EXISTENCE OF OBLIGATION AND EXTENT OF RESPONSIBILITY IN THE LAW OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Gregory C. Keating[1]

Taxonomical problems in law are currently not held in the highest repute. Arguing, say, over whether the strict liability of masters for the torts of their servants under the doctrine of *respondeat superior* is agency law or tort law proper is viewed with skepticism and even suspicion. To engage in the enterprise of classifying cases, doctrines and principles within a larger system is to invite the charge that one has failed to learn the basic lessons of legal realism, and is clinging to the legacy of a discredited Langdellian formalism. Taxonomical problems persist nonetheless and—because they set out to organize bodies of law—Restatements help to bring them to our attention. More importantly, taxonomical puzzles matter. The way in which we classify a doctrine can clarify or cloud our thinking about it, and can shape our sense of the doctrine itself and of the larger law in which it figures. If, for example, we take *respondeat superior* to be an intrusion of agency law upon the law of torts, we will find it easer to see the law of torts itself as constructed around a general commitment to fault liability.[2] The strict liability of *respondeat superior* will appear essentially anomalous. Conversely, if we see *respondeat superior* as an ancient common law redoubt of strict liability in tort, we will find it easer to see the law of torts itself as torn between competing principles of responsibility. Instead of seeing the law of torts as a realm of fault liability punctuated by exceptional pockets of strict liability, we will be more inclined to see the law of torts as terrain contested by competing principles of fault and strict responsibility.[3]

Liability for negligent infliction of emotional distress (NIED) is one of the preeminent taxonomical puzzles in our present day law of torts. Cases and commentary sometimes erupt into strenuous disagreement over whether recovery for NIED is a matter of duty and or a matter of proximate cause, or whether some NIED cases are proximate cause cases and others are duty cases.[4] This classificatory choice makes a difference. Duty is concerned with the existence of

---

[1] Academic Associate Dean and William T. Dalessi Professor of Law and Philosophy at the Gould School of Law at the University of Southern California. I am grateful to .. and to the participants in this conference and the editors of this journal for many helpful comments. Errors remain mine.

[2] See, e.g., ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 185-87 (1995) (advocating a generalized fault liability taking the view that *respondeat superior* simply determines what counts as a "person" in cases where agency relationships are at stake).

[3] See e.g., Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability* 54 Vand. L. Rev. 1285, 1303-1317 (2001) (arguing that *respondeat superior* is one of two main fonts of strict enterprise liability in tort, and that tort law is torn between competing principles of strict and fault responsibility).

[4] John Goldberg and Ben Zipursky, for instance, see duty where I am inclined to see proximate cause. Compare Goldberg and Zipursky Shielding Duty: How Attending to Assumption of

obligation in tort, *with whether the defendant's conduct is governed by the law of negligence or not*. Put differently, duty doctrine is concerned with the choice of the legal norm that regulates the conduct at issue. Duty decisions ask us to inquire into the advisability of imposing an obligation of reasonable care with respect to some class of risks and for the benefit of some class of persons. They invite us to consider such possibilities as leaving risk of pure emotional injury legally unregulated, or leaving pure economic loss to the law of contract.[5] Broad reflection on the urgency of the interest at issue—the physical integrity of the person, legitimate economic expectancies, emotional tranquility—and the legal protection that the interest is owed, are the order of the day when a determination of duty must be made.

The duty of care with respect to risks of physical harm is, moreover, highly general and deeply entrenched. The Wisconsin Supreme Court, for example, has proclaimed that "everyone has a duty of care to the whole world."[6] The California Supreme Court, echoing a 130 year-old statute, has remarked that "[i]n this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct."[7]. *The Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* states:

> [A]n actor ordinarily has a duty to exercise reasonable care. That is equivalent to saying that an actor is subject to liability for negligent conduct that causes physical harm. Thus, in cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of this ordinary duty. [8]

Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases, 79 S. Cal. L Rev 329, 357 (2006) ("California's expansion of duty famously includes the recognition of new duties to take care not to cause others emotional harm, [but] even under California law there was no basis for concluding that a restaurant such as KFC owed a duty to take care to avoid causing emotional harm to a patron such as Brown in a situation such as the one it faced") with Dilan A. Esper & Gregory C. Keating, *Putting Duty in its Place*, 41 Loyola L. Rev. 1225, 1264-65, 1292-93 (2008) (treating the issue in KFC as one of extent of liability). The KFC case is Kentucky Fried Chicken, Inc. of California v. Superior Court, 927 P.2d 1260 (Cal. 1997). See also John Goldberg and Ben Zipursky, The Moral of MacPherson – at 1832-34 (construing negligent infliction of emotional distress cases as "limited duty" cases). Pressure to construe NIED cases as duty cases aries, importantly, out of ideas of correlativity.

[5] See e.g., *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986), discussed in the text *infra* at n. –.

[6] Miller v. Wal-Mart Stores, Inc. 580 N.W.2d 233, 238 (Wis. 1998) ("[T]he proper analysis of duty in Wisconsin is as follows: The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act....") (internal quotation omitted).

[7] Randi. v. Muroc Joint Unified School Dist., 929 P.2d 582, 588 (Cal. 1997); *see also* Cal. Civ. Code § 1714(a) (West 2002)(originally enacted in 1872, prescribing that everyone owes to everyone else a duty of ordinary care).

[8] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 6, cmt. f. [check]

For their part, commentators have recognized a general duty to exercise reasonable care at least since the time of Oliver Wendell Holmes.[9] To be sure, recent retrenchment in the law of torts may represent an attempt to shrink the domain of negligence law, but even these developments leave intact a general duty to exercise reasonable care to avoid inflicting physical harm.[10]

By contrast, proximate cause is concerned not with the question of what legal standard governs the defendant's conduct (not with the *existence of an obligation* of reasonable care) but with the *extent of liability* for failure to discharge an acknowledged obligation. For example, when a defendant is: (1) subject to a tort duty of reasonable care; (2) breaches that duty; and (3) through its breach physically injures some plaintiffs and inflicts pure economic loss on other plaintiffs, the question of liability to those who have suffered pure economic loss or pure emotional harm is a classic question concerning just how far liability should extend.[11] This "proximate cause" inquiry is very different from a duty inquiry, as the *Restatement 3rd* recognizes.[12] It is more fact-intensive and particular. "Proximate cause" doctrine is not as highly general as "duty" doctrine is. Indeed, "proximate cause" doctrine is decidedly more specific in its pronouncements. There is a general duty to exercise reasonable care to avoid physical harm to others, but only *some* economic losses are recoverable under proximate cause doctrine. [13]

---

[9]See G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY at 13 (1985) (citing *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873), an unsigned article all but universally attributed to Holmes) (hereinafter WHITE, TORT LAW IN AMERICA). Case law began to recognize the modern duty of due care in the 1830's. WHITE, TORT LAW IN AMERICA, *supra*, at 15; *see* Brown v. Kendall, 60 Mass. 292, 296 (1850) (Shaw, C.J.). But the duty was not general in the 19th Century because it was hedged in by property and contract. *See, e.g.,* Robertson v. Mayor, Etc., of the City of New York, 7 Misc. 645, 646 (N.Y. Common Pleas 1894) (reciting that landowners owe licensees and trespassers no affirmative duties to keep the premises safe); Losee v. Clute, 51 N.Y. 494, 496-97 (1873) (holding that manufacturer of dangerous boiler owes no duty of reasonable care to anyone other than its employees); Thomas v. Winchester, 6 N.Y. 397, 407-08 (1852) (noting that sellers of goods had no general duty to those who they were not in privity of contract with); Farwell v. Boston & Worcesster R.R. Corp., 45 Mass. 49, 59 (1842) (Shaw, C.J.) (holding that employer has no duty to take precautions that would protect employee from injury at the hands of his or her fellow employees); Rex v. Smith, 2 Car. & P. 449, 456, 172 Eng. Rep. 203, 207 (Gloucester Assizes 1826) (holding caretakers of mentally disabled man owed no duty to tend to his health). It was not until the 20th Century that the duty of reasonable care became a highly general legal obligation. *See* text accompanying notes 12-31, *infra*.

[10] See generally, Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*79 S. CAL L. REV. 265 (2007).

[11] See e.g, Barber Lines v. Donau Maru 764 F.2d 50 (1t Cir. 1985).

[12][citation needed]

[13] *Donau Maru*, for instance, lists nine exceptions to the general rule that there is no recovery for pure economic loss. [cite and examples needed]

"Proximate cause" doctrine picks and chooses among very similar cases, extending and contracting liability in ways that are perennially vulnerable to the charge of being unprincipled. It does so because proximate cause doctrine's chief preoccupation is defining an appropriate orbit of liability, an orbit that is neither so large that it is both unmanageable and disproportionate to the wrong done, nor so small that it provides an inadequate incentive to honor the duty of due care. Because it performs a role different from the role of duty doctrine, the questions that proximate cause doctrine invites sound both decidedly more instrumental and decidedly more retributive than the questions that duty doctrine asks. Proximate cause cases are rightly more concerned with efficacy and proportionality and less concerned with the kind of legal protection owed to persons' differing interests in their physical integrity, their emotional tranquility, and their economic expectancies.

The classification of liability for negligent infliction of emotional distress as either duty or proximate cause thus matters. Duty doctrine is more general and sweeping. Proximate cause doctrine is more particular and nuanced. Inconveniently, however, liability for negligent infliction of emotional distress will not go gently into either box. The distinctions drawn by the *Restatement 3rd* illustrate the difficulty. Sections 46 and 47 distinguish between two familiar kinds of emotional distress cases.[14] One kind encompasses emotional distress which is parasitic on physical injury. This covers both cases where the plaintiff is negligently put at risk of physical harm and fortuitously escapes such harm, only to suffer severe emotional distress from his or her physical peril; and cases where physical injury befalls someone else and the plaintiff seeking recovery for pure emotional harm is witness to that injury.[15] The natural way to conceptualize both of these fact patterns is as "proximate cause" puzzles, not "duty" puzzles. The duty breached is both clear and unproblematic—it is the traditional negligence duty not to inflict physical harm. Indeed, duty, breach, and cause-in-fact are all plainly present. Yet the cases themselves are problematic even though duty is plain. The harm culpably risked (physical injury) is different from the harm actually inflicted (severe emotional distress). This discrepancy between the reasons we have for counting the conduct is culpable and the harm that conduct causes puts a hard question to us. Does liability for breach of a duty not to inflict physical harm negligently extend to encompass responsibility for pure emotional injury. Taxonomically, that is a problem of proximate cause; it is a question about the proper scope of liability, not a question about the legal standard to which defendant must conform his or her conduct.

---

[14] See § 46(a) & §47. The sharp division between these two kinds of cases articulated by the RESTATEMENT'S adoption of distinct rules to govern them is contestable. The second class of cases arose out of judicial criticism of the arbitrariness of the "zone of danger" test as it works to limit recover in the first class of cases. See *Dillon v. Legg* 68 Cal.2d 728, – 441 P.2d 912, – (1968) (criticizing the "zone of danger" rule as "hopelessly artificial[]" and indefensible and overruling it). Fundamentally, the two kinds of cases are similar, because recovery for emotional distress is parasitic on culpable imposition of risk of physical harm. But see §46, comment (b) (arguing that the two kinds of cases are fundamentally different).

The second familiar kind of NIED case is defined by the existence of a preexisting relationship between plaintiff and defendant—and by the fact that risk of physical peril is *not* required. The essential question in these cases is whether the emotional distress "occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance."[16] These are not accidents among strangers. They are accidents among parties with preexisting relationships. The puzzle here seems deeper: should we say that these cases, too, are "proximate cause" cases, because they are about the extent of liability for breach of an independently established duty of care? Or should we say that these are "duty" cases because they recognize a freestanding obligation of care with respect to the emotional tranquility of certain classes of persons?

This article will sketch a case for taking both kinds of NIED cases to be proximate cause cases, conceding that the preexisting relationship cases are atypical proximate cause cases. From a "proximate cause" perspective the peculiarity of the preexisting relationship cases lies in the fact that the worry they address is the exact opposite of the worry that animates most of "proximate cause" doctrine. Proximate cause case law is haunted by the specter of excessive liability and is therefore preoccupied with placing "controllable limits on liability."[17] This is, indeed, exactly the worry behind limits on recovery in those NIED cases where the right to recover for emotional distress is parasitic on the culpable imposition of risk of physical harm. Without some arbitrary cutoff, liability for emotional distress might extend indefinitely and therefore excessively.[18] Preexisting relationship NIED cases address an extent of liability problem, but the problem they address is not excessive liability. "When the defendant owes an independent duty of care to the plaintiff, there is no risk of unlimited liability to an unlimited number of people. Liability turns solely on relationships accepted by the defendant, usually under a contractual arrangement."[19] The extent of liability problem in "preexisting relationship" NIED cases is thus not too much but *too little liability*. Precisely because the defendant's failure

---

[16] §46(b). Comment (d) notes "Unlike Subsection (a) recovery under this Subsection does not require that the defendant have created a risk of bodily harm to the plaintiff."

[17] Straus v. Belle Realty Co., 65 N.Y.2d 399, – ; 482 N.E.2d 34, – (1985).

[18] "There is a recurring (and new) theme in these materials: the use of arbitrary lines to limit recovery for emotional disturbance. See especially §47, which limits bystander recovery for emotional disturbance to those who contemporaneously perceive an accident causing injury to a family member of the bystander. In many instances, one could persuasively argue that such restrictions on recovery are no more appropriate or rational than an alternative limitation and so, in that sense, are arbitrary. We agree with that assessment—while cautioning that, given the ubiquity of emotional disturbance, lines must be drawn." RESTATEMENT 3RD, *Reporter's Memorandum*, at xxi. *Compare* Dillon v. Legg 68 Cal.2d 728, – , 441 P.2d 912, – (1968). *Cf.* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF L. REV. 209, 356 (1979) ("The rules about the tort of intentional infliction of emotional harm might, if they were enforceable, modify every aspect of private social intercourse.")

[19] *Restatement 3rd §46 cmt. d* quoting DAN B. DOBBS, THE LAW OF TORTS § 312, at 849 (2000).

to discharge its obligations does not result in physical injury *to anyone* no liability at all would be the norm unless liability for negligent infliction of emotional distress is recognized.[20]

Recall that duty is about the existence of obligation. Proximate cause is about the extent of liability. Duty doctrine determines the legal standard to which an actor is subject; proximate cause doctrine determines the scope of the actor's responsibility for harm done through failure to comply with that standard. "Preexisting relationship" NIED cases are "proximate cause" cases, not "duty" ones, because they are about the extent of the defendant's responsibility for failing to comply with obligations which originate independently of the law of liability for negligent infliction of emotional distress. "Preexisting relationship" NIED cases do not impose freestanding duties of care running from the occupants of particular social roles to those who make use of the services they provide by performing those roles. Preexisting NIED cases impose a particular form of responsibility for harm done on the occupants of particular social roles. That responsibility attaches when those occupants fail to discharge obligations which preexist and arise independently of the decisions that extend liability to encompass severe emotional distress. Preexisting relationship NIED cases extend liability. They do not impose new obligations. The pertinent obligations originate independently of and antecedent to the liability recognized by the NIED cases themselves. Or so I shall argue.

The next section of this paper unpacks the pertinent conception of duty, with an eye towards distinguishing duty from proximate cause, existence of obligation from extent of liability. The following section explains why all cases of liability for negligent infliction of emotional distress can be seen as proximate cause or extent of liability cases. A final very brief section floats a suggestion about why we are tempted to see NIED cases as duty cases and proposes that NIED cases provide fertile ground for pondering the question of tort as a body of law concerned with responsibility for doing *harm*.

I. The Role of "Duty" in Modern Negligence Law

The existence of a duty of care means that the norms of negligence law determine the rights and obligations of the parties joined together by the defendant's infliction and the victim's suffering of a particular injury. The absence of a duty means that either some other body of law— contract law, most often— determines the rights of the parties to the harm, or that no body of law does. In this latter case, the harm is legally unregulated. "Duty" is a nonissue in most cases of accidental physical injury because most cases of accidental physical injury are governed by negligence law.

---

[20]Compare now Justice, then Judge, Breyer's explanation of why we permit recovery for pure economic losses in negligent misrepresentation cases such as Barber Lines v. Donau Maru 764 F.2d 50, 56 (1st Cir. 1985) ("Awarding damages for financial harm caused by negligent misrepresentation is special in that , without such liability, tor law would not exert significant financial pressure to avoid negligence; a negligent accountant lacks physically harmed victims as potential plaintiffs . . .").

To see the role of duty doctrine consider a case where a design defect causes a turbine installed on a ship to fail. Suppose first that the product failure only damages the turbine itself, thereby inflicting a loss on the owner and purchaser of the turbine. In this circumstance, contract law will govern the purchaser's claim against the seller of the turbine. The injury involved— physical damage to the product itself— is likely to be treated as a form of "pure economic loss," and pure economic losses do not give rise to a cause of action for negligence. Pure economic losses arising out product failures fall squarely within the domain of contract law.[21] Suppose next that the product failure causes the product to explode and the explosion physically injures the purchaser, who happened to be in the vicinity of the turbine at the time it blew up. In this circumstance, the purchaser will have a tort claim against the seller. Physical injury to natural persons is as much the concern of tort law as pure economic loss is the concern of contract law.

Now consider a third possibility: that the turbine fails in a frightening but physically harmless way, thereby inflicting emotional distress on the purchaser, who just happens to witness the turbine's distressing demise. In this circumstance, the purchaser's emotional injury will generally go unredressed. *Pure* emotional harm usually falls into a legally unregulated domain of "no duty" —people generally have no duty to exercise reasonable care to avoid emotional distress to others. Tort law does not generally extend its protections against accidental injury so far, and no other body of law generally steps into the opening, protecting the purchaser's peace of mind in the way that contract law generally protects her economic expectancies.[22] Proximate cause extensions of liability to encompass pure emotional injury when physical harm is risked

---

[21] I adapt this example from *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986). In *East River Steamship*, the U.S. Supreme Court rejected products liability and negligence claims in admiralty law made by charterers of a ship against the manufacturer of its turbines for defects in the turbines which necessitated repairs. The Court explained that the traditional functions of tort law were not served by allowing such an action:

> The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the "cost of an injury and the loss of time or health may be an overwhelming misfortune," and one the person is not prepared to meet.... In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured....
>
> Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." The maintenance of product value and quality is precisely the purpose of express and implied warranties.

Id. at 871-72 (citations omitted)

[22] In both these areas– emotional distress and pure economic loss– *intentional* inflictions of harm are tortious; only the negligent infliction of such harm usually goes uncompensated. See Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268 (Cal. 2004) (plaintiff could sue for fraud but not negligence in a case involving a defective helicopter part which could have led to a fatal accident.)

but only emotional harm is inflicted, do not apply because the turbine has failed in a physically harmless way.

To be sure, it has not always been well-settled that accidental physical harm is presumptively the province of tort. The way in which this has come about is instructive because it casts the essential role of duty into much clearer relief. In our time, the role of duty is obscured by the very fact that the obligation of reasonable care is so pervasive. Precisely because the negligence duty of reasonable care covers most cases where physical harm is risked, we have trouble appreciating just what duty doctrine does. Nineteenth century tort law contained far more capacious domains of "no duty", and assigned much of the domain now held by tort to property and contract.[23] On the property side, the duties owed by those in control of real property to entrants onto that property were governed by categories framed to give property law considerations (i.e., the existence and extent of plaintiff's right to be on the property) priority over tort concerns.[24] Personal rights were subordinated to property rights. On the contract side, when a chain of contracts was present— as it is in product accidents involving injuries to product purchasers— absent a contractual relation between injurer and victim "no duty" of care was owed to those foreseeably injured by negligent conduct.[25] Contract took hold of the situation and tort receded.

Contemporary tort law recognizes a more extensive duty of reasonable care because it is the heir to the twin revolutions of *MacPherson v. Buick* and *Rowland v. Christian*.[26] *MacPherson* overthrew privity of contract in the critical domain of product accidents (the doctrine had barred suits by product users against manufacturers where the product had been sold

---

[23] *See, e.g.*, Robert Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GEORGIA L. REV. 925, 928, 944-54 (1981) (arguing "that fault liability emerged out of a world-view dominated largely by no-liability thinking" and delineating domains of "no duty"); G. EDWARD WHITE, TORT LAW IN AMERICA, 184 (publication date) (arguing that 19th Century limitations on negligence recovery were intended to keep a leash on juries); Dillon v. Legg, 441 P.2d 912.

[24] See, e.g., ROBERT E. KEETON, et al., eds., TORT AND ACCIDENT LAW at 441,441-45,461-83 (4th ed. 2004) (hereinafter KEETON, TORT AND ACCIDENT LAW); Rabin, *supra* note , at 933-36; ABRAHAM, *supra* note , at 227-30 (describing the "limited duties" of owners and occupiers of land); WHITE, TORT LAW IN AMERICA, *supra* note 8, at 190 (1985) ("[T]he liability of landowners... has been persistently dominated by... 'status' conceptions of tort liability that had preceded the rise of modern negligence."); PROSSER & KEETON, *supra* note 2, at 432 (describing "the traditional distinctions in the duties of care owed to persons entering land" as "based upon the entrant's status as a trespasser, licensee or invitee").

[25] *See e.g.*, KEETON, TORT AND ACCIDENT LAW, *supra* note , at 254, 254-59; *id.*, *Teacher's Manual* at 8-1, 8-2, 8-3, 8-4; ABRAHAM, *supra* note , at 186-89 (describing the "Era of Contract Privity" in product liability law); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099 (1960).

[26] MacPherson v. Buick Motor Co, 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.) . Rowland v. Christian 443 P. 2d 561 (Cal. 1968). The developments, of course, are much broader than these cases. On the demise of "privity of contract" *see* Prosser *supra* note [insert citation].

through an intermediary, such as a car dealership), allowing tort law to follow its own premise that "where danger is to be foreseen, there is a duty to avoid the injury."[27] *Rowland* spawned a less sweeping overthrow of the categories— invitee, licensee, and trespasser— by which the duties owed to entrants on real property were determined in the nineteenth century and the first two-thirds of the twentieth.[28] The property law status of entrants onto land─are they invitees, licensees or trespassers?─ now has less to do with the duties they are owed and the general duty of reasonable care has more and more say in fixing the pertinent obligations. Tort has triumphed over contract and property, and tort law— not contract or property law— generally determines

---

[27] 217 N.Y. 382, 111 N.E. 1050. Prior to *MacPherson*, reasonable foreseeability of physical injury was the first and principal determinant of the existence of a duty of care within the constricted domain ceded to tort. *See*, *e.g.*, Blyth v. Birmingham Waterworks Co., 159 Eng. Rep. 1047 (Exch. 1856). Many contemporary American jurisdictions take reasonable foreseeability of physical injury to be, in general, the necessary and sufficient condition of a tort duty of care, the key to the obligation to exercise reasonable care. The Wisconsin Supreme Court, for example, writes:

> [T]he proper analysis of duty in Wisconsin is as follows: 'The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act....'

Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 238 (Wis. 1998) (citation omitted). A number of other jurisdictions are in accord. Washington v. City of Chicago 720 N.E.2d 1030 (Ill. 1999) Thompson v. Mindis Metals, 692 So.2d 805, 807-08 (Ala. 1997); Rudolph v. Arizona B.A.S.S. Federation, 898 P.2d 1000, 1003 (Ariz. App. 1995) Munson v. Otis, 396 A.2d 994, 996 (D.C. 1979); Delmarva Power & Light Co. v. Burrows, 435 A.2d 716, 718 (Del. 1981); Florida Specialty v. H2 Ology, 742 So.2d 523, 526 (Fla. App. 1999); Bradley Center, Inc. v. Wessner, 296 S.E.2d 693, 695 (Ga. 1982); Bain v. Gillispie, 357 N.W.2d 47, 49 (Iowa App. 1984) Melchers v. Total Electric Construction, 723 N.E.2d 815 (Ill. App. 1999); Seigle v. Jasper, 867 S.W.2d 476, 483 (Ky. App. 1993); Glick v. Prince Italian Foods of Saugus, 514 N.E.2d 100, 101-02 (Mass. App. 1987); Colvin v. AR Cable Services-Me, 697 A.2d 1289, 1290 (Maine 1997); Baltimore Gas & Elec. Co. v. Flippo, 705 A.2d 1144, 1154 (Md. 1998); Horner v. Spalitto, 1 S.W.3d 519, 522 (Mo. App. 1999); Donald v. Amoco Production Co., 735 So.2d 161, 175 (Miss. 1999); Hart v. Ivey, 420 S.E.2d 174, 178 (N.C. 1992); Nelson v. Gillette, 571 N.W.2d 332, 340 (N.D. 1997); Mulvey v. Cuviello, 687 N.Y.S.2d 584, 588 (N.Y. Supr. 1999); D'Amico v. Delliquadri, 683 N.E.2d 814 (Ohio App. 1996); Smith v. Speligene, 990 P.2d 312, 315 (Okla. App. 1999); Roberts v. Fearey, 986 P.2d 690, 692 (Or. App. 1998); Hicks v. Metropolitan Edison Co., 665 A.2d 529, 533 (Penn. Cmwlth.), *appeal denied*, 675 A.2d 1253 (Penn. 1995); Horne v. Beason, 331 S.E.2d 342, 344 (S.C. 1985); Thompson v. Summers, 567 N.W.2d 387, 392 (S.D. 1997); McCall v. Wilder, 913 S.W.2d 150, 156 (Tenn. 1995); Trail v. White, 275 S.E.2d 617, 619 (Va. 1981).

[28] Rowland's formulates a multi-factor approach to "duty" with "foreseeability" the preeminent factor. *See infra* note , and accompanying text. After reciting *Rowland's* factors Randi. v. Muroc Joint Unified School Dist., 929 P.2d 582, 588 (Cal. 1997) observes "[t]he foreseeability of a particular kind of harm plays a very significant role in this calculus." Connecticut is explicit in enumerating foreseeability as the most important of the factors, Jaworski v. Kiernan, 696 A.2d 332, 336-38 (Conn. 1997). Some other jurisdictions list foreseeability as the first of a list of factors. Mesiar v. Heckman, 964 P.2d 445, 450 (Alaska 1998); Doe v. Garcia, 961 P.2d 1181, 1184 (Idaho 1998); Thorne v. Miller, 722 A.2d 626, 629 (N.J. Super. 1998).

the duties that people owe to each other with respect to the reasonably foreseeable risks of physical harm that their acts and activities create.

Within this framework, duty is not exactly a vestigial organ, but it is a shadow of its former self. In the 19th Century, large domains of "no duty" were created by the hold of property and contract law over important realms of accidental injury. When workplace accidents, product accidents, or injuries to entrants onto land were at issue, tort law could not follow its own premise that reasonable foreseeability of risk of physical injury gives rise to duty, because property and contract trumped tort and cut off its duties of care.[29] At the outset of the 21st century, "no-duty" doctrine still nibbles around the edges of the reconfigured tort-contract and tort-property boundaries, and still enables courts to snatch cases away from juries in a variety of unusual circumstances.[30] But the boundaries are far different and the terrain controlled by tort far larger. So "duty" performs its old function, but in a more modest way.

In product liability law, for example, the recently developed "no duty" doctrine that there is no tort claim for damage caused to a defective product itself[31] helps to locate the boundaries between tort and contract, and self-consciously so. The normative and conceptual edge on the ruling is the conclusion that damage to the product itself—a kind of *physical* damage— is best thought of as a kind of purely economic loss, properly governed by the law of contract, designed

---

[29] The materials in KEETON, TORT AND ACCIDENT LAW, *supra* note , at 254-59, 271-279, & 662-69, illustrate or discuss the structure of accident law in the late nineteenth century. Rabin, *supra* note , at 944-54, gives an excellent overview of the relation of the fault principle to various domains of "no duty", showing that the general duty of reasonable care supposedly characteristic of late nineteenth century tort law governed only over accidents among strangers producing physical harm. Outside that domain, the tort duty of reasonable care was preempted by domains of "no duty" governing: (1) all entrants onto land except for invitees; (2) workplace and product accidents; and (3) purely emotional and economic harms. Liability to entrants on land was controlled by property conceptions; workplace and product accidents were controlled by contract conceptions; and pure emotional and economic harms were legally unregulated. *See also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 at 208-210 (1977) (describing how the doctrine of assumption of the risk excluded tort duties of care from the workplace). The grip of "no duty" ideas was so strong that even those who drove the movement to recognize a general duty of reasonable care and thereby bring modern negligence law into existence (preeminently, Oliver Wendell Holmes and the members of the "legal science" movement) preferred "doctrines limiting liability... to those expanding it." WHITE, TORT LAW IN AMERICA, *supra* note , at 50.

[30] [cite to Abusing Duty?]

[31] *See East River Steamship*, 476 U.S. at 871. The damage to property—to the ship's turbine—was treated as an instance of pure economic loss. 476 U.S. at 870; *accord* Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987); *cf.* Seely v. White Motor Co., 403 P.2d 145, 149 (Cal. 1965) (applying economic loss rule to bar strict liability claim for damage to product itself). Not every jurisdiction subscribes to the *East River Steamship* "damage to the product itself" rule. *See, e.g.,* Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1180 (Alaska 1993) (reaffirming rule that damages may be awardable for damage to the product itself if defendant's conduct caused a safety risk that could have harmed lives as well as property); *see also* Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268 (Cal. 2004) (holding economic loss rule does not bar claim for product damage resulting from fraud rather than negligence).

as it is to regulate the economic expectations of the parties. "No duty" doctrine also continues to fix tort's boundaries with property, but here, too, the modern cases nibble along a perimeter that concedes far more terrain to tort. Although the triumph of tort over property came later and is less complete than tort's triumph over contract,[32] in the wake of cases like *Rowland v. Christian*[33] the categories of licensee and invitee are gradually being abandoned, and the particular duties of care owed to persons who once fell into these categories are slowly being replaced by a general duty of reasonable care.[34]

To be sure, this second reconfiguration of the terrain of private law has not been neat. The proper treatment of trespassers has perplexed modern courts, prompting a proliferation of distinctions among categories of trespassers. Some courts have been receptive to the extension of a duty of reasonable care to innocent trespassers,[35] recreational trespassers, or child trespassers but courts and legislatures alike have recoiled from the idea that felony trespassers are owed a duty of ordinary care.[36] The doctrine that "no duty" is owed to felony trespassers is both an acknowledgment that property rights still matter to the definition of tort duties, and an example of "no-duty" doctrine performing its traditional task of fixing the boundaries between tort and neighboring bodies of civil law.[37]

---

[32] PROSSER & KEETON, *supra* note , at 432-33; DOBBS, *supra* note , at 615, 615-16; Prosser, *supra* note , at 1099; ABRAHAM, *supra* note , at 186 & 228 (noting, inter alia, that no courts retain privity of contract in product liability law whereas some courts do retain the categories in entrants onto real property cases).

[33] 443 P. 2d 561 (Cal. 1968). *Rowland* is the seminal case establishing a single standard of care for cases involving landowner liability to entrants onto land.

[34] *See, e.g.,* 740 Ill. Comp. Stat. 130/2 (West 1995); Mallet v. Pickens, 522 S.E.2d 436, 446 (W.Va. 1999); Sheets v. Ritt, Ritt & Ritt, Inc., 581 N.W.2d 602, 605 (Iowa 1998); Nelson v. Freeland, 507 S.E.2d 882, 892 (N.C. 1998); Heins v. Webster County, 552 N.W.2d 51, 57 (Neb. 1996); Jones v. Hansen, 867 P.2d 303, 310 (Kan. 1994); Clarke v. Beckwith, 858 P.2d 293, 296 (Wyo. 1993); Poulin v. Colby College, 402 A.2d 846,849 (Me. 1979); O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977); Cates v. Beauregard Elec. Coop., 328 So.2d 367, 371 (La. 1976); Basso v. Miller, 352 N.E.2d 868,871 (N.Y. 1976); Mounsey v. Ellard, 297 N.E.2d 43, 47 (Mass. 1973). The trend towards eliminating these categorical distinctions has been carried to the point where the Colorado Supreme Court held that a statute which attempted to reinstate the categories lacked even a rational basis and was thus unconstitutional. Gallegos v. Phipps, 779 P.2d 856,863 (Colo. 1989).

[35] *See, e.g.,* Moody v. Manny's Auto Repair 871 P.2d 935 (Nev. 1994) (replacing the categories with a general duty of reasonable care in a case involve an "innocent trespasser"— a police officer who cut through defendant's parking lot while pursuing a suspect, only to collide with a steel cable strung across the entrance to the lot.)

[36] *See, e.g.*, Basso v. Miller, 352 N.E.2d 868, 877 (N.Y., 1976) (Breitel, concurring) ("Surely a landowner is not obligated, even under the single standard, to make his property safe for adult trespassers entering upon the property to pursue criminal ends."); Cal. Civ. Code § 847 (immunizing "landowners" from liability "to any person" for "any injury or death" which occurs "during the course of or after the commission of" a list of enumerated felonies).

[37] To be sure, even this might be contested. We might easily argue that the special treatment of felony trespassers under the single standard is driven not by deference to property rights (witness the very different treatment of other kinds of trespassers) but by the principle that criminals should not profit from

Fundamental developments in the law of torts in the twentieth century have thus reconfigured the boundaries between tort, contract and property in fundamental ways. For our purposes, the significance of this reconfiguration lies in the fact that our law can be correctly characterized by saying that a duty of reasonable care may generally be presumed, whenever risk of physical harm is at issue.[38] Doctrines of "no duty" set far less significant limits to tort liability than they once did. Because duty may generally be presumed when physical harm is risked, defendants are generally obligated to conform their conduct to negligence law's requirement of reasonable care whenever they engage in conduct with creates a significant risk of physical injury.

II. Why NIED Cases are Not Duty Cases

My hypothesis is simple. Negligent infliction of emotional distress ("NIED") cases have the characteristics of proximate cause cases, not duty cases. NIED cases involve either plaintiffs who are physically unharmed but emotionally traumatized by the negligent imposition of a risk of physical injury, or plaintiffs who have preexisting relationships with the parties whose negligence inflicts emotional injury on them.[39] In the former class of cases—let us call them "bystander" cases—duty exists because physical injury to a class of persons including the plaintiff is reasonably foreseeable, and gives rise to a duty of care. In the latter class of cases—preexisting relationship cases—an antecedent legally significant relation between plaintiff and defendant gives rise to duties of care. In both kinds of cases *duty exists independent of the*

---

their own wrongs, Cal. Civ. Code § 3517; *Riggs v. Palmer*, 22 N.E. 188, 190 (1889), by the argument that criminals "forfeit" their right to reasonable care from their victims, or by the fact that felony trespassers endanger public safety as well as property rights and these public safety interests justify limitations on tort liability. But even if we concede more than we perhaps should, and suppose that the special treatment of felony trespassers reflects at least in part the influence of property rights, the generalization that tort has occupied much of the terrain once held by property holds true.

[38] "[L]andmark decisions such as *Heaven v. Pender* [, 11 Q.B.D. 503, 1883 WL 19069 (1883)], *MacPherson v. Buick*[*Motor Co.*, 111 N.E. 1050 (N.Y. 1916)], and *Donoghue v. Stevenson*[, 1932 A.C. 562], have helped establish a general rule governing the application of the duty element specifying that each of us ordinarily owes a duty of care to others to go about our business in a manner that does not impose unreasonable risks of physical injury on others. See John C. P. Goldberg & Benjamin Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND L. REV 639, 700 (2001)(footnotes omitted).

[39] Parallel questions arise in cases involving recovery for negligent infliction of pure economic loss. In these cases, too, there is either physical injury risked *to someone* or a preexisting relationship which gives rise to an independent duty of care (e.g., the relationship of accountant to client). *See* KEETON ET AL., *supra* note at 657–64. Cases discussing pure economic loss in the context of product liability law show how the rule that there is no liability for pure economic loss in tort is a general rule of duty, which shunts purely economic harm out of tort law and into contract law. These are cases where the product failure does not risk physical injury *to anyone*. The flip side of this coin is that the economic expectancies involved are the proper subject of the law of contract. *Compare id.* at 968–73, *with Abusing "Duty," supra* note ., at 273–74.

prospect of emotional injury being negligently inflicted. Liability for emotional injury arises as a question of the extent of the defendant's liability for the consequences of its breach of a duty based on the foreseeability of other harm.

In bystander cases—*Dillon v. Legg*[40] is likely the most famous—the duty owed and breached is the duty not to impose an unreasonable risk of physical injury. That duty fixes the standard of conduct to which the defendant must conform his or her conduct, and it protects the class of persons that includes the plaintiff.[41] The question before the court is whether breach of that duty should give rise to liability for severe emotional distress—whether risk of physical injury wrongfully imposed should result in liability for severe (and eminently foreseeable) emotional distress actually inflicted. In answering that question courts attend to a host of considerations commonly found in proximate cause cases. Courts ask if liability and wrongdoing are proportional—with or without liability for pure emotional harm. They ask how severe the emotional harm is—whether it is distinguishable from "normal" emotional distress. They ask the straightforwardly instrumental question of whether the imposition of liability for pure emotional or economic loss is advisable in part as an incentive to induce other potential injurers to exercise appropriate care.

Preexisting relationship NIED cases—examples include cases involving doctors and patients, and involving morticians and the families of those they bury[42] —are structurally the

---

[40] 441 P.2d 912 (Cal. 1968). Erin Lee Dillon was killed by a negligent driver. *Id.* at 914. Her mother and her sister were present at the scene of the accident. Though they were physically uninjured, they brought suit alleging that they had each suffered "great emotional disturbance and shock" from witnessing Erin's death. *Id.* The trial court dismissed the mother's claim because she was not within the zone of physical danger created by the defendant's negligence; the sister's claim was permitted to go forward because she had been closer to the accident and might have "feared for her own safety." *Id.* at 915. The California Supreme Court reversed the dismissal of the mother's claim and repudiated the "zone of danger" rule (which itself recognized the principle that negligent infliction of emotional distress was actionable only where there was a breach of a preexisting duty, such as the duty to use reasonable care to protect plaintiff's physical safety). *Id.*

[41] *See, e.g.*, Battala v. State, 176 N.E.2d 729, 729–30 (N.Y. 1961) (permitting recovery of emotional damages by an infant plaintiff who was placed in a chair lift at a ski resort by an employee who negligently failed to latch the belt on the lift; plaintiff became hysterical during the descent and experienced consequential injuries); Shultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983) (permitting recovery for serious emotional distress by a plaintiff who escaped physical harm when a large sheet of glass negligently fell off of defendant's truck onto the highway and crashed into the windshield of plaintiff's vehicle); Johnson v. W. Va. Univ. Hosps., Inc., 413 S.E.2d 889, 893 (W.Va. 1991) (plaintiff security guard was bitten by an HIV-positive hospital patient and brought suit seeking recovery for NIED; after reviewing the case law the court remarked: "It is evident from the above cases that before a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be *exposure* to the disease. If there is no exposure, then emotional distress damages will be denied.").

[42] *E.g.,* Chizmar v. Mackie, 896 P.2d 196, 203 (Alaska 1995) (permitting recovery for NIED in a case where defendant doctor negligently misdiagnosed plaintiff as having AIDS and asserting that outside the context of bystander cases "a plaintiff's right to recover emotional damages caused by mere

same. Duty arises out of the preexisting relationship between the parties, not out of the freestanding possibility of emotional injury being negligently inflicted.

Consider the duty of care that physicians owe patients. That duty is not imposed because physician carelessness is likely to result in emotional distress. Except, perhaps, for psychiatrists, physicians are not subject to special obligations of solicitude for the emotional well-being of their patients. If anything, physicians appear to be specially licensed to inflict emotional distress. Few things are more emotionally traumatic than being told one has a fatal ailment, yet physicians may sometimes be at risk of *breaching* their duties of care if they do *not* deliver such emotionally devastating news clearly and unflinchingly. Care may require that severe emotional distress be inflicted. It therefore seems quite right to say that the professional role responsibilities of physicians give them special leeway to inflict emotional distress intentionally. Conduct which causes severe emotional distress—and which might otherwise be outrageous—may be eminently reasonable when it is undertaken by a physician in the course of her professional role.[43]

To be sure, the duty of physicians to their patients is special. It is a duty to promote the health of the patient and it therefore seems both broader and more affirmative than the normal negative duty not inflict physical injury by the exercise of inadequate care. Even so, the duty of due care to which physicians are subject is mostly a special case of the general duty of due care. Physical injury is the more obvious and worrisome risk of negligent medical care and, at its core, injury to one's health is a form of physical injury. More importantly, the problem presented by the physician NIED cases is an extent of liability problem. Absent liability for NIED, liability will not extend far enough because there will be no liability *at all*. Consider the *in vitro* fertilization cases: neither the plaintiff "parents" nor the fetus are physically harmed and no one else is owed a duty of care. If the "parents" cannot recover there will be no recovery at all. Absent liability for negligent infliction of emotional distress, the extent of liability will be inadequate because there will be no liability at all. This is true in negligent misdiagnosis cases as well: unless the plaintiff who has been negligently misdiagnosed as HIV-positive can recover for

---

negligence should be limited to those cases where the defendant owes the plaintiff a preexisting duty"). The court also noted that "[a] growing number of jurisdictions have adopted this approach." *Id.* In *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28, 29 (App. Div. 2001), a malpractice claim against fertility clinic which mistakenly implanted plaintiff's embryo into the uterus of another woman was allowed to proceed, even though plaintiffs sought to recover only for emotional harm because "[d]amages for emotional harm can be recovered even in the absence of physical injury 'when there is a duty owed by defendant to plaintiff, [and a] breach of that duty result[s] directly in emotional harm.'" *Id.* (quoting Kennedy v. McKesson Co., 448 N.E. 2d 1332, 1334 (N.Y. 1983) (alterations in the original))). In *Guth v. Freeland*, 28 P.3d 982 (Haw. 2001), plaintiff family members were permitted to recover for emotional distress caused by defendant morgue's mishandling of the body of plaintiff's mother. "[T]he duty to use reasonable care in the preparation of a body for funeral, burial, or crematory services . . . runs to the decedent's immediate family members . . . ." *Id.* at 990. "Many courts have . . . recognized that the nearest relatives of the deceased have a quasi-property right in the deceased's body that arises from their duty to bury the deceased." *Id.* at 986 n.4.

[43][cases?]

her emotional trauma, there well be no recovery at all.[44] Negligent misdiagnosis does not cause physical injury *to someone else*. And even if it did, it is by no means obvious why any such injured "bystander" would have been owed a duty of care. Strong duties to patients often preclude duties to others.

It may seem that the difficulty in these cases lies in saying just what duty is at work. For reasons I shall explain in the final section of this paper, I believe that there is something important in this intuition. But it is unpersuasive to argue that the defendants in these cases owe the plaintiffs a duty to care for their emotional tranquility. It cannot be (as we have seen) that the duty physicians owe patients in these cases is a duty not to upset the patients. If that were the case, we would have trouble explaining why the intentional but competent delivery of traumatic news would not give rise to liability. By extension, reasonable care on the part of physicians would seem to require not inflicting avoidable trauma on the patients. Perhaps reasonable care *should* so construed (though I rather doubt it), but plainly reasonable care is not so construed. Doctors can deliver bad news in rough and unpleasant fashion. Second, the emotional trauma in these cases is parasitic not primary. In one case, it arises out of the horror of thinking that one is HIV-positive and with no inkling that having contracted HIV was even a possibility. In the other, it arises out of the trauma of being deprived of important and irreplaceable experiences—"of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child, and by their separation from the child for more than four months after his birth."[45] Emotional distress marks harm, but it is as much the symptom of harm as the harm itself. There is a difficulty here, but it is not really a difficulty about duty. It is a difficulty concerning just what counts as morally and legally significant "harm." Duty is actually quite straightforward: it is the widely accepted duty to practice medicine competently.

The "dead body" cases are more difficult but structurally similar. Explaining just why duty exists in negligent infliction cases involving the mishandling of the dead by morgues is, no doubt, difficult. The impersonal value that requires respect for the dead, including proper disposal of dead bodies, is neither easy to articulate nor easy to justify. Calling the interest at stake a "quasi-property right" is crude at best. But it *is* easy to see that the duty to exercise care in tending to the disposal of the dead does not arise from the prospect of emotional distress on the part of the family in the event that a dead body is mishandled. Many businesses cause their customers foreseeable emotional distress by failing to discharge their contractual duties adequately. If the prospect of emotional distress sufficed to trigger duty in tort, liability for negligent infliction of emotional distress would be pervasive. It is not. Liability for mishandling the dead is a special case. Importantly, the family's distress arises from its sense of having failed to discharge its obligation to ensure a decent burial. Distress here arises out of shame at failing to discharge a last, moral duty to a loved one. The mortician, in agreeing to perform services, has knowingly accepted delegation of that duty. Family and undertaker, then, are both bound by the same duty. The duty attaches to their roles, albeit for different reasons. Undertakers owe duties of care *to the families* of the dead whose bodies they handle because those families have

[44] See e.g., Chizmar v. Mackie 896 P.2d 196 (Alaska, 1995).
[45] Perry-Rogers, at –.

delegated—and those undertakers have assumed—a part of the families' duties to give the dead a decent burial. The special gravity of this value and the harm to the family attend on failure to honor that value, justify the law's intervention.

That negligent infliction cases are proximate cause cases is confirmed by the arguments courts use to justify the imposition of liability in such cases, and to calibrate its extent. One prominent argument is an argument of relative culpability and proportionality: "Unlike an award of damages for intentionally caused emotional distress which is punitive, the award for NIED simply reflects society's belief that a negligent actor bears some responsibility for the effect of his conduct on persons other than those who suffer physical injury."[46] Put differently, the argument is that defendant's *culpable risk imposition* is the basis for concluding that it is *only just* for the defendant to bear some responsibility for the terrible emotional harm that he has wrought by his breach of his duty of care to the plaintiff. It is only just for the extent of the defendant's liability to exceed, arguably, the scope of his duty. This argument appeals to the intuition at the heart of Judge Andrews' *Palsgraf* dissent: that justice favors placing the cost of a harmful but unforeseeable outcome at the feet of the party culpably responsible for causing the harm.[47]

To be sure, this basis of liability violates precepts dear to defenders of the purity of "private law": culpable risk creation is the ground of liability and the principle of responsibility at work sounds not in corrective but in retributive justice.[48] It is unjust for a severely injured victim to be saddled with the full cost of her injury while the party responsible for inflicting it escapes scot-free. The intuition on which these doctrines rest is that a finding of "no liability" would be disproportionate to the wrong done to the plaintiff by the defendant. That intuition

---

[46] Thing v. La Chusa, 771 P.2d 814, 829 (Cal. 1989).

[47] Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

[48] ERNEST WEINRIB, THE IDEA OF PRIVATE LAW, 158-64 (1995) expresses the corrective justice objection to making risk imposition the basis of liability in an unqualified way: Predicating liability on culpable risk creation violates the correlativity required by corrective justice. Correlativity requires that the harm suffered by the plaintiff be the same harm culpably risked by the defendant. When this is not the case, the defendant has not violated the plaintiff's right; and all that the defendant has done is violate some other person's right to be free of unreasonable risk of physical injury. This emphasis on strict correlativity of doing and suffering-of defendant's wrong and plaintiff's right-leads Professor Weinrib to object both to the relaxation of factual causation, and to proximate cause doctrines which impose liability for injuries which do not fall within the scope of the defendant's negligence. See id. at 153-57 (insisting on traditional factual causation of harm and objecting to "probabilistic causation" and the imposition of liability on the basis of culpable risk creation); id. at 160-61 (praising Cardozo's Palsgraf opinion and criticizing Andrews' opinion).

Professors Goldberg and Zipursky jointly object to imposing liability in cases where there is duty, breach, cause in fact and injury, but where the injury inflicted is not the injury against which the duty was directed. See John C. P. Goldberg and Benjamin Zipursky*, The Moral of MacPherson*, ----, 1828-29 ("Our negligence law does not give a plaintiff a right of action against anyone who injured him, but only against a defendant who breached a duty not to injure him." (footnote omitted)). To sustain this thesis, they do and must construe negligent infliction cases as "limited duty" cases. Id. at 1832-34. .

sounds more in retribution than in repair. But the lesson here is that our law of torts is not the pure expression of corrective justice that Ernest Weinrib, for one, takes it to be.[49] Here, it prefers the competing claims of retributive justice.[50] To be sure, considerations of retributive justice do not justify the imposition of the duty of reasonable care in the first place, but that simply underscores the fact that different considerations are relevant to the existence of obligation and the extent of liability.

A second justification at work in the "dead body" cases also marks them as proximate cause cases. If the decedent's immediate family members cannot recover, "there will often be no one to hold defendants accountable for their negligent handling of dead bodies. A defendant does not owe a duty of care to the decedent, who is not himself actually harmed by the defendant's actions."[51] In the absence of liability for negligent infliction of emotional distress, the duty of care itself will be toothless—just as it would be in the negligent misdiagnosis cases—because the breach of the duty of care will have no adverse consequences for the breaching party. Here the concern is less retributive and more instrumental. It matters that duties of care be honored in practice, and we therefore have reasons sounding in deterrence to see to it that those whose negligence fortuitously inflicts only severe emotional distress do not escape scot-free. This concern with fixing the scope of liability at a level that will deter wrongful conduct is quintessentially a concern of proximate cause doctrine.[52] It is also quintessentially

---

[49] WEINRIB, PRIVATE LAW, *supra* note , at 153–54. "Private law" is not pure in the way that Weinrib imagines, as his critics have pointed out. *See* John Gardner, *The Purity and Priority of Private Law*, 46 U. TORONTO L.J. 459, 470 (1996) (criticizing Weinrib's thesis that the "form taken by a part of private law must be the form taken by the whole of private law."); Kenneth W. Simons, [citation].

[50] For a brief discussion, see TONY HONORE, RESPONSIBILITY AND FAULT 85–90 (1999). *See also* Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, 387, 390–91, 406 (David. G. Owen ed., 1995) (noting both that notions of proportionality and retributive justice cannot be entirely expunged from the law of torts even though the justice of tort law is not primarily the justice of retribution).

[51] Guth v. Freeland, 28 P.3d 982, 989 (Haw. 2001). Negligent misdiagnosis of a patient as HIV-positive (*Chizmar*) and negligent implantation of a patient's embryo in the uterus of another woman (*Perry-Rogers*) are other examples of negligence which do not physically injure victims. Chizmar v. Mackie, 896 P.2d. 196 (Alaska 1995); Perry-Rogers v. Obasaju, 723 N.Y.S.2d 28 (App. Div. 2001). Compare Judge Breyer In *Barber Lines v. M/V Donau Maru*, 764 F.2d 50, 56(1st Cir. 1985), quoted supra note .

Contract concerns also justify the availability of negligent infliction of emotional distress liability as a way around the problem that the dead person cannot sue when her corpse is mishandled. Obviously, the mortician is paid to perform a professional service, up to professional standards, and liability is necessary to ensure that the service paid for is provided. Thus NIED fills a gap where breach of contract remedies may not be adequate to ensure that contracts are performed.

[52] DOBBS, supra note 102, at 443 ("Proximate cause rules are among those rules that seek to determine the appropriate scope of a negligent defendant's liability."); W. PAGE KEETON, PROSSER AND KEETON ON TORTS 273 (1984) (identifying proximate cause as being concerned with the "scope of liability").

instrumental—and properly so. The law of torts ought to care about its own efficacy. Rights are supposed to be efficacious.

III. Why Permit Recovery for Negligent Infliction of Emotional Distress?

If the argument sketched here is essentially correct, we need to examine it from another direction and ask two further questions. Why should negligent infliction of emotional distress be a doctrine of proximate cause and not a doctrine of duty? And why are we tempted to conceive of it as a doctrine of duty?

The answer to the first question lies, I think, in attending to the generality of duty doctrine. A general duty to exercise reasonable care not to inflict physical harm on others imposes manageable burdens on us. A general duty to exercise reasonable care not to inflict emotional distress on others, would be almost literally unbearable, even if the distress involved were limited to severe emotional distress. Duncan Kennedy's remark that "[t]he rules about the tort of intentional infliction of emotional harm might, if they were enforceable, modify every aspect of private social intercourse."[53] is on target. If we are to have religious practices like shunning and marital practices like divorce we must be prepared to accept the *intentional* infliction of severe emotional distress.[54] The tort of intentional infliction of emotional distress must thus be cabined. We must be at liberty to distress others—and severely—if we are to be free to break off intimate personal relations and to practice certain religions. A blanket prohibition on the infliction of severe emotional distress would stifle essential freedoms. A general duty not to inflict avoidable emotional distress would be even more stifling. If we were to prohibit the negligent infliction of emotional distress, it is not clear that we could continue to conduct many ordinary activities. Industrial life is a horror. That, indeed, is the Rousseauean lesson at the heart of Professor Kennedy's observation. You do not have to be neurasthenic to see the point. Many ordinary activities—like flying planes or driving cars—inevitably inflict violent and horrifying injury. Ordinary car crashes are capable of snuffing out small children's lives right in front of their mothers eyes. Ordinary plane crashes are quite capable of ending hundreds of lives in split seconds of terror and, in an age of television, we may all become unwilling witness to these horrors. Yet these horrors are simply the inevitable byproducts of indispensible activities which harness the enormous power of modern machinery. We need the eggs. r.

The other direction in which the classification of negligent infliction of emotional distress cases leads is toward an appreciation of the limits of taxonomy. However once classifies them, negligent infliction of emotional distress cases present deep puzzles. Why does some emotional distress justify the imposition of liability whereas other emotional distress does not? Why has the past hundred years of tort law involved a steady expansion in liability for emotional harm? These questions push us in more than one direction, but one direction where they plainly push us

---

[53]Supra note ,
[54]Cases

is to inquire more deeply into the nature of "harm"itself. Our tort law of accidents is a law of "harms", a law of responsibility for harm done—wrongly done in the case of negligence and justifiably done in the case of strict liability. Canonically, harm in the law of torts has meant "physical harm", in contradistinction both to pure economic loss and pure emotional harm.

The answer to the second question, I suspect, has much to do with the fact that part of what is going on NIED cases is the delineation of those claims that are important enough to trigger liability in tort. Here there is an overlap between the law of duty and the law of tort. The law of duty is concerned with the kind of legal protection owed various interests—the interest in the physical integrity of one's person, the interest in legitimate economic expectancies, the interest in emotional tranquility. NIED cases identify some emotional harm as urgent enough to justify liability. The work being done by proximate cause doctrine here resembles work done by duty doctrine elsewhere. By fixing the scope of liability—and generally excluding economic loss and emotional injury from that scope—the rules of proximate cause help to define just what counts as "harm" for the purposes of tort law.

For the most part, the rules of proximate cause covering the types of harms to which liability extends reinforce the status of physical harm as the canonical case of harm. But the NIED cases are undermining that lesson. They show that tort rules have also changed relentlessly and significantly to permit more and more recovery for emotional harm. The common law is telling us something, namely, that at least some emotional harm is as morally significant as physical harm. We have long understood the law of torts to tell us that our freedom ends and our responsibility for redress begins when we inflict physical harm on others. It is now telling us that, sometimes, our freedom also ends when we inflict "severe emotional distress." To understand and appraise this lesson we will have both to explore the common law's enumeration of those cases where liability extends to pure emotional distress and to reflect upon what it is that makes "harm" a morally significant phenomenon. "Harm" has occupied a central place in liberal moral and political thought at least since John Stuart Mill penned *On Liberty*, but it has attracted surprisingly little attention in contemporary tort scholarship. We are not likely to fully grasp the law of negligent infliction of emotional distress and give it a secure home in our law of torts until we understand how the kind of pain and suffering it encompasses resembles serious physical injury.

Where an inquiry into harm will lead us is hard to say. My own conjecture—and it is no more than a conjecture—is that harm as it matters to tort law is morally significant because it utterly negates our autonomy.[55] Harm does not just increase the cost of our activities or hinder us in our pursuit of our objectives. Harm in its core and morally most significant forms negates

[55] For a conception along these lines, see Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm* 5 Legal Theory 117, (1999). The idea that harm is linked (negatively) to autonomy goes back at least as far as Mill, but it competes with other accounts. Notable among these is Joel Feinberg's account of harm as a setback to an interest. See, e.g., JOEL FEINBERG, *Wrongful Life and the Counterfactual Element in Harming*, FREEDOM AND FULFILLMENT, 3 (1992).

our will and our agency. We *suffer* harm. It is to be endured. Harm is done to us and, in its core forms, devastatingly. We are not agents when we are experiencing harm. We are not the masters of our physical persons or the authors of our experiences. We are subjects, subjects of intensely unpleasant experience thrust upon us, experience which we cannot master with our minds or our wills. Physical injury is one canonical way in which we can have agonizing and unmasterable experiences imposed upon us, but it is not the only way. If the law of negligent infliction of emotional distress is registering moral phenomena accurately, it is identifying other ways in which our experiences can be similarly alienated from our wills.

20