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# Engler v. Illinois Farmers Insurance Co. and Negligent Infliction of Emotional Distress

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# Engler v. Illinois Farmers Insurance Co. and Negligent Infliction of Emotional Distress

## **Abstract**

The rules governing negligent infliction of emotional distress claims differ significantly from state to state. The predominant rule is the bystander recovery rule, which permits recovery by persons who are not physically threatened by the defendant's negligent conduct but who suffer emotional distress from witnessing injury to a third person. In bystander recovery jurisdictions, the required degree of proximity of the plaintiff to the accident scene, how the plaintiff hears about the accident, the plaintiff's relationship to the person actually injured in the accident, and the proof required to establish severe emotional distress vary, sometimes significantly, from jurisdiction to jurisdiction. The purpose of this Article is to review the response of Engler v. Illinois Farmers Insurance Co. to the issue of whether a plaintiff in the zone of danger should be entitled to recover damages for emotional distress arising from fear or anxiety for the safety of a third person, primarily against the backdrop of the Minnesota experience with negligent infliction of emotional distress claims. Part II of this Article sets out the primary Minnesota emotional distress cases in order to provide a context for the discussion of Engler in Part III. Part IV looks at the mechanics of applying Engler in the future. Part V is the conclusion.

## **Keywords**

Torts, IIED, Intentional infliction of emotional distress, intentional torts, negligent infliction of emotional distress, Minnesota law

## **Disciplines**

Torts

**ENGLER V. ILLINOIS FARMERS INSURANCE CO. AND  
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

Michael Steenson<sup>†</sup>

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## I. INTRODUCTION

The rules governing negligent infliction of emotional distress claims differ significantly from state to state. The predominant rule is the bystander recovery rule, which permits recovery by persons who are not physically threatened by the defendant's negligent conduct but who suffer emotional distress from witnessing injury to a third person. In bystander recovery jurisdictions, the required degree of proximity of the plaintiff to the accident scene, how the plaintiff hears about the accident, the plaintiff's relationship to the person actually injured in the accident, and the proof required to establish severe emotional distress vary, sometimes significantly, from jurisdiction to jurisdiction.

The zone of danger rule, adopted in Minnesota in 1892 in *Purcell v. St. Paul City Railway*,<sup>1</sup> was at one time the dominant approach to negligent infliction of emotional distress claims in the United States, but only a minority of jurisdictions adhere to that rule now. The zone of danger rule requires proof that the plaintiff was physically threatened by the defendant's negligence, feared for his own safety, and suffered severe emotional distress as a result. The Minnesota Supreme Court has tightened the zone of danger rules, requiring proof that the distress resulted in physical symptoms and, as a practical matter, that the proof be bolstered by medical testimony connecting the physical symptoms to the emotional distress.

Until recently, one question the supreme court had not directly addressed was whether a plaintiff in the zone of danger should be entitled to recover damages for emotional distress arising from fear or anxiety for the safety of a third person. The court resolved that issue in *Engler v. Illinois Farmers Insurance Co.*<sup>2</sup> The purpose of this Article is to review *Engler's* response to this issue, primarily against the backdrop of the Minnesota experience with negligent infliction of emotional distress claims.<sup>3</sup> Part II of this Article sets out the primary Minnesota emotional distress cases in order to provide a context for the discussion of *Engler* in Part III. Part IV looks at the mechanics of applying *Engler* in the future. Part V is the conclusion.

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1. 48 Minn. 134, 139, 50 N.W. 1034, 1035 (1892).

2. 706 N.W.2d 764, 770 (Minn. 2005).

3. See generally Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1 (1993) (providing a detailed analysis of the law governing emotional distress in Minnesota through 1993).

## II. A SHORT HISTORY OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN MINNESOTA

The following section is an abbreviated discussion of Minnesota emotional distress cases that will provide the context for the subsequent discussion of the *Engler* case. The cases discussed span the past one hundred years. Most of the cases involve negligent infliction of emotional distress, but not all. The discussion includes two cases involving intentional infliction of emotional distress to determine the interrelationship, if any, between negligent and intentional infliction of emotional distress law. Each of the cases marks a key point in the development of the right to recover damages for emotional distress in Minnesota.

### A. *Keyes v. Minneapolis & St. Louis Railway Co.*

In *Keyes v. Minneapolis & St. Louis Railway Co.*, the plaintiff, along with his wife and daughter, was driving his carriage along a highway when his team of horses ran into a barb wire fence that the defendant had negligently placed on the highway.<sup>4</sup> His horses became entangled in the fence wire, and so did he when he tried to free them.<sup>5</sup> The horses were plunging and rearing and he told his wife to jump out of the carriage.<sup>6</sup> At trial his counsel asked him if he suffered any mental anxiety for his family.<sup>7</sup> He said that he feared not so much for himself as he did for his wife and daughter.<sup>8</sup> The issue on appeal was whether it was error to admit that evidence.<sup>9</sup> The supreme court said that it was not reversible error to admit the evidence, but that in general, compensable mental distress and anxiety in a personal injury action has to be connected with physical injury to the person.<sup>10</sup> The court thought that the evidence concerning the plaintiff's anxiety for his wife and daughter would be inadmissible under that rule.<sup>11</sup> *Keyes* appears to be the first Minnesota case involving the issue of whether damages may be awarded for fear for the safety of a third person. It takes a restrictive view in indicating that recovery should not be allowed for

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4. 36 Minn. 290, 291, 30 N.W. 888, 888 (1886).

5. *Id.* at 293, 30 N.W. at 889.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 292, 30 N.W. at 889.

10. *Id.*

11. *Id.* at 293-94, 30 N.W. at 889-90.

fear for a family member's safety, even where the plaintiff is not only physically threatened, but actually suffers personal injury.

B. *Purcell v. St. Paul City Railway*

Six years later, in 1892, in *Purcell v. St. Paul City Railway*, the Minnesota Supreme Court adopted the zone of danger rule in a case where the plaintiff alleged that she suffered a miscarriage as a consequence of being involved in a near accident when the streetcar in which she was riding crossed the track of a cable-train line, almost colliding with a rapidly approaching cable train.<sup>12</sup> She alleged that the imminence of the collision, ringing of alarm bells, and passengers rushing out of the car caused her nervous shock resulting in a miscarriage.<sup>13</sup> The supreme court concluded that the fact the miscarriage was a product of nervous shock would not automatically be a superseding cause:

Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury. In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to-wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease, a mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system. Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and injury does not necessarily<sup>14</sup> break the required sequence of intermediate causes.

C. *State Farm Mutual Automobile Insurance Co. v. Village of Isle*

*State Farm Mutual Automobile Insurance Co. v. Village of Isle*, a

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12. 48 Minn. 134, 137, 50 N.W. 1034, 1034 (1892).

13. *Id.*

14. *Id.* at 138, 50 N.W. at 1035.

1963 Minnesota Supreme Court decision, also involved a bystander recovery issue, but in the context of a Civil Damage Act claim.<sup>15</sup> It is a frequently cited decision because it delineated certain exceptions to the Minnesota zone of danger rules. Because of the importance of those exceptions, the following discussion of the case is detailed.

One of the issues in the case concerned the right of the plaintiff, who might be termed a remote bystander, to recover damages for mental anguish in a Civil Damage Act claim against the Village of Isle for the illegal sale of alcohol that contributed to permanent and disabling injuries, including brain damage, suffered by her husband in a car accident.<sup>16</sup> In response to a question concerning the post-accident impact on her, the plaintiff testified she was nervous and worried all the time, and that she was unable to relax because she had to constantly watch her husband.<sup>17</sup> The plaintiff was not present at the scene of the accident involving her husband.<sup>18</sup> All her emotional distress occurred later.<sup>19</sup> The trial court in the case submitted the plaintiff's claim for loss of means of support as well as mental anguish to the jury.<sup>20</sup> The jury awarded the plaintiff damages for both loss of means of support and for injury to her person.<sup>21</sup> On appeal, the supreme court held that the evidence was insufficient to support her claim for injury to her person.<sup>22</sup> In what has become a standard statement in emotional distress cases in Minnesota,<sup>23</sup> the court said:

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

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15. 265 Minn. 360, 122 N.W.2d 36 (1963).

16. *See id.* at 367-68, 122 N.W.2d at 43.

17. *Id.* at 367, 122 N.W.2d at 41.

18. *Id.* at 362, 122 N.W.2d at 38.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 367, 122 N.W.2d at 41.

23. *E.g.*, Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557, 560 (Minn. 1996); M.H. v. Caritas Fam. Servs., 488 N.W.2d 282, 290 (Minn. 1992); Covey v. Detroit Lakes Printing Co., 490 N.W.2d 138, 144 (Minn. Ct. App. 1992).

*misconduct.*<sup>24</sup>

Notwithstanding the frequent repetition of the phrase in the Minnesota cases, it is not entirely clear exactly what the court meant in suggesting that a plaintiff could recover for emotional harm absent physical injury if the defendant's conduct is "willful, wanton, or malicious." The court cited four cases in support of that proposition: *Larson v. Chase*,<sup>25</sup> *Lesch v. Great Northern Railway Co.*,<sup>26</sup> *Purcell v. St. Paul City Railway Co.*,<sup>27</sup> and *Beaulieu v. Great Northern Railway*.<sup>28</sup>

*Larson* was an 1891 case involving the mutilation and dissection of the plaintiff's deceased husband's body, in which the plaintiff had a legally protected interest.<sup>29</sup> The plaintiff alleged that she suffered mental suffering and nervous shock as a result.<sup>30</sup> In holding that the plaintiff was entitled to recover, the court recognized that mental suffering would be compensable if it is proximately caused by a "wrongful act" constituting "an infringement on a legal right."<sup>31</sup> As an example, the court noted that substantial damages could be recovered in a class of cases in which only mental injury is claimed, as in an assault case without physical contact, or in a false imprisonment action, even if "physically the plaintiff did not suffer any actual detriment."<sup>32</sup>

*Lesch v. Great Northern Railway Co.* was decided in 1906.<sup>33</sup> The court considered the right of the plaintiff to recover for physical harm caused by emotional shock from a highly invasive trespass, including a search of her house and displacement of her personal belongings, by two railroad employees who were apparently looking for railroad property.<sup>34</sup> The court's statement of the facts notes that "[s]he was frightened by their acts, and immediately after they left she became sick, feverish, her head ached, she trembled, and had spells of vomiting."<sup>35</sup> She was confined to her bed for some two

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24. *Vill. of Isle*, 265 Minn. at 367-68, 122 N.W.2d at 41 (emphasis added).

25. 47 Minn. 307, 50 N.W. 238 (1891).

26. 97 Minn. 503, 106 N.W. 955 (1906).

27. 48 Minn. 134, 50 N.W. 1034 (1892).

28. 103 Minn. 47, 114 N.W. 353 (1907).

29. *Larson*, 47 Minn. at 308, 50 N.W. at 238.

30. *Id.*

31. *Id.* at 311, 50 N.W. at 240.

32. *Id.*

33. 97 Minn. 503, 106 N.W. 955 (1906).

34. *Id.* at 504-05, 106 N.W. at 956.

35. *Id.* at 505-06, 106 N.W. at 956.

weeks and “was not well for a considerable time afterwards.”<sup>36</sup> The defendant argued that the fright suffered by the plaintiff was not the product of any legal wrong against her.<sup>37</sup> Citing *Purcell*, the court said the law in Minnesota is “that there can be no recovery for fright which results in physical injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant.”<sup>38</sup> The court also noted that “[i]t is a matter of common knowledge that fright may, and often does, affect the nervous system to such an extent as to cause physical pain and serious bodily injury.”<sup>39</sup>

The court noted that while the plaintiff’s husband had legal title to their home, she had an interest in it, and “[a]ny unlawful or wanton invasion of, or interference with, such right would be a legal wrong against her within the meaning of the rule, which is to be liberally construed and applied in cases where the defendant’s acts are wanton and ruthless.”<sup>40</sup> The court held that the evidence was sufficient to establish that the defendant’s employees committed a tort when they invaded the plaintiff’s peaceful enjoyment of her home and interfered with her personal wearing apparel.<sup>41</sup>

*Beaulieu v. Great Northern Railway Co.*,<sup>42</sup> decided in 1907, involved a suit against a common carrier for breach of contract for failure to deliver the corpse of the plaintiff’s deceased child on time for his funeral.<sup>43</sup> The plaintiff alleged the delay resulted in the deterioration of the corpse.<sup>44</sup> The court noted that the issue of whether mental anguish is recoverable in either a contract or tort action has resulted in a substantial conflict of opinion.<sup>45</sup> The court recognized that damages for mental anguish are recoverable in cases in which the plaintiff is physically injured by the defendant, or where the plaintiff has a claim for slander or malicious prosecution, or “in those willful wrongs where some legal right has been invaded, though no physical injury is inflicted or character or

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36. *Id.* at 506, 106 N.W. at 956-57.

37. *Id.*, 106 N.W. at 957.

38. *Id.*

39. *Id.* at 506-507, 106 N.W. at 957.

40. *Id.* at 506, 106 N.W. at 957.

41. *Id.*

42. 103 Minn. 47, 114 N.W. 353 (1907).

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

44. *Id.*

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

reputation assailed.”<sup>46</sup> *Beaulieu*, in turn cited *Purcell, Lesch*, and a third case, *Sanderson v. Northern Pacific Railway Co.*<sup>47</sup> *Sanderson* involved a claim by a mother for emotional harm from witnessing a train conductor attempting to put her children off a train because of her husband’s refusal to pay a half fare for their children, having made prior arrangements for them.<sup>48</sup> As a result, she alleged that she suffered fright and shock, and her husband alleged that he incurred medical expenses.<sup>49</sup> The trial court granted the defendant’s motion for a directed verdict on Mrs. Sanderson’s claim at the close of the evidence.<sup>50</sup> The supreme court affirmed, holding that “there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant.”<sup>51</sup> There was no conduct constituting a legal wrong directed against the plaintiff in that case.

In context, it seems clear that when the court in the *State Farm* case stated that recovery for mental anguish will be allowed where the defendant commits some other tort, slander, for example, or for “other like willful, wanton, or malicious misconduct,”<sup>52</sup> the court is referring to a defined tort or interference with a legally protected interest of the plaintiff—not, as the terms “willful, wanton, or malicious”<sup>53</sup> might imply, conduct that necessarily involves particularly egregious conduct by the defendant. That degree of culpability is certainly not a necessary element of a libel or slander case, although that element may be involved in malicious prosecution cases, where malice is an essential element of the claim.<sup>54</sup> It would also apply to other intentional torts—battery,

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46. *Id.*

47. *Id.*

48. 88 Minn. 162, 163-64, 92 N.W. 542, 543 (1902).

49. *Id.* at 164, 92 N.W. at 543.

50. *Id.* at 164-65, 92 N.W. at 543.

51. *Id.* at 166, 92 N.W. at 544.

52. *State Farm Mut. Auto. Ins. Co. v. Vill. of Isle*, 265 Minn. 360, 368, 122 N.W.2d 36, 41 (1963).

53. BLACK’S LAW DICTIONARY 1020 (8th ed. 2004) defines “willful and wanton misconduct” as “[c]onduct committed with an intentional or reckless disregard for the safety of others, as by failing to exercise ordinary care to prevent a known danger or to discover a danger,” or “willful indifference to the safety of others.” The term willful misconduct is difficult to define, “but it is clear that it means something more than negligence.” *Id.* (quoting FRANK L. MARAIST, ADMIRALTY IN A NUTSHELL 185-86 (3d ed. 1996)).

54. *See Dunham v. Roer*, 708 N.W.2d 552, 569 (Minn. Ct. App. 2006) (there must be proof that “(1) the action was brought without probable cause or

for example, where the supreme court has previously clearly held that a plaintiff is entitled to recover for emotional distress flowing from the battery, even absent any real physical harm, and where much of the claimed mental suffering and humiliation did not result in physical symptoms.<sup>55</sup>

If “willful and wanton misconduct” is defined as “[c]onduct committed with an intentional or reckless disregard for the safety of others, as by failing to exercise ordinary care to prevent a known danger or to discover a danger,”<sup>56</sup> or “willful indifference to the safety of others,”<sup>57</sup> the potential exists for an expansion of the basic zone of danger rules in cases where the necessary degree of culpability on the part of the defendant can be established.

Assume, for example, that the plaintiff is a bystander who suffers serious emotional distress after witnessing injury to a close family member caused by a defendant who has driven recklessly, perhaps while intoxicated, just to emphasize the defendant’s culpability. Minnesota’s zone of danger rule would clearly bar recovery under a negligence theory. The issue is whether the exception would kick in to permit recovery because of the reckless conduct of the defendant. The supreme court’s opinion in *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.* may support that proposition.<sup>58</sup>

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reasonable belief that the plaintiff would ultimately prevail on the merits; (2) the action must be instituted and prosecuted with malicious intent; and (3) the action must terminate in favor of [appellant]” (quoting *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. Ct. App. 1997)). Seduction claims are of course no longer permitted. See MINN. STAT. § 553.01 (2004).

55. See *Smith v. Hubbard*, 253 Minn. 215, 225, 91 N.W.2d 756, 764 (1958). The court of appeals decision in *Johnson v. Ramsey County*, 424 N.W.2d 800 (Minn. Ct. App. 1988), shows how the concept works. The plaintiff in the case sued for battery for an unwanted sexual advance—a kiss. 424 N.W.2d at 804. The jury awarded him substantial compensatory damages. *Id.* at 801. He testified at trial that the kiss made him sick and upset, enough so that he related the incident to several friends. *Id.* at 804. The defendant argued that there was no evidence to corroborate the plaintiff’s claim of emotional harm. *Id.* at 805. However, the plaintiff’s confidants had testified that he was upset. *Id.* He also had a psychologist with expertise on victims of sexual harassment who assessed the plaintiff testimony that he suffered the kind of emotional and psychological trauma that can arise from such an incident. *Id.* The court of appeals found the evidence sufficient to justify the verdict, even though it did not meet the standards for intentional infliction of emotional distress. *Id.* at 804-05.

56. See *supra* note 53 and accompanying text.

57. See *supra* note 53 and accompanying text.

58. 556 N.W.2d 557 (Minn. 1996). Alternatively, the tightness of the rule creates the possibility that cases will be forced into the specific categories even if they may not belong there. In *Gooch v. North Country Regional Hospital*, No. A05-

D. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*

In *Lickteig*, a legal malpractice suit, the plaintiff claimed damages for emotional harm based on negligent misrepresentation, as found by an arbitrator.<sup>59</sup> The plaintiff was obviously not in the zone of physical danger and did not suffer physical injury.<sup>60</sup> The court held that “[d]amages for emotional distress could be justified only [if] the appellants violated [the plaintiff’s] rights by willful, wanton or malicious conduct.”<sup>61</sup> The ordinary rule would be that the plaintiff would not be entitled to recover damages for emotional harm in a legal malpractice case, but *Lickteig* indicates that if the defendant’s conduct is egregious

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576, 2006 WL 771384 (Minn. Ct. App. Mar. 28, 2006), the plaintiffs sued the hospital for the loss of their stillborn fetus. *Id.* at \*1. The plaintiffs sued for the hospital’s negligent and careless loss of the fetus. *Id.* at \*2. The hospital argued that the plaintiff’s claim was in actuality a negligent infliction of emotional distress claim. *Id.* Had it been treated that way the plaintiffs would have lost the case because they were not in the zone of danger of any physical injury.

The trial court, following *Lickteig*, concluded the plaintiffs had to establish that the defendant’s conduct was willful and wanton in order to be entitled to recover for emotional harm. *Id.* at \*3. The court of appeals held that the trial court correctly instructed the jury that “a person behaves willfully when he or she knows or has reason to know that an act is prohibited by a policy, rule, regulation, statute, or law and intentionally does it anyway,” but that the jury could not reasonably have found that the defendant acted willfully. *Id.* (quoting 4A MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES—CIVIL 25.40 (4th ed. 1999)). On the other hand, the court of appeals held the evidence was sufficient to establish that the defendant acted wantonly, which was defined as “[a]n act, or failure to act when there is a duty to do so, in reckless disregard of another’s rights, coupled with the knowledge that injury will probably result.” *Id.* at \*4 (quoting BLACK’S LAW DICTIONARY 1014 (7th ed. 1999)).

The court considered prior Minnesota cases involving interference with dead bodies, but concluded that it is unclear “whether a claim for wrongful interference with a dead body can be supported by a showing of mere negligence, or whether it requires a showing of willful or wanton misconduct similar to an NIED case.” *Id.* at \*2. The court attributed the lack of clarity in the law, in part, to the fact that earlier “cases arose before the evolution of the law that replaced many of the intentional torts with the developing rule of ‘negligence’ as the measure of the duty of care owed in tort.” *Id.* That is possible, although negligence theory had rounded out in Minnesota in the early twentieth century. *See O’Brien v. Am. Bridge Co.*, 110 Minn. 364, 125 N.W. 1012 (1910) (defective construction of public bridge). More likely, the cases involving interference with dead bodies have simply been regarded as a unique category, given the likelihood that in this category of cases emotional harm is likely to arise. *See W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS* § 54 (5th ed. 1984).

59. 556 N.W.2d at 559.

60. *Id.* at 559-60.

61. *Id.* at 560.

enough recovery would be allowed.<sup>62</sup> If the zone of danger requirement of actual physical danger is waived because of the defendant's culpability, there should be no reason why a bystander would not be entitled to recover for emotional distress. The question is whether the court really meant what it said, given the potential implications. The source of the problem is the broad statement in *State Farm*.

E. *Okrina v. Midwestern Corp.*

In *Okrina v. Midwestern Corp.*,<sup>63</sup> in 1969, the plaintiff suffered a strong emotional reaction as the result of the collapse of a wall that was under construction as part of an addition being added to the store that the plaintiff was in at the time of the collapse.<sup>64</sup> The plaintiff became sick and numb as a consequence, was hospitalized for five days, and thereafter continued to suffer from persistent and severe pain in her head, back, and leg.<sup>65</sup> Her physician testified that, in addition to her pain, her personality changed and she became moody and introspective because of the fright she experienced because of the wall collapse.<sup>66</sup> The court concluded that the plaintiff sustained a physical injury as a result of her mental anguish, that she feared for her own safety, and—to distance her claim from the plaintiff's claim in the *Village of Isle* case—that “her distress was not occasioned by concern for the safety of others.”<sup>67</sup> The court concluded that her right to recover was supported by the evidence.<sup>68</sup> While the defendant argued that the injury was not foreseeable, the court noted that “foreseeability is a test of negligence and not of damages,”<sup>69</sup> and that if the defendant can foresee some harm to a person to whom the defendant owes a duty, it is unnecessary for the defendant to be able to foresee the exact nature and extent of the harm.<sup>70</sup>

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62. *Id.* at 561-562.

63. 282 Minn. 400, 165 N.W.2d 259 (1969).

64. *Id.* at 401-02, 165 N.W.2d at 261.

65. *Id.* at 403, 165 N.W.2d at 262.

66. *Id.*

67. *Id.* at 404, 165 N.W.2d at 262 (discussing *State Farm Mut. Auto. Ins. Co. v. Vill. of Isle*, 265 Minn. 360, 122 N.W.2d 36 (1963)).

68. *Id.* at 405, 165 N.W.2d at 263.

69. *Id.* (citing *Dellwo v. Pearson*, 259 Minn. 452, 456, 107 N.W.2d 859, 862 (1961)).

70. *Id.*

*F. Stadler v. Cross*

The court specifically rejected the bystander recovery rule in 1980, in *Stadler v. Cross*.<sup>71</sup> The court's rejection of that rule reflects its intent to establish limits on recovery that are "workable, reasonable, logical, and just as possible,"<sup>72</sup> and its concern that a limit that is not susceptible to consistent and meaningful application by courts and juries would result in the arbitrary and capricious imposition of liability.<sup>73</sup> The court remained unpersuaded "that the problems we see in limiting liability once it is extended beyond the zone of danger of physical impact can be justly overcome."<sup>74</sup> The court said that it did not consider as dispositive other factors typically advanced against bystander recovery, including "the fear of a proliferation of claims, the potential for fraudulent claims, the foreseeability of the injury, and unduly burdensome liability."<sup>75</sup>

*G. Langeland v. Farmers State Bank of Trimont*

The Minnesota Supreme Court has been clear that negligent infliction of emotional distress cases are limited to cases where the claimant is in the zone of physical danger. In *Langeland v. Farmers State Bank of Trimont*, decided in 1982, the plaintiff landowners lost their right to redeem their farm from mortgage foreclosure due to the defendants' misinterpretation of the redemption statute.<sup>76</sup> The plaintiffs sought to recover for the negligent infliction of emotional distress, in addition to other theories.<sup>77</sup> The court noted that negligent infliction of emotional distress requires the claimant to have "been in some personal physical danger caused by the defendant's negligence."<sup>78</sup> One of the striking aspects about this rather clear limitation on negligent infliction of emotional distress claims is how often the decision seems to be ignored. Negligent infliction of emotional distress claims are routinely asserted in cases where the plaintiff is not in the zone of physical danger, and courts

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71. 295 N.W.2d 552, 554-55 (Minn. 1980).

72. *Id.* at 554.

73. *Id.*

74. *Id.* at 555.

75. *Id.* at 555 n.3.

76. 319 N.W.2d 26, 28-29 (Minn. 1982).

77. *Id.* at 29.

78. *Id.* at 31.

dutifully cite *Langeland* and deny those claims.<sup>79</sup>

#### H. Dornfeld v. Oberg

The supreme court's 1993 decision in *Dornfeld v. Oberg* involved a case that seemed to fit squarely in the zone of danger rules established by the court, with the added element that the plaintiff was claiming damages as a result of mental suffering caused by her husband's death in an automobile accident in which she was also involved.<sup>80</sup> The plaintiff's husband was killed while changing a tire on their vehicle when he was hit by an intoxicated driver.<sup>81</sup> The plaintiff was in the car at the time and felt an impact, according to the supreme court opinion.<sup>82</sup> The court of appeals opinion stated she was "tossed around,"<sup>83</sup> although she did not suffer any significant physical injury as a result of that impact.<sup>84</sup> She did, however, claim that she began to suffer from post-traumatic stress syndrome/disorder (PTSS/PTSD), and that she suffered deterioration in her memory, was unable to retain a job, and had terrible nightmares because of the accident.<sup>85</sup> A psychiatrist testified at trial that the PTSS was triggered by the accident.<sup>86</sup> The plaintiff asserted both negligent and intentional infliction of emotional distress claims.<sup>87</sup> The jury found that she was in the zone of danger and that she reasonably feared for her own safety, but that her emotional distress did not arise out of that fear.<sup>88</sup> The jury also found that the defendant Oberg's extreme and outrageous

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79. *E.g.*, *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395 (Minn. 1998) (failure of psychiatric nurse to prevent abuse did not place plaintiff in zone of physical danger); *Porter v. Children's Health-Care Minneapolis*, No. C5-98-1342, 1999 WL 71470 (Minn. Ct. App. Feb. 16, 1999) (failure to immediately grant admission to emergency room); *Schmidt v. HealthEast*, No. C1-96-152, 1996 WL 310032 (Minn. Ct. App. June 11, 1996) (denial of workers' compensation claim); *Anderson v. Morris Excavating, Inc.*, No. C5-95-404, 1995 WL 407436 (Minn. Ct. App. July 19, 1995) (trespass on property by workers performing maintenance work on a sewer line).

80. 503 N.W.2d 115 (Minn. 1993).

81. *Id.* at 116.

82. *Id.* at 117.

83. *Dornfeld v. Oberg*, 491 N.W.2d 297, 299 (Minn. Ct. App. 1992), *rev'd on other grounds*, 503 N.W.2d 115 (Minn. 1993).

84. *Id.*

85. *Dornfeld*, 503 N.W.2d at 117.

86. *Id.*

87. *Id.* at 116 & n.1.

88. *Dornfeld*, 491 N.W.2d at 299.

driving was reckless.<sup>89</sup> Those findings would seem to support the claim for negligent infliction of emotional distress. The plaintiff was in the zone of physical danger. Even more, she actually suffered an impact, which presumably would entitle her to recover for all damages flowing from that impact. That claim derailed, however, and ended up as a claim for intentional infliction of emotional distress.<sup>90</sup> Had the case arisen after *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*,<sup>91</sup> one wonders if the result would have been different, given the finding of reckless misconduct.

In *Dornfeld*, the court of appeals held that when the supreme court adopted the tort of intentional infliction of emotional distress in *Hubbard v. United Press International, Inc.*,<sup>92</sup> it did not change settled law that permits recovery for emotional harm by a person in the zone of danger.<sup>93</sup> The court of appeals said that a plaintiff is still entitled to recover under section 46(2) of the *Restatement (Second) of Torts*,<sup>94</sup> which permits recovery by a person who suffers severe emotional distress when the conduct of the tortfeasor is directed at a third person.<sup>95</sup>

The supreme court distinguished the zone of danger cases because they arose under a theory of the tort of negligent infliction of emotional distress, not intentional infliction of emotional distress, and also because the negligence cases such as *Stadler* required proof of physical injury as a requirement.<sup>96</sup> The plaintiff in *Dornfeld* did sustain physical injury, certainly, in the form of physical consequences flowing from the emotional distress.<sup>97</sup> This would ordinarily satisfy the zone of danger proof requirement for physical symptoms arising from the emotional harm.

The court, however, interpreted section 46(2) of the *Restatement (Second) of Torts*<sup>98</sup> to require an element of intent on the

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89. *Dornfeld*, 503 N.W.2d at 117.

90. *Id.* at 120 (holding plaintiff could not recover for intentional infliction of emotional distress because the car's driver had not directed his behavior at her and had not been aware of her presence).

91. 556 N.W.2d 557 (Minn. 1996). For a discussion of the case, see *supra* notes 59-62 and accompanying text.

92. 330 N.W.2d 428 (Minn. 1983).

93. *Dornfeld*, 491 N.W.2d at 300.

94. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965).

95. *Dornfeld*, 491 N.W.2d at 300.

96. *Dornfeld v. Oberg*, 503 N.W.2d 115, 118 (Minn. 1993).

97. *Id.* at 117 (stating plaintiff complained of memory deterioration, inability to retain jobs, and terrible nightmares as a result of the accident).

98. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965).

part of the defendant, and held that in order to find Oberg liable for the reckless infliction of emotional distress it would have to “find that his actions were intentionally ‘directed at’ [Dornfeld’s] husband,”<sup>99</sup> and denied recovery on that basis. Of course, intent is typically at the base of all negligent or reckless acts. A person intends to drive at an excessive rate of speed, for example, and that creates a risk of injury to third persons; but for conduct to be reckless, it need not be directed toward any specific individual. The court in *Dornfeld* confused the intent requirement with the recklessness requirement. It assumed that the requirement of an intentional act for reckless misconduct meant that the defendant Oberg had to have intended to hit the plaintiff’s husband in order for Oberg’s conduct to have been “directed at” the husband.<sup>100</sup> That is not what the recklessness standard means. The *Restatement* clearly recognizes that a defendant may be liable for the reckless infliction of emotional distress by creating a high degree of probability that the distress will occur.<sup>101</sup> This standard differs from intent cases where the defendant’s purpose is to cause the distress or where the defendant knows to a substantial degree of certainty that the distress would occur. The court’s reading of the recklessness standard would effectively cut it out of the *Restatement*.

The real question is why the zone of danger rule should have presented a barrier to recovery, particularly since the plaintiff was not only in the zone of danger, but also suffered a physical impact, even though the injuries were not significant. If she sustained even minor injuries, she should have been entitled to recover for the damages that were directly caused by the accident.

#### I. K.A.C. v. Benson

In *K.A.C. v. Benson*, the supreme court summarized the law governing negligent infliction of emotional distress in a case involving a claim by a patient against a physician with AIDS who performed a gynecological exam on her.<sup>102</sup> The plaintiff sued

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99. 503 N.W.2d at 119. In *Anderson*, the court of appeals used *Dornfeld*’s analysis to conclude that the plaintiffs were not in the zone of danger of physical injury because the defendant’s conduct was directed toward their property. *Anderson v. Morris Excavating, Inc.*, No. C5-95-404, 1995 WL 407436, at \*2 (Minn. Ct. App. July 11, 1995).

100. See *Dornfeld*, 503 N.W.2d at 119-20.

101. RESTATEMENT (SECOND) OF TORTS § 46 cmt. i. (1965).

102. 527 N.W.2d 553, 555 (Minn. 1995).

under a variety of theories, including negligent infliction of emotional distress.<sup>103</sup> The court held that the plaintiff was not in the zone of danger for purposes of the negligent infliction of emotional distress claim.<sup>104</sup>

Drawing on *Stadler*,<sup>105</sup> the court first set out the standard elements of a negligent infliction of emotional distress claim, which require a plaintiff to show that she “(1) was within a zone of danger of physical impact; (2) reasonably feared for her own safety; and (3) suffered severe emotional distress with attendant physical manifestations.”<sup>106</sup>

The court’s subsequent discussion deviated slightly from the standard elements from *Stadler*, however:

This court has limited the zone of danger analysis to encompass plaintiffs who have been in some actual personal physical danger caused by defendant’s negligence. Whether plaintiff is within a zone of danger is an objective inquiry.

Thus, cases permitting recovery for negligent infliction of emotional distress are characterized by a reasonable anxiety arising in the plaintiff, with attendant physical manifestation, from being in a situation where it was abundantly clear that plaintiff was in grave personal peril for some specifically defined period of time. Fortune smiled and the imminent calamity did not occur.<sup>107</sup>

The discussion prompts a question as to whether the supreme court intended to magnify the requirements for negligent infliction of emotional distress, although it seems reasonable to assume that the court was simply summarizing the kinds of cases where negligent infliction of emotional distress claims have been successful.<sup>108</sup>

#### J. *Navarre v. South Washington County Schools*

Where there is a statutory violation and the statute provides a

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103. *Id.* at 557.

104. *Id.* at 560.

105. *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980).

106. *K.A.C.*, 527 N.W.2d at 557.

107. *Id.* at 558 (citations omitted).

108. The supreme court noted the added discussion in *Wall v. Fairview Hospital & Healthcare Services*, 584 N.W.2d 395, 408 (Minn. 1998). The court of appeals repeated it in an unpublished decision, *Graham v. Independent School District 625*, No. A05-201, 2005 WL 3159742, at \*6 (Minn. Ct. App. Nov. 29, 2005).

specific remedy, damages for emotional distress may be awarded even if the more stringent standards for negligent and intentional infliction of emotional distress claims are not met. In *Navarre v. South Washington County Schools*,<sup>109</sup> a teacher sued a school district for violation of the Minnesota Government Data Practices Act because of its release of certain private personnel data concerning the teacher's classroom management and instruction.<sup>110</sup> She sought to recover for emotional harm because of the statutory violation.<sup>111</sup> Relying on *Williams v. Trans World Airlines, Inc.*<sup>112</sup> and *Gillson v. State Department of Natural Resources*,<sup>113</sup> the court of appeals stated broadly that "[i]n cases involving violation of a statutory right, emotional-distress damages are recoverable absent evidence of verifiable physical injury or severe emotional distress."<sup>114</sup> *Williams*, an Eighth Circuit case, held that damages are to be presumed in a Title VII employment discrimination case where there is a violation of a substantive constitutional right.<sup>115</sup> *Gillson*, a Minnesota Court of Appeals case involving a Minnesota Human Rights Act violation, held that damages for emotional harm may be awarded based solely on subjective testimony without a showing that the plaintiff's pain and suffering was severe.<sup>116</sup> The supreme court, in *Navarre*, somewhat obtusely distinguished both cases—*Williams* because it involved the violation of a substantive constitutional right and *Gillson* because it involved discriminatory conduct similar to that in *Williams*.<sup>117</sup> The supreme court further concluded, however, that the plaintiff was still entitled to recover damages for emotional harm for a violation of the Data Practices Act because of the broad remedy provision stating that an entity violating the Act "is liable to a person . . . who suffers any damage as a result of the violation."<sup>118</sup>

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109. 652 N.W.2d 9 (Minn. 2002).

110. *Navarre v. S. Wash. County Schs.*, 633 N.W.2d 40, 45 (Minn. Ct. App. 2001).

111. *Id.*

112. 660 F.2d 1267 (8th Cir. 1981).

113. 492 N.W.2d 835 (Minn. Ct. App. 1992).

114. *Navarre*, 633 N.W.2d at 54.

115. 660 F.2d at 1272.

116. 492 N.W.2d at 842.

117. *Navarre v. S. Wash. County Schs.*, 652 N.W.2d 9, 29-30 (Minn. 2002).

118. *Id.* at 30 (citing MINN. STAT. § 13.08, subd. 1 (2004)). In *Scott v. Minneapolis Public Schools, Special District No. 1*, No. A05-649, 2006 WL 997721 (Minn. Ct. App. Apr. 18, 2006), the court of appeals seemed to read *Navarre* more broadly. The case also involved a violation of the Minnesota Government Data

The court noted its traditional conservatism in cases involving damages awards for emotional harm, and also that the plaintiff in the case “failed to produce any verifiable medical or psychological evidence to support her claim,”<sup>119</sup> although she did introduce evidence that the disclosure of the information caused her to be “extremely upset and caused her to be afraid to go out in public.”<sup>120</sup> The court held that while the evidence was conclusory and unsubstantiated by medical testimony, it was sufficient to justify submitting the claim for emotional damage to the jury.<sup>121</sup> In a later opinion, the supreme court in *Langeslag v. KYMN Inc.*<sup>122</sup> noted that the “appropriate method of proving the severity and causation of emotional distress is through medical testimony,”<sup>123</sup> but made a point of stating that it did not intend to overrule *Navarre*.<sup>124</sup> While *Navarre* should not be read broadly, given the supreme court’s traditionally cautious approach to cases involving claims for emotional harms, it does indicate that establishing a statutory cause of action may be one way to avoid the stringent damages requirements of the prevailing negligent and intentional infliction of emotional distress law.

#### K. Summary

In summary, at the time the *Engler* case arose, the right to

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Practices Act. The court cited *Navarre* for the proposition that “[m]edical-expert testimony is not a prerequisite to recovering damages for emotional distress.” *Id.* at \*6 (citing *Navarre*, 652 N.W.2d at 30). The court cited *Lickteig* for the proposition that the plaintiff “must nonetheless ‘prove that emotional injury occurred under circumstances tending to guarantee its genuineness.’” *Id.* at \*6 (quoting *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 560 (Minn. 1996)). The court’s subsequent discussion indicating that medical-expert testimony is unnecessary to establish a claim for emotional distress seems to be generalized, and not limited solely to cases involving a violation of the Government Data Practices Act. *See id.* at \*6-\*7. The court in *Lickteig*, however, confines the seemingly broad statement made in *Scott* by noting that it is an exception to the general rules governing recovery for negligent infliction of emotional distress. 556 N.W.2d at 560. Suffice it to say that the supreme court’s subsequent decisions seem to impose the more rigid physical symptoms and medical evidence requirements as necessary conditions to guarantee the genuineness of emotional distress claims.

119. *Navarre*, 652 N.W.2d at 30.

120. *Id.*

121. *Id.*

122. 664 N.W.2d 860 (Minn. 2003). For an in depth discussion of *Langeslag*, see *infra* notes 199-232 and accompanying text.

123. *Id.* at 870.

124. *Id.* at 870 n.9.

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recover for emotional distress in Minnesota reduced to several mostly settled principles:

1. A plaintiff who sustains a physical injury is entitled to recover for the emotional harm flowing from that injury.
2. A plaintiff who does not suffer physical harm but is in the zone of danger of physical harm and who reasonably fears for his/her own safety is entitled to recover for severe emotional distress with attendant physical manifestations if appropriate medical evidence supports the distress and causation requirements.
3. A plaintiff who is not in the zone of danger of physical impact is entitled to recover damages for emotional harm if there is a direct invasion of the plaintiff's rights, as in slander, libel, or malicious prosecution cases, or for other intentional torts, such as battery.
4. A plaintiff is also entitled to recover for other willful, wanton, or malicious misconduct. The exact meaning of the term is unclear, although the most logical assessment is that it simply means that there is liability for emotional distress flowing from the commission of other torts, rather than from any conduct that may be labeled willful and wanton.
5. A plaintiff who asserts a statutory cause of action may be able to recover for emotional distress without proving physical symptoms and supporting medical evidence on the severity and causation issues.

### III. *ENGLER V. ILLINOIS FARMERS INSURANCE CO.*

#### A. *The Facts*

Geralyn Engler and her two sons, Jacob and Jeffrey, were riding in a vehicle driven by Geralyn's boyfriend, Brent Renner, when four-and-a-half year old Jeffrey said he had to go to the bathroom.<sup>125</sup> Renner pulled the car to the side of the rural road they were driving down, and Jeffrey got out of the car and walked about thirty feet to the tree line by the road.<sup>126</sup>

As Beverly Wehmas was driving down the road, nearing where

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125. Engler v. Illinois Farmers Ins. Co., 706 N.W.2d 764, 765-66 (Minn. 2005).

126. *Id.* at 766.

Renner's car was stopped, she lost control of her vehicle, which veered toward Renner's car and the tree line where Jeffrey was.<sup>127</sup> Engler first thought that the vehicle was going to hit her, but then she realized that it was going to strike Jeffrey instead.<sup>128</sup> She screamed and turned away just before he was hit by Wehmas' vehicle.<sup>129</sup> She rushed to Jeffrey and carried him back to Renner's car.<sup>130</sup> Jeffrey was seriously injured in the accident and spent four days in intensive care.<sup>131</sup> He was scarred as a result of the accident.<sup>132</sup>

Engler stated in her deposition that "she sought medical treatment a few months after the accident because she 'did not feel like herself.'"<sup>133</sup> She was also "irritable, did not want to get out of bed, cried frequently, and had lost all ambition."<sup>134</sup> She was diagnosed by her physician with PTSS and depression.<sup>135</sup> The physician prescribed antidepressants for her.<sup>136</sup>

Engler sued Wehmas, asserting a claim of negligent infliction of emotional distress.<sup>137</sup> The district court denied the defendant's motion for summary judgment and certified to the court of appeals the issue of whether the plaintiff was entitled to "recover damages for emotional distress caused by her fear for the safety of her son and from witnessing her son's injuries," when she was "in the 'zone of danger' of physical impact, . . . experienced a reasonable fear for her own safety," and "demonstrated physical manifestations of emotional distress."<sup>138</sup>

The court of appeals, one judge dissenting, held that she was not entitled to recover.<sup>139</sup> There was no dispute over the issue of whether the plaintiff would be entitled to recover for damages based on her fear for her own safety,<sup>140</sup> but the court of appeals—relying on the Minnesota Supreme Court's decision in *Stadler v.*

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Engler v. Wehmas, 633 N.W.2d 868, 870-71 (Minn. Ct. App. 2001).

139. *Id.* at 873.

140. *Id.* at 872.

*Cross*<sup>141</sup> and its own decision in *Carlson v. Illinois Farmers Insurance Co.*<sup>142</sup>—held that she was not entitled to recover damages arising out of fear for the safety of her son or from witnessing her son’s injuries.<sup>143</sup> The Minnesota Supreme Court granted review, but the parties settled the suit against Wehmas for \$50,000, Wehmas’ insurance policy limit.<sup>144</sup> The plaintiff claimed that her damages exceeded the settlement amount and then brought a claim against her own automobile insurance company, Illinois Farmers, seeking to recover under her underinsured motorist coverage.<sup>145</sup>

The issue concerning the scope of recoverable damages was

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141. 295 N.W.2d 552 (Minn. 1980).

142. 520 N.W.2d 534 (Minn. Ct. App. 1994). The plaintiff in the case was one of four young adults who were involved in a one-car rollover accident in which she sustained serious injuries and her best friend was killed instantly. *Id.* at 535. She settled her claims against the driver and, because her damages exceeded the amount of the settlement, she brought suit against her insurer—Illinois Farmers—to recover underinsured motorist insurance benefits. *Id.* She sought to recover damages for her own personal injuries, the emotional distress that resulted from those injuries, as well as emotional distress that resulted from witnessing her best friend’s death. *Id.* The trial court granted the defendant partial summary judgment on her claim for emotional distress for witnessing the death of her best friend. *Id.* The plaintiff appealed and the court of appeals affirmed. *Id.* at 535, 538.

The plaintiff admitted that this part of her claim did not arise out of physical injury. *Id.* at 536. Instead of arguing that she was in the zone of danger and all her emotional harm was related to her physical injuries in the accident, she argued that her claim was “covered by a new cause of action which allows recovery for negligently inflicted emotional distress without attendant physical harm as long as the surrounding circumstances suggest the distress is genuine.” *Id.* at 536-37.

The court of appeals rejected the claim in part because of the lack of an allegation of physical manifestations arising out of the emotional distress and in part because it concluded that the defendant owed no duty to her to guard against the risk of emotional harm from witnessing the death of her friend, stating:

While the tortfeasor had a duty to protect both Carlson and her friend from physical harm because they were passengers in his car, he had no duty to protect Carlson from distress arising from the fate of her friend.

To hold otherwise would impose on a negligent tortfeasor liability out of proportion to his culpability.

*Id.* at 537.

The court treated her claim as a bystander recovery claim. *Id.* at 538. Because her claim for emotional harm from witnessing her friend’s death was unrelated to her own personal injuries, the court saw her as in the same position as the plaintiff bystanders in *Stadler*, and that her physical injuries were no indication of the reliability of her claim for emotional harm. *Id.*

143. *Engler*, 633 N.W.2d at 873.

144. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 766 (Minn. 2005).

145. *Id.*

raised at the district court level.<sup>146</sup> The court held that Engler was not entitled to recover damages for emotional distress from fear for her son's safety or witnessing her son's injury.<sup>147</sup> The court of appeals affirmed in an unpublished opinion<sup>148</sup> and the supreme court reversed.<sup>149</sup>

*B. The Briefs*

The statement of facts in the appellant's brief said that when Engler first saw her son she believed he was dead, and that

[a]s a result of experiencing this harrowing event, Ms. Engler began experiencing symptoms of emotional distress. Most of her symptoms were in response to witnessing, helplessly, what happened to Jeffrey, including the effects of seeing his small, bloodied, lifeless body in the ditch. Emotionally she was out of control. She had difficulty coping with day-to-day responsibilities. She was diagnosed with, and continues to suffer from, Post-Traumatic Stress Disorder ("PTSD") and depression as a direct result of this incident. Her symptoms of PTSD currently include: anxiety, overprotectiveness, fear, nightmares, flashbacks, a 70 lb.+ weight gain and uncontrollable feelings of sadness. She has also been depressed since the accident, resulting in symptoms of irritability, decrease in sexual desire and lack of sociability.<sup>150</sup>

The brief made a point of emphasizing that most of the emotional harm the plaintiff suffered was a result of witnessing the injury to her son, rather than fear for her own safety.

The issue as framed in the appellant's brief was whether a plaintiff who is in the zone of danger of physical impact, experiences reasonable fear for her own safety, and demonstrates physical manifestations of emotional distress may "also recover damages for emotional distress caused by her fear for the safety of her son and from witnessing her son's injuries."<sup>151</sup> The brief made

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146. *Id.*

147. *Id.*

148. Engler v. Ill. Farmers Ins. Co., No. A04-1445, 2005 WL 704100, at \*1 (Minn. Ct. App. Mar. 29, 2005).

149. Engler, 706 N.W.2d at 772.

150. Appellant's Brief and Appendix at 5, Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764 (Minn. 2005) (No. A04-1445).

151. *Id.* at 1.

a straightforward argument that the basic elements of a negligent infliction of emotional distress claim were met, and that the plaintiff should therefore be entitled to recover for all the damages proximately caused by the defendant's negligence,<sup>152</sup> relying on the supreme court's classical statement in 1896 in *Christianson v. Chicago St. Paul M & O Railway Co.*<sup>153</sup>

If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen.<sup>154</sup>

The appellant also argued that the plaintiff had to meet a heavy burden of proof in establishing the elements of a negligent infliction of emotional distress claim in Minnesota,<sup>155</sup> and that limiting the plaintiff's right to recover to only those damages caused by fear for her own safety would create "an unprecedented, unrealistic, and impossible standard that in no way reflects the full measure of the emotional distress caused by the tortfeasor's negligence."<sup>156</sup>

The statement of facts in the brief for the respondent understated the nature of her injuries:

Appellant testified that while at first she thought that the Wehmas vehicle was going to hit her, Jacob and Brent Renner, she also testified that it happened so quickly she really didn't have an estimation as to how long she herself was in fear.

Appellant testified that it was a couple of months after the accident that she sought medical treatment for her own symptoms, i.e., post-traumatic stress. Appellant

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152. *Id.* at 11.

153. 67 Minn. 94, 69 N.W. 640 (1896).

154. *Id.* at 97, 69 N.W. at 641 (quoted in Appellant's Brief, *supra* note 150, at 11).

155. Appellant's Brief, *supra* note 150, at 9.

156. *Id.* at 15.

testified that she sought medical treatment because she would cry all the time for no reason, couldn't get out of bed and was irritable. Appellant testified she didn't feel like herself, she couldn't function normally and didn't have any ambition.<sup>157</sup>

The argument against permitting recovery for fear for another's safety by a person in the zone of danger was based in part on the lack of Minnesota precedent and in part on the concerns the Minnesota Supreme Court expressed in 1980 in *Stadler v. Cross*,<sup>158</sup> when it rejected bystander recovery because of concerns about limiting the persons who would be entitled to recover under that theory.<sup>159</sup> The brief also argued that the law in other jurisdictions supported denial of recovery also, including a reference to an American Law Reports Annotation,<sup>160</sup> asserting that four states—Minnesota, Colorado, Oklahoma, and Virginia—deny recovery for emotional distress caused by witnessing negligent injury to another, although the cases do not support that proposition.<sup>161</sup>

Focusing on bystander recovery jurisdictions, the brief argued that permitting recovery for one in the zone of danger who fears for the safety of another would create the same problems that have existed in California, where bystander recovery rules have shifted as the California Supreme Court has struggled to define appropriate limits for persons seeking to recover because of emotional distress suffered in witnessing injuries to third persons.<sup>162</sup>

The amicus brief submitted on behalf of the Minnesota Trial Lawyers Association (MTLA) also argued that “fear for one's own safety” is only appropriate for purposes of determining whether a claimant was within the “zone of danger” created by the accident, but that once the plaintiff satisfies that standard, “fear for one's

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157. Respondent's Brief and Appendix at 5, *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764 (Minn. 2005) (No. A04-1445).

158. 295 N.W.2d 552, 554-55 (Minn. 1980).

159. Respondent's Brief, *supra* note 157, at 7-10.

160. Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in Zone of Danger*, 89 A.L.R. 5th 255 (2001). The annotation specifically says that the four jurisdictions “do not allow recovery under any circumstances for emotional distress caused by witnessing negligent injury to another.” *Id.* § 2a. Suffice it to say that the cases the annotation cites do not support that proposition.

161. Respondent's Brief, *supra* note 157, at 13.

162. *Id.* at 15-19.

own safety” should be rejected as a test for damages.<sup>163</sup> Instead, the brief argued, “damages should reasonably include all harm proximately caused by the negligence of the tortfeasor.”<sup>164</sup> The MTLA brief stressed, as did the Appellant’s brief, that it was not seeking any change in the existing standards used to determine whether a person in the zone of danger is entitled to recover.<sup>165</sup>

Much of the MTLA brief focused on the propriety of using “fear for one’s safety” as the standard for damages in cases where emotional harm is caused by witnessing injury to another.<sup>166</sup> The brief argued that the standard is inadequate for a variety of reasons, including the illogic of focusing on only one form of a complex emotional reaction to a traumatic event.<sup>167</sup>

The issue as framed in the Minnesota Defense Lawyers Association (MDLA) amicus brief was “[s]hould Minnesota recognize an entirely new cause of action for negligent infliction of emotional distress for bystanders who experience emotional distress as a result of fear for the safety of another?”<sup>168</sup> The brief argued that not only does Minnesota law not recognize bystander claims, but that to do so would result in an undue expansion of liability through the application of a standard that has proven difficult to administer.<sup>169</sup> The brief relied heavily on bystander recovery cases in constructing the argument.<sup>170</sup>

### C. *The Opinion*

The supreme court noted that the issue of “whether a person who is in the zone of danger and who fears both for his or her own safety and for the safety of another may recover for distress caused by fearing for the other’s safety or witnessing the other’s injury” is a

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163. Brief and Appendix of Amicus Curiae Minnesota Trial Lawyers Association at 1, Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764 (Minn. 2005) (No. A04-1445).

164. *Id.*

165. *Id.* at 2.

166. *Id.* at 17-26.

167. *Id.*

168. Brief of Amicus Curiae Minnesota Defense Lawyers Association at 1, Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764 (Minn. 2005) (No. A04-1445).

169. *Id.* at 11-18.

170. *Id.* (citing *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513, 523-24 (Cal. 1963); *Resavage v. Davies*, 86 A.2d 879 (Md. 1952); *Okrina v. Midwestern Corp.*, 282 Minn. 400, 404-06, 165 N.W.2d 259, 263 (1969); *Iacona v. Schrupp*, 521 N.W.2d 70, 73 (Minn. Ct. App. 1994); *Carlson v. Ill. Farmers Ins. Co.*, 520 N.W.2d 534, 537 (Minn. Ct. App. 1994)).

question of first impression in Minnesota.<sup>171</sup> The court began its analysis of the issue with a standard analysis of the three primary rules courts have adopted to resolve claims for emotional harm by bystanders who have witnessed another's peril or injury: the impact, zone of danger, and bystander recovery rules.<sup>172</sup>

The bystander recovery rule, based on variations of the California Supreme Court's 1968 decision in *Dillon v. Legg*,<sup>173</sup> is the most commonly accepted rule, adopted by some twenty nine states, according to the court's count in *Engler*.<sup>174</sup> The impact rule is still followed by three jurisdictions and the zone of danger rule by ten.<sup>175</sup> The numbers vary, depending on who does the counting, but the predominant rule is the bystander recovery rule.<sup>176</sup>

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171. *Engler*, 706 N.W.2d at 768.

172. *Id.* at 768-70.

173. 441 P.2d 912 (Cal. 1968).

174. *Engler*, 706 N.W.2d at 769.

175. *Id.* at 768-69.

176. Breakdown of States Bystander Recovery for Negligent Infliction of Emotional Distress:

I. No test for NIED (2 total jurisdictions).

Jurisdictions not recognizing NIED:

*Gideon v. Norfolk S. Corp.*, 633 So. 2d 453, 454 (Ala. 1994) (per curiam); *Mech. Lumber Co. v. Smith*, 752 S.W.2d 763, 765 (Ark. 1988).

II. Direct impact test (6 total).

Jurisdictions recognizing NIED for bystander recovery and applying the physical (or direct) impact rule. This rule requires that a plaintiff seeking damages for emotional injury stemming from a negligent act must have also contemporaneously sustained a physical impact or injury due to the defendant's conduct:

*Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 85 (Ga. 2000); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 464 (Idaho 1996); *Anderson v. Scheffler*, 752 P.2d 667, 669 (Kan. 1988); *Deutsch v. Shein*, 597 S.W.2d 141, 146 (Ky. 1980); *Kraszewski v. Baptist Med. Ctr. of Okla.*, 916 P.2d 241, 247-48 (Okla. 1996); *Hammond v. Cent. Lane Comm'n Ctr.*, 816 P.2d 593, 597 (Or. 1991).

III. Zone of Danger Tests (13 total).

1. Zone of Danger jurisdictions stating that a negligent infliction of emotional distress cause of action requires the plaintiff to (1) witness an injury to a closely related person, (2) suffer mental anguish manifested as physical injury, and (3) be within the zone of danger so as to be subject to an unreasonable risk of bodily harm created by the defendant (whether the plaintiff must also be found to be in reasonable fear for his/her own safety at the time of the accident is indicated in parenthesis):

*Pierce v. Casas Adobes Baptist Church*, 782 P.2d 1162, 1165 (Ariz. 1989); *Towns v. Anderson*, 579 P.2d 1163, 1164-65 (Colo. 1978); *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 24 (Del. Super. Ct.

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- 1983); *William v. Baker*, 572 A.2d 1062, 1064 (D.C. 1990) (requiring plaintiff also fear for his/her own safety); *Rickey v. Chi. Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983) (requiring plaintiff also fear for his/her own safety); *Resavage v. Davies*, 86 A.2d 879 (Md. 1952); *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 770-71 (Minn. 2005) (requiring plaintiff also fear for his/her own safety); *Bovsun v. Sanperi*, 461 N.E.2d 843, 848 (N.Y. 1984); *Nielson v. AT & T Corp.*, 597 N.W.2d 434, 441 (S.D. 1999); *Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc.*, 425 A.2d 92, 95 (Vt. 1980) (requiring plaintiff also fear for his/her own safety).
2. Zone of Danger jurisdictions where the victim does not have to prove mental anguish as manifested by a physical injury (the simple zone of danger test, but all other factors stay the same):
    - Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 599-600 (Mo. 1990) (requiring plaintiff also fear for his/her own safety); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684-685 (N.D. 1972) (requiring plaintiff also fear for his/her own safety); *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236, 240 (Utah 1992) (requiring plaintiff also fear for his/her own safety).
- IV. The Foreseeability Jurisdictions (30 total). These jurisdictions follow modified versions of the *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) foreseeability doctrine:
1. These jurisdictions require that (1) the NIED plaintiff is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. (This test is from *Thing v. La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989), which modified *Dillon*):
    - Thing v. La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989); *Fineran v. Pickett*, 465 N.W.2d 662, 664 (Iowa 1991); *Nelson v. Flanagan*, 677 A.2d 545, 548 (Me. 1996); *Satchfield v. R.R. Morrison & Son, Inc.*, 872 So. 2d 661, 664 (Miss. 2004); *Buck v. Greyhound Lines, Inc.*, 783 P.2d 437, 443 (Nev. 1989); *Graves v. Estabrook*, 818 A.2d 1255, 1259 (N.H. 2003); *Portee v. Jaffee*, 417 A.2d 521, 528 (N.J. 1980); *Folz v. State*, 797 P.2d 246, 260 (N.M. 1990); *Marchetti v. Parsons*, 638 A.2d 1047, 1052 (R.I. 1994) (requiring physical manifestation/injury of emotional distress); *Kinard v. Augusta Sash & Door Co.*, 336 S.E.2d 465, 467 (S.C. 1985) (requiring physical manifestation/injury of emotional distress); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973) (requiring physical manifestation/injury of emotional distress); *Heldreth v. Marr*, 425 S.E.2d 157, 162 (W. Va. 1992).
  2. Jurisdictions that follow the *Dillon* (as modified by *Thing*) foreseeability doctrine, but do not require the NEID plaintiff to be at the scene of the accident, but often requiring the plaintiff to arrive shortly thereafter:
    - Clohessy v. Bachelor*, 675 A.2d 852, 865 (Conn. 1996); *Zell v. Meek*, 665 So. 2d 1048, 1054 (Fla. 1995) (requires a physical manifestation/injury of the emotional distress); *Lejeune v.*

Adopting the bystander recovery rule would have been one solution to the issue the court faced in *Engler*, but the appellant certainly was not asking the court to adopt that rule. Nonetheless, the court took the opportunity to note that it had soundly rejected the bystander rule in *Stadler*.<sup>177</sup> The court said that the advantage of the zone of danger rule is that it “provides a bright line to limit recovery,” and avoids the problems of potentially unlimited liability and the absence of clear standards associated with the bystander recovery rule,<sup>178</sup> even though the proliferation of claims was specifically noted by the *Stadler* court as a non-factor in its decision.<sup>179</sup>

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Rayne Branch Hosp., 556 So. 2d 559, 570 (La. 1990); Dziokonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978) (requiring physical manifestation/injury of emotional distress); Wargelin v. Sisters of Mercy Health Corp., 385 N.W.2d 732, 735 (Mich. Ct. App. 1986) (requiring physical manifestation/injury of emotional distress); Vosburg v. Cenex-Land O'Lakes Agronomy Co., 513 N.W.2d 870, 873 (Neb. 1994); Paugh v. Hanks, 451 N.E.2d 759, 766-67 (Ohio 1983); Ramsey v. Beavers, 931 S.W.2d 527, 531 (Tenn. 1996); Gain v. Carroll Mill Co., 787 P.2d 553, 557 (Wash. 1990).

3. Jurisdictions that apply the foreseeability doctrine without reference to the seriousness, severity, or physical manifestation of the plaintiff's emotional distress, only requiring that the plaintiff's mental anguish be of a kind normally suffered by a reasonable person. The plaintiff must still (1) have actually witnessed or come on the scene (2) soon after the death or severe injury of a loved one (3) with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortious conduct:

Croft v. Wicker, 737 P.2d 789, 791-92 (Alaska 1987); Groves v. Taylor, 729 N.E.2d 569, 573 (Ind. 2000) (calling for a “direct involvement” standard); Sinn v. Burd, 404 A.2d 672, 685 (Pa. 1979); Freeman v. City of Pasadena, 744 S.W.2d 923, 923-24 (Tex. 1988); Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432, 445 (Wis. 1994); Gates v. Richardson, 719 P.2d 193, 200-01 (Wyo. 1986).

V. The “pure” foreseeability test (3 total).

These jurisdictions only require that serious mental distress to the plaintiff was a reasonably foreseeable consequence of the defendant's negligent act:

Rodrigues v. State, 472 P.2d 509, 521 (Haw. 1970); Sacco v. High Country Indep. Press, Inc., 896 P.2d 411, 425 (Mont. 1990); Johnson v. Ruark Obstetrics & Gynecology Ass'n, 395 S.E.2d 85, 97 (N.C. 1990).

177. *Engler*, 707 N.W.2d at 770 (citing *Stadler v. Cross*, 295 N.W.2d 552, 554-55 (Minn. 1980)).

178. *Id.* at 771.

179. *Stadler*, 295 N.W.2d at 555 n.3.

The court in *Stadler*, however, did not resolve the damages issue the court faced in *Engler*. On that issue the court in *Engler* held that “a plaintiff may recover damages for distress caused by fearing for another’s safety or witnessing serious injury to another”<sup>180</sup> if the plaintiff proves she “(1) was in the zone of danger of physical impact; (2) had an objectively reasonable fear for her own safety; (3) had severe emotional distress with attendant physical manifestations; and (4) stands in a close relationship to the third-party victim.”<sup>181</sup>

The court then added a fifth requirement: “the plaintiff also must establish that the defendant’s negligent conduct—the conduct that created an unreasonable risk of physical injury to the plaintiff—caused serious bodily injury to the third-party victim.”<sup>182</sup> Later in the opinion, the court held that the requirement is “either death or serious bodily injury” to the victim.<sup>183</sup>

#### 1. *Zone of Danger of Physical Impact*

The plaintiff must be in the zone of danger of physical impact,<sup>184</sup> which seriously limits the utility of zone of danger cases, effectively limiting it to accident cases. The plaintiff must have been in “some actual personal physical danger caused by” the negligence of the defendant.<sup>185</sup> It is an objective inquiry.<sup>186</sup> In *K.A.C. v. Benson*,<sup>187</sup> the Minnesota Supreme Court denied a plaintiff’s claim of negligent infliction of emotional distress based on an invasive physical examination performed on her by a physician suffering from AIDS.<sup>188</sup> The *K.A.C.* court held that “a remote possibility of personal peril is insufficient to place plaintiff

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180. *Engler*, 706 N.W.2d at 770.

181. *Id.*

182. *Id.* at 770-71.

183. *Id.* at 772. The *Engler* court followed the New York Court of Appeals decision in *Bovson v. Sanperi*, 61 N.Y.2d 219 (N.Y. 1984). 706 N.W.2d at 771-72.

184. See *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 32 (Minn. 1982) (noting that, in Minnesota, the only exception to the physical injury requirement “occurs in cases involving a direct invasion of the plaintiff’s rights such as defamation, malicious prosecution, or other willful or malicious conduct”).

185. *K.A.C. v. Benson*, 527 N.W.2d 553, 558 (Minn. 1995).

186. *Id.* (citing *Stadler v. Cross*, 295 N.W.2d 552, 554-55 (Minn. 1980)).

187. 527 N.W.2d 553 (Minn. 1995). For a discussion of the case see *supra* notes 102-08 and accompanying text.

188. *K.A.C.*, 527 N.W.2d at 555. The plaintiff was not physically injured from the examinations. *Id.* at 558.

within a zone of danger for purposes of a claim of negligent infliction of emotional distress.”<sup>189</sup> The plaintiff must have been “in some actual personal physical danger caused by defendant’s negligence.”<sup>190</sup> A plaintiff’s reasonable fear that she is in the zone of danger would be insufficient if she was not actually in peril of physical harm.<sup>191</sup>

2. *Objectively Reasonable Fear for One’s Own Safety*

The plaintiff’s claim for fear for her own safety must be objectively reasonable. Framed slightly differently, the plaintiff’s anxiety must be a reasonable response to the event.<sup>192</sup>

3. *Severe Emotional Distress with Attendant Physical Manifestations*

To substantiate her claim, the plaintiff must prove “severe emotional distress with attendant physical manifestations.”<sup>193</sup> *Engler* does not, however, require that those physical manifestations flow from the plaintiff’s fear for her own safety.<sup>194</sup> By framing the requirement that way, the court avoided the problems that would be involved if a trier of fact were required to determine which emotional reaction, fear for the plaintiff’s own safety or witnessing injury to a third person, caused the physical manifestations.

A second question concerns the standards for proof of severe emotional distress. Severe emotional distress is required for both intentional and negligent infliction of emotional distress claims in Minnesota.<sup>195</sup> One of the issues in construing the requirement concerns the relationship between the two theories. The Minnesota Supreme Court recognized the independent tort of intentional infliction of emotional distress for the first time in 1983, in *Hubbard v. United Press International, Inc.*,<sup>196</sup> but the court severely limited the terms and conditions of recovery.<sup>197</sup> This has paved the way for a steady stream of summary judgments on the issue, either because the plaintiff’s allegations failed to establish extreme and

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189. *Id.* at 559.

190. *Id.* at 558.

191. *See* Hansen v. Sea Ray Boats, Inc., 830 P.2d 236, 241 (Utah 1992).

192. *K.A.C.*, 527 N.W.2d at 559.

193. *Id.* at 557.

194. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 770-71 (Minn. 2005).

195. *E.g.*, *K.A.C.*, 527 N.W.2d at 557, 560.

196. 330 N.W.2d 428, 438 (Minn. 1983).

197. *Id.* at 438-39.

outrageous conduct, allegations of the severity of the emotional distress were insufficient, or the evidence of causation between the defendant's conduct and the plaintiff's distress was inadequate. Negligent infliction of emotional distress of course does not require extreme and outrageous conduct, but it does require a showing of severe emotional distress caused by the defendant's negligence.<sup>198</sup> The issue is whether the restrictive cast given to the severe emotional distress requirement by the Minnesota Supreme Court applies in negligent infliction of emotional distress claims.

*Langeslag v. KYMN Inc.*,<sup>199</sup> the Minnesota Supreme Court's most recent decision on the issue, illustrates the rigidity of the court's approach to intentional infliction of emotional distress claims. The case arose out of a highly acrimonious employment relationship between the plaintiff and the principal owner of a radio station.<sup>200</sup> The plaintiff sued the radio station and principal owner, Eddy, under an impressive array of theories, including "breach of contract, violation of Minnesota's whistle-blower statute,<sup>201</sup> sexual harassment, reprisal, and [sic] aiding and abetting in violation of the Minnesota Human Rights Act (MHRA),<sup>202</sup> failure to pay wages, assault, intentional interference with contract, retaliation for serving a complaint, violation of Minnesota's equal pay act,<sup>203</sup> wrongful and retaliatory termination, defamation and slander."<sup>204</sup>

"Eddy counterclaimed, alleging intentional infliction of emotional distress, defamation, and intentional interference with a contractual relationship."<sup>205</sup> The procedure was complicated, but in the end the jury found in favor of the employer, Eddy, on the plaintiff's claims against him, except for the whistle-blower and Minnesota Human Rights Act claims.<sup>206</sup> The jury also found in his favor on all three of his counterclaim theories, awarding him \$535,000 for his claim of intentional infliction of emotional distress.<sup>207</sup> In a subsequent bench trial, the court found in favor of

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198. *E.g.*, *K.A.C.*, 527 N.W.2d at 557-58.

199. 664 N.W.2d 860 (Minn. 2003).

200. *Id.* at 862-63.

201. MINN. STAT. § 181.932 (2002).

202. *Id.* § 363.03(1), (2), (6), (7).

203. *Id.* § 181.66-71.

204. *Langeslag*, 664 N.W.2d at 863.

205. *Id.*

206. *Id.*

207. *Id.* at 863-64.

Eddy on the plaintiff's whistle-blower and Minnesota Human Rights Act claims.<sup>208</sup> The supreme court granted review to consider only Eddy's intentional infliction of emotional distress counterclaim against the plaintiff.<sup>209</sup> The court reversed.<sup>210</sup>

Intentional infliction of emotional distress is an independent tort. The standard elements, as established in *Hubbard v. United Press International, Inc.*,<sup>211</sup> are extreme and outrageous conduct that is intentional or reckless and that causes severe emotional distress.<sup>212</sup> *Hubbard* cautioned that the tort should be "sharply limited to cases involving particularly egregious facts,"<sup>213</sup> and that a plaintiff asserting the claim would have to meet a "high threshold standard of proof."<sup>214</sup> Taking *Hubbard* as its test, the court in *Langeslag* held that Eddy's claim failed both because Langeslag's conduct was not extreme and outrageous and because Eddy's proof that Langeslag's conduct caused his emotional distress was insufficient.<sup>215</sup>

The standard for determining whether conduct is extreme and outrageous is whether it is "utterly intolerable to the civilized community."<sup>216</sup> The supreme court in *Langeslag* dissected each alleged incident, which included filing false police reports, threats to take legal action, and frequent workplace arguments; and the court held that each incident was insufficient to justify recovery.<sup>217</sup>

Most relevant to this Article is the court's conclusion that Eddy's evidence of severe emotional distress was insufficient to justify recovery. The court applied the "high threshold" standard to the issue of whether the distress was severe.<sup>218</sup> The facial test is whether the distress is so severe that no reasonable person could be expected to endure it.<sup>219</sup>

There was a de novo review of the district court's decision to deny Langeslag's motion for JNOV.<sup>220</sup> The court noted that the

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208. *Id.* at 864.

209. *Id.*

210. *Id.* at 870.

211. 330 N.W.2d 428 (Minn. 1983).

212. *Id.* at 438-39.

213. *Id.* at 439.

214. *Id.*

215. *Langeslag*, 664 N.W.2d at 866-69.

216. *Hubbard*, 330 N.W.2d at 439.

217. *Langeslag*, 664 N.W.2d at 866-68.

218. *Id.* at 868-69.

219. *Id.* at 869 (citing *Hubbard*, 330 N.W.2d at 439).

220. *Id.* at 864.

evidence would be taken in the light most favorable to the non-moving party, Langeslag, and that the trial court's ruling would have to be affirmed if "there was any competent evidence reasonably tending to sustain the verdict."<sup>221</sup> The court's statement of the appropriate review standard, however, seems to be inconsistent with the "high threshold standard" the court actually applied in reviewing the evidence.<sup>222</sup>

Eddy's evidence that he suffered severe emotional distress because of Langeslag's conduct consisted of his own testimony coupled with his medical records.<sup>223</sup> Eddy testified to persistent stomach pain, hair loss, difficulty in sleeping, aggravation of his eczema and diabetes, and impotence.<sup>224</sup> He also testified that his doctor had to prescribe antidepressants for him.<sup>225</sup> His medical records indicated high work-related stress and skin problems, but the supreme court concluded that the records were insufficient to establish the necessary causation because of prior criminal problems that provided an alternative explanation for the stress.<sup>226</sup> Those symptoms pre-dated Langeslag's police reports, which provided one of the bases for the intentional infliction of emotional distress claim.<sup>227</sup> The eczema and diabetes were pre-existing conditions and the court concluded that there was no evidence that they were specifically aggravated by Langeslag's conduct.<sup>228</sup> The court held that based on the evidence, the jury should not have been allowed to consider the emotional distress claim.<sup>229</sup> Noting that Eddy's claim involved "allegations of complex medical issues and issues of causation, possibly from multiple sources," the court said that in such cases "testimony from the individual making the claim and inconclusive medical records are not sufficient to establish a causal connection between the conduct and the emotional distress."<sup>230</sup> Rather, the court said, "[t]he appropriate method of proving the severity and causation of

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221. *Id.* (citing *Navarre v. S. Wash. County Schs.*, 652 N.W.2d 9, 21 (Minn. 2002)).

222. *Id.*

223. *Id.* at 869.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

emotional distress is through medical testimony.”<sup>231</sup>

The “high threshold standard of proof” required of a complainant in intentional infliction of emotional distress cases, as applied to the issue of whether emotional distress is sufficiently severe, translates in practice into a detailed examination of the facts to determine whether the case should be sent to a jury in the first place.<sup>232</sup> The issue is whether that standard effectively applies in cases involving negligent infliction of emotional distress claims as well.

The Minnesota Court of Appeals considered the impact of the severity standard in intentional infliction of emotional distress cases on a negligent infliction of emotional distress claim in *Quill v. Trans World Airlines, Inc.*<sup>233</sup> The plaintiff, Abrahamson, a frequent business traveler, was a passenger on a TWA flight that suddenly rolled over and dropped more than 30,000 feet in forty seconds before the pilot regained control of the airplane.<sup>234</sup> The airplane continued to shake and make substantial noise before landing forty minutes later.<sup>235</sup> The plaintiff sought to recover for negligent infliction of emotional distress because of the impact the flight had on him.<sup>236</sup> A frequent business traveler, the plaintiff experienced anxiety on half of the flights he took after the incident.<sup>237</sup> The anxiety manifested itself in “adrenaline surges, sweaty hands, [and] elevated pulse and blood pressure.”<sup>238</sup> On occasion he had to postpone flights because of that anxiety and it sometimes would take him two days to relax after a flight.<sup>239</sup> The plaintiff, a non-practicing physician, did not consult any medical professionals because he believed they would be unable to help him.<sup>240</sup> A jury awarded the plaintiff \$50,000 on his negligent infliction of emotional distress claim.<sup>241</sup> On appeal, TWA argued that the plaintiff had to meet *Hubbard’s* demanding standard for severe emotional distress.<sup>242</sup> The court of appeals thought it doubtful that

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231. *Id.*

232. *Id.* at 864.

233. 361 N.W.2d 438 (Minn. Ct. App. 1985).

234. *Id.* at 440.

235. *Id.*

236. *Id.* at 441.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 440.

242. *Id.* at 442.

the plaintiff would meet that standard because of the lack of medical evidence to support his claim, but the court said that it was unnecessary to decide the issue because it concluded that the *Hubbard* standard was inapplicable in claims for negligent infliction of emotional distress:

First, the supreme court did not state the independent tort of intentional infliction of emotional distress displaced all other torts in which damages for emotional distress had been allowed. Second, cases decided as recently as *Langeland* refer to physical symptoms without suggesting plaintiffs must meet the high threshold adopted in *Hubbard*. Minnesota law has long separated the two emotional distress torts, not recognizing one until 90 years after adopting the other. We see little basis for borrowing an element from one to add to the other, particularly when the zone of danger rule provides an indicia of genuineness the intentional tort requirements lack.<sup>243</sup>

In determining the sufficiency of the evidence the court noted that its “task is problematic for no clear line can be drawn between mental and physical injury,”<sup>244</sup> but the court concluded that, given the unique circumstances of the accident, the plaintiff’s reaction, including sweaty hands, elevated blood pressure, and other evidence relating to fear of flying was sufficient to justify recovery.<sup>245</sup>

In contrast, in *State by Woyke v. Tonka Corp.*,<sup>246</sup> which arose out of claims by the plaintiffs related to the defendant’s disposal of hazardous waste on the plaintiffs’ property, the court of appeals held that the plaintiffs were not entitled to recover damages for emotional distress.<sup>247</sup> The court’s summary of the evidence consisted of a complaint by Mrs. Woyke that her hair was falling out and that the children suffered more colds than previously.<sup>248</sup> The court said that the trial court was properly skeptical of the subjective testimony of emotional distress in the absence of medical evidence.<sup>249</sup> Citing *Hubbard*, the court of appeals noted the conspicuous absence of medical evidence and said that “[a]bsent

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243. *Id.* at 443.

244. *Id.*

245. *Id.* at 443-44.

246. 420 N.W.2d 624 (Minn. Ct. App. 1988).

247. *Id.* at 629.

248. *Id.* at 627.

249. *Id.*

an objective showing of physical manifestations of emotional distress, a damage award for negligent infliction of emotional distress is not usually appropriate.”<sup>250</sup>

The absence of medical testimony is not always the specific reason for the denial of recovery in negligent infliction of emotional distress claims, however. In *Leaon v. Washington County*,<sup>251</sup> the plaintiff, a Washington County deputy sheriff, brought suit against the county and law enforcement personnel who were organizers of a stag party that got out of hand and resulted in his forced participation in acts that he found distressing and humiliating.<sup>252</sup> The plaintiff sued for negligent and intentional infliction of emotional distress, in addition to other theories.<sup>253</sup>

One of the issues on appeal was whether the trial court erred in refusing to permit the plaintiff's motion to add a claim for negligent infliction of emotional distress to his complaint.<sup>254</sup> Donald Leaon testified that “he lost weight (later regained), became depressed, and exhibited feelings of anger, fear, and bitterness.”<sup>255</sup> The court simply held that those symptoms did not satisfy the physical manifestations test, without mentioning any necessity of medical testimony, citing, by way of comparison, the court of appeals decision in *Quill*.<sup>256</sup>

The supreme court has referred to *Quill* on occasion, although perhaps not too much can be drawn from those references.<sup>257</sup> It would be safe to say that it would be a mistake in cases involving negligent or intentional infliction of emotional distress to seek recovery without medical evidence that establishes the link between the accident and the emotional distress and consequent physical symptoms. And, notwithstanding the specifically articulated “high threshold” standard in the intentional infliction of emotional distress cases, the standards for severe emotional distress seem to bridge the two torts.<sup>258</sup>

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250. *Id.*

251. 397 N.W.2d 867 (Minn. 1986).

252. *Id.* at 869.

253. *Id.* at 870.

254. *Id.* at 874-75.

255. *Id.* at 875.

256. *Id.*

257. *See, e.g.,* K.A.C. v. Benson, 527 N.W.2d 553 (Minn. 1995); Dornfeld v. Oberg, 503 N.W.2d 115 (Minn. 1993); Garvis v. Employers Mut. Cas. Co., 497 N.W.2d 254 (Minn. 1993).

258. In *Bowen v. Lumbermens Mutual Casualty Co.*, 517 N.W.2d 432, 443 n.23 (Wis. 1994), the Wisconsin Supreme Court specifically adopted the standard from

#### 4. *Close Relationship to the Third-Party Victim*

The court in *Engler v. Illinois Farmers Insurance Co.*<sup>259</sup> held that the plaintiff seeking to recover damages for emotional distress because of injury to a third person must be “closely related to the third-party victim.”<sup>260</sup> As with the serious injury requirement, the court adopted the requirement to limit the liability of a negligent tortfeasor and to authenticate the plaintiff’s distress.<sup>261</sup> The court did not further define the term, however, preferring to permit gradual common law development of the issue, and because the facts of the case, involving a mother-child relationship, would have satisfied even the most restrictive definitions of the term.<sup>262</sup>

Justice Barry Anderson concurred in the court’s opinion, but wrote separately to express his view that the category of persons entitled to recover for fear for another’s safety should be more narrowly confined:

In my view, the use of a “close relationship” test as set out in the majority opinion is a minimal, at best, limitation on NIED claims. Not only does the majority formulation present the specter of the sudden discovery of a “close relationship” between previously distant parties, it also invites inquiry into, and controversy about, relationships thought to be “close,” e.g., a married couple experiencing conflict or sibling disputes of long-running duration. Surely there will be requests by defense counsel for a special interrogatory on the jury verdict form to address the question of whether the plaintiff had the

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intentional infliction of emotional distress for negligence cases involving claims for emotional harm.

259. 706 N.W.2d 764 (Minn. 2005).

260. *Id.* at 772. The Minnesota Supreme Court and Minnesota Court of Appeals have permitted recovery under the Civil Damage Act, Minnesota Statutes section 340A.801, subdivision 1, when the person seeking recovery was not married to the person whose injury prompted the means of support claim under the Act. See *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 857-58 (Minn. 1998) (plaintiff and daughter, who were living with plaintiff’s fiancé, entitled to recover for loss of means of support as a result of injuries to him); *Skelly v. Mount*, 620 N.W.2d 566, 568-69 (Minn. Ct. App. 2000) (ex-wife who was living with her husband to help him with alcoholism held to be another person entitled to recover under the Civil Damage Act for loss of means of support due to her ex-husband’s death). Those cases would be irrelevant on the issue of negligent infliction of emotional distress, however, because they involve the construction of a statute.

261. *Engler*, 706 N.W.2d at 772.

262. *Id.*

requisite “close relationship” to qualify for recovery.

Instead, I would require that NIED claims be further limited to circumstances where the third-party victim is a spouse, parent, child, grandparent, grandchild, or sibling of the plaintiff.<sup>263</sup>

He acknowledged that there is “some arbitrariness” in his approach, but thought that it was necessary to establish workable limits for the law of negligent infliction of emotional distress.<sup>264</sup>

The court said that it agreed with decisions in other jurisdictions that have adopted a close relationship requirement, noting two decisions, *Bovsun v. Sanperi*,<sup>265</sup> a New York Court of Appeals case, and *Keck v. Jackson*,<sup>266</sup> an Arizona Supreme Court decision, although New York has adopted a narrower approach that limits recovery to certain family members and *Keck* has been interpreted to apply to familial or similar relationships.<sup>267</sup> *Bovsun* held that a plaintiff in the zone of danger is entitled to recover “damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family,” assuming the necessary causal connection between the damages and the defendant’s negligence.<sup>268</sup> Subsequent decisions in New York have adhered to that limitation. In *Trombetta v. Conkling*,<sup>269</sup> the New York Court of Appeals refused to extend *Bovsun* to a case involving a negligent infliction of emotional distress claim brought by the plaintiff to recover damages for witnessing the death of her aunt, who was killed instantly when hit by a truck as the plaintiff was trying to pull her out of the path of the truck.<sup>270</sup> The plaintiff was not physically injured or touched in the accident.<sup>271</sup> The plaintiff’s mother had died when she was eleven and her aunt became the maternal figure in her life.<sup>272</sup> They always lived close to each other and participated in activities together on a daily basis.<sup>273</sup> The court of appeals held that she was

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263. *Id.* (Anderson, Barry, J., concurring).

264. *Id.* at 772-73.

265. 461 N.E.2d 843 (N.Y. 1984).

266. 593 P.2d 668 (Ariz. 1979).

267. 706 N.W.2d at 772.

268. 461 N.E.2d at 848.

269. 626 N.E.2d 653 (N.Y. 1993).

270. *Id.* at 654.

271. *Id.*

272. *Id.*

273. *Id.*

not entitled to recover, limiting recovery as a matter of policy.<sup>274</sup> Aside from concerns about an unmanageable proliferation of claims, the court said that the restriction of negligent infliction of emotional distress claims “to a discrete readily determinable class also takes cognizance of the complex responsibility that would be imposed on the courts in this area to assess an enormous range and array of emotional ties of, at times, an attenuated or easily embroidered nature.”<sup>275</sup>

More recently, the New York Supreme Court Appellate Division in *Jun Chi Guan v. Tuscan Dairy Farms*<sup>276</sup> considered whether a grandmother was a member of the immediate family within the meaning of *Bovsun*. The plaintiff was pushing her two-and-a-half year old grandson in a carriage when both were allegedly hit by a truck owned by the defendant.<sup>277</sup> The plaintiff was thrown in the air as a result of the collision.<sup>278</sup> She suffered a broken thigh and other injuries.<sup>279</sup> Her grandson died.<sup>280</sup> The plaintiff provided full-time care for her grandson, six days a week.<sup>281</sup> She argued that given the culture of the Chinese family, she was a member of her grandson’s “immediate family.”<sup>282</sup> The appellate division rejected the claim, applying the *Bovsun* limitation.<sup>283</sup>

Arizona, also a zone of danger jurisdiction, has similar limitations. In *Keck v. Jackson*,<sup>284</sup> the plaintiff and her mother were involved in an automobile accident that killed the plaintiff’s mother and caused serious injuries to the plaintiff. The Arizona Supreme Court held that a person in the zone of danger could recover for emotional distress resulting “from witnessing an injury to a person with whom the plaintiff has a close personal relationship, either by consanguinity or otherwise.”<sup>285</sup>

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274. *Id.* at 655.

275. *Id.* at 655-56.

276. 806 N.Y.S.2d 713 (App. Div. 2005).

277. *Id.* at 714.

278. *Id.* at 715-16 (Miller, J., dissenting).

279. *Id.* at 714, 716.

280. *Id.* at 714-15.

281. *Id.* at 716.

282. *Id.* at 714 (majority opinion).

283. *Id.* at 715.

284. 593 P.2d 668 (Ariz. 1979).

285. *Id.* at 670. The court cited the Hawaii Supreme Court’s decision in *Leong v. Takasaki*, 520 P.2d 758 (Haw. 1974) as an example. Hawaii is a bystander recovery jurisdiction. *See id.* at 762 (citing *Rodriguez v. State*, 472 P.2d 509 (Haw. 1970) for the proposition that Hawaii permits claims of “negligently-inflicted mental distress unaccompanied by resulting physical injuries”). The court in

Although the decision seems broad, particularly since it appears to extend beyond family relationships, the Arizona Court of Appeals read it more narrowly in *Hislop v. Salt River Project Agricultural Improvement & Power District*,<sup>286</sup> a case involving claims by the plaintiffs for emotional distress they suffered as a result of seeing a friend and co-worker die by electrocution. The resulting fireball also momentarily engulfed the plaintiffs, although they were not burned.<sup>287</sup> The *Hislop* court interpreted *Keck* to mean that while a blood relationship is not necessarily required, “there must still be a familial relationship, or something closely akin” to it to justify recovery.<sup>288</sup> Without deciding the outer limits of liability, and whether those limits were limited to the family relationships, the court held that a plaintiff is not entitled to recover damages for witnessing injury to a co-worker and friend.<sup>289</sup>

It would of course be a mistake to draw too much from the court’s references to *Keck* and *Bovsun*. The court’s reference to those decisions does not mean that the Minnesota Supreme Court in *Engler* intended to apply the same approaches, nor does it mean that the court intended to reject those approaches. The court clearly expressed its preference to instead let the law on the close relationship issue evolve on a case-by-case basis.

One of the particularly interesting aspects of the New York decisions discussed above is that the plaintiffs in both cases were in the zone of danger, and the plaintiff in *Jun Chi Guan* was seriously injured, in the accidents that resulted in the injuries to or deaths of the closely related persons.<sup>290</sup> New York courts denied recovery to a grandparent<sup>291</sup> and niece,<sup>292</sup> both of whom had close relationships to the accident victims. In particular, as to the plaintiff in *Jun Chi Guan*, the issue is why the zone of danger rule should limit recovery

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*Leong* held that the absence of a blood relationship was not a bar to recovery by a ten-year-old boy for mental and emotional distress because of witnessing the death of his stepgrandmother. *Id.* at 766. In reaching its conclusion, the court emphasized both the unique nature of extended family relationships in Hawaii and also the unique Hawaiian concept of adoption. *See id.*

286. 5 P.3d 267 (Ariz. Ct. App. 2000).

287. *Id.* at 268.

288. *Id.* at 269.

289. *Id.* at 272.

290. *Trombetta v. Conkling*, 626 N.E.2d 653 (N.Y. 1993); *Jun Chi Guan v. Tuscan Dairy Farms*, 806 N.Y.S.2d 713 (App. Div. 2005) (grandmother who witnessed grandson’s death sustained a broken thigh and other injuries).

291. *Jun Chi Guan*, 806 N.Y.S.2d at 715.

292. *Trombetta*, 626 N.E.2d at 653-54.

in a case where the plaintiff has sustained personal injuries. Oklahoma, as an example, deals with those situations by classifying plaintiffs who suffer physical injury as direct victims who are then entitled to recover for all the emotional harm that flows from the accident. In *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*,<sup>293</sup> the plaintiff and his wife were holding hands and walking when they were hit by an intoxicated driver. The husband was hit in the shoulder, chest, and knee.<sup>294</sup> His wife was torn away from him and dragged down the street under the car that hit her.<sup>295</sup> She died later in the day.<sup>296</sup> He asserted claims for both intentional and negligent infliction of emotional distress.<sup>297</sup> He was treated as a direct victim for purposes of the negligent infliction of emotional distress claim, which entitled him to recover damages resulting from fear for his wife's safety, even though his injuries were slight.<sup>298</sup>

In *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*,<sup>299</sup> the Minnesota Supreme Court noted that a person who suffers a physical injury because of a defendant's negligence is entitled to recover for the accompanying mental anguish.<sup>300</sup> The court viewed that sort of claim as separate from a claim for negligent infliction of emotional distress where the plaintiff is in the zone of danger and suffers no physical injury.<sup>301</sup> If the two categories of cases are kept separate, there should be no reason for the limiting rules from zone of danger cases to cross over and apply to what Oklahoma has called "direct victim" cases.<sup>302</sup> This should be true even in cases where the plaintiff's physical injuries are slight in comparison to the emotional damages suffered as a result of witnessing injury to a

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293. 916 P.2d 241 (Okla. 1996).

294. *Id.* at 244.

295. *Id.*

296. *Id.*

297. *Id.* at 244-45.

298. *Id.* at 247. The jury found for the plaintiff but did not award him money damages for his injuries. *Id.* at 247 n.16. There are other examples. *E.g.*, *Boryszewski v. Burke*, 882 A.2d 410, 435 (N.J. Super. Ct. App. Div. 2005) (reinstating \$5,000,000 damages awards by jury for each of three children whose mother was killed in a car accident that crushed her skull and slightly injured the children).

299. 556 N.W.2d 557 (Minn. 1996).

300. *Id.* at 560.

301. *Id.*

302. *See, e.g.*, *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 916 P.2d 241, 246 (Okla. 1996) ("Direct victims are those plaintiffs which are involved directly in an accident but whose emotional damages are caused by the suffering of another.").

third person. A good test of the rule would be the Minnesota Court of Appeals case, *Carlson v. Illinois Farmers Insurance Co.*, in which the plaintiff sought recovery for witnessing the death of her best friend in an automobile accident.<sup>303</sup> The plaintiff sustained serious injuries in a one-car rollover accident and her best friend died.<sup>304</sup> The plaintiff was denied recovery for emotional harm from witnessing her friend's death.<sup>305</sup> While the court of appeals viewed the plaintiff's right to recover for that emotional harm as a duty issue,<sup>306</sup> *Lickteig* would appear to justify recovery because the plaintiff suffered physical injury.

#### 5. *Serious Bodily Injury to the Third-Party Victim*

Section 436 of the *Restatement (Second) of Torts* does not require actual injury to the third person. It specifically applies where bodily harm to the plaintiff is caused by "shock or fright at harm *or peril*" to a member of the plaintiff's immediate family.<sup>307</sup> Minnesota deviates from the *Restatement* requirement in requiring death or serious bodily injury to the third-party victim.<sup>308</sup>

### IV. MECHANICS OF SUBMITTING THE NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS CASE TO A JURY

There are two questions concerning the submission of negligent infliction of emotional distress cases to a jury. One concerns the instructions and the other the supporting special verdict forms. In a standard negligent infliction of emotional distress case there are four questions that have to be answered: (1) Was the plaintiff in the zone of danger of physical impact, or, in the alternative, was the plaintiff in actual physical danger in the accident? (2) Did the plaintiff reasonably fear for her own safety? (3) Did the plaintiff suffer severe emotional distress? (4) Did the severe emotional distress cause physical manifestations or symptoms?<sup>309</sup>

In a case where the plaintiff suffers emotional distress as a result of witnessing injury to a third persons there are two

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303. 520 N.W.2d 534 (Minn. Ct. App. 1994).

304. *Id.* at 535.

305. *Id.* at 538.

306. *Id.* at 537-38.

307. RESTATEMENT (SECOND) OF TORTS § 436 (3) (1965) (emphasis added).

308. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 772 (Minn. 2005).

309. *Id.* at 770.

additional questions: (5) Is the plaintiff in a close relationship with the third-party victim? (6) Did the defendant cause the third-party victim serious bodily injury or death?<sup>310</sup> These issues would be in addition to the standard questions concerning negligence and direct cause,<sup>311</sup> which would have to be answered affirmatively before the additional questions would be in issue.

Questions one, two, four, and six could be the subject of special verdict questions without accompanying jury instructions. Question three—the “severe emotional distress” issue—likely needs to be defined for a jury. And question five, the close relationship issue, could potentially be the subject of a jury instruction.

The pattern Minnesota instruction covering intentional infliction of emotional distress states as an element that “the distress must have been so severe that no reasonable person could be expected to endure it.”<sup>312</sup> The key issue is whether the severe emotional distress standards for intentional and negligent infliction of emotional distress are effectively the same. There is also a question as to whether the standard should be further defined to provide greater guidance for a jury.

The issue is handled differently, depending on the jurisdiction. Ohio’s pattern instruction requires a showing of serious emotional distress, which it defines as follows:

Serious emotional distress describes injury which is both severe and debilitating. It does not extend to mere insults, indignities, threats, annoyances, petty oppression or mere trivialities. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress caused by the circumstances of the case. It is mental anguish of a nature that no reasonable person could be expected to endure. You may consider any evidence of a resulting physical condition in judging the degree of emotional distress suffered.<sup>313</sup>

California also requires serious emotional distress. The Judicial Council of California pattern instruction defines “emotional distress” to include “suffering, anguish, fright, horror,

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310. *Id.* at 770-71.

311. *See* 4 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES—CIVIL 25.10, 27.10 (4th ed. 1999).

312. *Id.* at 60.75. The standard is drawn from *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983).

313. 2 OHIO JURY INSTRUCTIONS 219.05 (2002).

nervousness, grief, anxiety, worry, shock, humiliation, and shame,” and states that “[s]erious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.”<sup>314</sup>

Tennessee’s pattern instruction on negligent infliction of emotional distress requires the emotional injury to the plaintiff to be “serious or severe,” defined as “one which causes a reasonable person, normally constituted, to be unable to adequately cope with the mental stress arising from the circumstances of the event.”<sup>315</sup> The instruction also states that “[t]he emotional injury must be established by expert medical or scientific proof.”<sup>316</sup>

The Pennsylvania pattern instructions offer two alternatives. The first alternative simply states that “[t]he plaintiff claims that the negligent conduct of the defendant caused [him] [her] to suffer emotional injuries.”<sup>317</sup> The second, which defines what constitutes physical injury, is as follows:

The plaintiff claims that [he] [she] was near the scene of an accident and observed injury to a close family member caused by the negligent conduct of the defendant, and that as a result [he himself] [she herself] suffered a physical injury in addition to [his] [her] emotional injuries.

I will give you examples of injuries that are considered physical injuries. These injuries include but are not limited to continued nausea or headaches, repeated hysterical attacks, insomnia, severe depression, nightmares, stress, nervousness, or anxiety.<sup>318</sup>

The South Carolina pattern instructions state that “the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.”<sup>319</sup>

Delaware, a zone of danger jurisdiction, has two pattern instructions, one for cases where the plaintiff is in the zone of danger and seeks recovery for his or her emotional distress and the other where the claim is for fright or severe emotional distress

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314. JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS 1621 (2006).

315. 8 TENNESSEE PRACTICE PATTERN JURY INSTRUCTIONS T.P.I.-CIV. 4.36B (2005).

316. *Id.*

317. PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 3.07 (2003).

318. *Id.*

319. ANDERSON’S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL § 29-1 (2002).

suffered because of witnessing injury to a close relative. The first instruction simply states that “[i]f someone’s negligence causes fright or severe emotional distress to a person within the immediate area of physical danger created by that negligence, and if the person suffers physical consequences as a result of that severe emotional distress, then the injured person may recover damages.”<sup>320</sup>

The second instruction, where the injury is to a close relative, and the plaintiff is in the zone of danger, reads as follows:

A person may recover damages for fright or severe emotional distress suffered as a result of witnessing an injury negligently caused to a close relative only if:

- (1) the person was in the immediate area of physical danger created by the negligent party; and
- (2) the person suffered physical injury as a result of the emotional distress.

If you find that [plaintiff’s name] suffered severe emotional distress and then physical injury from witnessing [\_\_describe negligent act to a close relative\_\_] and that [plaintiff’s name] was within an immediate area of physical danger created by [defendant’s name]’s negligence, then [defendant’s name] is liable for damages.<sup>321</sup>

It would seem to be unnecessary to tell a jury that the physical symptoms or emotional injury have to be established by medical or expert or scientific evidence, as in the South Carolina and Tennessee instructions. That issue should be a threshold issue for the court to decide in determining whether to permit a negligent infliction of emotional distress case to go to a jury in the first place. The issue of whether there has to be a lengthier explanation of what constitutes severe emotional distress is a separate question. Providing examples of physical symptoms or injuries might be helpful to a jury. The Pennsylvania instruction does that, but the heavily fact-dependent determination of what physical symptoms are sufficient may caution against trying to define the term. Once again, the trial court will have to determine whether the plaintiff’s evidence of physical symptoms is sufficient to submit to the jury. The jury’s function would be to determine whether the plaintiff in

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320. SUPERIOR COURT OF DELAWARE ONLINE CIVIL PATTERN JURY INSTRUCTIONS, COMPLETE & ANNOTATED § 14.3 (2000).

321. *Id.* at § 14.4.

fact exhibited physical symptoms and whether they were caused by the emotional distress.

Minnesota law would require a special verdict question on the issue of whether the plaintiff's distress is severe. If the pattern instruction on intentional infliction of emotional distress is followed,<sup>322</sup> the jury would be instructed that the distress would have to be "so severe that no reasonable person could be expected to endure it,"<sup>323</sup> a definition that comes from the intentional infliction of emotional distress cases. If in fact physical symptoms are required, a second question would ask the jury whether the distress directly caused physical symptoms. The trial judge would presumably be the gatekeeper on that issue, as well as the issue of whether medical evidence established those symptoms. In most cases it will be a requirement, unless there is an extraordinary combination of circumstances, as in the *Quill* case, where recovery would be permitted without that showing.<sup>324</sup>

The close relationship issue may be the subject of a special verdict question.<sup>325</sup> Justice Barry Anderson, concurring in *Engler*, thought that it would.<sup>326</sup> There will always be pressure to adopt a bright line approach to the issue,<sup>327</sup> but even in cases where there is a brighter line defining the relationships that will justify recovery the quality of the relationship may present an issue that has bearing on the damages the plaintiff claims.

If the close relationship issue is left open, there is an issue of establishing guidelines to assist in making that determination. This is especially true since the supreme court has not yet indicated the parameters of the relationship necessary to support recovery by a plaintiff in a negligent infliction of emotional distress claim where

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322. 4A MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES—CIVIL 60.75 (4th ed. 1999).

323. *Id.*

324. *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438 (Minn. Ct. App. 1985) (where the plaintiff was involved in the severe loss of control of an airplane). For discussion, see *supra* notes 233-45 and accompanying text.

325. See generally Howard H. Kestin, *The Bystander's Cause of Action for Emotional Injury: Reflections on the Relational Eligibility Standard*, 26 SETON HALL L. REV. 512 (1996) (discussing the requirements relating to the relationship between the emotionally distressed bystander and the physically injured party in emotional distress cases).

326. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 772 (Minn. 2005) (Anderson, Barry, J., concurring).

327. See, e.g., *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988); *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994).

she is claiming damages arising from witnessing injury to a third party.

New Jersey law provides an example of what could evolve in Minnesota. The New Jersey guidelines for emotional distress in bystander cases require a plaintiff to prove “a marital or intimate, familial relationship between the plaintiff and the injured person.”<sup>328</sup> That grouping potentially includes co-habitants, fiancés, as well as others with strong emotional bonds.<sup>329</sup> The New Jersey Supreme Court established guidelines for determining whether the relationship is sufficiently close:

We acknowledge that this critical determination must be guided as much as possible by a standard that focuses on those factors that identify and define the intimacy and familial nature of such a relationship. That standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and, as expressed by the Appellate Division, “whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life’s mundane requirements.”<sup>330</sup>

The New Jersey Supreme Court thought it a jury issue: “Our courts have shown that the sound assessment of the quality of interpersonal relationships is not beyond a jury’s ken and that courts are capable of dealing with the realities, not simply the legalities, of relationships to assure that resulting emotional injury is genuine and deserving of compensation.”<sup>331</sup>

The alternative is for a court to determine whether a particular relationship is sufficiently close to justify submitting the damages issue to the jury. The quality of the relationship will then be assessed by the jury in determining the damages to which the plaintiff is entitled for emotional distress. It is not clear which position the supreme court will take on the issue, of course.

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328. *Portee v. Jaffee*, 417 A.2d 521, 528 (N.J. 1980).

329. *Dunphy*, 642 A.2d at 380.

330. *Id.* at 378 (citing *Dunphy v. Gregor*, 617 A.2d 1248, 1255 (N.J. Super. Ct. App. Div. 1992)).

331. *Id.*

## V. CONCLUSION

The Minnesota rules governing recovery for emotional distress are for the most part well settled. The supreme court has adhered to the basic zone of danger rule adopted in *Purcell*<sup>332</sup> for some one hundred and fourteen years.<sup>333</sup> The court has indicated that it has been cautious in its approach to recovery for emotional harm.<sup>334</sup> Its decisions certainly bear out that observation.

The zone of danger rule, once a progressive rule when it was adopted by the Minnesota Supreme Court in *Purcell*, is now overshadowed by the bystander recovery rule, which has been adopted by most jurisdictions considering the issue. The court took the opportunity in *Engler* to reaffirm that rule, as did the predecessor court in *Stadler* over twenty years earlier.

*Engler* is a limited decision, however. It doesn't profess to be anything else. The damages recoverable in a zone of danger case are expanded only slightly by the decision, although the expansion seems to be perfectly consistent with previously settled law in Minnesota permitting recovery for all the direct consequences of a personal injury.

In a sense, one might ask what's the fuss? The decision to permit the plaintiff to recover damages for witnessing what could have been fatal injury to her son doesn't open the floodgates and it doesn't mean the legal sky is falling. Allowing someone who is in the zone of danger to recover for the direct consequences of a defendant's negligence isn't equivalent to permitting bystander recovery, even without the close relationship requirement that the court in *Engler* imposed as a limitation on recovery. The court seemed to implicitly recognize that severe and undifferentiated emotional distress flows from involvement in a catastrophic occurrence.

Application of the *Engler* rules may be problematic, but they are not unworkable. The range of special verdict questions and potential jury instructions that will be necessary to apply the rules in zone of danger cases is relatively limited. The broader questions concerning the fairness and utility of the basic zone of danger rules will await another day.

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332. *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892).

333. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005) (citing *Purcell*, 48 Minn. 134, 50 N.W. 1034 and discussing it as the standard for over 100 years).

334. *Navarre v. S. Wash. County Schs.*, 652 N.W.2d 9, 30 (Minn. 2002).