage to a victim. Family relationships are presumed to be close, affectionate and enduring relationships (CAERs) under the proposed test because people—and the law—presume them to be so.[231] However, in the real world, people's day-to-day analyses of the relationships of others do not stop there and neither should the law's.

The proposed test should provide a way for courts to examine a type of injury that seems speculative or ethereal. But there is nothing speculative or ethereal about suffering as a result of terrible injuries to people we care deeply about. Psychiatrists have analyzed the problem of traumatic stress and devised criteria that should be of great help to courts and juries.[232]

The proposed test helps to remove a fundamental absurdity from California's NIED jurisprudence. Courts show great deference to the feelings of relatives of the deceased whose remains are mishandled or misplaced. The death of a loved one is a very difficult experience in a person's life.[233] The aggrieved relatives are given broad latitude in recovery; they need not be present at the "scene" nor must they actually see the misfeasance.[234] However, also under California's current NIED jurisprudence, a mother who comes upon her injured child in the middle of the road after the child was struck by a car will not be permitted to recover for emotional distress.[235] If that mother

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231. *See supra* part IV.A.3.

232. Unless a person simply does not trust psychiatry.

233. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL (DSM-III-R) 11 (1987) [hereinafter DSM-III-R]. For adults, the death of a spouse is rated as an "extreme" stressor; the death of a child is even worse, rated as "catastrophic." *Id.* For children and adolescents, the death of a parent is an "extreme" stressor; the death of both parents is "catastrophic." *Id.* The "Severity of Psychosocial Stressors Scale" was not included in *DSM-III-R*'s successor, *DSM-IV*. However, its usefulness to people not in the mental health professions as a general indicator of stress made it appropriate to include here.

234. *See supra* part IV.C.1.

235. *See* Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

must care for a child maimed in the accident, she will likely suffer very gravely.[236] No doubt that all the sufferers described here endure genuine emotional distress. To permit recovery for mishandling a dead person's remains while refusing to do so when the victim is still living and suffering is patently absurd. To deny recovery to one person because he or she did not happen to be married to the victim while allowing recovery for another who was divorcing the victim is equally absurd.

For these reasons, I propose an NIED test that requires that (1) the victim to suffer a fatal, disfiguring, permanently crippling injury or one that requires the victim to endure a long recovery period; (2) the plaintiff suffer Posttraumatic Stress Disorder (PTSD) as a result of the victim's injuries; and (3) the victim and plaintiff had a close, affectionate and enduring relationship (CAER) that was destroyed or damaged as a result of the victim's injury.

The proposed test is not a real solution to the problem of helping people who are traumatized by accidents or medical malpractice. While the test is better than nothing, money damages do not make people whole from mental or physical injury.[237] The problem is that when a person is "injured or incapacitated, a great deal of caregiving work is necessary."[238] The traditional caregivers, the victim's family, friends or religious institution, will suffer as well, both from the burden of caring for the victim and their own sorrow at the victim's condition.[239] But it seems unfair for people who had nothing to do with causing the accident to bear the consequences. Perhaps the greatest problem is that our culture and economy tend to marginalize caregivers and care-giving activity.[240]

One antidote would be to resist the law's present impulse to place dollar values on everything at the moment and consider long-term costs. There will always be people who will complain about the costs of caregiving. Accidents and their aftermath cost a great deal because we lose when our neighbors suffer. This may be partly out of a selfish realization that we could have been in our neighbors' place. Technical devices like automobiles magnify our ability to

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236. *See* DSM-III-R, *supra* note 233, at 11. A "serious chronic illness in self or child" is rated as an "extreme" stressor, like the death of a spouse. *Id.*

237. *See* Bender, *supra* note 17, at 872-75.

238. *Id.* at 905.

239. *See supra* part IV.A.2.

240. *See* Bender, *supra* note 17, at 905 (noting that hired caregivers are "usually lower class women who are paid too little and given no prestige for this vital work").

perform the chores of living, but they can also give us the ability to cause terrible harm. We should consider our collective responsibility to care for each other, and by extension, ourselves.

*David Paul Bleistein**

* I dedicate this piece to my family, who freely offered me a great deal of psychic help through law school; my mother, Jeanne Dering Bleistein; my father, Paul J. Bleistein; and my brother, Steven R. Bleistein. I also dedicate this piece to the staff and editors on the Loyola of Los Angeles Law Review who polished this piece with their collective grit.