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Jeffrey A. Ehrich

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**NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS:
A CASE FOR AN INDEPENDENT DUTY RULE IN
MINNESOTA**

Jeffrey A. Ehrich[†]

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[†] Mr. Ehrich is an attorney at Alliant Techsystems, Inc., assigned to its Security and Sporting Division. He formerly clerked for Justice Sam Hanson, Minnesota Supreme Court, and was a litigation associate at Leonard, Street and Deinard, P.A., practicing primarily in the areas of tort and insurance coverage litigation. Mr. Ehrich is a 2005 *magna cum laude* graduate of William Mitchell College of Law.

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I. INTRODUCTION

However articulated, the law of negligent infliction of emotional distress (NIED)

[I]s fundamentally concerned with striking a balance between two opposing objectives: first, promoting the underlying purpose of negligence law—that of compensating persons who have sustained emotional injuries attributable to the wrongful conduct of others; and second, avoiding the trivial or fraudulent claims that have been thought to be inevitable due to the subjective nature of these injuries.¹

The challenge is to refine “principles of liability to remedy violations of reasonable care while avoiding speculative results or punitive liability.”² Courts are often skeptical of mental anguish damages because they are easy to fabricate and exaggerate, and difficult to confirm, measure, and quantify. Accordingly, most courts recognize that there is generally no duty to avoid negligently inflicting emotional distress on others unless the activity falls within a narrow exception.³

1. *Camper v. Minor*, 915 S.W.2d 437, 440 (Tenn. 1996).

2. *Portee v. Jaffee*, 417 A.2d 521, 526 (N.J. 1980).

3. *E.g.*, *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 807 (Cal. 1993) (“There is no duty to avoid negligently causing emotional distress to another”); *Boyles v. Kerr*, 855 S.W.2d 593, 594–96 (Tex. 1993) (rejecting the contention

Under Minnesota law, unless specifically authorized by statute the only exceptions to this general “no duty rule” are where (1) the emotional distress arose out of a physical injury (the “physical injury” rule); (2) the emotional distress arose out of the plaintiff’s exposure to physical danger (the “zone of danger” rule); and (3) “there has been some conduct on the part of defendant constituting a direct invasion of the plaintiff’s rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious conduct” (the “direct invasion” rule).⁴

An increasing trend in other jurisdictions is to recognize a duty to avoid negligently causing emotional distress, independent of a physical injury or danger of physical injury, where the defendant violates some legal interest of the plaintiff involving a highly emotional subject matter.⁵ Types of activities typically triggering this rule include misdiagnosing serious diseases,⁶ psychological malpractice,⁷ injuring a baby during or shortly after delivery,⁸ and mishandling corpses.⁹ This article refers to the rule adopted in these cases as the “independent duty rule.” Although there is little consensus on how to define the scope of the independent duty rule, cases applying the rule can be generally grouped into three categories: (1) cases finding an independent

that there is a general duty to avoid negligently inflicting emotional distress on others); *Gates v. Richardson*, 719 P.2d 193, 195 (Wyo. 1986) (“[Traditionally t]here was no duty with respect to negligent acts which caused purely mental harm where there was no impact or threat of impact upon someone in the zone of danger.”).

4. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 560 (Minn. 1996).

5. Because independent duty cases typically involve breaching a duty owed directly to the plaintiff, they are distinguishable from bystander cases, where the plaintiff only witnesses the breach against the directly impacted victim. *See also Burgess v. Superior Court*, 831 P.2d 1197, 1200 (Cal. 1992) (“[Bystander cases] all arise in the context of physical injury or emotional distress caused by the negligent conduct of a defendant with whom the plaintiff had no preexisting relationship, and to whom the defendant had not previously assumed a duty of care beyond that owed to the public in general.”); *Chizmar v. Mackie*, 896 P.2d 196, 204 (Alaska 1995) (quoting *Burgess* for the same proposition); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 419 (Mont. 1995) (“Bystander victims are those who observe the injury or death of another person and suffer resultant emotional distress.”). This article does not address bystander recovery.

6. *E.g., Chizmar*, 896 P.2d at 205.

7. *E.g., Gracey v. Eaker*, 837 So. 2d 348, 358 (Fla. 2002).

8. *E.g., Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981).

9. *E.g., Larson v. Chase*, 47 Minn. 307, 312, 50 N.W. 238, 240 (1891).

duty because of a special relationship between the parties;¹⁰ (2) cases finding an independent duty because emotional distress was a foreseeable consequence of the breach;¹¹ and (3) cases finding an independent duty for specified categories of emotionally-charged activities as a matter of public policy.¹² A tentative draft of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (Third Restatement) endorses this third approach.¹³

This article provides a brief overview of Minnesota law on recovering damages for emotional distress,¹⁴ collects and summarizes foreign authorities endorsing and defining the independent duty rule,¹⁵ and advocates for adopting a narrow independent duty rule in Minnesota.¹⁶ If carefully constructed, the independent duty rule is more consistent with the roots of Minnesota law on emotional distress claims, better serves the general principle of providing compensation for legitimate injuries, adequately guards against frivolous claims reaching juries, does not upset any of the justifications traditionally cited for denying NIED recovery, and makes sense from a public policy standpoint.

The proposed rule takes an approach similar to that tentatively endorsed by the Third Restatement, but would include guidelines for courts when defining categories of protected activities.¹⁷ Some courts have borrowed the guidelines that many courts use when determining whether to make an exception to the general duty rule in physical injury cases.¹⁸ These guidelines, however, do not adequately advance the main objective in defining categories of activities deserving of protection from negligently inflicted emotional distress—providing a threshold guarantee that only genuine emotional injuries can reach juries. Accordingly, courts

10. *See infra* Part III.B.1.

11. *See infra* Part III.B.2.

12. *See infra* Part III.B.3.

13. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46(b) (Tentative Draft No. 5, 2007).

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part IV.

18. *E.g.*, *Kallstrom v. United States*, 43 P.3d 162, 167 (Alaska 2002); *Burgess v. Superior Court*, 831 P.2d 1197, 1205–09 (Cal. 1992); *Friedman v. Merck & Co.*, 131 Cal. Rptr. 2d 885, 891 (Ct. App. 2003) (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)); *Larsen v. Banner Health Sys.*, 81 P.3d 196, 203–04 (Wyo. 2003).

should analyze whether there is a duty to avoid negligently inflicting emotional distress on a categorical basis—as opposed to examining the facts of each individual case—by considering a number of factors:

1. Does the relevant industry recognize a standard of care that requires the defendant to prevent emotional distress?
2. Does the legal interest involve a highly emotional subject matter?
3. Is there a special relationship between the plaintiff and defendant?
4. Is the occurrence of emotional distress a foreseeable consequence of the breach?
5. Is the injury likely to be experienced by an appreciable number of the population, as opposed to a rare, idiosyncratic, hypersensitive or unusual minority?
6. Is the category narrowly defined to ensure commonality?
7. Have other jurisdictions recognized a duty for that particular category of activity?
8. Do other circumstances provide some guarantee that claims of emotional distress will be genuine and material?
9. Do strong countervailing public policy considerations militate against imposing a duty?

These factors are designed to reduce trivial or speculative claims, while providing a threshold guarantee that claims of emotional distress arising out of a protected category of activities are genuine.

II. A BRIEF OVERVIEW OF MINNESOTA LAW ON NEGLIGENTLY INFLICTED EMOTIONAL DISTRESS

As in most states, Minnesota disfavors claims seeking damages for emotional distress.¹⁹ Because psychological injury can be highly subjective and easily feigned, the Minnesota Supreme Court has explained that allowing recovery without an accompanying physical injury presents the potential for speculative, trivial, exaggerated, and/or contrived claims reaching a jury.²⁰ Accordingly, Minnesota

19. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 437 (Minn. 1983) (“Tort claims seeking damages for mental distress generally have not been favored in Minnesota.”).

20. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 560 (Minn. 1996); *Garvis v. Emp’rs Mut. Cas. Co.*, 497 N.W.2d 254, 257 n.3 (Minn.

law restricts “the availability of such damages to those plaintiffs who prove that emotional injury occurred under circumstances tending to guarantee its genuineness.”²¹ Minnesota courts currently recognize only three such circumstances.²² Each has roots dating

1993); *see also* Francis v. W. Union Tel. Co., 58 Minn. 252, 261–62, 59 N.W. 1078, 1080 (1894) (“The suffering of one under precisely the same circumstances would be no test of the suffering of another, and there being no possible standard by which such an injury can be even approximately measured, they are subject to many, if not most, of the objections to speculative damages which are universally excluded.”).

21. *Hubbard*, 330 N.W.2d at 438 (“Our past reluctance to provide a direct remedy through the recognition of an independent tort reflects a policy consideration that an independent claim of mental anguish is speculative and so likely to lead to fictitious allegations that there is a considerable potential for abuse of the judicial process.”). Minnesota law also requires that the emotional distress be premised upon a “physical manifestation.” *Leaon v. Washington Cnty.*, 397 N.W.2d 867, 875 (Minn. 1986). The threshold guarantees of trustworthiness that justify imposing an independent duty provide a substantial basis to depart from this archaic and rather arbitrary “physical manifestation” requirement. *See Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1284 (Me. 1987) (“[T]he requirement of physical manifestation of mental distress was both over-inclusive . . . and underinclusive . . .” (citing *Culbert v. Sampson’s Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982))); *Bass v. Nooney Co.*, 646 S.W.2d 765, 771 (Mo. 1983) (“[T]he requirement of physical injury resulting from the emotional distress merely meant the replacement of one arbitrary, artificial rule with another which was only somewhat less restrictive.”); *Boorman v. Nev. Med. Cremation Soc’y*, 236 P.3d 4, 8 (Nev. 2010) (“[O]ur historical concern that emotional distress must be demonstrated by some physical manifestation of emotional distress is not implicated in this context. We need not question the trustworthiness of an individual’s emotional anguish in cases involving desecration of a loved one’s remains.”); *Sinn v. Burd*, 404 A.2d 672, 679 (Pa. 1979) (“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.”); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. g (Tentative Draft No. 5, 2007) (“The requirements that the harm be serious, that the circumstances of the case be such that a reasonable person would suffer serious harm, and that there be credible evidence that the plaintiff has suffered such harm better serve the purpose of screening claims than a requirement of physical consequences.”). The physical manifestation and other requirements related to the extent of the damages suffered are beyond the scope of this article.

22. *Lichteig*, 556 N.W.2d at 560 (recognizing recovery for negligent infliction of emotional distress if (1) the plaintiff “suffers a physical injury as a result of another’s negligence”; (2) the plaintiff “was actually exposed to physical harm as a result of the negligence of another (the ‘zone-of-danger’ rule)”; and (3) where “there has been a ‘direct invasion of the plaintiff’s rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious conduct.” (quoting *State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 265 Minn. 360, 368, 122 N.W.2d 36, 41 (1963))). Although no Minnesota court has expressly framed this as a duty issue, courts from other jurisdictions have properly analyzed whether NIED damages can reach a jury under the rubric of the duty analysis. *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 807 (Cal.

back over a century.²³

The Minnesota Supreme Court first recognized the right to recover damages for emotional distress in 1886.²⁴ It confined recovery to “mental distress and anxiety which . . . is connected with the bodily injury, and is fairly and reasonably the plain consequence of such injury.”²⁵

Six years later, the court allowed emotional distress recovery without a physical impact where the plaintiff suffered fright from riding in a streetcar that nearly collided with a cable train.²⁶ This “zone of danger” basis of recovery has been limited over the years to require the plaintiff to show that he or she (1) was within the “zone of danger” of physical impact; (2) reasonably feared for his or her own safety; and (3) suffered severe emotional distress with attendant physical manifestations.²⁷ This basis for recovery was also recently expanded to include a very limited bystander recovery rule for those whose emotional distress arose out of concern for the safety of others.²⁸

1993) (recognizing that there is not a duty for one to avoid negligently inflicting emotional distress on another person in California); *Rodrigues v. State*, 472 P.2d 509, 518 (Haw. 1970) (“The cases contain the broad statement that there is no duty to refrain from the negligent infliction of mental distress. Thus the paramount issue is characterized as one of duty: whether the plaintiff’s interest in freedom from mental distress is entitled to legal protection from Defendant’s conduct.” (citation omitted)); *Boyles v. Kerr*, 855 S.W.2d 593, 594–96 (Tex. 1993) (rejecting contention that there is a general duty to avoid negligently inflicting emotional distress on others); *Gates v. Richardson*, 719 P.2d 193, 195 (Wyo. 1986) (“[Traditionally t]here was no duty with respect to negligent acts which caused purely mental harm where there was no impact or threat of impact upon someone in the zone of danger.”). This general rule will be referred to herein as the “no duty rule.”

23. See *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 137–39, 50 N.W. 1034, 1034–35 (1892) (creating the zone of danger exception); *Larson v. Chase*, 47 Minn. 307, 312, 50 N.W. 238, 240 (1891) (creating the direct invasion exception); *Keyes v. Minneapolis & St. Louis Ry.*, 36 Minn. 290, 293, 30 N.W. 888, 889 (1886) (creating the physical injury exception).

24. *Keyes*, 36 Minn. at 293, 30 N.W. at 889.

25. *Id.*

26. *Purcell*, 48 Minn. at 137–39, 50 N.W. at 1034–35. The plaintiff’s fright resulted in convulsions, a miscarriage, and later, an illness. *Id.*

27. See *K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995).

28. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 770 (Minn. 2005). In order to recover for distress caused by fear for another’s safety, the plaintiff must prove that he or she “(1) was in the zone of danger of physical impact; (2) had an objectively reasonable fear for her own safety; (3) had severe emotional distress with attendant physical manifestations; (4) stands in a close relationship to the third-party victim; and (5) that “the defendant’s conduct—the conduct that created an unreasonable risk of physical injury to the plaintiff—caused serious

Finally, in 1891 the supreme court expanded emotional distress recovery to situations where “the act complained of constitutes a violation of some legal right of the plaintiff.”²⁹ As discussed in more detail in Part IV, this “direct invasion” exception has evolved over the years to only allow recovery in cases involving “slander, libel, malicious prosecution, seduction, or other [invasions] like willful, wanton, or malicious misconduct.”³⁰

III. THE INDEPENDENT DUTY RULE

A. *An Introduction to the Independent Duty Rule*

In recent years, courts from across the country have soundly criticized the traditional rule requiring proof of physical injury or fear of physical injury before allowing compensation for emotional distress. The most common criticism is that the physical injury rule is both overinclusive and underinclusive. It is “overinclusive in permitting recovery for emotional distress when the suffering accompanies or results in any physical injury whatever, no matter how trivial,” and “underinclusive because it mechanically denies court access to claims that may well be valid and could be proved if the plaintiffs were permitted to go to trial.”³¹ In addition, “from a

bodily injury to the third-party victim.” *Id.* at 770–71.

29. *Larson v. Chase*, 47 Minn. 307, 312, 50 N.W. 238, 240 (1891).

30. *State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 265 Minn. 360, 368, 122 N.W.2d 36, 41 (1963). In an unpublished decision, the court of appeals endorsed using the pattern jury instruction for willful behavior for purposes of determining whether the direct invasion exception has been satisfied. *Gooch v. N. Country Reg'l Hosp.*, No. A05-576, 2006 WL 771384, at *3 (Minn. Ct. App. Mar. 28, 2006). According to that instruction, “a person behaves willfully when he or she knows or has reason to know that an act is prohibited by a policy, rule, regulation, statute, or law and intentionally does it anyway.” *Id.* (citing 4 MINN. PRACTICE SERIES, JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 25.40 (Michael K. Steenson & Peter B. Knapp 1999)). The *Gooch* court also endorsed using the Black’s Law Dictionary definition for wanton misconduct: “[A]n act, or failure to act when there is a duty to do so, in reckless disregard of another’s rights, coupled with the knowledge that injury will probably result.” *Id.* at *4 (citing BLACK’S LAW DICTIONARY 1014 (7th ed. 1999)). In *Lichteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557 (Minn. 1996), the supreme court declined to recognize that legal malpractice is inherently willful, reiterating that “[t]here must be a direct violation of the plaintiff’s rights by willful, wanton or malicious conduct; mere negligence is not sufficient.” *Id.* at 562.

31. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 820 (Cal. 1980); *see also Chizmar v. Mackie*, 896 P.2d 196, 202 (Alaska 1995) (quoting *Molien* and recognizing that “[s]uch concerns have prompted a growing number of jurisdictions to abandon the physical injury requirement altogether”); *St.*

purely practical point of view, it was proving difficult if not impossible to separate physical injury from what was to be considered purely mental and emotional reaction.”³² As one court aptly observed, using artificial limitations to prohibit entire classes of emotional distress claims “solely because some of the actions may be tainted by mischief is like ‘employing a cannon to kill a flea.’”³³

From a historical perspective, the physical injury limitation was created at a time when the only proof of emotional distress was the plaintiff’s own, often self-serving, testimony. More recently, courts are increasingly recognizing that “with ‘today’s more advanced state of medical science, technology and testing techniques,’ evidence of physical injury [is] not necessary to adequately determine whether a party [has] suffered emotional distress.”³⁴ Another court observed that “expert witnesses such as psychiatrist [sic], psychologists and social workers are fully capable of providing the jury with an analysis of a plaintiff’s emotional injuries.”³⁵ As early as 1970, the Hawaii Supreme Court also recognized these realities and concluded that “[i]t can no longer be said that the advantages gained by the courts in administering claims of mental distress by reference to narrow categories outweigh the burden thereby imposed on the plaintiff.”³⁶ Accordingly, in addition to being arbitrary, the traditional justifications for strict physical injury and zone of danger limitations are largely antiquated.

But, expanding emotional distress recovery involves a delicate balance. On one hand, there is no doubt that “[c]omplete emotional tranquillity [sic] is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of

Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 652 (Tex. 1987) (citing and paraphrasing *Molien*), *overruled on other grounds by* Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993) (“Therefore, we overrule the language of *Garrard* to the extent that it recognizes an independent right to recover for negligently inflicted emotional distress.”); Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 24–25 (1992).

32. Bass v. Nooney Co., 646 S.W.2d 765, 771 (Mo. 1983).

33. Gates v. Richardson, 719 P.2d 193, 197 (Wyo. 1986) (quoting *Nehring v. Russell*, 582 P.2d 67, 79 (Wyo. 1978)).

34. Sacco v. High Country Indep. Press, Inc., 896 P.2d 411, 425 (Mont. 1995) (quoting *Versland v. Caron Transp.*, 671 P.2d 583, 588 (Mont. 1983)); *see also* Sinn v. Burd, 404 A.2d 672, 679 (Pa. 1979) (“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.”).

35. Corgan v. Muehling, 574 N.E.2d 602, 609 (Ill. 1991).

36. Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970)

the price of living among people.”³⁷ But at the same time, “the human psyche can be injured in a way that is every bit as real as slicing through flesh or crushing bones,”³⁸ and “is as much entitled to legal protection as is . . . physical well-being.”³⁹ Many courts have recognized that a narrowly defined independent duty rule strikes an appropriate balance between these extremes, while providing adequate threshold guarantees of trustworthiness.⁴⁰

But to say that the defendant had an independent duty is only “a shorthand statement of a conclusion, rather than an aid to analysis in itself.”⁴¹ The concept of a “‘duty’ is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”⁴² Accordingly, to understand what it means to have an independent duty to avoid causing emotional distress, it is necessary to examine how courts have defined the scope of the duty and the circumstances under which it has been adopted. Approaches followed by different jurisdictions can be loosely grouped into three categories: (1) the foreseeability approach; (2) the special relationship approach; and (3) the categorical approach.

37. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

38. *Boyles v. Kerr*, 855 S.W.2d 593, 618 (Tex. 1993) (Doggett, J., dissenting).

39. *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1283 (Me. 1987).

40. *See, e.g., Kallstrom v. United States*, 43 P.3d 162, 167 (Alaska 2002) (“The bystander and preexisting duty exceptions permit recovery for [NIED] in the absence of physical injury because they ‘represent isolated situations where courts have found that the special circumstances surrounding a claim for emotional damages serve as a sufficient guarantee that the claim is neither false nor insubstantial.’” (quoting *Chizmar v. Mackie*, 896 P.2d 196, 202 (Alaska 1995))); *Larsen v. Banner Health Sys.*, 81 P.3d 196, 205 (Wyo. 2003) (“[T]he independent duty exception . . . is sufficiently limited in scope so as to avoid an overwhelming burden.”); *see also* DAN B. DOBBS, *THE LAW OF TORTS* 849 (2000) (“When the defendant owes an independent duty of care to the plaintiff, there is no risk of unlimited liability to an unlimited number of people. Liability turns solely on relationships accepted by the defendant, usually under a contractual arrangement.”).

41. *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968) (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 332–33 (3d ed. 1964)).

42. *Id.*

B. *Different Formulations of the Independent Duty Rule*

1. *Foreseeability Approach*

A few jurisdictions recognize a duty when emotional distress was a foreseeable consequence of the breach.

In *Gammon*, the Maine Supreme Judicial Court declared that foreseeability alone “provides adequate protection against unduly burdensome liability claims for emotional distress.”⁴³ Using the classic case of mishandling a corpse as an illustration, the court reasoned that foreseeability and genuineness of the injury go hand-in-hand:

Courts have concluded that the exceptional vulnerability of the family of recent decedents makes it highly probable that emotional distress will result from mishandling the body. That high probability is said to provide sufficient trustworthiness to allay the court’s fear of fraudulent claims. This rationale, it seems, is but another way of determining that the defendant reasonably should have foreseen that mental distress would result from his negligence.⁴⁴

The court found further comfort by rejecting the “eggshell” plaintiff doctrine for NIED claims.⁴⁵ According to the court, “[a] defendant is bound to foresee psychic harm only when such harm reasonably could be expected to befall the ordinarily sensitive person.”⁴⁶ Applying this test to the facts, it found “no sound basis to preclude potential compensation” to the plaintiff, who suffered emotional distress upon finding a human leg in a bag that he believed contained his recently deceased father’s personal belongings.⁴⁷

The North Carolina Supreme Court viewed the foreseeability approach as striking an appropriate balance between the harshness of the physical impact rule and the potential for abuse if recovery

43. *Gammon*, 534 A.2d at 1285. The court characterized the following traditional limitations on NIED recovery as “more or less arbitrary”: proof of a physical impact, an objective manifestation of the mental distress, an underlying or accompanying tort, and special circumstances. *Id.* at 1283.

44. *Id.* at 1285 (citations omitted) (internal quotation marks omitted).

45. *See id.* (“We do not foresee any great extension of tort liability by our ruling today. We do not provide compensation for the hurt feelings of the supersensitive plaintiff . . .”).

46. *Id.*

47. *Id.* at 1283, 1286.

were allowed for temporary fright or disappointment.⁴⁸ According to the court in *Johnson*, damages for NIED are recoverable “if the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and foreseeable result of the defendant’s negligence.”⁴⁹ It explained that foreseeability is the appropriate standard because:

If recovery is limited to instances where it would be generally viewed as appropriate and not excessive, then, by definition, the defendant’s liability is commensurate with the damage that the defendant’s conduct caused. Further, the judicial system would not be overburdened by administering fair and proper claims. Additionally, our trial courts have adequate means available to them for disposing of improper claims for negligent infliction of emotional distress and for adjusting excessive or inadequate verdicts.⁵⁰

Accordingly, the *Johnson* court held that the mother of a stillborn fetus properly stated a claim for NIED against her physician who wrongfully caused the fetus’ death.⁵¹

The Missouri Supreme Court also concluded that the foreseeability test struck the appropriate balance between “unduly extending liability to situations where the defendant’s acts constitute socially desirable activity and his blame is only slight,” and the unfairness, inequity and arbitrariness of the now-antiquated impact rule.⁵² The court thus endorsed imposing a duty if “the defendant should have realized that his conduct involved an unreasonable risk of causing the distress.”⁵³ Under the particular

48. See *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 97 (N.C. 1990). In rejecting the physical impact test and overruling a prior decision suggesting that a physical impact was a prerequisite, the court noted that “[c]ommon sense and precedent tell us that a defendant’s negligent act toward one person may proximately and foreseeably cause emotional distress to another person and justify his recovering damages, depending upon their relationship and other factors present in the particular case.” *Id.* at 95.

49. *Id.* at 97 (emphases omitted). The Montana Supreme Court has adopted a nearly identical test. See *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 425 (Mont. 1995) (“A cause of action for negligent infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant’s negligent act or omission.”).

50. *Johnson*, 395 S.E.2d at 98 (citations omitted) (internal quotation marks omitted).

51. *Id.* at 87, 99.

52. *Bass v. Nooney Co.*, 646 S.W.2d 765, 772 (Mo. 1983).

53. *Id.*

facts of the case, it found that there was a fact issue for trial on whether “these defendants could anticipate that an ordinary person normally constituted would succumb to serious emotional distress by reason of being trapped in a stalled elevator.”⁵⁴

2. *Special Relationship Approach*

A growing number of jurisdictions recognize that certain special relationships give rise to an independent duty to avoid negligently inflicting emotional distress.⁵⁵ As a general proposition, courts using this approach look for the existence of some special contractual or statutory relationship involving the plaintiff’s particular vulnerability or susceptibility to emotional distress.

For instance, in *Burgess v. Superior Court*,⁵⁶ the California Supreme Court held that recovery is allowed “in cases where a duty arising from a preexisting relationship is negligently breached.”⁵⁷ The plaintiff sought to recover for emotional distress arising out of witnessing physical injuries to her child during birth.⁵⁸ After easily finding the doctor-patient relationship created a duty of care,⁵⁹ the

54. *Id.* at 773. The court suggested that evidence relevant to this question would be the maximum period of entrapment that might reasonably be contemplated, the method of release, and the physical hazard presented during rescue. *Id.* at 773 nn.5–6.

55. DOBBS, *supra* note 40, at 849. (“The idea that a contractual or similar relationship can bespeak a duty assumed by the defendant or one imposed by law is itself of respectable lineage.”).

56. 831 P.2d 1197 (Cal. 1992).

57. *Id.* at 1201. Twelve years earlier, the same court had strongly suggested that the existence of a duty to avoid causing emotional distress is governed by a strict foreseeability standard. *See Molién v. Kaiser Found. Hosp.*, 616 P.2d 813, 816–17 (Cal. 1980) (discussing at length the role of foreseeability in the duty analysis and finding the existence of a duty in large part because “[i]n the case at bar the risk of harm to plaintiff was reasonably foreseeable to defendants.”). Nine years later, the court backed away from a strict foreseeability approach, stating “it is clear that foreseeability of the injury alone is not a useful ‘guideline’ or a meaningful restriction on the scope of the NIED action.” *Thing v. La Chusa*, 771 P.2d 814, 826 (Cal. 1989). The *Burgess* court expressly overruled *Molién* to the extent it purported to introduce “a new method for determining the existence of a duty, limited only by the concept of foreseeability.” *Burgess*, 831 P.2d at 1201.

58. *See Burgess*, 831 P.2d at 1199.

59. *Id.* at 1201. The court noted that the existence of a preexisting relationship between the plaintiff and the defendant made this a “direct victim” case, which is distinguishable from bystander cases. *Id.* at 1200. The major concern in bystander cases is the possibility of exposing the tortfeasor to a limitless class of plaintiffs, which could result in the imposition of liability out of proportion to the culpability of the defendant. *Thing*, 771 P.2d at 826–27. Accordingly, like many jurisdictions, bystander recovery in California is limited to situations where

court focused its analysis on the scope of the duty that the defendant physician owed the mother.⁶⁰ It noted the physical and emotional connection between a mother and her fetus:

It is in light of both these physical and emotional realities that the obstetrician and the pregnant woman enter into a physician-patient relationship. It cannot be gainsaid that both parties understand that the physician owes a duty to the pregnant woman with respect to the medical treatment provided to her fetus. Any negligence during delivery which causes injury to the fetus and resultant emotional anguish to the mother, therefore, breaches a duty owed directly to the mother.⁶¹

Because the defendant's negligent delivery of the plaintiff's baby breached a duty that he owed to both the baby and the mother, the court explained that her "claim for emotional distress damages may simply be viewed as an ordinary professional malpractice claim, which seeks as an element of damage compensation for her serious emotional distress."⁶²

the plaintiff "(1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." *Id.* at 815. The *Burgess* court made clear that these limitations do not apply to direct victim cases. *Burgess*, 831 P.2d at 1203.

60. *Burgess*, 831 P.2d at 1202. Later in the opinion, the court applied a multi-factor balancing test to determine whether public policy considerations compel a finding of no duty. *Id.* at 1205–09. This portion of the opinion is discussed in more detail in Part V. Before conducting the balancing test, however, the court declared that the result was predetermined because of the doctor-patient relationship. *Id.* at 1205 ("Although in this case the existence of the applicable duty is clearly established by virtue of the physician-patient relationship between [the plaintiff and defendant], the considerations set forth above provide a framework for our review of [the defendant's] policy arguments against imposing liability."). Thus, the court treated the balancing approach as necessary only to determine whether an exception should be made to the imposition of a duty in doctor-patient cases involving highly emotional subjects such as childbirth. *See id.* at 1205–06 (describing the mother-child relationship during pregnancy).

61. *Id.* at 1203.

62. *Id.* While generally touted as a seminal decision in this area, the *Burgess* decision leaves much to be desired when attempting to apply it outside the context of negligent childbirth because it does not clearly define what type of "preexisting relationship" is necessary to trigger an independent duty. It is unclear, for example, whether the court was imputing the child's physical harm to the mother, making a categorical exception for all medical malpractice cases, or limiting the duty to avoid negligently inflicting emotional distress to childbirth cases.

An Alaska decision expanded upon the *Burgess* rule by adopting a hybrid foreseeability/special relationship approach.⁶³ After criticizing the strict foreseeability approach, the Alaska Supreme Court limited recovery to situations “where the defendant owes the plaintiff a preexisting duty.”⁶⁴ Exactly what the court meant by “preexisting duty” is unclear from the opinion, but it found such a duty to exist where the plaintiff alleged her treating physician misdiagnosed her with AIDS.⁶⁵ Instead of using foreseeability as an element of the duty analysis, the court held that the scope of the physician’s duty is to “refrain from activity which presented a foreseeable and unreasonable risk of causing emotional distress.”⁶⁶ After taking judicial notice of the “unquestionable” “significance of a false imputation of AIDS,” it held that this allegation was sufficient to present a fact issue for the jury on the foreseeability and seriousness of the plaintiff’s emotional distress.⁶⁷

A Texas court has also endorsed a hybrid foreseeability/special relationship test that imposes a duty when emotional distress is “a foreseeable result of a breach of a duty arising out of certain ‘special relationships.’”⁶⁸ The Texas Court of Appeals aptly observed that “[s]pecial relationship cases generally have three common elements: (1) a contractual relationship between the parties, (2) a particular susceptibility to emotional distress on the part of the plaintiff, and (3) the defendant’s knowledge of the plaintiff’s particular susceptibility to the emotional distress, based on the circumstances.”⁶⁹ Applying this test, the court found that a special relationship existed between a county medical examiner’s office and the father of a recently deceased young child where the defendant had a statutory obligation to perform an autopsy, but

63. *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995).

64. *Id.* The extent of the court’s criticism of the strict foreseeability approach was “[w]e do not believe that the traditional tort principle of foreseeability, standing alone, properly defines the scope of a defendant’s duty in an action for damages for negligently inflicted emotional distress.” *Id.* The court was also careful to note that “a plaintiff may recover for only ‘severe’ or ‘serious’ emotional distress.” *Id.* at 204.

65. *Id.* at 203.

66. *Id.* at 205. The impact of this distinction is that foreseeability becomes a question for the jury, not the court. *Id.*

67. *Id.*

68. *Freeman v. Harris Cnty.*, 183 S.W.3d 885, 890 (Tex. App. 2006) (citing *Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997)).

69. *Id.*

lost the child's body.⁷⁰

In *Curtis v. MRI Imaging Services II*,⁷¹ the Oregon Supreme Court provided a somewhat more helpful explanation as to when emotional distress damages are recoverable in the context of special relationships.⁷² According to the court, the duty to avoid a specific type of harm is driven by the standard of care in that particular industry:

[W]here the standard of care in a particular medical profession recognizes the possibility of adverse psychological reactions or consequences as a medical concern and dictates that certain precautions be taken to avoid or minimize it, the law will not insulate persons in that profession from liability if they fail in those duties, thereby causing the contemplated harm.⁷³

Later Oregon decisions clarified that an industry standard to avoid emotional harm is not, in itself, determinative.⁷⁴ Rather, "the legally protected interest so identified must be of sufficient importance to warrant the award of damages for emotional distress," such as certain types of special relationships between the plaintiff and the defendant.⁷⁵ Instead of declaring the existence of special relationships on a categorical basis (e.g., all doctor-patient

70. *Id.* Although the plaintiff did not have a contractual relationship with the defendant, the court noted that the statutory duty was a sufficient substitute. *Id.* The statute at issue required the defendant medical examiner to conduct an autopsy on "a child who is younger than six years of age and the death is reported under Chapter 264, Family Code," which governs child protective services. TEX. CODE CRIM. PROC. ANN. art. 49.25 § 6(a)(7). In an earlier, highly controversial decision, the Texas Supreme Court refused to recognize that an intimate sexual relationship gives rise to a special relationship because there was no "specific duty of care that, under the law, arises from the relationship." *Boyles v. Kerr*, 855 S.W.2d 593, 600 (Tex. 1993). Thus the *Boyles* court refused to allow the plaintiff to recover for mental suffering when her companion surreptitiously videotaped their sexual relations and distributed it to persons in her social network. *Id.* Accordingly, absent a contractual relationship, the statutory duty in *Freeman* was probably necessary for the imposition of a duty.

71. 956 P.2d 960 (Or. 1998).

72. *See id.* at 963.

73. *Id.*

74. *Shin v. Sunriver Preparatory Sch., Inc.*, 111 P.3d 762, 770 (Or. Ct. App. 2005).

75. *Id.* (citations omitted) (internal quotation marks omitted). According to the Oregon Court of Appeals in another case, "the critical inquiry becomes whether the kind of interest invaded is of sufficient importance as a matter of policy to merit protection from emotional impact." *Bennett v. Baugh*, 961 P.2d 883, 888 (Or. Ct. App. 1998) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 985 P.2d 1282 (1999).

relationships), Oregon law requires the court to examine the particular facts of each case and determine whether “the parties construct[ed] an essentially fiduciary-type relationship” such that “the party who owe[d] the duty has a special responsibility toward the other party.”⁷⁶ Using this framework, Oregon courts have found protected special relationships to exist, for example, between a patient and his doctor performing an MRI scan⁷⁷ and between a twenty-four-hour boarding school and a suicidal student.⁷⁸

Iowa law focuses on the emotional nature of the relationship to determine whether it qualifies as a special relationship. Accordingly, there is a duty to avoid emotional distress where the defendant performs an act that is

so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the [obligation] that such suffering will result from its breach.⁷⁹

The Iowa Supreme Court has further explained that foreseeability is an “important factor for consideration in the determination of the existence of a duty.”⁸⁰ Using this framework, Iowa courts have

76. *Shin*, 111 P.3d at 771 (citation omitted); *see also* *Strader v. Grange Mut. Ins. Co.*, 39 P.3d 903, 906 (Or. 2002) (“[T]he cases establish a functional as opposed to a formal analysis in determining whether the special relationship exists; in other words, the crucial aspect of the relationship is not its name, but the roles that the parties assume in the particular interaction where the alleged tort and breach of contract occur.”).

77. *Curtis v. MRI Imaging Servs.II*, 956 P.2d 960, 963 (Or. 1998). The plaintiff in *Curtis* stated a valid cause of action by alleging that “the defendants were medical professionals who owed a duty to plaintiff to identify and guard against predictable psychological reactions or consequences—including claustrophobic reactions—to the MRI procedure.” *Id.*

78. *Shin*, 111 P.3d at 773. The standard of care that the court identified required a “reasonably prudent boarding school-surrogate parent [to] recognize[] the possibility of grave emotional distress as a concern associated with handling a suicidal teenage student in the school’s custody and dictates that certain precautions be taken to avoid or minimize such risks.” *Id.* at 772.

79. *Meyer v. Nottger*, 241 N.W.2d 911, 921 (Iowa 1976). Iowa further requires that the degree of emotional distress suffered be “so severe that no reasonable man could be expected to endure it.” *Bethards v. Shivers, Inc.*, 355 N.W.2d 39, 44 (Iowa 1984).

80. *Lawrence v. Grinde*, 534 N.W.2d 414, 422 (Iowa 1995) (citing *Barnhill v. Davis*, 300 N.W.2d 104, 106 (Iowa 1981)).

found special relationships to exist in actions involving the negligent delivery of a baby,⁸¹ the negligent delivery of a telegram announcing the death of a loved one,⁸² and the negligent performance of a contract to perform funeral services,⁸³ but not for committing legal malpractice.⁸⁴

The Nevada Supreme Court recently concluded that two different defendants accused of committing the exact same act owe different duties because of the nature of the relationship involved.⁸⁵ In *Boorman*, either the defendant county coroner or the defendant mortuary lost a body's internal organs.⁸⁶ According to the *Boorman* court, "[u]nlike the duty of a county coroner . . . a mortuary voluntarily undertakes a duty to competently prepare the decedent's body for the benefit of the bereaved."⁸⁷ Accordingly, "close family members who are aware of both the death of a loved one and that mortuary services were being performed may bring an action for emotional distress resulting from the negligent handling of the deceased's remains" against a mortuary.⁸⁸ A county coroner, however, "is obligated by law to perform [those] services," "does not create a special relationship," and does not "undertake any particular duty to the bereaved to prepare the deceased's body for funeral services."⁸⁹ Accordingly, a county coroner only has a duty to "the person with the right to dispose of the deceased's body for negligently handling a deceased person's remains."⁹⁰

81. *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990). The *Oswald* court suggested that negligent delivery cases will almost always support a duty to avoid inflicting emotional distress. *Id.* ("As we observed by way of analogy in *Meyer*, the birth of a child involves a matter of life and death evoking such 'mental concern and solicitude' that the breach of a contract incident thereto 'will inevitably result in mental anguish, pain and suffering.'" (quoting *Meyer*, 241 N.W.2d at 920)).

82. *Cowan v. W. Union Tel. Co.*, 98 N.W. 281, 282–84 (Iowa 1904).

83. *Meyer*, 241 N.W.2d at 920–21.

84. *Lawrence*, 534 N.W.2d at 423. The court reasoned that (1) legal work "is not so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering;" and (2) "the claimed emotional distress is too far removed from the defendants' negligent conduct to cause the imposition of a duty and does not naturally ensue from the acts complained of." *Id.* (internal quotation omitted).

85. *Boorman v. Nev. Mem'l Cremation Soc'y*, 236 P.3d 4, 8–9 (Nev. 2010).

86. *Id.* at 6.

87. *Id.* at 7.

88. *Id.* at 8.

89. *Id.* at 9.

90. *Id.*

Some courts have attempted to more clearly define the parameters of a “special” or “preexisting” relationship by using what essentially amounts to a negligence per se analysis. In *Clomon v. Monroe City School Board*,⁹¹ the Louisiana Supreme Court framed the independent duty rule as “permitting recovery for emotional distress from a tortfeasor who owed the plaintiff a special, direct duty created by law, contract or special relationship.”⁹² The plaintiff, a motorist who struck and killed a four-year-old child who had just exited a school bus, sued the bus driver and school board for the driver’s negligent failure to “await the safe passage of the child and to refrain from prematurely deactivating the signals or resuming her trip” in violation of Louisiana statute.⁹³ While not expressly defining the scope or limitations on what constitutes a “special, direct duty,” the court suggested that any statutory violation satisfying the requirements of a negligence per se analysis would qualify.⁹⁴ In addition, although the court did not make foreseeability an express requirement, it noted that a bus driver who breaches the statutory duty to keep bus signals on until exiting children reach safety could reasonably foresee that a passing motorist may strike a child and suffer resulting emotional distress.⁹⁵

Likewise, the Florida Supreme Court found legislative intent important in allowing recovery for emotional distress “under the theory that there has been a breach of fiduciary duty arising from the very special psychotherapist-patient confidential relationship recognized and created under section 491.0147 of the Florida Statutes.”⁹⁶ That statute required psychotherapists to keep the

91. 572 So. 2d 571 (La. 1990).

92. *Id.* at 575.

93. *Id.* at 577.

94. *See id.* at 576 (“To determine whether Sonya established that the school board employees owed her a special, direct duty that they breached, entitling her to recover emotional distress damages caused by the violations, we follow a method similar to that of determining whether a defendant may be held liable in a negligence case on the basis of his violation of a statute.”). As to how a passing motorist is within the class of persons the statute was intended to protect, the court broadly recognized that “the motorist is required and entitled to rely for his safety, convenience and peace of mind upon the bus driver’s performance of his duty to activate highly visible signals, await the child’s safe passage and remain as a stationary sentinel until the child’s security is clearly assured.” *Id.* at 578.

95. *Id.* at 578 (“It is obvious that the bus driver’s dereliction may result in minimal to extreme consequences for the motorist including his fright at a near miss, his own physical injury or property damage, or his serious emotional and mental illness associated with a child’s injury or death . . .”).

96. *Gracey v. Eaker*, 837 So. 2d 348, 352 (Fla. 2002). The court also found it

substance of patient communications confidential.⁹⁷ Without defining the scope of this special relationship exception to Florida's traditional impact rule, the court held that a married couple could recover for emotional distress resulting from their marital counselor revealing "confidential information which the other spouse had told him in their private sessions."⁹⁸ A New York court also recognized the validity of a similar NIED claim against a psychotherapist after emphasizing the fiduciary and confidential nature of the doctor-patient relationship, and acknowledging that "the several statutes and regulations requiring physicians to protect the confidentiality of information gained during treatment are clear evidence of the public policy of New York."⁹⁹

Finally, a relatively early Maine court decision made explicit what is implicit in each of these other decisions; that is, the nature of, and circumstances surrounding, certain special relationships make the traditional rationales for NIED denying recovery inapplicable:

The rationale for requiring an independently actionable tort is that absent either tactile contact or the usual indicia of harm, no objective evidence exists that the defendant's negligence actually has caused the plaintiff to suffer emotional distress. There is little likelihood, however, that objective evidence of mental distress will be unavailable in a claim by a patient against his psychotherapist. Given the fact that a therapist undertakes the treatment of a patient's mental problems and that the patient is encouraged to divulge his innermost thoughts, the patient is extremely vulnerable to mental harm if the therapist fails to adhere to the standards of care recognized by the profession. Any psychological harm that may result from such negligence is neither speculative nor easily feigned. Unlike evidence of mental distress occurring in other situations, objective proof of the existence *vel non* of a psychological injury in these

important that the legislature has "declared for the people of Florida that 'emotional survival is equal in importance to physical survival.'" *Id.* (quoting FLA. STAT. § 491.002 (2001)).

97. FLA. STAT. § 491.0147 (1997). Florida generally follows the "impact rule," but the court held that "under the particular facts of the case before us," this rule did not accommodate the intent and purpose of section 491.0147. *Gracey*, 837 So. 2d at 351, 355, 358.

98. *Id.* at 351.

99. *MacDonald v. Clinger*, 84 A.D.2d 482, 484 (N.Y. App. Div. 1982).

circumstances should not be difficult to obtain. As this case illustrates, the severity of such an injury can be medically significant and objectively supportable. We therefore conclude that the reasons for precluding recovery for mental distress are not cogent here.¹⁰⁰

Rowe involved a defendant who provided psychotherapy to both the plaintiff and a woman with whom the plaintiff was romantically involved.¹⁰¹ After a few months, the defendant allegedly terminated therapy with the plaintiff because she had developed “some emotional feelings” toward the plaintiff’s partner, which later developed into a romantic relationship.¹⁰² The plaintiff presented testimony that the defendant “failed to adhere to the basic standards applicable to a psycho-therapist when she continued to treat the plaintiff after [the defendant] became involved in a relationship with the plaintiff’s primary companion.”¹⁰³ Accordingly, the court held that the psychotherapist-patient relationship created a duty to avoid causing emotional distress.¹⁰⁴

3. *The Categorical Approach*

Instead of trying to articulate a universal test applicable to all factual situations, the Third Restatement approaches the independent duty rule on a categorical basis:

An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct:

. . . .

(b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.¹⁰⁵

100. *Rowe v. Bennett*, 514 A.2d 802, 806–07 (Me. 1986).

101. *Id.* at 803.

102. *Id.* at 803–04.

103. *Id.* at 804.

104. *See id.* (“Accordingly *Bennett*, as a qualified social worker who undertook treatment of the plaintiff, and DHRS, as *Bennett*’s employer and supervisor, were under a duty to provide care in accordance with the standards of practice applicable to similar professionals engaged in counseling and psychotherapy.”).

105. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 (Tentative Draft No. 5, 2007).

The Third Restatement identifies several categories of activities for which courts have traditionally allowed recovery, but declines to take a position on which specific activities, undertakings, or relationships should support a duty.¹⁰⁶ While the Third Restatement does not offer guidelines for determining when categories are appropriate for protection, it does observe that independent duty cases generally involve an undertaking or relationship “in which serious emotional harm is likely or where one person is in a position of power or authority over the other and therefore has greater potential to inflict emotional harm.”¹⁰⁷ In this regard, the Third Restatement seems to be endorsing the general policy considerations underlying the special relationship approach, while acknowledging that a single test for determining the existence of a special relationship has not yet been satisfactorily announced.¹⁰⁸ The Third Restatement further acknowledges what the preceding summary of cases demonstrate: (1) this is a developing area of law;¹⁰⁹ (2) “[c]ourts have not provided clear guidelines to identify precisely which activities, undertakings, or relationships will support liability;”¹¹⁰ and (3) there is little consensus among courts on how to identify proper categories.¹¹¹

The Third Restatement’s position on the duty element in emotional distress cases is essentially the inverse of its position on the duty element in cases involving physical injury. According to section 7(a), “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”¹¹² Under this rule, courts generally “need not concern themselves with the existence or content of this ordinary duty”¹¹³ on a case-by-case basis as long as the actor’s conduct created a risk of

106. *Id.* at cmt. d. The comment highlights cases involving erroneous death notifications, mishandling of a corpse or body remains, consumption of food contaminated with “repulsive foreign objects,” negligent childbirth, and misdiagnosis of a serious disease. *Id.*

107. *Id.*

108. *See id.* at cmt. f. The comments to Section 46(b) specifically reject the foreseeability approach for its overbreadth. *See id.* For example, they illustrate why foreseeability alone is undesirable: “[A] doctor who negligently (and incorrectly) diagnoses a popular movie star or professional athlete as having terminal cancer is not liable to the star’s fans who suffer emotional disturbance upon hearing the diagnosis, even though such harm is clearly foreseeable.” *Id.*

109. *See id.* at cmt. d.

110. *Id.*

111. *Id.*

112. *Id.* § 7(a) (2010).

113. *Id.* § 6 cmt. f.

physical harm.¹¹⁴ The narrow exception is where “an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.”¹¹⁵ In such “exceptional cases,” the court should make a categorical exception “explained and justified based on articulated policies or principles that justify exempting [such] actors from liability or modifying the ordinary duty of reasonable care.”¹¹⁶ In emotional distress cases, however, section 47(b) embraces a general rule that there is no duty to avoid negligently inflicting emotional distress on others, but courts are allowed to make categorical exceptions where public policy considerations justify imposing liability.¹¹⁷

Although few cases have overtly adopted the categorical approach, the rationales provided in several cases clearly indicate that is what the courts were doing. For instance, in *La Fleur v. Mosher*,¹¹⁸ the Wisconsin Supreme Court recognized that, although there is generally no duty to avoid negligently inflicting emotional distress, an exception should be made for negligent confinement cases because the tort “by its very nature has the special likelihood of causing real and severe emotional distress.”¹¹⁹ The court went on to explain that:

114. *Id.*

115. *Id.* § 7(b). The Third Restatement provides several examples of where courts have identified important public policy considerations opposing the existence of a duty, including cases where courts held that (1) mothers owe no duty to their unborn fetuses; (2) physicians owe no duty to third parties; (3) social hosts who serve liquor owe no duty to third parties injured by their guests; and (4) certain media defendants owe no duty to protect the public from physical harm due to publishing material such as video games, books, and movies. *Id.* at cmts. c, d & cmt. e reporters’ note.

116. *Id.* at cmt. j.

117. *See id.* § 46 cmt. f (Tentative Draft No. 5, 2007) (“[T]he rules stated in this Section and in § 47 are exceptions to a general rule that negligently caused pure emotional disturbance is not recoverable even when it is foreseeable.”).

118. 325 N.W.2d 314 (Wis. 1982).

119. *Id.* at 317. That is not to say, however, that Wisconsin’s categorical exception means a duty will be imposed every time that a defendant’s conduct falls within a recognized category. The *La Fleur* court went on to hold that plaintiffs with a negligent confinement action must prove five factors:

- (1) The defendant must have been negligent in confining the plaintiff.
- (2) The confinement must be for a substantial period of time.
- (3) The circumstances surrounding the confinement must be such that a reasonably constituted person would be emotionally harmed.
- (4) The confinement must be a substantial factor in causing the emotional distress.
- (5) The resulting emotional distress must be severe.

Id. at 318.

By the very fact of confinement, under facts like those set forth here, a person's right to be free from bodily restraint is infringed. This deprivation of liberty alone, when it causes serious emotional distress, is a wrong sufficiently worthy of redress that the physical injury requirement should not be necessary. When there is a substantial and unwarranted deprivation of liberty, that deprivation itself is a sufficient guarantee that the claim is not frivolous and that it is more probable that the plaintiff did, in fact, suffer the emotional distress alleged. It is the very nature of confinement that creates the likelihood of emotional injury. Emotional harm, in the appropriate circumstances, is a reasonably foreseeable consequence of negligent confinement.¹²⁰

It is unclear whether the Wisconsin Supreme Court will use this analysis to create other categorical exceptions.¹²¹

Similarly, the West Virginia Supreme Court adopted negligent mishandling of corpses as a narrow exception to the general rule of no recovery for negligently inflicted emotional distress.¹²² The only rationale provided was the long history of courts recognizing a "quasi-property" right in the survivors to control the disposition of a loved one's remains."¹²³

The Texas Supreme Court has emphasized the flexibility of the categorical approach, noting that "the law of mental anguish damages is rooted in societal judgments, some no longer current, about the gravity of certain wrongs and their likely effects."¹²⁴ The categorical approach, according to the court, arose in part out of the impossibility of "distilling a unified theory of mental anguish,"¹²⁵ but recognized "that there are some categories of cases in which the problems of foreseeability and genuineness are sufficiently mitigated that the law should allow recovery for anguish."¹²⁶ The only categories that the court mentioned were "intentional or

120. *Id.* at 317–18 (citations omitted) (internal quotation marks omitted). The court cited foreseeability as a public policy factor supporting a categorical exception, not as a stand-alone basis to impose a duty. *Id.* at 318.

121. *See* M.M.H. v. United States, 966 F.2d 285, 291 (7th Cir. 1992) (declining to speculate whether Wisconsin would expand *La Fleur*).

122. *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 462–63 (W. Va. 1985).

123. *Id.* at 460–61.

124. *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997).

125. *Id.*

126. *Id.* at 495.

malicious conduct such as libel” and “violations of certain statutes such as the Deceptive Trade Practices Act.”¹²⁷ It declined to adopt a new category for the flooding of one’s home and destruction of personal items.¹²⁸

Absent from the foregoing authorities is any useful framework for determining when a particular category should be recognized. This absence exposes these decisions to criticism for being result-oriented and generating unpredictability and uncertainty. Several jurisdictions attempt to address these problems by using a multi-factor test that takes into account

- (1) The foreseeability of harm to the plaintiff;
- (2) The degree of certainty that the plaintiff suffered injury;
- (3) The closeness of the connection between the defendant’s conduct and the injury suffered;
- (4) The moral blame attached to the defendant’s conduct;
- (5) The policy of preventing future harm;
- (6) The extent of the burden to the defendant;
- (7) The consequences to the community of imposing a duty to exercise care with resulting liability for breach; and
- (8) The availability, cost, and prevalence of insurance for the risk involved.¹²⁹

Applying this test, courts have found an independent duty to exist in categories of cases involving babies switched at birth¹³⁰ and babies injured during delivery,¹³¹ but declined to recognize an independent duty in categories of cases involving product manufacturers that fail to warn strict ethical vegans of the presence of animal products in their products¹³² and defendants who negligently place the plaintiff in a position to unknowingly harm a

127. *Id.* (citations omitted).

128. *Id.* at 496–97. The court reasoned that not everyone suffering this injury would be likely to suffer emotional distress or feel undercompensated by receiving the monetary value of their destroyed property. *Id.* at 497.

129. *Friedman v. Merck & Co.*, 131 Cal. Rptr. 2d 885, 891 (Ct. App. 2003) (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)); *accord Kallstrom v. United States*, 43 P.3d 162, 167 n.24 (Alaska 2002) (citing *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554, 555 (Alaska 1981)); *Burgess v. Superior Court*, 831 P.2d 1197, 1205 (Cal. 1992); *Larsen v. Banner Health Sys.*, 81 P.3d 196, 203–04 (Wyo. 2003).

130. *Larsen*, 81 P.3d at 206–07.

131. *Burgess*, 831 P.2d at 1205.

132. *Friedman*, 131 Cal. Rptr. 2d at 892.

third party.¹³³ More can be gleaned from the cases that reject an independent duty using this balancing test than those that recognize one.

For instance, the defendant in *Friedman* negligently misrepresented to the plaintiff that a tuberculosis test was “vegan safe,” meaning it contained no animal byproducts.¹³⁴ The plaintiff commenced suit when he discovered that the test actually involved injecting him with bovine (cow) serum, which offended his ethical belief that animals should not be exploited for any purpose and allegedly caused him emotional distress.¹³⁵ The court found it dispositive that its task was

[N]ot to decide whether a *particular* plaintiff’s injury was reasonably foreseeable in light of a *particular* defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.¹³⁶

Because strict ethical vegans do not constitute an “appreciable or substantial” portion of the population, the court determined that “public policy does not support the imposition of a duty to warn or advise.”¹³⁷

Moving from cases where the class size is too small, an Alaska decision illustrates how a class size can be too large. The defendant in *Kallstrom* negligently allowed someone to leave a pitcher of lye-based caustic detergent near a kitchen sink.¹³⁸ Believing the pitcher contained fruit juice, the plaintiff poured a cup for a child to drink, which caused the child severe internal injuries.¹³⁹ The plaintiff brought suit for the emotional distress she suffered in knowing that she harmed the child.¹⁴⁰ Because the “[f]actual circumstances creating the participant or unwitting instrument scenario can vary so widely,” the court was concerned that such a classification did

133. *Kallstrom*, 43 P.3d at 168.

134. *Friedman*, 131 Cal. Rptr. 2d at 888–89.

135. *Id.* at 889.

136. *Id.* at 891 (citing *Ballard v. Uribe*, 715 P.2d 624, 629 n.6 (Cal. 1986)).

137. *Id.* at 892, 894. The court cited a long line of cases for the proposition “that there is no duty to warn of the possibility of rare, idiosyncratic, hypersensitive, or unusual reactions to an otherwise safe and useful product.” *Id.* at 892.

138. *Kallstrom*, 43 P.3d at 164.

139. *Id.*

140. *Id.*

not provide “a sufficient guarantee that the claim is neither false nor insubstantial.”¹⁴¹ The court explained how the breadth of the proposed category undermined the “first and most important factor, foreseeability of harm to the plaintiff”:

We can imagine a potentially endless variety of factual circumstances that may give rise to an unwitting instrument claim: the friend who mails a defective toy to a child who later chokes on a small part of the toy, the owner who lends his car to a friend unaware that the car has faulty brakes, the cook whose customers develop a disease ten years after he served them food containing a carcinogenic preservative, and the driver who sues parents for negligent supervision after hitting a child who chases a ball into the street. Although all might be labeled “unwitting instruments,” these scenarios vary widely with regard to the relevant considerations of duty, including foreseeability, certainty of injury, and ability to prevent future harm.¹⁴²

The court went on to cite other potentially problematic variables inherent in this type of category, including “the relationship between the plaintiff and the victim, the nature of the participant’s involvement, and the uncertain mix of potential emotions, including guilt, shock or indifference.”¹⁴³

IV. A CASE FOR AN INDEPENDENT DUTY RULE IN MINNESOTA

A. *Suitability of an Independent Duty Rule Under Minnesota Law*

While the Minnesota Supreme Court has been reluctant “to expand the availability of damages for emotional distress,”¹⁴⁴ it has endorsed recovery where “the emotional injury occurred under circumstances tending to guarantee its genuineness.”¹⁴⁵ Minnesota law thus does not necessarily foreclose the possibility of recognizing a narrowly tailored independent duty to avoid negligently inflicting emotional distress.¹⁴⁶

141. *Id.* at 167.

142. *Id.* (citing *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554, 555 (Alaska 1981)).

143. *Id.* at 168.

144. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 560 (Minn. 1996).

145. *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 437 (Minn. 1983).

146. *See also* Michael K. Steenson, *The Anatomy of Emotional Distress Claims in*

Neither the special relationship nor the foreseeability formulations of the independent duty rule, however, appear to satisfy the criteria for NIED recovery in Minnesota. When formulating rules for NIED recovery, the Minnesota Supreme Court has emphasized the need for a bright-line test that is “workable, reasonable, logical and just as possible.”¹⁴⁷ An objective test is “necessary to ensure stability and predictability in the disposition of emotional distress claims.”¹⁴⁸ None of the foreign decisions falling within the special relationship approach have successfully outlined a useful test for determining when a qualifying special relationship exists, let alone articulated a bright-line rule.¹⁴⁹ And the Minnesota Supreme Court has already rejected a similar version of the foreseeability test for bystander recovery, criticizing it as being too subjective, too expansive, and not conducive to a precise definition.¹⁵⁰ Many courts from other

Minnesota, 19 WM. MITCHELL L. REV. 1, 21–22 (1993). After discussing Minnesota’s NIED decisions, Professor Steenson discusses the special relationship rule announced in *Burgess v. Superior Court*, 831 P.2d 1197, 1200 (Cal. 1992), and notes that “the possibility still exists for the Minnesota Supreme Court to adopt the *Burgess* approach, even if it adheres to the basic zone of danger/physical formulation as the standard for resolving negligent infliction of emotional distress cases.” Steenson, *supra*, at 31. He concludes that if Minnesota courts liberalize the zone of danger requirement in “direct victim” cases such as *Burgess*, courts would be permitted “to analyze the issue of whether recovery should be granted by using the same policy factors used to analyze duty cases in general.” *Id.* at 22.

147. *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980). The *Stadler* court explained that “[i]f the limits cannot be consistently and meaningfully applied by courts and juries, then the imposition of liability would become arbitrary and capricious,” and “the cause of just apportionment of the losses would suffer.” *Id.* at 554.

148. *K.A.C. v. Benson*, 527 N.W.2d 553, 559 (Minn. 1995). The plaintiff in *K.A.C.* was exposed to a risk of AIDS when the defendant performed two gynecological procedures on her while he was infected with HIV. *Id.* at 555. The court held that a mere fear of exposure failed to satisfy the zone of danger requirement because it would impart subjectivity into the analysis. *Id.* at 559.

149. See *supra* Part III.B.2.

150. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 770 n.3 (Minn. 2005); *Stadler*, 295 N.W.2d at 554–55. According to the *Engler* court, bystander tests in other jurisdictions fall into three categories: (1) the impact rule; (2) the zone of danger test; and (3) the foreseeable bystander test. *Engler*, 706 N.W.2d at 768. The foreseeable bystander test allows recovery where “the plaintiff: (1) is closely related to the [third-party] victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.” *Id.* at 769 n.2 (quoting *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989)). *Stadler* expressly rejected this test. *Stadler*, 295 N.W.2d at 554–55. The *Engler* court observed that some jurisdictions have adopted a variation of this test that looks solely to the foreseeability of the harm.

jurisdictions have also soundly criticized the foreseeability approach for its vagueness, unpredictability, and subjectivity.¹⁵¹

The categorical approach, on the other hand, is more cautious, far less arbitrary than the existing limits on NIED recovery, and can be as narrow as courts wish to make it. Further, once qualifying categories are adopted, the approach results in objective, bright-line rules that are easy to apply. Perhaps most importantly, the categorical approach is more consistent with Minnesota's direct invasion exception and better serves to reconcile cases that have allowed recovery with those that have not. An examination of the roots and evolution of Minnesota's direct invasion exception illuminates these advantages.

B. The Tortured Evolution of Minnesota's Direct Invasion Exception

In the seminal 1891 decision, *Larson v. Chase*,¹⁵² the Minnesota Supreme Court examined whether a woman could recover for "mental suffering and nervous shock" for the defendant's "unlawful mutilation and dissection" of her husband's body.¹⁵³ The court first examined cases from other jurisdictions and concluded that "all courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and

Engler, 706 N.W.2d at 770 n.3. *Engler* expressly rejected this test as being even more expansive because it "is not cabined by the imposition of mandatory elements, such as a close relationship or contemporaneous observation." *Id.* at 770 n.3.

151. *E.g.*, *Thing*, 771 P.2d at 826 ("[I]t is clear that foreseeability of the injury alone is not a useful 'guideline' or a meaningful restriction on the scope of the NIED action."); *Camper v. Minor*, 915 S.W.2d 437, 443 (Tenn. 1996) ("[The foreseeability approach] provides little, if any, concrete guidelines for trial courts and juries to use in deciding how each case should be resolved."); *Boyles v. Kerr*, 855 S.W.2d 593, 599–600 (Tex. 1993) ("[The foreseeability] standard, however, fails to delineate meaningfully those situations where recovery should be allowed."); *Gates v. Richardson*, 719 P.2d 193, 196 (Wyo. 1986) ("Unfortunately [the foreseeability] test is so vague that it has little practical value."); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46(b) cmt. f (Tentative Draft No. 5, 2007) ("Instead of relying on foreseeability to identify appropriate cases for recovery, the policy issues surrounding specific categories of undertakings, activities, and relationships must be examined to determine whether, as a category, they merit inclusion among the exceptions to the general rule of no liability.").

152. 47 Minn. 307, 50 N.W. 238 (1891).

153. *Id.* at 307, 50 N.W. at 238.

protect.”¹⁵⁴ In holding that recovery for emotional distress is permitted under these circumstances, the court broadly declared that “where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act.”¹⁵⁵ The court did not limit this proclamation to willful or wanton conduct.¹⁵⁶

In *Bucknam v. Great Northern Railway Co.*,¹⁵⁷ the Minnesota Supreme Court emphasized that *Larson* is limited to situations involving a direct violation of an underlying legal interest.¹⁵⁸ The plaintiff sought recovery for emotional distress because she had witnessed the defendant use “harsh, violent, and abusive language, and ma[k]e threatening and insulting demands of and towards plaintiff’s husband.”¹⁵⁹ The court quickly dispensed with her argument because she was not able to identify “any infraction of her legal right.”¹⁶⁰ The court further explained that:

Many vexatious, annoying, and humiliating things frequently occur in every community that are not actionable. Such things may affect those peculiarly sensitive, while to others they would seem only a matter of indifference. The latter, unaffected thereby, could not maintain an action for a personal wrong; and, if the former should be permitted to do so, we should have litigated a question of comparative nervousness and sensitiveness as an element of damages, and the courts burdened with vexatious litigation where there was neither slander, physical injury, negligence, or intent to injure or frighten a third person, and where the defendant might be entirely unaware of the physical condition of the person so alleged to be injured.¹⁶¹

154. *Id.* at 309, 50 N.W. at 238–39.

155. *Id.* at 311, 50 N.W. at 239–40.

156. *See id.* The opinion does not describe enough facts to understand the level of the defendant’s culpability. The fact that he was accused of “mutilation” and “dissection” is suggestive of morbid intentional misconduct, but it is equally possible the defendant was a mortician or coroner acting under the mistaken belief that an autopsy was authorized. In either event, the court did not focus on the defendant’s culpability in any way in allowing recovery.

157. 76 Minn. 373, 79 N.W. 98 (1899).

158. *Id.* at 377, 79 N.W. at 99.

159. *Id.* at 376, 79 N.W. at 98.

160. *Id.* at 377, 79 N.W. at 99.

161. *Id.*

In 1894, the supreme court refused to extend *Larson* to allow recovery for mental suffering resulting from negligently failing to deliver a telegram.¹⁶² The plaintiff in *Francis v. Western Union Telegraph Co.* sent a telegram to his estranged wife asking if she wished to reconcile their marriage.¹⁶³ When she did not respond, the plaintiff “concluded that she was unwilling to renew her marriage relations with him, and feared that all hope of reconciliation with her was at an end.”¹⁶⁴ When the plaintiff discovered that his wife did not respond because she had never received the telegram, he brought suit claiming the telegraph company was responsible for causing his emotional distress.¹⁶⁵

Even though the defendant had violated a state statute in failing to transmit the telegram, and even though the statute specifically authorized the plaintiff to recover all actual damages sustained as a result of that failure, the supreme court characterized the gravamen of the action as being for a breach of contract, not a tort.¹⁶⁶ Because the plaintiff’s action was not possible without the existence of a contract, the court limited the plaintiff to contract damages, which does not include damages for emotional distress.¹⁶⁷ The court explained why emotional distress damages are disfavored:

The law has always been exceedingly cautious in allowing damages for mental suffering, for the manifest reasons, among others, that such damages are more sentimental than substantial, depending largely upon temperament and physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another, and there being no possible standard by which such an injury can be even approximately measured, they are subject to many, if not most, of the objections to speculative damages which are universally excluded. In no case will an action for damages lie for mental suffering caused by an act which, however wrongful, infringes no legal right of the party.¹⁶⁸

162. *Francis v. W. Union Tel. Co.*, 58 Minn. 252, 266, 59 N.W. 1078, 1082 (1894).

163. *Id.* at 258, 59 N.W. at 1078.

164. *Id.*

165. *Id.*

166. *Id.* at 261, 59 N.W. at 1080.

167. *See id.* at 261–64, 59 N.W. at 1080–81.

168. *Id.* at 261–62, 59 N.W. at 1080.

The court then distinguished *Larson* as involving: (1) a willful tort, not a pure contract action; and (2) circumstances that “naturally and necessarily [tend] to injure the feelings.”¹⁶⁹

In *Lindh v. Great Northern Railway Co.*,¹⁷⁰ the court shifted its focus back to the plaintiff’s legal interest, and cited *Larson* as being dispositive to the question of whether a widow could recover for her emotional distress resulting from the defendant “carelessly and negligently” leaving his dead wife’s coffin exposed to rain while transporting it in a railroad truck.¹⁷¹ The opinion also mentions that the defendant “willfully ignored the request of the plaintiff to place the truck under cover,”¹⁷² but does not mention the defendant’s culpability as being important or even relevant to the outcome.¹⁷³ Instead, the court hinted for the first time that the nature of the undertaking (i.e., handling dead bodies) imparted some inherent reliability to an allegation of emotional distress: “Injury to the feelings of the family of deceased spring as naturally from disfiguration and mutilation of the body by exposure to the elements as by dissection.”¹⁷⁴ The decision does not cite *Francis* or make any distinction between pure contract actions and actions for willful torts.

One year after *Lindh*, the court again shifted the focus back to the *Francis* court’s contract/tort distinction. Like *Larson* and *Lindh*, *Beaulieu v. Great Northern Railway Co.*,¹⁷⁵ involved a rail carrier delivering a damaged corpse, but with one important distinction. Instead of the rail carrier causing the damage, it neglected to unload the body at the proper station, which delayed the funeral

169. *Id.* at 262, 59 N.W. at 1080. The court later suggested that it is never proper in pure breach of contract actions (i.e., contract actions that do not involve willful conduct) to distinguish between contracts that are merely pecuniary in nature, and those that are emotional in nature. *Id.* at 264, 59 N.W. at 1081. The court emphasized the danger of creating a slippery slope if mental distress damages were allowed in certain breach of contract actions but not others. *See id.*

170. 99 Minn. 408, 109 N.W. 823 (1906).

171. *Id.* at 408, 109 N.W. at 823–24.

172. *Id.* at 408, 109 N.W. at 823.

173. *See id.* at 408–10, 109 N.W. at 823–24. Nor did the court mention the fact that the plaintiff could not have proved her case without the existence of an underlying contractual obligation to ship the corpse, a consideration that the *Francis* court found dispositive. *See id.*

174. *Id.* at 409, 109 N.W. at 824. In mentioning “exposure” and “dissection,” the court was referring to the facts of the case (exposing the corpse to the elements) and the facts in *Larson v. Chase*, 47 Minn. 307, 308, 50 N.W. 238, 238 (1891) (dissecting the body).

175. 103 Minn. 47, 114 N.W. 353 (1907).

for twenty-four hours and gave the corpse additional time to decay naturally.¹⁷⁶ The court began by observing generally that emotional distress damages are “limited to actions where the plaintiff has received some injury to his person, or some legal right has been invaded of a nature naturally to cause grief and distress of mind.”¹⁷⁷ But the court went on to explain that this rule only applies to tort actions, and that failing to timely deliver a corpse to a funeral, without more, was really just a breach of contract.¹⁷⁸ Accordingly, if an action is based purely upon a breach of contract, the plaintiff has to show that the breach was willful in order to recover damages for emotional distress.¹⁷⁹ The court distinguished *Larson* and *Lindh* as both involving willful conduct.¹⁸⁰

In 1940, the supreme court transitioned back to focusing on the invasion of the plaintiff’s legal interest, again without mentioning the defendant’s culpability. In *Sworski v. Simons*,¹⁸¹ an undertaker acting at the direction of the county coroner began embalming the plaintiff’s son’s body without his permission.¹⁸² Relying heavily on *Larson*, the court focused on the plaintiff’s legal right to his son’s body and the accompanying right to determine who would perform the embalming, not on any willful or wanton misconduct by the defendant.¹⁸³ The opinion makes no mention of any wrongful act other than negligence, and does not cite *Francis* or *Beaulieu*.

Although seemingly inconsistent, these “direct invasion” decisions can be reconciled as allowing emotional distress damages in certain emotionally-charged tort actions and contract actions involving a willful breach. In 1963, however, the supreme court in

176. *Id.* at 48, 114 N.W. at 353.

177. *Id.* at 49, 114 N.W. at 353.

178. *See id.* at 52–53, 114 N.W. at 355. In an action for breach of contract, the court explained that the only recoverable damages are those “within the contemplation of the parties when the contract was made, and which may be measured and determined by some definite rule or standard of compensation.” *Id.* Because damages for emotional distress are “incapable of definite calculation,” they can be recovered in a breach of contract action only “in those exceptional cases where the breach amounts to an independent willful tort, in which event they may be recovered under proper allegations of malice, wantonness, or oppression.” *Id.*

179. *Id.* at 55–56, 114 N.W. at 356.

180. *Id.*

181. 208 Minn. 201, 293 N.W. 309 (1940).

182. *Id.* at 203, 293 N.W. at 310.

183. *See id.* at 205, 293 N.W. at 311.

State Farm Mutual Automobile Insurance Co. v. Village of Isle,¹⁸⁴ perhaps inadvertently blurred this distinction when attempting to summarize these decisions in a single sentence:

It is well established that damages for mental anguish or suffering cannot be sustained where there has been no accompanying physical injury unless there has been some conduct on the part of [the] defendant constituting a direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct.¹⁸⁵

The result was a confusing and inaccurate synthesis of the direct invasion decisions that does not fully effectuate the *Larson* court's holding that "where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate and natural result of the wrongful act."¹⁸⁶

In addition, the *Village of Isle* court's characterization of the direct invasion exception was unnecessary for the outcome of the decision because the plaintiff only alleged a derivative injury (mental distress arising out of the death of another), not a direct invasion of her own legal interest.¹⁸⁷ Accordingly, her emotional distress damages should have been denied summarily based upon *Bucknam* and *Larson*.¹⁸⁸ In this regard, the *Village of Isle* court committed the same error that the *Larson* court chastised other courts for making:

There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no

184. 265 Minn. 360, 122 N.W.2d 36 (1963).

185. *Id.* at 367-68, 122 N.W.2d at 41 (citations omitted).

186. *Larson v. Chase*, 47 Minn. 307, 311, 50 N.W. 238, 239-40 (1891).

187. *See Village of Isle*, 265 Minn. at 362, 122 N.W.2d at 38. The court was analyzing whether a woman could recover emotional distress damages in a dram shop action for the loss of her husband. *Id.*

188. *Bucknam v. Great N. Ry. Co.*, 76 Minn. 373, 376-77, 79 N.W. 98, 98-99 (1899) (denying recovery to a woman who witnessed the defendant using "harsh, violent and abusive language" towards her husband because the defendant did not invade her legal interest); *Larson*, 47 Minn. at 311, 50 N.W. at 239 ("It is unquestionably the law . . . that for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining.") (quotation omitted).

recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all¹⁸⁹

The problem created by *Village of Isle* came full circle when the plaintiff in *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*,¹⁹⁰ asked the Minnesota Supreme Court to allow her to recover emotional distress damages in a legal malpractice action.¹⁹¹ Because legal malpractice is a hybrid tort/contract action, the court could not just cite *Beaulieu* and *Francis* as authority that willful conduct is a prerequisite to recovery in pure breach of contract actions.¹⁹² Unwilling to recognize that all legal malpractice actions should give rise to recovery of damages for emotional distress, the court cited the dicta in *Village of Isle* as authority for requiring a showing of willful misconduct, even in negligence actions.¹⁹³ Ever since, courts have struggled with applying *Lickteig* and *Village of Isle* in direct invasion cases.¹⁹⁴

As demonstrated, the focus for emotional distress recovery has inexplicably shifted from the defendant's invasion of the plaintiff's legal interest in a highly emotional undertaking, to almost entirely the defendant's culpability when invading the legal interest. This evolution is inconsistent with *Larson* and *Sworski*, which do not rely in any way on the defendant's culpability and, in fact, appear to have involved purely negligent conduct.¹⁹⁵ It also fails to appreciate

189. *Larson*, 47 Minn. at 311, 50 N.W. at 239.

190. 556 N.W.2d 557 (Minn. 1996).

191. *Id.* at 560.

192. *See id.* at 561 ("Our analysis is complicated by the hybrid nature of claims for legal malpractice.")

193. *Id.* at 560-62 ("There must be a direct violation of the plaintiff's rights by willful, wanton or malicious conduct; mere negligence is not sufficient.")

194. *See, e.g.*, *Gooch v. N. Country Reg'l Hosp.*, No. A05-576, 2006 WL 771384, at *2 (Minn. Ct. App. Mar. 28, 2006) ("It is unclear in Minnesota . . . whether a claim for wrongful interference with a dead body can be supported by a showing of mere negligence, or whether it requires a showing of willful or wanton misconduct similar to an NIED case."); *Schmidt v. HealthEast*, No. C1-96-152, 1996 WL 310032, at *2 (Minn. Ct. App. June 11, 1996) (citing *Village of Isle* and suggesting the direct invasion exception also requires proof that the plaintiff was in the zone of danger); *Kamrath v. Suburban Nat'l Bank*, 363 N.W.2d 108, 111-12 (Minn. Ct. App. 1985) (citing the direct invasion exception as informing the IIED analysis).

195. *See Sworski v. Simons*, 208 Minn. 201, 203, 293 N.W. 309, 310 (1940); *Larson v. Chase*, 47 Minn. 307, 311, 50 N.W. 238, 239 (1891).

the original purpose of the willfulness requirement, which was to distinguish between pure breach of contract actions and contract actions involving an independent tort.¹⁹⁶ And it is contradicted by the *Beaulieu* court's recognition that emotional distress damages are recoverable in tort actions where a "legal right has been invaded of a nature naturally to cause grief and distress of mind."¹⁹⁷ The categorical approach to the independent duty rule would allow courts to correct these inconsistencies.

C. Redefining the Limits of NIED Recovery in Direct Invasion Cases

Aside from its shaky foundation, the *Lickteig* court's version of the direct invasion exception fails to advance the underlying purpose of granting exceptions to the general no duty rule—to ensure that only genuine claims of emotional distress reach the jury.¹⁹⁸ It is difficult to comprehend how, for example, the spouse of a recently deceased is any less likely to suffer emotional distress upon discovering that her husband's corpse was lost or mutilated due to negligent conduct, than if it were lost or mutilated due to reckless or willful conduct. Likewise, a patient misdiagnosed with a terrible disease is no less likely to suffer emotional distress upon learning of the diagnosis than if he or she were to later find an expert willing to testify that the doctor made the diagnosis in reckless disregard of the truth with knowledge that injury could result. In short, attempting to draw a line based on the defendant's culpability is arbitrary, illogical, and inharmonious with the roots of the direct invasion exception.

Reverting back to the *Francis* and *Beaulieu* courts' strict contract/tort distinction is also unappealing. The mere fact that the legal interest invaded originates from a common law standard of care rather than a contractual obligation does not ensure that the injury is genuine. Moreover, as the dissenting justice in *Beaulieu* pointed out, distinguishing a tort action from a contract action based purely on whether the action involves an underlying contract

196. *Francis v. W. Union Tel. Co.*, 58 Minn. 252, 261–62, 59 N.W. 1078, 1080 (1894).

197. *Beaulieu v. Great N. Ry. Co.*, 103 Minn. 47, 49, 114 N.W. 353, 353 (1907).

198. *See Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 437 (Minn. 1983) ("We have been careful to restrict the availability of such damages to those plaintiffs who prove that emotional injury occurred under circumstances tending to guarantee its genuineness.").

[A]mounts to defining a tort as a wrong independent of contract. The fallacy of that definition has been clearly and repeatedly demonstrated. It is elementary that the distinction between contracts and torts is not philosophical, but historical, and largely concerns the law adjective. . . .

In point of actual number, nine-tenths of the actions *ex delicto* heard by this court, and by most courts, involve causes of action which could not be maintained without pleading and proving the contract.¹⁹⁹

Since that time, of course, the contract/tort distinction has been further blurred or eliminated in many types of cases—such as strict products liability and professional malpractice—as a matter of public policy.²⁰⁰ The same policy considerations support removing this artificial distinction in certain breach of contract claims involving highly emotional subject matters.²⁰¹

199. *Beaulieu*, 103 Minn. at 57–58, 114 N.W. at 357 (Jaggard, J., dissenting) (internal quotation marks omitted). Likewise, a year earlier, the *Lindh* court recognized that “[i]t is elementary ‘that a tort is a violation of legal duty and may involve as one of its elements a breach of contract.’” *Lindh v. Great N. Ry. Co.*, 99 Minn. 408, 409, 109 N.W. 823, 824 (1906) (quoting *Rich v. N.Y. Cent. & Hudson River R.R. Co.*, 87 N.Y. 382 (1882)).

200. *See, e.g.*, *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 14 (Minn. 1992) (“Although strict liability is a tort, it is really a stripped-down model of a breach of warranty claim, with the result that the two remedies frequently overlap.”); *Wagener v. McDonald*, 509 N.W.2d 188, 190 (Minn. Ct. App. 1993) (implying that legal malpractice does not fit nicely into either a breach of contract claim or tort claim).

201. *See Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981) (“Although the general rule in Alabama is that mental anguish is not a recoverable element of damages in an action for breach of contract, an exception to this rule . . . has been recognized by this Court: Where the contractual duty or obligation is so coupled with matters of mental concern or solitude . . . that a breach will necessarily or reasonably result in mental anguish or suffering” (citations omitted) (internal quotation marks omitted).); *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85, 93 (N.C. 1990) (“[T]he contractual relationship provides a strong factual basis to support *either* a claim for emotional distress based upon a breach of the contract *or* a finding of proximate causation and foreseeability of injury sufficient to establish a tort claim for emotional distress.”); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. e (Tentative Draft No. 5, 2007) (“A court might hold that, although damages for emotional disturbance normally are not recoverable for breach of contract, some contracts—such as burial contracts—are so intimately tied to emotional issues that they call for an exception to the general rule.”). The Third Restatement further recognizes that liability under the independent duty rule “can sometimes be explained as an appendage to contract law” and encourages courts to “be cognizant of the close relationships between tort and contract in these cases to ensure that the rules in each area are compatible.” *Id.* (citation omitted).

Like the supreme court's early direct invasion decisions, the Minnesota Court of Appeals has more recently observed that the direct invasion exception typically involves tort where the very nature of the legal interest invaded tends to "naturally and directly cause emotional distress."²⁰² As a substantial number of other jurisdictions have implicitly recognized, this observation is no less true when those legal interests are invaded through purely negligent conduct, such as misdiagnosing serious diseases, mishandling corpses, committing psychological malpractice, and giving erroneous death notifications.²⁰³ Thus, focusing back on the emotional nature of the legal interest invaded, as opposed to the defendant's culpability, is how the duty analysis should be guided in future cases.

Concededly, merely asking whether the legal interest invaded tends to directly and naturally lead to emotional distress is far from a bright-line rule. But at the same time, no court to date has succeeded in reducing societal values into a single, all-inclusive rule that strikes an appropriate balance between weeding out frivolous emotional distress claims and compensating legitimate injuries for every fact pattern that could present itself.²⁰⁴ Accordingly, the Third Restatement's approach of allowing judges to define narrow,

202. *Carlson v. Ill. Farmers Ins. Co.*, 520 N.W.2d 534, 536 (Minn. Ct. App. 1994); *see also Beaulieu*, 103 Minn. at 49, 114 N.W. at 353 (observing that emotional distress damages are "limited to actions where the plaintiff has received some injury to his person, or some legal right has been invaded of a nature naturally to cause grief and distress of mind."); *Lindh*, 99 Minn. at 409, 109 N.W. at 824 (1906) ("Injury to the feelings of the family of deceased spring as naturally from disfigurement and mutilation of the body by exposure to the elements as by dissection.").

203. *See supra* Part III.B.1-3 (summarizing cases from fifteen different jurisdictions allowing recovery for emotional distress without regard to the defendant's culpability).

204. *See, e.g., Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1285 (Me. 1987) ("[Our prior cases] also demonstrate the frailty of supposed lines of demarcation when they are subjected to judicial scrutiny in the context of varying fact patterns."); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 424 (Mont. 1995) ("As is readily apparent, the case law demonstrates that negligent infliction of emotional distress as an independent tort action is a thorny issue with which this Court has struggled."); *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997) ("Our opinion today does not attempt the perhaps impossible task of distilling a unified theory of mental anguish from the existing precedents."); W.E. Shipley, Annotation, *Right to Recover for Emotional Disturbance or Its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 103 (1959), *superseded by* 38 A.L.R.4th 998 ("The case law in the field . . . is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed perplexity.").

policy-based categories of legal interests that are worthy of protection appears to be the most logical, fair, and harmonious way of redefining Minnesota's direct invasion exception.

Further, providing factors to guide the courts' analysis eliminates some of the subjectivity inherent in the process of determining which categories qualify, while retaining the needed flexibility to respond to the different types of fact patterns that will transpire. Once courts identify categories of protected legal interests, juries would have purely objective, bright-line tests to apply.²⁰⁵ If district courts are adopting overbroad categories, de novo appellate review is available to curtail the improper expansion of liability.

The eight-factor test that the courts in *Larson*, *Friedman*, *Kallstrom*, and *Burgess* applied is a start, but can be improved.²⁰⁶ In *Rowland v. Christian*,²⁰⁷ the California Supreme Court originally designed that test for the very different purpose of determining whether a specific category of conduct should be excluded from the general rule in physical injury cases imposing a duty whenever the actor increased the risk of harm.²⁰⁸ Thus, the objective in the *Rowland* analysis is to determine whether strong public policy considerations against imposing liability override the general policy of providing compensation for physical injuries.²⁰⁹ The overarching goal in NIED cases, however, is to identify categories of legal interests that, when invaded, tend to directly and naturally cause

205. See *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980) (recognizing that the zone of danger rule provides an objective guide for a jury to determine). As with bystander recovery, each category of protected legal interests must also include the class of plaintiffs with standing to pursue recovery. For example, simply identifying preserving a corpse is not helpful unless the relationship between the plaintiff and the deceased were limited to, for example, spouses, parents, children, and siblings of the deceased who actually observed the body's mutilated condition.

206. See *supra* Part III.B.3 and note 129.

207. 443 P.2d 561 (Cal. 1968).

208. See *id.* at 564, *superseded by statute in part on other grounds*, CAL. CIV. CODE § 1714.7 (West 2009), *as stated in* *Perez v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 100, 102 (Ct. App. 1990).

209. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a)–(b) (2010); see also *supra* notes 115–117 (noting the Third Restatement's examples of situations where public policy considerations oppose recognizing a duty, including holdings that (1) mothers owe no duty to their unborn fetuses; (2) physicians owe no duty to third parties; (3) social hosts who serve liquor owe no duty to third parties injured by their guests; and (4) certain media defendants owe no duty to protect the public from physical harm due to publishing material such as video games, books, and movies).

emotional distress.²¹⁰ Analyzing, for example, the availability and prevalence of insurance, the defendant's moral blame, and the burden on the defendant does not serve this purpose. The other *Rowland* factors can be modified slightly to better serve the goal of the duty analysis in NIED cases.

D. Proposed Guidelines for Identifying Categories of Protected Activities

Examining the considerations courts have cited as being important when imposing a duty in NIED cases can help develop a better set of guidelines. Grouped loosely in order of importance, those guidelines follow.

1. Does the Relevant Industry Recognize a Standard of Care that Requires the Defendant to Prevent Emotional Distress?

If the pertinent industry has already established a standard of care designed to guard against causing emotional distress, then that fact alone provides both a threshold guarantee that the claimed emotional distress is trustworthy and fair notice to the defendant that a breach is likely to result in liability. This is the consideration that the Oregon Supreme Court found important in *Curtis v. MRI Imaging Services II*,²¹¹ where the plaintiff alleged that, in performing an MRI, the defendant undertook

[A] duty to explain the nature of the procedure, to warn of its possible claustrophobic effects, to take an adequate medical history in order to discover any particular physical or psychological sensitivities that might be affected by the procedure, and . . . to terminate the procedure if the [plaintiff] begins to experience physical or psychological difficulties.²¹²

According to the court

[W]here the standard of care in a particular medical profession recognizes the possibility of adverse psychological reactions or consequences as a medical concern and dictates that certain precautions be taken to avoid or minimize it, the law will not insulate persons in that profession from liability if they fail in those duties,

210. See *supra* note 204 and accompanying text.

211. 956 P.2d 960 (Or. 1998).

212. *Id.* at 963.

thereby causing the contemplated harm.²¹³

This consideration is also probably applicable in cases involving, for example, morticians preparing bodies for funerals, doctors delivering death notifications or news of serious illnesses, and psychologists treating patients for psychological disorders.²¹⁴ The source and notoriety of the standard should drive the weight given to this factor.²¹⁵

2. *Does the Legal Interest Involve a Highly Emotional Subject Matter?*

The highly emotional character of the undertaking or activity is either explicitly or implicitly a central consideration in virtually every case imposing a duty to avoid negligently inflicting emotional distress.²¹⁶ Like the first factor, the highly emotional nature of an activity tends to both ensure that the resulting emotional distress is trustworthy, and that the defendant had fair notice of the potential for liability in the event of a breach.

213. *Id.*

214. The *Curtis* court analogized these allegations to “a patient’s claim against a psychotherapist who violates the relevant standard of care by entering into a sexual relationship with a patient, thereby causing depression or anxiety, or against a physician who inappropriately prescribes a drug that causes or exacerbates a psychological condition.” *Id.* (citing *Richard H. v. Larry D.*, 243 Cal. Rptr. 807 (Ct. App. 1988), *disagreed with on other grounds* by John R. v. Oakland Unified Sch. Dist., 769 P.2d 948 (Cal. 1989); *Rowe v. Bennett*, 514 A.2d 802 (Me. 1986); *Kampe v. Colom*, 906 S.W.2d 796 (Mo. Ct. App. 1995); *Mazza v. Huffaker*, 300 S.E.2d 833 (N.C. Ct. App. 1983); *Sisson v. Seneca Mental Health/Mental Retardation Council, Inc.*, 404 S.E.2d 425, 428 (W. Va. 1991)).

215. For instance, a standard established by statute, ordinance, or code of ethics could be given significant weight. A standard established by treatise, journal article, or industry publication should be given moderate weight. And a standard established solely by expert testimony could be given less weight.

216. *See, e.g.*, *Lindh v. Great N. Ry. Co.*, 99 Minn. 408, 409, 109 N.W. 823, 824 (1906) (“Injury to the feelings of the family of deceased spring . . . naturally from disfigurement and mutilation of the body by exposure to the elements”); *Kamrath v. Suburban Nat’l Bank*, 363 N.W.2d 108, 112 (Minn. Ct. App. 1985) (“[H]arm of the type Kamrath suffered, based in emotional distress, flows naturally from [forcing an employee to undertake a polygraph examination].”); *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 443 (Minn. Ct. App. 1985) (“There can be few experiences as terrifying as being pinned to a seat by gravity forces as an airplane twists and screams toward earth at just under the speed of sound. The nature of that experience guarantees plaintiff suffered severe emotional distress during the descent and the emergency detour to Detroit.”).

3. *Is There a Special Relationship Between the Plaintiff and Defendant?*

Courts are more likely to recognize a duty to avoid negligently inflicting emotional distress where the breach occurred within the confines of a special relationship rather than between complete strangers.²¹⁷ The following elements are common to special relationship cases: (1) the existence of a contractual relationship or other voluntary undertaking by the defendant directly with or to the plaintiff; (2) the plaintiff's vulnerability to emotional distress; and (3) the defendant's knowledge of the plaintiff's vulnerability.²¹⁸ The existence of a special relationship not only ensures some rational and bright-line limits on the extent of the defendant's liability, but also provides some indicia of trustworthiness and fair notice to the defendant.

217. See, e.g., *Chizmar v. Mackie*, 896 P.2d 196, 203–05 (Alaska 1995) (finding that a doctor owed said duty to his patient); *Burgess v. Superior Court*, 831 P.2d 1197, 1203 (Cal. 1992) (finding that a doctor owed said duty to his minor patient's mother); *Gracey v. Eaker*, 837 So. 2d 348, 357 (Fla. 2002) (implying that a psychotherapist owes said duty to his patient); *Rowe*, 514 A.2d at 807 (“[B]ecause of the nature of the psychotherapist-patient relationship, an action may be maintained by a patient for serious mental distress caused by the negligence of his therapist despite the absence of an underlying tort.”); *Boorman v. Nev. Mem'l Cremation Soc'y*, 236 P.3d 4, 7–8 (Nev. 2010) (finding that a mortuary owes said duty to the family of the deceased); *Curtis*, 956 P.2d at 963 (“[W]here the standard of care in a particular medical profession recognizes the possibility of adverse psychological reactions or consequences as a medical concern and dictates that certain precautions be taken to avoid or minimize it, the law will not insulate persons in that profession from liability if they fail in those duties, thereby causing the contemplated harm.”); *Shin v. Sunriver Preparatory Sch., Inc.*, 111 P.3d 762, 770 (Or. Ct. App. 2005) (holding that, because of the special relationship between a boarding school and its students, the boarding school owed a duty to avoid negligently causing emotional harm to its student).

218. *Freeman v. Harris Cnty.*, 183 S.W.3d 885, 890 (Tex. App. 2006). Although Minnesota law does not discuss the direct invasion exception in terms of special relationships, this explanation appears consistent with Minnesota's treatment of emotional distress resulting from statutory violations. Compare *Kamath*, 363 N.W.2d at 112 (holding employer's violation of statutory duty to not subject employees to polygraph test permitted recovery for resulting emotional distress), with *Beaulieu v. Great N. Ry. Co.*, 103 Minn. 47, 55–57, 114 N.W. 353, 356–57 (1907) (holding telegraph company's violation of statutory duty to deliver telegraphs did not permit recovery for resulting emotional distress).

4. *Is the Occurrence of Emotional Distress a Foreseeable Consequence of the Breach?*

Although related to the second factor, the foreseeability question differs in that it focuses on the defendant's perspective, rather than on the nature of the undertaking in general.²¹⁹ While many authorities provide a convincing reason for denying dispositive significance to the foreseeability consideration,²²⁰ its well-established role in the duty analysis cannot be denied.²²¹ But the highly subjective nature of this inquiry should slightly diminish its importance in the overall analysis.

5. *Is the Injury Likely to be Experienced by an Appreciable Number of the Population, as Opposed to the Rare, Idiosyncratic Hypersensitive, or Unusual Minority?*

The foreseeability of the injury should be examined from the standpoint of the "normally constituted" or "ordinarily sensitive" plaintiff, not the hypersensitive or idiosyncratic.²²² Importantly, however, this consideration is not to be confused with denying a particular plaintiff damages because of unusual sensitivity. The Minnesota Supreme Court has adopted the eggshell plaintiff doctrine in the emotional distress context, distinguishing between the foreseeability of *some* harm versus the foreseeability of the *ultimate* harm:

219. Using the example of handling a corpse, the foreseeability prong would provide a different result for a rail carrier employee who caused damage by failing to cover the casket during transport from a passenger who was unaware of the corpse's presence and negligently caused a fire that destroyed all cargo aboard, including the corpse. Although the legal interest invaded would be highly emotional in both instances, emotional distress to the deceased's family would arguably be foreseeable to the former, but not the latter.

220. See *supra* notes 150–51.

221. See *Austin v. Metro. Life Ins. Co.*, 277 Minn. 214, 217, 152 N.W.2d 136, 138 (1967) ("The common-law test of duty is the probability or foreseeability of injury to plaintiff."); see also *La Fleur v. Mosher*, 325 N.W.2d 314, 318 (Wis. 1982) (discussing foreseeability as a relevant consideration in determining whether to recognize a categorical exception); *supra* Part III.B.1.

222. See *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1285 (Me. 1987) ("A defendant is bound to foresee psychic harm only when such harm reasonably could be expected to befall the ordinarily sensitive person."); *Bass v. Nooney Co.*, 646 S.W.2d 765, 773–74 (Mo. 1983) (en banc) (remanding for trial on whether the defendant could have foreseen that an ordinary person would suffer significant emotional distress while trapped in a stuck elevator).

A more difficult question is the broad problem of compensating one whose injuries are the result of unusual sensitivity or susceptibility to shock. Much has been written on the subject, both by courts and commentators. Defendant vigorously argues that plaintiffs should not be entitled to recover for injuries which defendant could not reasonably foresee. However, we have held that foreseeability is a test of negligence and not of damages. If defendant can foresee some harm to one to whom he owes a duty, the exact nature and extent of the harm need not be foreseeable to permit recovery for all of the damages proximately caused.²²³

Accordingly, this factor only examines—on a categorical, not case-by-case, basis—whether an appreciable portion of the population is likely to experience some emotional harm. A plaintiff falling within this category can recover even if the extent of his or her emotional distress was unforeseeable because of an unusual susceptibility to emotional distress.

This was the consideration that the *Friedman* court found dispositive when it denied recovery to a strict ethical vegan who alleged emotional distress stemming from his discovery that a tuberculosis test contained animal byproducts.²²⁴ Discovery of a putrid object in food, on the other hand, is an example of something that would no doubt trigger a negative emotional response by an appreciable or substantial portion of the population.²²⁵

6. *Is the Category Narrowly Defined to Ensure Commonality?*

The concern against protecting only the idiosyncratic, hypersensitive, or unusual minority of the population must be balanced against the danger of classifying categories of legal interests too broadly. This factor derives from the Alaska Supreme

223. *Okrina v. Midwestern Corp.*, 282 Minn. 400, 405, 165 N.W.2d 259, 263 (1969).

224. *Friedman v. Merck & Co.*, 131 Cal. Rptr. 2d 885, 892–95 (Ct. App. 2003).

225. Several jurisdictions recognize a duty to avoid negligently causing emotional distress by way of contaminated food. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. d reporters' note (Tentative Draft No. 5, 2007) (citing *Hagan v. Coca-Cola Bottling Co.*, 804 So. 2d 1234 (Fla. 2001); *Way v. Tampa Coca Cola Bottling Co.*, 260 So. 2d 288 (Fla. Dist. Ct. App. 1972); *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970), *overruled on other grounds by Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433, 437 (Me. 1982)).

Court's concerns when it declined to recognize a duty to avoid emotional distress in all cases where the defendant causes the plaintiff to unknowingly injure a third party.²²⁶ The test is whether the potential factual variations among cases falling within a proposed category could vary so widely that the classification does very little to ensure that class members' injuries are genuine.²²⁷

This factor also demands precise definition of the particular class of plaintiffs with standing to claim membership in the protected category. Where the breach arises out of a contractual relationship, perhaps only parties to the contract can recover.²²⁸ Where the breach derives from a statutory requirement, a negligence per se analysis can be used to define the class of qualifying plaintiffs.²²⁹ In the rare case where there is no underlying tort or contract violation, courts must make public policy distinctions to define the scope of the class.²³⁰

7. *Have Other Jurisdictions Recognized a Duty for that Particular Category of Activity?*

When recognizing new torts, Minnesota courts consistently consider how other jurisdictions have addressed the issue.²³¹ Similarly, examination of whether other jurisdictions have recognized a particular category of activity as permitting NIED

226. *Kallstrom v. United States*, 43 P.3d 162, 167–68 (Alaska 2002).

227. *Id.* at 167.

228. For instance, a court may find that in negligent diagnosis cases, only the patient can directly recover for the resulting emotional distress, not members of his or her family.

229. *See, e.g., Clomon v. Monroe City Sch. Bd.*, 572 So. 2d 571, 577 (La. 1990) (“In determining whether the bus driver’s violation was a breach of a delictual duty owed specially and directly to [the plaintiff] it is necessary to examine the purposes of the legislation and decide (1) whether [the plaintiff] falls within the class of persons it was intended to protect and (2) whether the harm complained of was of the kind which the statute was intended, in general, to prevent.”).

230. *See, e.g., Boorman v. Nev. Mem’l Cremation Soc’y*, 236 P.3d 4, 8 (Nev. 2010) (holding that family members can maintain a negligent emotional distress claim against a mortuary regarding the handling of a loved one’s remains but may not pursue a claim against the county coroner). In *Boorman*, the court found a distinction between the nature of the duty undertaken by a county coroner, who does not have a contract with the deceased’s family, and a private mortuary, which does. *Id.* at 8–10. Because of this distinction, the court held that the coroner was only liable to “the person with the right to dispose of the deceased’s body,” and the mortuary was only liable to “close family members who are aware of both the death of a loved one and that mortuary services were being performed.” *Id.* at 8–9.

231. *Larson v. Wasemiller*, 738 N.W.2d 300, 304 (Minn. 2007); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234 (Minn. 1998).

recovery, and the success of those decisions, should guide a Minnesota court's analysis.

8. Do Other Considerations Provide Guarantees of the Genuineness and Materiality of the Emotional Distress?

A catchall factor gives courts the needed flexibility in responding to endless factual circumstances, changing societal norms, new technologies, and the unpredictable ways that genuine emotional distress could result from negligent conduct.

9. Do Strong Countervailing Public Policy Considerations Militate Against Imposing a Duty?

This factor is borrowed from the Third Restatement's exception to the general duty rule in physical injury cases.²³² Like physical injury cases, there may be exceptional cases where strong public policy considerations warrant denying liability. For instance, a proposed category of activities may so strongly implicate the First Amendment that imposing liability could risk curtailing the defendant's freedom of speech.

V. CONCLUSION

The categorical approach to defining the scope of NIED recovery strikes an appropriate balance between objectivity and flexibility. Carefully identifying narrow categories of activities that naturally and foreseeably tend to cause emotional distress in the event of a breach is a far fairer, more rational, and more jurisprudentially sound approach to defining the limits of NIED recovery than Minnesota's existing limits. With the guidance of a factor-based test and appellate supervision, judges can adequately assure that plaintiffs will not flood the courthouses with spurious or trivial claims. After that, modern science and the time-honored role of the jury can adequately ensure that only genuine injuries are compensated.

232. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010).