CHAPTER 4

NEGLIGENCE

It is well recognized that negligence is the preeminent theory of liability in U.S. tort law. Generations of law students have dutifully memorized the five elements of a plaintiff's prima facie case of negligence: duty, breach, cause-in-fact, proximate cause and damages. In common parlance, the first two elements – duty and breach – are often lumped together and referred to as the negligence inquiry. Strictly speaking, however, the two elements are separate: there can be no requirement to act reasonably (*i.e.*, non-negligently) unless there is an antecedent duty imposed on the defendant to take care to safeguard plaintiff's interests. Absent a duty, there can be no breach.

In the discussions leading to the Third Restatement of Torts, a lively debate broke out among academics as to whether the concept of duty should be considered obsolete.[1] The issue arose because the existence of a duty to exercise reasonable care is often presupposed in contemporary tort law, except for truly exceptional situations in which public policy clearly dictates relieving defendants of responsibility.[2] Although the debate was not finally settled, there is general agreement that the duty to act reasonably now operates as the default standard and that deviation from that standard requires explanation and justification. To a large degree, negligence plus causation is synonymous with tort liability.

What is not always acknowledged or understood, however, is that this general duty of care due extends only to cases of physical injury and property damage.[3]

Significantly, there is no general duty to protect against emotional harm or relational loss.[4] This huge exception from the duty-to-act-reasonably requirement encompasses a wide spectrum of harm. Under the heading of emotional harm fall mental disturbances of all sorts, from fear, shock, and trauma to grief, anxiety, humiliation, and shame. Although also intangible, relational injury is distinct from emotional injury; it is centered on the damage or destruction done to important human relationships.[5] For example, relational claims for wrongful death and loss of consortium compensate for the severing of ties between spouses or for the severe impairment of the parent/child relationship. It is interesting that, outside the realm of law, the state of a person's emotional and relational life is regarded as central that person's well-being. Tort law, however, continues to regard these interests with a high degree of skepticism. In this respect, the preoccupation of tort law with physical harm seems outdated and out of touch with social reality.

The standard story told about the rationale for limiting claims for emotional harm has shifted over time.[6] Early cases tended to doubt the genuineness of emotional distress claims. There were fears that plaintiffs could easily fake injuries and that it would be impossible to trace the invisible causal chain from the accident to the plaintiff's injury. Additionally, early courts also often faulted plaintiffs for not being "tougher," suggesting that emotional distress was more a function of the idiosyncrasies of the victim than the dangerous quality of the defendant's action.

This skepticism toward plaintiffs in emotional disturbance suits still surfaces today. The new Restatement of Torts, for example, attempts to explain the "caution" that courts have historically displayed in granting recovery for emotional distress by noting that "emotional distress is less objectively verifiable than physical harm and therefore

easier for an individual to feign, to exaggerate or to engage in self deception about the existence or extent of the harm."[7] Comments to the Restatement also echo a distaste for compensating timid, supersensitive plaintiffs, reciting the familiar view that "some minor or modest emotional harm is endemic in living in society and individuals must learn to accept and cope with such harm."

As courts and commentators have long noted, however, these twin concerns about genuineness and seriousness of emotional injuries are incapable of justifying a total ban on recovery for this type of harm.[8] Over time, plaintiffs have had considerable success convincing courts that fraudulent claims can be weeded out if courts and juries rely on their own good judgment and on the wealth of medical knowledge describing and documenting various types of emotional disturbances.[9] In this respect, many emotional injuries are not qualitatively different from physical injuries which can sometimes be difficult to prove and verify. Additionally, it is now well accepted there is no need to deny recovery for all emotional injuries in order to screen out cases of trivial or insubstantial harm. Taking a page from the development of the tort of intentional infliction of emotional distress, most courts seem to understand that claims for negligent infliction of emotional distress can be expressly limited to cases of severe emotional harm, as defined by each particular jurisdiction.

Given the weakness of these traditional rationales for denying recovery, it is not surprising that, in more recent cases, the hesitation to award damages for emotional distress is often couched in terms of pragmatic concerns about imposing disproportionate liability of defendants and providing a clear stopping point for liability.[10] In other words, the rhetorical ground has shifted from concerns about the worthiness of plaintiffs and

their claims, to worries about the effect of liability on defendants and the courts. In a negligent infliction claim decided in 1994 by the U.S. Supreme Court under the Federal Employers' Liability Act, for example, Justice Clarence Thomas stressed that, unlike physical harm caused through impact, injuries produced through the mechanism of fear or other distress can occur far from the time and place of the original accident.[11] This particular feature of emotional injury means that many more people can be subjected to a risk of harm and that damages can mount if multiple victims pursue their claims. Even proponents of liberalization of tort recovery for negligence acknowledge that these pragmatic concerns are not groundless. There is thus a recognized need for line-drawing in emotional distress cases and for the development of fair rules that limit the scope of liability. As the new Restatement puts it, some courts have been "more sympathetic to liability when the circumstances are such that any reasonable person would suffer serious emotional disturbance, when the severity of the harm or effect limits the victim's ordinary activities, and when the scope of liability is sufficiently limited."[12] While these pragmatic limitations on recovery for emotional distress are still "considerably more" than those imposed for physical harm, they do represent an opening in the law and greater comfort on the part of at least some courts to allow recovery for intangible harm.

The shift in rationale for limiting claims of emotional distress highlights that concerns of judicial administration are central to this fast developing area of law. In our view, the crucial question regarding compensation for emotional distress is no longer *whether* compensation for negligently inflicted emotional distress should ever be allowed. Some legal protection already exists and has existed for quite some time. Rather, the crucial policy choices have to do with *when* to provide compensation, that is,

identifying those contexts in which the genuine emotional distress suffered by victims is so compelling that it deserves recognition in law. In this chapter we identify three contexts – cases involving sexual exploitation, cases involving reproductive injury and cases involving harm to close family members – that we argue deserve special scrutiny, in part because of their close connection to women's interests and gender equality.

One of the main points we stress is that, despite the trend toward liberalizing recovery, treating emotional harm and relational losses differently from physical harm and property loss remains an important structural feature of tort law.[13] The dichotomy between physical and emotional harm (or between damage to property and damage to relationships) does not simply set up a system of contrasting legal interests; it constructs an implicit hierarchy of value as well. Although the standard texts do not always state so explicitly, there is little question that a higher value is placed on physical injury and property loss than on emotional and relational harm. This well-entrenched hierarchy is reinforced in the Third Restatement, which has a separate section on emotional harm and no treatment at all of relational harms.[14] For these less favored types of harms, tort law still imposes a welter of special rules and limitations on recovery.

The special doctrinal rules governing emotional and relational harms are stated in gender-neutral terms and initially do not seem to be tied to any gender or other social group. Because all persons have a body, emotions, and personal relationships, it is often assumed that people possess "privileged" and "non-privileged" interests in equal proportions. As they operate in social contexts, however, the implicit hierarchy of value privileging physical injury and property loss has an important gender impact. It tends to place women at a disadvantage because important and recurring injuries in women's lives

are more often classified as lower-ranked emotional or relational harm.[15] This gender effect cuts across racial lines, affecting subgroups of women in differing ways.

As mentioned previously, in contemporary law, the lower ranking of emotional and relational injuries does not always cut off relief altogether. Courts no longer flatly declare that mental disturbance does not qualify for legal protection or refuse to recognize any relational injuries. Rather, through stringent requirements placed on recovery for emotional and relational harm, the law makes it harder to sue for gendered injuries such as sexual exploitation, damage connected to pregnancy, fertility and childbirth, and suffering arising from injury to children and other family members. Under the guise of setting boundaries for recovery of intangible harm, courts routinely confront gender-inflected issues of sex, reproduction, and parent/child relationships. Mired in the intricacies of doctrine, however, they rarely see the larger picture and only rarely avert to gender in such cases. Instead, they tend to lump these claims together under the general rubric of "emotional distress" claims, masking the gender dimension underlying such lawsuits and often trivializing the harm. To be clear, the gender dynamic in these cases is not that of favoring individual female plaintiffs over individual male plaintiffs. Rather, gender disadvantage flows from disfavoring the type of claim that women plaintiffs are likely to bring, thus placing them -- and any male plaintiffs bringing similar claims -- at a structural disadvantage.

When emotional distress cases are analyzed through a critical lens, two features emerge as especially problematic. The first consists of judicial handling of contests involving consent to sexual encounters and the evaluation of harm caused by coerced or forced sex. Many cases involve plaintiffs who claim they were pressured or deceived into

having sex with the defendant or otherwise exploited sexually. A key question in these cases is whether courts will embrace a feminist conception of consent that takes into consideration the power and social situation of the parties and understands that harm can flow from being forced or pressured to acquiesce in sexual conduct, even absent the application of physical force or threat of physical force.[16] The second feature present in many emotional distress cases involves the recognition and valuation of intimate relationships, particularly the mother/child relationship. Plaintiffs in these cases often ask courts to award damages for conduct that disrupts, damages or severs such intimate relationships. A crucial issue in these cases is whether tort law will respond to the criticism posed most vigorously by cultural feminists who maintain that the law has not treated intimacy on a par with property rights and that essential cultural activities associated with women – such as childbearing and childrearing – have been undervalued.[17]

In this chapter, we discuss the evolving rules on recovery for negligent infliction of emotional distress, a particularly volatile area of the law that is often crowded out of the torts curriculum and marginalized in torts scholarship. This chapter builds upon the discussion in Chapter 2 treating "nervous shock" cases. In Chapter 2, we described how the physical/emotional distinction was deployed in negligence law well into the 20th century to deny recovery for any injury – even physical injuries such as miscarriages or stillbirths – caused by fright or trauma, unless there was proof of physical contact with the person of the plaintiff. This "impact rule" is now rejected in virtually all states.[18] Recognizing the shift, the Third Restatement makes it clear that recovery for physical harm produced by any means is governed by ordinary negligence principles, including

the imposition of a duty of reasonable care.[19] However, as we show, milder versions of the physical/emotional distinction are still very much alive and scattered throughout this area of law.

It is conventional to break down cases of emotional harm into two groups – (1) direct victim and (2) secondary victim or bystander cases. In the latter group of cases, the injury to the plaintiff is caused through witnessing or otherwise experiencing harm to another, most often a family member. In our view, these bystander cases, while conventionally categorized as emotional harm cases, are better understood as claims for relational injury. The "direct victim" category is the large residual category that encompasses all other claims for emotional harms.

Direct Victims and Gender

The most chaotic pocket of the law is that governing recovery in direct victim cases. This is due in part to the fact that cases in this category range over such disparate territory. Perhaps the most familiar negligent infliction of emotional distress claims are those for emotional distress arising from fear of physical harm that never materializes (the "near miss" cases) or for fear of contracting a disease or physical illness in the future (*e.g.*, fear of AIDS or cancerphobia cases).[20] In this genre of cases, there is no clear gender dimension or disparate gender impact. Over the years, we have witnessed a liberalization of rules governing recovery in this strand of cases. Thus, the Third Restatement now endorses recovery for "stand alone" emotional distress in cases in which the plaintiff is placed in "immediate danger of bodily harm," an approach

commonly known as the "danger zone" rule."[21] As one commentator notes, the danger zone rule is really a physical risk rule, a subsidiary of the physical/emotional distinction that limits recovery to those plaintiffs regarded as most at risk for physical injury, even if it never materializes.[22] Despite liberalization of the rules for emotional harm, it appears that courts are still most comfortable permitting recovery in cases that conceptually can be linked in some way to physical harm, even though the ultimate harm is purely emotional.

In contrast, the type of direct victim litigation that very often has a gender dimension consists of suits between parties in either a professional or a significant personal relationship. These suits often implicate not only a plaintiff's interest in emotional tranquility – the quaint term used by the Restatement to describe the interest at stake – but also a plaintiff's interest in sexual integrity and autonomy and in reproductive health and choice. Such cases typically are saturated with gender: the plaintiffs are disproportionately women and their claims of emotional distress implicate cultural norms relating to gender roles, sexual relationships, and personal identity.

The courts are most in conflict when it comes to rules governing this second strand of negligent infliction of emotional distress cases. Many states continue to refuse to allow recovery in such cases unless the plaintiff can point to a "physical manifestation" arising from the emotionally distressing conduct of the defendant.[23] This stepchild of the impact rule insists on proof of physicality of the injury, even when it is clear that the emotional distress is severe and the plaintiff's response is not unreasonable under the circumstances. Other states have been more willing to impose liability in such cases, often by stretching the definition of "physical manifestation" beyond recognition.[24]

Surveying this disarray, the Third Restatement has wisely chosen to reject any attempt to broaden the definition of physical harm and to support recovery for "stand alone" emotional distress – unaccompanied by physical manifestations – in certain contexts. Under the Restatement's more sensible approach, recovery for negligent infliction of emotional distress would be allowed in cases in which the harm occurs in "the course of specified categories of activities, undertakings or relationships in which the negligent conduct is especially likely to cause emotional disturbance." [25]

The Restatement's emphasis on the relational context in which the tort is committed and away from basing recovery solely on the categorization of the injury marks an important development, especially if it influences the development of future caselaw. Significantly, however, the Restatement did not express an opinion as to which specific activities, undertakings or relationships would give rise to liability. Whether there will be greater protection against gendered injuries thus depends on how courts interpret this proposed new synthesis of the rule.

In the past, some courts have limited recovery solely to cases in which plaintiff and defendant are in a contractual relationship.[26] Courts have envisioned this genre of emotional distress case as the modern version of an old line of cases that permitted recovery against a telegraph company which erroneously negligently failed to deliver a telegram announcing the death of a family member or against a funeral parlor or burial service which negligently mishandled a corpse.[27] These courts essentially treat this strand of negligent infliction of emotional distress as an appendage to contract law, providing recovery for emotional distress only in that special subset of contracts in which emotional distress is highly predictable given the delicate nature of the undertaking. In such cases, it

is sometimes stated that the contract supplies the "independent duty" towards the plaintiff that justifies protection against emotional distress. Like the search for a physical manifestation, the search for an independent duty highlights the degree to which courts are uncomfortable finding a duty to protect against emotional harm and are still scrambling to discover another doctrinal peg from which to hang recovery.

The pre-existing contract limitation does capture many cases – particularly those involving interference with reproduction – that occur in the context of the doctor/patient relationship.[28] It also potentially permits employees who claim that the employers have negligently failed to protect them from sexual harassment and exploitation to sue for negligent infliction of emotional distress. However, envisioning the tort as an expansion of contract rights suggests that the primary interest at stake is bolstering and enforcing the parties' voluntary agreement, *i.e.*, the general interest in private ordering protected by contract. By foregrounding contract, the exclusive source of the duty becomes private undertakings, rather than social norms or public policy. This conceptualization of the tort also misses a key relational dimension of the cases, beyond simply that there is often (but not always) an underlying contract between the parties.

In our view, a critical feature of this strand of negligent infliction of emotional distress cases is that the defendant's conduct often damages plaintiff's well being in non-commercial contexts central to her identity as an individual, mother, or family member. Today, the negligent infliction of emotional distress tort is often the repository for claims involving harm to plaintiff's interest in sexual integrity and autonomy and in reproductive health and choice. Notably, these interests are not invariably linked to voluntary contractual arrangements between the parties and possess a relational as well as

individualistic quality. Women's control over their sexuality and their decisions about bearing and nurturing children are often at stake.

The Restatement and some courts do recognize that this strand of negligent infliction of emotional distress involves sensitive and personal activities which if handled negligently "are especially likely to cause emotional disturbance." The commentary to the Restatement also indicates that, like claims for intentional infliction of emotional distress, claims for negligent infliction of emotional distress often occur in situations in which "one person is in a position of power or authority over the other and therefore has greater potential to inflict emotional harm."[29] However, it is still far from clear whether courts will insist on the existence of a contract between the parties before they permit recovery or how they will evaluate the sensitive nature of the activity or the presence of exploitation or abuse of power, absent a contract.

The important step that the Restatement and even more liberal courts have failed to take is explicitly to prioritize the interests in sexual integrity and reproduction as fundamental interests, worthy of heightened protection against privately inflicted damage in tort law. Neither makes the analogy to the heightened protection these fundamental interests receive against government-based interference in constitutional law. Thus, the U.S. constitution prohibits state action which interferes with an individual's choice of a sexual partner or with an important decision relating to childbearing and childrearing, absent proof that such interference is necessary to further a compelling state interest.[30] In constitutional doctrine, it is the fundamental personal interests at stake that trigger the Court's "strict scrutiny" in such cases. As yet, there is no similar strict scrutiny or similar

condemnation of private activities that pose equally potent threats to these personal interests.

Sexual Exploitation Cases

Two cases from the highest courts of Texas and Illinois illustrate the courts' ambivalence toward plaintiffs in negligent infliction of emotional distress cases involving allegations of sexual exploitation. The Texas decision was a rare instance in which gender bubbled up from the surface and became a key factor in the case.[31] *Boyles v. Kerr* was a 1993 Texas case involving a 19-year-old woman whose boyfriend, with the aid of his friends, cooked up a scheme secretly to videotape the couple having sex. Before the surreptitious taping, the friends set the stage for the video by taping themselves making crude comments and jokes about the event that was about to take place. After the taping, the boyfriend took possession of the video and showed it to ten other people, purportedly even charging money for one viewing. The video eventually was widely circulated and gossiped about at the college campuses plaintiff and her now ex-boyfriend attended. The plaintiff found out about the tape two months after the event, when she discovered that she was becoming known as the "porno queen" among her classmates.

The woman sued her ex-boyfriend and the others involved in the scheme asserting a variety of legal theories. The trial focused, however, primarily on the claim for negligent infliction of emotional distress, the theory that most readily reached the behavior of all of the defendants and would presumably allow plaintiff to tap into the homeowners' insurance policies of defendants' parents that covered negligence, but not

intentional injury.[32] The plaintiff alleged that the events significantly interfered with her ability to study and caused her severe emotional suffering and humiliation, culminating in a diagnosis of post-traumatic stress disorder. Apparently the jury agreed: it ruled for the plaintiff, bringing in a verdict of $1,000,000, for both compensatory and punitive damages, which the appellate court affirmed.

By the time the case reached the Texas Supreme Court, it had garnered considerable attention from women's organizations who submitted amicus briefs to the court supporting the verdict and imploring the court to recognize the claim for negligent infliction of emotional distress in the context of sexual abuse and exploitation cases. Amici stressed that denying recovery in a case such as *Boyles* would send a message to sexual abuse victims that they were "second class citizens" and that it "defies logic to have a system of justice that will compensate the victim of a car wreck but that will refuse to compensate the recipients of the most devastating of emotional injuries."[33]

The impassioned arguments, however, did not persuade the majority of the court which overturned the jury verdict and declared that absent a finding of an "independent duty," there could be no recovery for negligent infliction of emotional distress in Texas. Tellingly, the court did not consider the special relationship between intimate sexual partners sufficient to create a duty. Justice Alberto Gonzalez, in a concurring opinion, flatly declared that "[t]his case has nothing to do with gender-based discrimination or an assault on women's rights."[34] The majority denied that it was leaving sex abuse victims wholly without a remedy, however, and remanded the case for retrial on an intentional tort theory.

The strong dissents in *Boyles* regarded the outcome in the case as an injustice to "the women of Texas" and chided the majority for treating what happened to the plaintiff as if it were "a mere trifle or any other distress associated with daily existence." In response to the majority's claim that the case should be litigated solely as an intentional tort, Justice Spector – the lone female Justice on the Texas Supreme court – noted that in many cases, severe emotional distress may be caused by an actor who does not desire to inflict severe emotional distress and who may be oblivious to the fact that such distress is substantially certain to result from his actions. In this case, for example, Justice Spector speculated that Dan Boyles may have videotaped the sexual intercourse with Susan Kerr, "not for the purpose of injuring her, but rather for the purpose of amusing himself and his friends." She was of the view that "[b]rutish behavior that causes severe injury, even though unintentionally, should not be trivialized."[35]

Justice Spector's dissent was notable for her take on the gender dimension of the negligent infliction tort. She emphasized that the claim of negligent infliction of emotional distress was of special significance to women because "the overwhelming majority of emotional distress claims have arisen from harmful conduct by men, rather than women." While recognizing that both men and women could have an interest in recovery for emotional distress, she expressed concern that historically "men have had a disproportionate interest in downplaying such claims." For the dissent, the court's rejection of the negligent infliction claim represented a "step backward" in the law's response to the sexual mistreatment of women and was "especially troubling" given the high incidence of sexual harassment and domestic violence throughout the country.

Boyles is a striking example of how tort law can miss the mark when it lumps together all negligent infliction cases, without regard to context. Rather than battle over the abstract issue of whether there exists an independent duty upon which to base tort liability, cases such as *Boyles* should be resolved more concretely by focusing on whether the defendant's conduct could be expected to jeopardize plaintiff's interest in sexual integrity and autonomy. Because it was clear in *Boyles* that secretly videotaping and distributing the sex tape would reasonably be expected to and did seriously erode plaintiff's control over her own sexuality, a duty of due care should have been triggered. Interestingly, all the members of the Texas Supreme Court seemed to regard the case as one of unacceptable sexual exploitation, yet disagreed as to whether there was a duty of due care. Focusing more directly on the interest at stake in this case would have the advantage of delimiting the scope of negligent infliction claims without downplaying the seriousness of the injury. Perhaps most importantly, it is not enough to say that plaintiff might have succeeded if only she had pursued a claim for intentional infliction of emotional distress or intentional invasion of privacy. Aside from the issue of availability of insurance, it is far from clear that the conduct of all the defendants in *Boyles* would be classified as outrageous, particularly under the high threshold of proof Texas courts have applied in intentional infliction cases. [36] Placing a high priority on the interest in sexual integrity and autonomy, moreover, means that the interest is regarded as so important that it should be protected against negligent as well as intentional interference.

Not all courts have been as reluctant to provide protection to sexual exploitation victims through the negligent infliction tort. In contrast to Texas, the Supreme Court of Illinois allowed a negligent infliction claim based on sexual exploitation to proceed to

trial in the 1991 Illinois case of *Corgan v. Mueling*..[37] In that case, an unregistered psychologist had sex with a patient under the guise of therapy. After she ended the professional relationship, the former patient sued the therapist, alleging both intentional and negligent infliction of emotional distress. She claimed that the sexual encounters were shameful and humiliating to her and forced her to undergo more extensive counseling and psychotherapeutic care. Perhaps because it was easier to think about this case as an instance of professional malpractice, the allegations in Corgan's complaint focused on the particular ways in which the therapist had failed to take due care, mentioning his negligence in treating female patients when "he was incapable of maintaining appropriate professional objectivity," allowing the relationship with the plaintiff "to become a vehicle for the resolution of his own psychosexual infirmities," and failing to consult with other psychologists when "he realized that his relationship with plaintiff was adverse to her psychological well-being." [38]

In ruling for the plaintiff, the majority of the Illinois court dispensed with the need to demonstrate a "physical manifestation" of injury and held that the therapist/patient relationship gave rise to a duty to exercise due care. The majority opinion highlighted the risks and harms of sexual exploitation, citing recent legislation in the state addressing the problem and an article in a feminist law journal analyzing the exploitation of women patients.[39] In sharp contrast to Texas, the court was not concerned that the case might also have been framed and litigated as an intentional tort case. For the Illinois court, the extra measure of protection to an abuse victim afforded by a negligence claim was regarded as an appropriate legal response, given the gravity of the injury and the relationship of the parties.

It is important to note that the *Corgan* decision was not unanimous and drew a stinging dissent from a member of the Court who had a very different idea of what constituted sexual exploitation and what was the proper legal response in such cases. The dissent would have disallowed the claim, characterizing the case as one of "mutually agreeable sexual intercourse" and concluding that the moment the sexual relationship began, the treatment by definition ended.[40] Because the plaintiff was not "a minor, mentally retarded or under some other legal disability," the dissenting Justice refused to regard her submission to sexual intercourse as sexual exploitation or sexual abuse. In the mind of the dissenting Justice, negligence liability should be inexorably tied to physical injury. He opined that this was not a proper negligence case because "[t]here was no allegation that the parties fell off a bed or injured any part of plaintiff's anatomy." The Justice's hostility to the majority's ruling was so intense that he ended his opinion by declaring that "to hold the defendant legally liable under such conditions is to countenance a legal form of extortion or blackmail" and complained that the plaintiff was using "the legal system as tool for a shakedown."

On display in both *Boyles* and *Corgan* are two very different stances toward allegations of sexual exploitation in tort cases. The majority in *Corgan*, as well as the dissenters in *Boyles*, were greatly affected by the context of the case and used it to justify liberalizing rules for recovery of damages under the negligent infliction tort. They seemed to start from an assumption that sexual exploitation was a serious societal problem and that tort law should respond to such a public policy concern. Although they stopped short of declaring that plaintiffs should receive heighted protection in sexual exploitation cases, they were aware of the importance of their decisions to women's

rights and sexual equality. In their opinions, one can discern traces of the influence of dominance feminist theorists – such as Catharine MacKinnon – who have long argued for a transformation of legal notions of consent and an appreciation for the severity of the harm caused by sexual exploitation.[41]

In contrast, the majority in *Boyles* and the dissenter in *Corgan* thought it unnecessary and undesirable to expand the legal protection against sexual exploitation, particularly if it meant exposing insurers to claims in such cases. Significantly, the dissenter in *Corgan* also clearly blamed the victim for her own suffering. Although the Justices in the Texas majority did not condone Dan Boyles's behavior, they were also careful to downplay the significance of the parties' relationship and noted that the plaintiff and defendant were "not dating steadily" but "had shared several previous sexual encounters," suggesting perhaps that Susan Kerr was foolish to trust a sex partner under such circumstances. These judges saw no connection between recovery for emotional distress and the larger cultural issues of gender equality and preservation of women's sexual integrity.

Aside from differing judicial attitudes toward sexual exploitation, of course, *Corgan* can be distinguished from *Boyles* because it entailed a contract for psychological treatment and an allegation of abuse of the therapeutic relationship. Noting those admittedly salient differences, however, only highlights what we believe to be a critical question posed by such cases: whether the protection of tort law from sexual exploitation in seemingly "consensual" sex settings should arise only when a contract exists. In our view, it is more relevant to focus on the fact that the women in both cases were unjustifiably misled and used. From a feminist perspective, the plaintiff in *Boyles* had as

much right to expect that her boyfriend would not tape their sex for the amusement of others, as did the patient in *Corgan* to trust that her therapist would not exploit her vulnerability to his sexual advantage. Of fundamental importance is that these expectations arise from normative standards of ethical behavior and decent treatment, not from contract. Admittedly, like most cultural norms, the norm against sexual exploitation is not universally accepted but remains contested. Like the dissenting Justice in *Corgan*, many people still hold to the belief that unless sexual intercourse is extracted through means of physical force or the threat of physical force, it is socially acceptable and ought not to be legally punished. And there is no escaping the sometimes difficult question of whether a defendant's conduct can fairly be characterized as sexual exploitation or abuse. However, this is the cultural terrain over which such contests should be waged, rather than deciding negligent infliction cases on less central features, such as whether a contract exists between the parties or whether the injury manifested itself physically.

Perhaps the most difficult question courts must address if and when the scope of protection against sexual exploitation is enlarged to encompass negligence claims is whether third parties – who did not personally sexually exploit the plaintiff – may be held liable for failing to prevent the exploitation or otherwise facilitating or enabling the conduct. This question comes up most frequently in the context of employment, when sexually harassed employees attempt to hold their employers liable for the damage caused by the harassing conduct of supervisors or co-employees.[42] Particularly if the jurisdiction does not impose vicarious liability on employers for intentionally harassing conduct, negligent infliction claims frequently surface as another strategy to hold the employer accountable.

In many respects, the tension points in the doctrine governing the intentional infliction tort in harassment cases are recapitulated in cases alleging negligent infliction on emotional distress. As mentioned in Chapter 3, many jurisdictions now cut off intentional tort claims altogether – on preemption grounds or by defining "outrageous" conduct narrowly – without ever reaching the question of whether the employer should be held vicariously liable for supervisory harassment. Likewise, when a claim for negligent infliction is asserted against an employer, the claim might fail at the outset for failure to allege physical injury or physical manifestations before getting to the question of employer liability. When the issue is the employer's negligence, however, it should be noted that an employer might well defeat the charge by showing that it has instituted and regularly enforced anti-harassment policies in its workplace and thus has exercised due care to prevent such conduct.[43] This "no breach" defense is sufficiently protective of employer interests in such cases. There is no need to cut suits off at the outset by declaring that there is no duty to act reasonably.

Cases Involving Reproduction

Negligent infliction claims in the reproductive context have also caused courts enormous difficulties. Frequently brought against hospitals, physicians, and other health professionals, there is typically an underlying contract in the background of the case, although, in addition to the actual patient, a spouse or partner of the patient may join as a plaintiff. Thus, there have been negligent infliction claims brought by women who suffer emotional distress resulting from stillbirths and miscarriages caused by physician

negligence and couples who sue fertility clinics for losing the sperm of a man about to undergo chemotherapy. Women who have lost their capacity to reproduce through sterilization have also sued under lack of informed consent and other theories. Claims also arise after a child is born. Parents have sued when their newborn was abducted from the hospital and when babies were switched at birth as result of hospital negligence. In this category also belong claims of "wrongful birth," discussed in Chapter 5, typically brought against doctors who negligently fail to advise their patients about the risks of giving birth to a child with serious disabilities.

As a doctrinal matter, courts have often struggled with whether to impose a "physical injury" or "physical manifestation" requirement in negligent infliction cases in the reproductive context. This inquiry is itself related to gender because such cases often require courts to characterize the relationship between a pregnant woman and her fetus. Many courts have had a particularly difficult time seeing and categorizing the physical and emotional connection between a mother and fetus. The intertwined physical and emotional nature of the response of a woman who experiences a miscarriage or stillbirth does not seem to fit neatly into the standard repertoire of injuries suffered by torts plaintiffs.

Only in 2004 did the New York Court of Appeals finally decide to allow a claim by a woman who suffered emotional distress at the stillbirth of her twins.[44] In that case, the woman's obstetrician had failed to diagnose and treat her for a condition (known as incompetent cervix) which put her pregnancy at risk. Before this case, the New York courts had clung to the "physical injury" rule and insisted that a female plaintiff demonstrate a physical injury to herself, "distinct from that suffered by the fetus and not a

normal incident of childbirth." Despite the existence of a doctor/patient relationship – which presumably carries an expectation that the doctor will exercise reasonable care to protect both the expectant mother and her unborn child – the New York courts had looked for something more before recognizing a duty and allowing recovery for the mother's clearly foreseeable emotional distress. Importantly, New York also disallows wrongful deaths suits in such cases, leaving the parents without a remedy in cases of negligently-caused stillbirths and miscarriages.

New York's formalistic approach requiring a separate physical injury to the mother that was not a normal incident of childbirth fails to comprehend a woman's distinctive interest in reproduction that encompasses a period during her pregnancy in which she and the fetus are linked physically. To try to isolate a wholly separate injury to the mother – and deny recovery when it is lacking – is a dramatic example of refusing to recognize an injury unless an identical harm can be suffered by a man. Plaintiffs have argued that it is enough that no one disputes that the medical treatment of a woman during pregnancy is the kind of activity which, if handled negligently, is highly likely to give rise to serious emotional injuries thereafter. In the 2004 case, the New York Court of Appeals finally agreed. Reversing a long line of cases, the court acknowledged that "[b]ecause the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes."

Some courts which have historically been reluctant to allow claims for "stand alone" emotional harm, however, have been impelled by the reproductive context of the claim to make an exception to the denial of recovery. A 1990 decision by the Iowa Supreme Court is a good example of judicial extension of the negligent infliction claim to

protect plaintiff's reproductive interests, without stating so in precise terms. In *Oswald v. Le Grand*,[45] a woman five months' pregnant was horribly mistreated by nurses and doctors at the emergency room of Mercy Hospital in Dubuque. Despite the woman's extensive bleeding and cramping, the nurses chided her for coming into the hospital, one even telling her that if she miscarried, it would not be a baby but rather "a big blob of blood." One of the doctors charged with treating the plaintiff was so eager to go on vacation that he left plaintiff in the hospital corridor, "hysterical and insisting she was about to deliver," minutes before she actually began delivering the baby in the hallway. After the delivery, the nurses and a doctor declared that the baby was stillborn and left the infant on an instrument tray for nearly one half hour. Remarkably, it was the baby's father who discovered that the infant was still alive, when the infant returned his grasp to her finger. After twelve hours in intensive care, however, the infant subsequently died.

The negligent infliction claim was crucial to this case because the couple could not prove that the hospital's mistreatment of the mother and infant somehow caused the infant's death or that the infant could have survived longer if the medical care had been otherwise. The court thus had to confront the question of whether an emotional distress claim could lie, even absent a claim of physical injury to the mother or the infant. Relying on the old cases involving false death telegraphs and mishandling of corpses, the court permitted recovery. It observed that the "life and death" context of childbirth was comparable to the old cases presumably because both involved the "negligent performance of contractual services that carry with them deeply emotional responses in the event of a breach." Under the circumstances, the court believed that liability for emotional distress should also attach to the delivery of medical services. The court's

decision was thus quite sensitive to context, even if it stopped short of declaring that plaintiff's interest in reproduction was a fundamental interest deserving of heightened protection.

One reason why courts in torts cases alleging reproductive harm may not be quick to draw an analogy to constitutional rights cases asserting deprivation of procreative rights may be that the latter generally involve the assertion of "negative" rights against government interference, while tort claims most often involve the assertion of "positive" rights against private defendants who fail to protect plaintiffs' interests.[46] This dilemma over duty is at the heart of a larger cultural controversy about the scope of civil rights, with progressives arguing for more expansive protection against harms inflicted by private interests, while conservatives generally aim to limit protection narrowly to abuses of official governmental power. In the real world, of course, there is often no strict separation between governmental power and private power, particularly for low-income persons who are forced to rely on the government for essential services such as medical care.

One prominent context in which constitutional claims for deprivation of reproductive rights have merged with tort-like allegations of lack of informed consent involves suits over the sterilization of poor women who qualify for Medicaid. Several high-profile suits were brought in the early and mid-1970s,[47] often alleging violations of 42 U.S.C. §1983, the Reconstruction-era statute that authorizes damage claims for civil rights violations committed under color of state law. The plaintiffs in these cases were typically minority women who claimed that they had been pressured to undergo sterilization procedures by doctors who believed that they were they were irresponsible

"welfare" mothers who already had too many children and were a burden on the public fisc. In some respects, these cases were similar to the miscarriage and stillbirth cases discussed above, in that both alleged serious, if intangible, damage to the plaintiffs' reproductive interests at the hands of negligent and often callous medical professionals. The sterilization cases, however, differed from the typical miscarriage case in that the plaintiffs in the sterilization cases also asserted that the doctors or hospitals had followed a discriminatory policy towards plaintiffs tied to their race, gender, and class. Moreover, such claims were brought and classified as statutory civil rights claims and were frequently pursued by civil rights organizations or poverty law centers which had little strategic interest in linking their efforts to tort suits for negligent infliction of emotional distress, despite their obvious similarities.[48]

Legal scholar Dorothy Roberts has chronicled the sterilization suits and their significance for the reproductive rights of minority women.[49] Her history details that, prior to the late 1970s, the practice of performing unnecessary hysterectomies and tubal ligations on poor women without their knowledge or consent was widespread in the North as well as in the Deep South. At the time, hospitals and doctors used a variety of tactics to coerce consent from poor pregnant women, from offering tubal ligations to women while they were in labor, to refusing to treat indigent patients unless they agreed to be sterilized.

The extent of the sterilization abuses in some states has only recently been uncovered. Due to research by historian Johanna Schoen[50] and investigative reporting by journalists at the Winston Salem Journal,[51]new details about the cases and procedures of the North Carolina Eugenics Board have surfaced. In its 40 year history – which lasted

until 1974 – the Board authorized the sterilization of more than 7600 persons. By the late 1960s, over 60% of those sterilized were black women, compared to North Carolina's population which was only approximately 25% black.[52] Social workers in the state adopted a policy of targeting young, unmarried black women who had given birth to a child. They threatened drastic actions, such as sending the teenage women to an orphanage or cutting off welfare funds to their entire families, including siblings and parents, if they did not submit to sterilization.[53] The revelation of the contents of the formerly-sealed records of the Eugenics Board prompted the North Carolina House of Representative in 2007 to vote to establish a commission to determine how to identify and give reparations to the victims, although no such program has yet been implemented or funded.[54]

Two notable civil rights cases from the 1970s exemplify the radically different positions courts took toward plaintiffs' claims of deprivation of reproductive rights and assertions of injury from coerced sterilizations. One case gained considerable notoriety, probably because the doctor involved was so explicit about his policy of pressuring poor black women to undergo sterilization. In *Walker v. Pierce*,[55] Dr. Clovis Pierce, the attending obstetrician at a county hospital in South Carolina, admitted that he had a policy of refusing to treat any woman who was on Medicaid or who was otherwise unable to pay her bills, if she were having a third or subsequent child and did not agree to be sterilized. As recounted by the dissenting judge, Dr. Pierce told one patient that it was his "tax money paying for this baby" and that he was "tired of paying for illegitimate children." He bluntly said to the patient that if she didn't want to be sterilized, she could

"find another doctor." Pierce was apparently unashamed of his practice and refused to sign an affidavit stating that he would not discriminate against Medicaid patients.

The two African American women who brought the suit in *Walker* testified that Pierce used coercive tactics to enforce his policy: he threatened to have one woman's State assistance terminated if she did not cooperate and ordered the immediate discharge from the hospital of another woman just after she gave birth, upon her refusal to submit to a tubal ligation. As could be expected, many women eventually gave into the pressure, signed the requisite forms and submitted to the sterilization procedure. The evidence indicated that the policy had an overwhelming negative impact on black women. Of the eighteen welfare mothers sterilized, sixteen were black.

From a torts perspective, *Walker* looks like a clear case of coerced consent, in the important sense that these women did not desire to lose their capacity to have children and there was no claim that the sterilization would somehow benefit their health. Nevertheless, the majority of the court found no civil rights violation. The court first characterized the doctor/patient relationship as "one of free choice for both parties," even though it was clear that indigent pregnant women, such as the plaintiffs, rarely had alternatives to medical care besides the county hospital. The court then disputed both the racial character and the public nature of the doctor's policy, characterizing it as a "personal economic philosophy," despite the fact that most welfare patients with multiple children were black and that Medicaid had paid Pierce over $60,000 during the period in question. For the majority of the court, the civil rights statutes posed no obstacle to the doctor's decision to "establish and pursue the policy he had publicly and freely announced" and indicated that the doctor had every right to maintain his "professional

attitude toward the increase in offspring" and then to set on a course of action to see his views "prevail." Apparently, the majority considered it reasonable for a doctor to place only subordinated women (who were poor, disproportionately minority and receiving public assistance) to the Hobson's choice of sterilization if they desired medically necessary health care.

The lawsuit which had the biggest impact on public policy, however, was a class action brought by the Minnie Lee and Mary Alice Relf, two African American sisters from Montgomery Alabama who claimed that they had been involuntarily sterilized at a federally funded clinic when they were only fourteen and twelve years old. Initiated by the Southern Poverty Law Center and the National Welfare Rights Organization, this class action represented over 125,000 class members consisting of poor persons, including minors and disabled persons, who were involuntarily sterilized under federally funded programs, such as Medicaid and AFDC. *Relf v. Weinberger*[56] was brought as a challenge to regulations promulgated by the Department of Health, Education and Welfare (HEW) which had been drafted in response to the nationwide attention given to the experience of the Relf sisters and the consequent exposure of the widespread abuses in sterilization procedures.

In an usually strong opinion, Judge Gesell of the D.C. federal district court found that an estimated 100,000 to 150,000 low-income persons had been sterilized annually under the federal programs and that "an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization." He ruled that funding such coercive practices and tactics

violated HEW's authority because it was Congress's intent that "federally assisted family planning sterilizations are permissible only with the voluntary, knowing and uncoerced consent of individuals competent to give such consent." As one of the remedies for the illegal action, Gesell ordered that federal recipients change their consent procedures to assure that a patient had not been subjected to pressure by doctors or others, including giving the patient a special oral and written assurance that federal funds could not be withdrawn because of a failure to accept sterilization.

Judge Gesell's order and other public policy initiatives to end sterilization abuse had a significant impact. In 1978, HEW issued new rules restricting sterilizations performed under programs receiving federal funds. The rules strengthened the requirements of informed consent, providing for consent in the preferred language of the patient and a 30 waiting period between the signing of the consent form and the sterilization procedure.[57] For our purposes, what is striking about these regulatory reforms is how closely they implicate issues that are at the heart of tort claims for negligent infliction of emotional distress in the reproductive context. The heightened protection against abuse afforded by the HEW regulations is predicated on the importance of the interest at stake which justifies regulating the doctor/patient relationship. Moreover, the regulations implicitly disavow the *Walker*'s court narrow view of informed consent by acknowledging that physician pressure and economic coercion can make a woman's "choice" to accept sterilization less than free and voluntary. While the ruling in *Relf* has no direct application to tort claims, its civil rights principles could easily be absorbed to guide courts in tort cases alleging malpractice and claims for negligent infliction of emotional distress. From our perspective, the take home

message of *Relf* is that medical personnel owe patients a heightened duty of care when advising and treating them on matters of reproductive choice and health and that they should guard against conduct that undermines or injures such patients' interests, whether it results in emotional or physical harm.

In her history of race and reproductive rights, Dorothy Roberts cautions that the federal regulations has not stopped sterilization abuse, citing the continued exceptionally high sterilization rates of black women.[58] However, today's cases are more likely to arise in individual, rather than class-wide settings, and in what otherwise appear to be ordinary malpractice and informed consent suits. It is unlikely that physicians today would openly acknowledge that they had unilaterally decided to sterilize a patient because she was receiving Medicaid and had too many children. Traces of the old paternalistic and racist attitudes, however, can still be found in the medical treatment of pregnant minority women and in judicial responses to their injuries.

One troubling recent case is *Robinson v. Cutchin*, [59] a lack of informed consent case from Maryland decided in 2001 involving a pregnant African American woman. In that case, Glenda Robinson was treated by Dr. Cuchin in connection with the birth of her sixth child. The controversy centered on whether Robinson had given her consent to a tubal ligation in the event that she had to undergo a cesarean section. Dr. Cuchin alleged that she gave such consent, while Robinson denied it and asserted that she and her husband were planning on having a seventh child.

As it turned out, it was necessary to perform an emergency C-section for the delivery of Robinson's baby. Cuchin then went ahead and performed the tubal ligation. According to Robinson, she did not even discover that the sterilization had been

performed until nearly two years after the birth of her child, when she learned she was incapable of conceiving. Robinson's suit against Dr. Cuchin alleged a variety of tort claims, including lack of informed consent, battery, and intentional infliction of emotional distress. Because the negligence claim of lack of informed consent resulted in a settlement, the only published opinion in the case involved the intentional tort claims for battery and intentional infliction of emotional distress.

The opinion of the district court dismissing the intentional tort claims displays skepticism toward claims of reproductive injury and casts doubt on the seriousness of plaintiff's alleged injury. Reminiscent of *Walker*'s disapproval of black women who choose to bear multiple children, the district court thought it relevant to point out that before she was married Robinson had "three prior children born out of wedlock" and that Robinson also had three children with her current husband. Assuming for the sake of argument that the tubal ligation had been performed without Robinson's consent, the court nevertheless concluded that it did not amount to a battery, defined as a harmful or offensive touching. To the court, the forced sterilization was not harmful "because it did not cause any additional physical pain, injury, or illness other than that occasioned by the C-Section procedure." In the court's view, the sterilization was also not offensive because it purportedly "did not offend Mrs. Robinson's reasonable sense of personal dignity." Remarkably, the court concluded that the injury to plaintiff's reproductive capacity had no connection to dignitary harm or harm to personal identity: the court bluntly stated that "the fact that she was not able to have a seventh child after previously giving birth to six children is hardly something which would offend a reasonable sense of dignity." Not surprisingly, given this assessment of the situation, the court also dismissed the

intentional infliction claim, concluding that there was no evidence that the doctor had acted outrageously.

Although Robinson's negligence claim survived – and with it, the prospect of recovering damages for emotional distress traceable to the sterilization procedure – the district court's opinion revealed a disconcerting tendency to devalue plaintiff's procreative interests and to minimize her suffering. The opinion seems oblivious to the constitutional principle that it is an individual woman's right to decide whether to bear children and to determine the size of her family. Particularly given that African American women have historically been denied the right of self-determination in these matters, the court in *Robinson* should not have been as quick to dismiss plaintiff's distress as "unreasonable" and to treat her lack of consent as having nothing to do with her sense of personal dignity.

In our view, the heightened protection for reproductive interests in negligent infliction cases should not be limited to cases of sterilization, stillbirth and miscarriage. Even after a child is born, the connection between a mother and infant should be recognized and valued. Rather than deny the special ties parents have to newborns or focus exclusively on an infant's separate injuries, courts should impose a duty of care upon medical professionals to protect parents against emotional distress in the important period during and immediately following childbirth. Thus, there should have been little difficulty finding liability in a recent case in which an employee of a hospital brought a one-day-old baby to a mother for breast feeding, neglected to see that the mother was heavily sedated, and left them alone.[60] The infant was then smothered to death when the mother fell asleep on top of him. Rather than struggle with whether the mother was a

bystander to her child's injury, was in the "danger zone," or satisfied some other artificial limitation imposed in negligent infliction cases, it should be easy to find tort protection simply on the defendant's failure to safeguard plaintiff's reproductive interests. Similarly, the emotional injury done to a parent when a hospital negligently loses a newborn [61]or switches a baby at birth [62] should be readily compensable. The absence of legal protection against negligence in such cases creates a legal anomaly whereby a person may recover tort damages for the value of damaged physical property, but not for the far more serious emotional injury stemming from the hospital's failure to protect their newborn baby. This treatment supports the criticism of cultural feminist writers who have argued that women's contribution to society as childbearers and caretakers has been misunderstood and undervalued.[63] In real world terms, the period of reproduction stretches from conception until the parents take the baby home from the hospital. The parents' special interest at stake during this period deserves heightened protection and warrants finding a duty to protect against the negligent infliction of emotional distress.

Admittedly, not all cases involving negligent infliction in the reproductive context are easy cases. A good example of a difficult case is *Harnicher v. University of Utah Medical Center*, a 1998 case decided by the Utah Supreme Court. [64] This claim of negligent infliction of emotional distress arose from a terrible mixup at a fertility clinic. At the recommendation of their doctor, a couple agreed to an *in vitro* procedure whereby the husband's sperm was to be mixed with that of donor selected by the couple. Under the procedure, the couple could not be sure whether the sperm that actually fertilized the ovum was from the husband. They chose a donor with physical characteristics similar to the husband and authorized use only of that donor sperm. The wife gave birth to triplets.

One of the infants had red hair, unlike the husband who had curly dark hair and brown eyes. When one of the children got sick, they conducted blood tests, revealing that two of the children could not have been the child of either the husband or the selected donor. A DNA test on one of the infants established that his biological father was actually another donor.

Both parents sued for negligent infliction of emotional distress and claimed injuries as a result of the clinic's negligence. The wife's symptoms were more severe than her husband's. He alleged depression and anxiety. She was diagnosed with "major depressive disorder." One major issue in the case was whether mental illness, as experienced by the wife, should qualify as physical harm. This seemingly paradoxical inquiry was necessitated by precedents that arguably refused to allow recovery for stand-alone emotional distress.

Ultimately, a badly split Utah Supreme Court (2-1-1) denied recovery. The plurality dodged the issue of whether mental illness – without accompanying physical injury or manifestations – was compensable. Instead, the plurality ruled that plaintiffs could not prevail because they had not shown that " a reasonable person, normally constituted, would be unable to cope with the mental stress engendered by the circumstances of the case." The plurality was influenced by the fact that the children were "normal, healthy children" and that their physiological characteristics could not have been "reliably predicted" even absent the mixup. The plurality seemed to be saying that the couple's response – perhaps especially the wife's response – was extreme and refused to allow recovery for such "eggshell plaintiffs." The dissent, however, would

have allowed recovery based on clear negligence on the part of the clinic and the fact that emotional distress to the parents was entirely predictable.

Our approach to negligent infliction cases does not point to a clear result in *Harnisher*. Because plaintiffs' interests in reproduction were clearly at stake, we would find a duty to exercise reasonable care. However, a persuasive argument can be made in this case to deny recovery on other grounds. Not only was the wife's reaction to the revelation extreme – likely traceable to a predisposition to mental illness – but it flowed solely from the fact that the children turned out not to be biologically linked to her husband, a possibility that the couple had known from the outset. Mixup cases, such as *Harnisher,* sometimes also involve reactions to race, when, for example, a child from an unintended donor turns out to be a different race than the mother or siblings.[65] To award a couple damages for emotional distress in such a case might well reinforce racial prejudice or racial antipathy and might be understood as making a statement that it is reasonable for a person to reject a child for the sole reason that their skin color or physical attributes are different from the plaintiffs'. In such highly unusual cases, it is justifiable to use the doctrine of proximate cause to cut off liability, with full recognition of the policy laden nature of that inquiry. In any event, it is preferable that courts decide whether permitting tort recovery in such cases would undermine important public policies, such as promoting racial equality or furthering the best interests of the child. Shifting the focus away from "duty" to "proximate cause" will not make the decision any easier, but at least it does not eclipse the central issue. As in other reproduction cases, nothing can be gained from having recovery turn on whether the plaintiff suffered physical versus emotional harm.

Bystander Cases and Family Relationships

The final strand of negligent infliction cases is infelicitously known as bystander cases, signaling that the plaintiff in such cases is not the primary accident victim but a mere bystander who happens to witness an accident to another. In line with the highly individualistic character of the common law, courts historically denied all recovery in such cases where the emotional distress is produced by fear for another.[66] It was said that the negligent defendant owed no duty to the plaintiff or that harm to such a plaintiff was unforeseeable. In reality, however, the vast majority of plaintiffs who sued in such cases were not mere bystanders, in the everyday sense of the word. Instead, the prototypical plaintiffs in such cases were mothers who saw their children die or suffer severe injury before their eyes.[67] In such cases, it strained credulity to argue that the presence of a mother or caretaker was unexpected and that her shock and distress were unforeseeable. Importantly, bystander plaintiffs in such cases were not basing their claims in any strict sense on their child's injury, but instead sought recovery for their own pain, emotional distress, and often accompanying physical injuries. There was, however, an important relational element to the bystander claim that flowed from the fact that it was often the injured party's family member who was at hand to witness the injury and suffer distress as a result. To this degree, bystanders' claims looked very much like mothers' claims or caretakers' claims seeking recovery for the extra shock and pain that comes from experiencing the suffering of a loved one in the plaintiff's care.

Over the years, tort law has steadily liberalized to allow compensation in some bystander cases. Replacing the rule of no recovery, courts gradually allowed bystander

plaintiffs to prevail if they could prove that they were in the zone of physical danger and might well have been physically injured along with the direct victim, if circumstances had been slightly altered. This liberalization allowed recovery in cases in which mothers or other caretakers of children narrowly escaped physical injury, but nevertheless suffered emotional harm primarily because they feared for their child's safety. Because the "danger zone" rule was based on a risk of physical harm, however, it did not represent a significant departure from prior law with its insistence on linking physical harm to the plaintiff.

The landmark case of *Dillon v. Legg* decided by the California Supreme Court in 1968 broke from this tradition, furthered liberalized recovery, and we suggest, may have altered the basic trajectory of bystander cases.[68] That case involved a mother who suffered nervous shock when she witnessed her child run down by a negligent driver. At the time, the mother was in a position of safety outside the physical danger zone. The California Supreme Court nevertheless allowed the claim and crafted guidelines for courts to follow in such cases. The *Dillon* factors, as they became known, permitted recovery when (1) plaintiff was located near the scene of the accident (2) the shock to plaintiff resulted from a direct emotional impact upon plaintiff from sensory and contemporaneous observance of the accident and (3) plaintiff and the accident victim were closely related.

In retrospect, the most innovative aspect of *Dillon* was its blending of individualistic and relational harm. Unlike traditional recovery for emotional distress in direct victim cases, *Dillon* did not provide a rule of universal recovery, but limited claims to close family members. This "family members" limitation resembles the restriction

typically placed on tort claims for wrongful death and loss of consortium, which compensate directly for damage to important personal relationships.[69] Thus, in relational harm cases, damages are predicated directly on the adverse change – in both pecuniary and non-pecuniary terms – that defendant's negligence caused in plaintiff's life because of the absence or injury of the loved one. There is no need for such relational claimants to witness the accident or the injury. In contrast, in the *Dillon*-type bystander claim, only a first-hand witness to the accident is given a claim. This requirement not only limits the number of claimants, but it is said to restrict compensation to those who suffer the "extra trauma" of such a first-hand experience. This aspect of the negligent infliction of emotional distress claim fits more comfortably with other negligent infliction claims with their focus on damage to the individual; from this perspective, the bystander claim is still basically a non-relational claim in which severe distress just happens to flow from the perception of suffering of another. Under this view, the family member requirement serves mainly to guarantee the genuineness of the distress and to limit the number of potential claimants.

Dillon's reception in other jurisdictions has been uneven. The Restatement reports that 14 states have rejected it outright and have clung to the danger zone rule; 4 jurisdictions have even continued to insist on proof of physical impact.[70] However, some variation of *Dillon* is now in force in 29 states, allowing the Restatement to adopt a rule authorizing recovery when the plaintiff "perceives the event contemporaneously and is a close member of the person suffering the bodily injury."[71]

To some degree, this liberalization of the bystander rule recognizes the special harm that mothers and other close family member suffer in such situations. However, the

courts' experience with applying *Dillon* has brought its own difficulties, particularly because of the artificial line drawing necessitated by the requirement of witnessing or contemporaneously perceiving the traumatic event. Thus, recovery has been denied to parents who see the bloodied body of their child moments after the accident occurs, or shortly thereafter at the hospital.[72] Although no one would deny that their suffering is genuine and serious, it is not clear that they have suffered the "extra trauma" required by *Dillon*, particularly in jurisdictions which treat the *Dillon* factors as requirements and not merely guidelines.[73]

In the 40 years since *Dillon* was decided, however, one point is clear. All courts embracing *Dillon* agree that recovery should be limited to close family members.[74] Accordingly, the new Restatement has called this limitation "a specific and independent requirement" and not merely "a factor to be balanced against other factors . . ." [75]This consensus underscores the relational dimension of the claim. Indeed, the most lively and important dispute in *Dillon*-type jurisdictions today centers on the meaning to be given to the term "close family" members, particularly whether same-sex partners, fiancees and extended family members may qualify as "family."[76]

The dominant approach adopts a "bright line" standard which limits family members to legally-recognized relationships of blood, marriage and adoption and excludes all but nuclear family members. Not surprisingly, this exclusion of nontraditional families can have a negative effect on minority families, which often do not mirror the white middle-class ideal. Thus, in one recent case from California, *Guzman v. Kirchhoefel*,[77] the court refused to allow plaintiff's claim when she witnessed the death of her second cousin by a negligent driver. Plaintiff described how she had lived with her

cousin in the same household most of her life and was living with her at the time of the accident. She explained that the families resided together "out of economic necessity" and that their living arrangements arose because "there was nowhere else to go." The California court, however, declined to regard plaintiffs' relationship as a close family relationship, concluding that the cousins did not qualify as members of the "immediate family unit." The court also characterized their living arrangement as mere "happenstance." Notably, the court's strict interpretation did not permit an inquiry into the social reality of whether plaintiff in fact had close everyday emotional ties with her cousin and left no room for a definition of "family" that encompassed extended families brought together in part because of economic exigencies.

Some courts, however, have adopted a more functional approach to the meaning of "family" in bystander cases. The leading case from New Jersey – *Dunphy v. Gregor* [78] -- allowed a fiancee to recover when she witnessed her partner stuck by an oncoming car. The couple had been living together for over two years and the court believed that a jury might well conclude that their relationship was an "intimate familial relationship," characterized by mutual dependence and shared experiences. Given the growing social acceptance of unmarried persons living together, the court concluded that sound public policy favored protecting such relationships when were "substantial, stable, and enduring." This move to a more functional analysis, of course, paves the way for same-sex couples and persons in nontraditional families to argue that their ties deserve the same measure of respect. This position recently received a boost from the Third Restatement which indicated its approval of the *Dunphy* approach and declared that "when defining what constitutes a close family relationship, courts should take into

account changing practices and social norms and employ a functional approach to determine what constitutes a family."[79]Additionally, the functional approach was recently embraced and extended beyond the bystander context to cover purely relational claims of loss of consortium. In Lozoya v. Sanchez,[80] the New Mexico Supreme Court permitted the claim of a woman whose long-term male partner was injured in an automobile accident. The couple had "been together" for over thirty years and had three children. Citing feminist scholarship,[81] the court decided that the ease of administration of "bright line" rules did not justify excluding the claims of "persons whose loss of a significant relational interest may be just as devastating as the loss of legal spouse."

These recent developments indicate that the legitimacy of the bystander claim is grounded in large part on damage to an intimate relationship. In this important respect, the bystander claim shares a kinship with "direct victim" negligent infliction claims centering on abusive sexual relationships or relationships to newborns or fetuses. Looked at in this way, the bystander claim is primarily a way to vindicate damage to a relationship and has as much to do with recognizing the value of intimacy and family ties – most prominently, maternal ties to children – than with compensating for nervous shock and trauma.

Reconceptualizing bystander claims as relational injury claims could finish what *Dillon* started. The arbitrary distinctions of the bystander rule could give way to a simpler regime in which all close family members – whether on the scene of the accident or not – would be afforded a claim for their relational loss.[82] The difficulty states experience in drawing the line for recovery could be eased by making proximity to the scene of the accident relevant to damages, not to a finding of duty. Reframing bystander claims as

relational injury claims would allow states to harmonize recovery for negligent infliction of emotional distress with claims for wrongful death and loss of consortium.[83] Most importantly for our purposes, it would elevate the status of injury to relationships in the law of torts and help soften the hierarchy of claims that has long plagued recovery for negligent infliction of emotional distress.

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[1] *See* John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657 (2001); David Owen, *Duty Rules*, 54 Vand. L. Rev. 767 (2001); Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 Vand. L. Rev. 787 (2001); Ernest J. Weinrib, *The Passing of* Palsgraf? 54 Vand. L. Rev. 803 (2001).

[2] Restatement (Third) §7(b) (noting that "in exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty . . .") (April 6, 2005).

[3] There is also no general duty to protect against economic loss unaccompanied by physical property loss. The protection of economic interests, however, is principally protected by contract law.

[4] *See* Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 Vand. L. Rev. 751 (2001).

[5] *See* Wex S. Malone, TORTS IN A NUTSHELL: INJURIES TO FAMILY, SOCIAL AND TRADE RELATIONS (West 1979); Joseph W. Glannon, THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS 244-45 (3d ed. 2005).

[6] *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright*: *A History*, 88 Mich. L Rev. 814, 824-34 (1990) (tracing the rationale for denying recovery in early cases).

[7] Restatement (Third) at 2 (April 4, 2007) (Scope Note).

[8] *See e.g.,* Rodrigues v. State, 472 P.2d 509, 519-20 (Haw. 1970); Sinn v. Burd, 404 A2d 672, 678-79 (Pa. 1979); W. Page Keeton et al, PROSSER AND KEETON ON THE LAW OF TORTS, § 54, at 360 (5th student ed. 1984); Peter A. Bell, *The Bell Tolls: Toward a Full Recovery for Psychic Injury*, 36 U. Fla. L. Rev. 333, 351 (1984); Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims,* 36 Ariz. St. J. J. 805, 831-36 (2004).

[9] It has not been a straight-line trend toward liberalization. Notable plaintiff victories of the 1970s were curbed in the 1980s, when courts and legislatives cut back on liability in

the name of tort reform. In the last two decades, there has been some incremental liberalization of recovery, with wide variations in different states.

[10] *See e.g.*, Thing v. La Chusa, 771 P.2d 814, 1819 (Cal. 1989); Wilder v. City of Keene, 557 A.2d 636, 638 (N.H. 1989); Williams v. Baker, 572 A.2d 1062, 1069 (D.C. 1990); Finnegan *ex rel.* Skoglind v. Wis. Patients Comp. Fund, 666 N.W.2d 797, 802-03 (Wis. 2003). *See* Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss*, 37 Stan.L. Rev. 1513,1524-26 (1985) (discussing fear of infinite liability in emotional harm cases).

[11] *See* Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 545 (1994) *citing* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U.Fla. L Rev. 477, 507 (1982).

[12] Restatement (Third) at 3 (April 4, 2007) (Scope Note).

[13] *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U.Pa. L. Rev. 463 (1998).

[14] *See* Restatement (Third) §§45-46 (April 4, 2007)(sections treating liability for emotional disturbance).

[15] Chamallas, *Architecture*, 146 U. Pa. L. Rev. at 510-521 (discussing devaluation of injuries associated with child care, sexual harassment and gender-linked cases of medical malpractice).

[16] *See* Catharine A. MacKinnon, TOWARD A FEMINIST THEORY OF THE STATE 173 (1989) (critiquing liberal, male-oriented conception of consent); Martha Chamallas, *Lucky: The Sequel*, 80 Indiana L. J. 441, 461 (2005) (discussing sex/violence dichotomy); Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. Cal. L. Rev. 777, 841-35 (1988) (reconstructing consent to exclude consent secured through excessive physical, economic and psychological pressure).

[17] Robin West, CARING FOR JUSTICE 117-118, 127-129 (N.Y.U. Press 1997) (analyzing maternal/child relationship and harms of separation); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 51 Vt. L. Rev. 41-47 (1990) (emphasizing importance of values of care, cooperation, and nurturing commonly associated with women's and women's work).

[18] *See* Restatement (Third) at 66 (April 4, 2007) ("The impact requirement has virtually disappeared today.); Florida continues to use the impact rule, but does so selectively. Dan B. Dobbs & Paul Hayden, TORTS AND COMPENSATION 745 (5th ed. 2005) (Teacher's Manual).

[19] Restatement (Third) at 113 (April 4, 2007).

[20] *See e.g.*, Falzone v. Busch, 214 A.2d 12 (N.J. 1965) (near miss); Williamson v. Waldman, 696 A.2d 14 (N.J. 1997) (fear of AIDS).

[21] Restatement (Third), §46.

[22] Dan B. Dobbs & Paul T. Hayden, TORTS AND COMPENSATION 752 (5th ed. 2005) (Teacher's Manual).

[23] *See e.g.*, O'Donnell v. HCA Health Serv. of N.H., 883A.2d 319 (N.H. 2005); Reynolds v. Highland Manor, Inc., 954 P.2d 11 (Kan. App.1998); Reilly v. United States, 547 A.2d 894 (R.I. 1988).

[24] There is a debate, for example, as to whether mental illness qualifies as a physical harm. *See* Harnicher v. University of Utah Med. Ctr., 962 P2d 67 (Utah 1998). *See also* Armstrong v. Paoli Memorial Hosp., 633 A.2d 605 (Pa. Super. 1993) (momentary loss of continence, nightmares, and insomnia qualifies as physical injury).

[25] Restatement (Third), §46.

[26] Larsen v. Banner Health System, 81 P.3d 196 (Wyo. 2003).

[27] *See e.g.*, Young v. Western Union Tel. Co., 11 S. E. 1044 (N. C. 1890)(negligent failure to deliver death telegram); Christensen v. Superior Ct., 820 P.2d 181 (Cal. 1991); Whitehair v. Highland Memory Gardens, Inc., 327 S.E. 2d 438 (W. Va. 1985) (mishandling of dead bodies).

[28] *See* Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990).

[29] Restatement at 59-60.

[30] *See* generally Erwin Chemerinsky, Constitutional Law: Principles and Policies §§10.1-5 (3d ed. 2006)(discussing fundamental rights to marry, custody of children, reproductive autonomy and sexual activity). *See e.g.*, Lawrence *v.* Texas*,* 539 U.S. 558 (2003) (right of sexual intimacy)*;* Roe v. Wade, 410 U.S. 113 (1973) (right to abortion); Eisenstadt v. Baird, 431 U.S. 438 (1972) (right to contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate); Santosky v. Kramer, 455 U.S. 746 (1982) (parental rights).

[31] Boyles v. Kerr, 855 S.W. 2d 593 (Tex. 1993); Twyman v. Twyman, 855 S.W. 2d 619 (1993) (companion case) (Justice Spector's dissent).

[32] Torts plaintiffs often "underlitigate" their cases, asserting only negligence claims, because of the basic exclusion for intentional harm in standard liability policies. *See* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 Tex. L. Rev. 1721 (1997).

[33] *Id*. at 610 (Doggett, J. dissenting) citing Amicus Brief of Women's Advocacy Project at iii.

[34] *Id*. at 604 (Gonzalez, J. concurring).

[35] Twyman v. Twyman, 855 S.W.2d 609, 644 (Tex. 1993) (Spector, J. dissenting) (companion case to Boyles v. Kerr).

[36] Mae C. Quinn, *The Garden Path of* Boyles v. Kerr *and* Twyman v. Twyman, 4 Tex. J. Women & L. 247 (1995).

[37] Corgan v. Muehling, 574 N.E. 2d 602 (1991).

[38] *Id*. at 603.

[39] Denise LeBoeuf, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 Harv. Women's L. J. 83 (1988) (Note).

[40] *Id.* at 611 (Heiple, J. dissenting).

[41] *See* Catharine A. MacKinnon, WOMEN'S LIVES, MEN'S LIVES 243 (Harv. U. Press 2005).

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[43] In Title VII harassment claims, employers are afforded an affirmative defense to liability and damages if they prove that they exercised reasonable care to prevent and correct the harassment and that the employee failed to take advantage of internal grievance procedures. Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

[44] Broadnax v. Gonzalez, 809 N.E.2d 645 (N.Y. 2004). In contrast, California have long allowed mothers to recover for emotional distress arising from injury to the infant during the course of delivery. *See* Burgess v. Superior Ct., 831 P.2d 1197 (Cal. 1992) (recognizing "the unique relationship of mother and child during pregnancy and childbirth").

[45] Oswald v. Le Grand, 453 N.W.2d 634 (Iowa 1990).

[46] In wrongful birth cases, however, courts have often cited to *Roe v. Wade* and have discussed women's constitutional right to decide whether to terminate a pregnancy. *See* cases discussed in Chapter 5.

[47] *See* Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975); Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974); Madrigal v. Quilligan, D.C. No. CV 75-2057-JWC (C.D. Cal. 1978); Kevin Begos & John Railey, *Sign This or Else . . . A young woman made a hard choice, and life has not been peaceful since*, Winston-Salem Journal (2002) (reporting on unsuccessful case of Nial Cox Ramirez); John Railey & Kevin Begos, *"Still Hiding" Woman sterilized at 14 carries a load of*

shame, Winston-Salem Journal (2002) (reporting on unsuccessful case of Elaine Riddick Jessie).

[48] *See* Carlos G. Velez, *The Nonconsenting Sterilization of Mexican Women in Los Angeles* in Twice A Minority: Mexican-American Women 235 (Margarita B. Melville, ed. 1980) (discussing trial in Madrigal v. Quilligan).

[49] *See* Dorothy Roberts, Killing the Black Body: Race, Reproduction and the Meaning of Liberty 89-98 (Vintage 1997).

[50] *See* Johanna Schoen, Choice and Coercion: Birth Control, Sterilization, and Abortion in Public Health and Welfare 75-138 (U. of N. Car. Press 2005).

[51] Series of articles in 2002 by Kevin Begos & John Railey, Winston-Salem Journal.

[52] John Railey, *"Wicked Silence": State Board began targeting black, but few noticed or seemed to care*, Winston-Salem Journal, 2002.

[53] *See* Kevin Begos & John Railey, *Sign This or Else . . . A young woman made a hard choice and life has not been peaceful since,* Winston-Salem Journal (2002); John Railey & Kevin Begos, "*Still Hiding": Woman sterilized at 14 carries a load of shame*, Winston-Salem Journal (2002).

[54] *See* House Bill 296, An Act to Provide A Study of Compensation to the Persons Sterilized through the State's Eugenic Sterilization Program (Feb. 21, 2007). The bill was passed by the House, but never taken up in the North Carolina Senate. However, the Speaker of the House has authority to set up the commission. *See* James Romoser, *Nothing done on Womble initiative: His House bill to examine sterilization reparations has not resulted in action*, Winston-Salem Journal, March 10, 2008.

[55] 560 F.2d 609 (4th Cir. 1977).

[56] 372 F. Supp. 1196 (D.D.C. 1974).

[57] Roberts at 95-97.

[58] Roberts at 97.

[59] 140 F. Supp.2d 488 (D.Md. 2001).

[60] Garcia v. Lawrence Hosp., 773 N.Y.S. 2d 59 (2004) (Supreme Court, Appellate Div, First Dept).

[61] Johnson v. Jamaica Hosp., 478 N.Y.S. 2d 838 (1984) (Court of Appeals).

[62] Larsen v. Banner Health System, 81 P.3d 196 (Wyo. 2003).

[63] *See* Martha Albertson Fineman, The Autonomy Myth: A Theory of Dependency 188 (2004); Mary Becker, *Care and Feminists*, 17 Wis.Women's L. J. 57 (2002).
[64] Harnisher v. University of Utah Medical Center, 962 P. 2d 67 (1998).

[65] *See* Andrews v. Keltz, 2007 WL 1029900 (N.Y. Sup. 2007) (no recovery for emotional distress for giving birth to "darker skinned" child when clinic used wrong sperm for IVF procedure) For a discussion of the cases, *see* Leslie Bender, *"To Err is Human" ART Mixups: A Labor-Based, Relational Proposal*, 9 Gender, Race & Just. 443 (2006).

[66] William L. Prosser, Law of Torts, §54 at 333 (4th ed. 1971).

[67] *See* Dulieu v. White & Sons, 2 K.B. 669 (1901); Hambrook v. Stoked Bros., 1 K.B. 141 (1925); Waube v. Warrington, 258 N.W. 497 (Wisc. 1935); Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513 (Cal. 1963); Dillon v. Legg, 441 P.2d 912 (Cal. 1968); Thing v. La Chusa, 771 P/2d 814 (Cal. 1989).

[68] *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

[69] *See* Dan B. Dobbs, §310 at 841-43 (2000) (discussing loss of consortium claims for spousal and parent/child relationships); *id*. §§296-298 at 807-815 (discussing recoverable damages in wrongful death action).

[70] Restatement (Third), §47 at 92-93 (Reporters' Note).

[71] Restatement (Third), §47.

[72] *See* Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) (recovery denied to mother who was nearby an accident, rushed to the scene and say her child's bloody and unconscious body); Marchetti v. Parsons, 638 A.2d 1047 (R.I. 1994) (recovery denied to parents who saw bloodied, immobile child on a stretcher at the hospital).

[73] *See e.g.*, Thing v. La Chusa, 771 P. 2d 814 (Cal. 1989) ("the impact of personally observing the injury-producing event . . .distinguishes the plaintiff's resultant emotional distress felt when one learns of the injury or death of a loved one from another, or observes pain and suffering but not the traumatic cause of the injury"). See Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 Tenn. L.Rev. 51, 77-78 (2003) (discussing especially severe effects of traumatic (versus normal) loss of a loved one).

[74] *See* Richard A. Epstein, TORTS, §10.15 at 278 (1999) (requirement that plaintiff be a close family member has held "fairly firm over time").

[75] Restatement (Third), §47, comment *e* (April 4, 2007).

[76] *Compare* Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994); Graves v. Estabrook, 818 A.2d 1255 (N.H. 2003);(allowing claim to fiancee); Lozoya v. Sanchez, 66 P.2d 948 (N.M. 2003) (allowing claim to fiancee ; Yovino v. Big Bubba's BBQ, 896 A.2d 161 (Con. Sup. Ct. 2006) (allowing claim to fiancee); Watters v. Walgreen, 967 So. @d 930 (Fla. Dist. Ct. 2007) (allowing claim to stepchildren) *with* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (denying claim to unmarried cohabitant); Smith v. Toney, 862 N.E. 2d 656 (Ind. 2007) (denying claim to fiancee); Trobetta v. Conkling, 626 N.E. 2d 653 (N.Y. 1993) (denying claim to niece); Grotts v. Zahner, 989 P.2d 415 (Nev. 1999) (denying claim to fiancee); Guzman v. Kirchhoefel, 2005 WL 1684978 (Cal. Dist. Ct. App. 2005) (denying claim to cousin).

[77] 2005 WL 1684978 (Cal. App. 2005).

[78] 642 A.2d 372 (N.J. 1994).

[79] Restatement §47,comment *e*, citing Principles of the Law of Family Dissolution: Analysis and Recommendations §2.03 (c) and Comment *c*.

[80] 66 P.3d 948 (N.M. 2003).

[81] Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 15 Wis. Women's L.J. 93, 133-37 (2000); Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Ore. L. Rev. 709, 764-65 (1996).

[82] Such an approach was advocated by Canadian law professor Shauna Van Praagh in a paper prepared for the Law Commission of Canada. *See* COMPENSATION FOR RELATIONAL HARM (July 5, 20001).

[83] Currently, wrongful death recovery is governed by statutes, typically naming specific classes of beneficiaries. For nonfatal cases, common law claims for loss of spousal consortium are well established. However, loss of consortium claims are less uniformly recognized for relational injuries to parents or children. *See* Dan B. Dobbs, THE LAW OF TORTS §§ 294, 310 (2000) (only minority of states recognize claim for damage to parent/child relationship).