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Freestanding Tort?

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Is Negligent Infliction of Emotional Distress A Freestanding Tort?

Gregory C. Keating

Abstract

Liability for negligent infliction of emotional distress (NIED) is often taken to be a freestanding tort, which guards our interest in emotional tranquility against careless injury. Scope of duty determinations? settling who owes a legal obligation to exercise reasonable care and to whom they owe that obligation? are paramount on this account. Gruesome accidents may traumatize hundreds and even thousands of people. Unless the duty to exercise reasonable care not to inflict emotional harm is carefully controlled, liability will be excessive.

In this paper, prepared for a conference on the Restatement 3rd of Torts, I argue that courts have come to conceptualize NIED doctrine as a doctrine of proximate cause. Proximate cause doctrine takes the existence of obligation for granted, and addresses the extent of the defendant's liability for breach of obligation. Proximate cause doctrine settles the scope of defendants' responsibility when defendants have failed to conduct themselves as they should. When courts address NIED liability, they are asking whether and when liability for breach of an antecedently existing duty should extend to encompass the infliction of emotional harm. In accidents among strangers, the pertinent preexisting duty is the general tort obligation to exercise reasonable care in order to avoid otherwise foreseeable physical harm. Liability for emotional harm is parasitic on the prospect of physical harm. In cases where the parties have a preexisting relationship, the pertinent duties are imposed by other bodies of law (e.g., by contract law). NIED doctrine does not impose new obligations; it extends liability for breach of preexisting obligations.

The prospect of excessive liability is the central threat to a flourishing body of

law imposing liability for negligently inflicted emotional distress. Conceptualizing NIED liability as proximate cause disarms this threat and arms courts with doctrinal tools devised to construct an appropriate domain of liability.

IS NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS A FREESTANDING TORT?

Gregory C. Keating¹

I. Taking Taxonomy Seriously

Restatements set out to elicit the normative order latent in the law. This is a very particular enterprise, self-consciously distinct from the legislative imposition of order upon law. Legislatures can draw on democratic authority to revise as well as restate law. The American Law Institute possesses no such authority and Restatements forswear any legislative ambitions. More subtly, the enterprise is distinct from the rational reconstruction of the law practiced and preached by prominent legal philosophers. Rational reconstruction has a critical and revisionary aspect; it aims to recast the law as well as to restate it.² The distinctive supposition of the Restatement enterprise is that there is a normative logic immanent in the law— an overarching set of policies and principles awaiting articulation— and that this logic can be extracted inductively if the cases themselves are arranged with sufficient care and discrimination. Cases must be sorted correctly, so that their apparently conflicting premises can be domesticated and they can be cast as compatible parts of a larger, well-ordered system.³ Because the classification and arrangement of cases figure so prominently in them, Restatements are deeply taxonomical enterprises.

¹ Academic Associate Dean and William T. Dalessi Professor of Law and Philosophy at the Gould School of Law at the University of Southern California. I am grateful to Nataline Viray-Fung for valuable research assistance, to the participants in this conference, to the attendees at a faculty workshop at Bar Ilan University in Israel and to Ariel Porat for many helpful comments. I am also grateful to Seana Shiffrin for several illuminating discussions of harm. Errors remain mine.

² The “general standpoint” of “rational reconstruction” is “critical and corrective.” H.L.A. HART, *ESSAYS ON BENTHAM* 162, 164 (1982) (explaining Bentham’s methodology and analogizing it to what we call “rational reconstruction”). Rational reconstruction seeks to clarify existing law but also to correct it by purifying the ideals and concepts it elicits from the law. Constructive interpretation in Ronald Dworkin’s sense of the term illustrates this kind approach to articulating the normative logic of the law. The best interpretation of a field of law is measured along two axes— fit and justification— and the best interpretation of an area of law allows us to condemn some settled law as “mistaken.” *See, e.g.*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81, 118-23 (1978); RONALD DWORKIN, *LAW’S EMPIRE*, 230-31, 239, 255-57 (1986) (arguing that normative theories of law must be judged by their justificatory power as well as by their interpretive fit).

³ See the example in the text, *infra*, following note 10, discussing the classification of the respondeat superior doctrine.

The belief that a single, latent logic of the law will emerge from a sufficiently careful arrangement of cases cuts against the grain of much modern legal scholarship. Modern legal theory argues that latent conflict is as much a part of the law as latent coherence⁴, and contemporary academic debates instantiate that belief. Tort scholars debate, for example, whether the law of negligence instantiates an ideal of justice or an ideal of efficiency.⁵ Modern jurisprudence argues that the law must be reshaped as well as restated if it is to be made coherent and compelling.⁶ Contemporary legal scholarship, in short, is informed by the realization that law is internally torn between competing ideals, and that the logic of the law must therefore be constructed at least as much as it is discovered. This makes it doubtful that the right arrangement of cases will, by itself, elicit a normative order latent in the law.

Restatements are nonetheless right to take what courts and cases say seriously, and to tease out the justifications implicit in the rulings and opinions of courts. These are necessary parts of any interpretive effort to make sense of the law, and necessary preludes to more ambitious exercises in reconstruction and critique. Case rulings and rhetoric stand at the center of engaged, interpretive efforts to make sense of the law. The pronouncements of courts are the starting point from which interpretive legal theorizing must begin and the authoritative material to which it must return. Persuasive interpretations of a body of law are persuasive because they explain and justify the doctrines courts articulate, the rulings they reach, and the distinctions that they draw. Cases and doctrines must be reckoned with in part because they are authoritative articulations of what the law is. But they also command our respect because it is both charitable and sensible to begin with the supposition that they rest on plausible reasons and reflect serious engagement with the issues at hand. Legal rulings and the reasons that courts give for them, may point us toward the best understanding of the matter at hand.⁷ We judge the greatness of cases in important part by the normative power of the principles that they articulate. By the same token, we judge the persuasiveness of normative accounts of law in important part by the

⁴ See ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

⁵ Compare, e.g., Richard Posner, *A Theory of Negligence* 1 J. LEGAL STUD. 29 (1972) with Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

⁶ See the sources cited *supra* note 2.

⁷ There is a resemblance here to the role that moral intuitions play in the kind of moral theorizing that Rawls describes as a quest for reflective equilibrium. We start with our considered moral convictions—those in which we have the greatest confidence—and search for general principles that might support those intuitions. We may then use those principles to help us make up our minds about cases where we are presently unable to form confident convictions. Rawls describes this process as a search for “reflective equilibrium.” Reflective equilibrium exists when we have brought our general moral principles and our considered moral convictions into alignment with one another, so that our principles cohere with and support our judgments in particular cases. See JOHN RAWLS, *A THEORY OF JUSTICE* 40-46 (rev. ed. 1999). Primary legal materials—rulings, rules and doctrines—ought to accord a similar kind of respect in legal theorizing and interpretive legal theory should aim for a similar kind of coherence with and justification of the primary legal materials.

interpretive power of the principles they espouse. Persuasive accounts of a field of law are convincing because they both make sense of that field and cast it in a compelling light.⁸

Restatements are likewise right to take taxonomy seriously. Taxonomical problems bubble up from the efforts of courts to impose coherence on the cases with which they wrestle. The distinction between duty and proximate cause in tort, for instance, has bedeviled courts and commentators at least since Cardozo and Andrews squared off in *Palsgraf*, and probably long before. Far from being an academic exercise in cubbyhole construction, the impulse to distinguish between these two elements of a negligence case is an attempt to get a clear view of the law. Indeed, taxonomies help to constitute legal fields because legal fields are, in large part, organized systems of concepts, rules, principles and policies. Tort law itself emerged as an independent legal field when Oliver Wendell Holmes and others extracted, from a mass of cases which had been previously read to show that negligence was a state of mind common to a number of distinct torts, a general principle of civil obligation enjoining reasonable care with respect to conduct which creates significant risks of harm.⁹ Modern tort law itself is thus the offspring of a taxonomical reordering of existing legal materials.

Formal classifications therefore shape the substance of the law. The way in which we classify a doctrine can clarify or cloud our thinking about that doctrine, and shapes our sense of the larger law in which that doctrine figures. For example, our assumptions about which doctrines instantiate general principles— and which doctrines do not— often have far reaching consequences. If we believe, for example, that the strict liability of masters for the torts of their servants under the doctrine of *respondeat superior* is part of the law of agency proper— and that it is incorporated into the law of torts only to solve the problem of identifying the legal “persons” to whom liability attaches— we will find it easier to see the law of torts itself as constructed around a general commitment to fault liability.¹⁰ The strict liability of *respondeat superior* will appear essentially anomalous.

Conversely, if we see *respondeat superior* as an ancient common law redoubt of strict liability in tort, we will find it easier to see the law of torts itself as torn between competing principles of responsibility for harm done. Instead of seeing the law of torts as a realm of fault liability punctuated by exceptional pockets of strict liability, we will be more inclined to see the law of

⁸ As Ronald Dworkin has long argued. See DWORKIN, *supra* note 2, *passim*.

⁹ Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1266-68 (2001). When negligence is presented as an element common to a number of distinct torts, it is cast as a mode in which, or mental state by which, a particular tort (e.g., misrepresentation) can be committed (e.g., misrepresentation can be committed with a careless state of mind as well as with a deliberate one). So rendered, negligence is not itself a tort; it is just a mental state common to a number of distinct torts. When a general duty *to conduct oneself* with due care is extracted from the mass of discrete negligence torts, a freestanding body of tort law is born. Recasting negligence as an obligation to conduct oneself reasonably— instead of casting it as a state of mind (carelessness) which might satisfy the “mens rea” requirement of any of a number of distinct torts— creates a new, freestanding body of law.

¹⁰ See, e.g., ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 185-87 (1995) (advocating a generalized fault liability taking the view that *respondeat superior* simply determines what counts as a “person” in cases where agency relationships are at stake).

torts as terrain contested by competing principles of fault and strict responsibility.¹¹ The way in which we categorize the doctrine of *respondeat superior* both expresses an understanding of its place in the law of torts and affects our understanding of the entire law of torts.

In this paper, I will largely accept the Restatement impulse to elicit taxonomical order from the law, and argue that the order immanent in the law of negligent infliction of emotional distress (NIED) is not the order found by the Restatement. The Restatement conceives of liability for NIED as essentially a question of duty. Duty, in turn, is essentially about the existence of obligation in tort— about whether the relationship of the parties is governed by the law of torts, by some other branch of law (e.g., by contract or property), or by no law at all. Duty fixes standards of conduct. Courts, however, conceive of NIED differently; implicitly, courts have come to cast NIED as a doctrine of proximate cause. My argument will go beyond taxonomy only insofar as I argue that this classification is normatively sound, because it focuses courts on the character of plaintiff's harm not defendant's obligation.

Proximate cause doctrine takes the existence of obligation in tort for granted, and addresses the extent of the defendant's liability for breach of such obligation. Proximate cause doctrine does not demand (as duty doctrine does) that defendants conduct themselves in a certain way, it settles the scope of their responsibility when defendants have failed to conduct themselves as they should. When they address liability for negligent infliction of emotional distress, courts are asking whether and when liability for breach of a duty grounded either on the prospect of physical injury or on the existence of a preexisting relationship between the parties should extend to encompass the infliction of emotional distress.¹²

This classification of NIED as a matter going to extent of liability— and not to existence of obligation— enables courts to address and resolve the central problem posed by such liability. Liability for negligently inflicted emotional harm must be limited. In an age of mass

¹¹ See e.g., Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability* 54 Vand. L. Rev. 1285, 1303-1317 (2001) (arguing that *respondeat superior* is one of two main fonts of strict enterprise liability in tort, and that tort law is torn between competing principles of strict and fault responsibility).

¹² Within the American common law system, the division of conceptual labor between duty and proximate cause is also a division of institutional labor between judge and jury. Duty is a question of law for the courts because it is concerned with law articulation. Proximate cause is generally thought to be a matter for juries because it is concerned with law application. To the extent that judicial practice matches this premise, the practical significance of classifying NIED liability as proximate cause and not duty is increased.

In my view, the proximate cause claim made by the conventional wisdom could stand some qualification. Many proximate cause cases in the pure economic loss and pure emotional harm domains involve judicial line drawing, delineating either the category of harm to which liability will extend or the class of persons to whom it will extend. For example, “virtually all courts treat the question of whether a close family relationship exists as one purely of law, regardless of how they resolve specific issues at the boundary of the standard adopted. RESTATEMENT (THIRD) OF TORTS § 47 Reporter's Note cmt. g (2001).

communication, routine accidents may horrify hundreds and even thousands of people.¹³ Ordinary actions— ending intimate personal relationships and important workplace ones— may cause severe emotional distress as a matter of course. General liability for reasonably foreseeable emotional harm is therefore unthinkable. Duty doctrine, however, is general. In modern negligence law, reasonable foreseeability of harm is the touchstone of obligation to avoid harm.¹⁴ Conceptualizing NIED cases as duty cases therefore invites excessive liability. Conceptualizing NIED cases as proximate cause cases, by contrast, invites courts to circumscribe liability. It focuses their attention on the task of determining an appropriate scope of liability for emotional harm and arms them with a framework fashioned to address scope of liability issues. Slotting the inquiry into proximate cause classifies the doctrine correctly; it brings the right questions into focus and orients courts in the right way.

My argument shall proceed as follows. Part II begins by noting that courts and commentators divide over whether to classify NIED liability as a doctrine of duty or a doctrine of proximate cause, and explains these competing accounts. It then addresses the distinction between duty and proximate cause, articulating that distinction as a distinction between existence of obligation in tort and the extent of liability for breach of such an obligation. Duty fixes standards of conduct; proximate cause fixes the scope of responsibility for harm done. This account of the distinction is familiar but contestable. Part III therefore explains and defends the account, by elaborating on the role of duty in modern negligence law. Part IV develops the argument that the leading NIED cases are best understood as proximate cause cases, not duty ones.

Duty doctrine directs our attention towards the character of defendant's obligation whereas proximate cause doctrine directs our attention toward the character of plaintiff's harm. The proximate cause inquiry is an inquiry into whether liability ought to extend to the harm suffered by the plaintiff. Part V examines why liability ought to extend to some, but not all, serious emotional harm. The case for extending negligence liability to emotional harm depends on both the moral significance of harm in general, and the distinctive features of emotional harm. Part V argues that the law of NIED supports and is supported by a particular philosophical account of harm, one which understands harm as an assault on autonomy— as a severing of the link between our experience and our wills. Part VI concludes, returning to the taxonomical concerns of Restatements and arguing that it is both fitting and just to classify liability for NIED as proximate cause, not duty. Classifying NIED liability as proximate cause fits the case law better than the duty classification does, and yields a more attractive approach such liability.

¹³ The Restatement gives this well-chosen example: "For example, it is undoubtedly true that that millions of Americans suffered foreseeable emotional disturbance when they learned that the Challenger space shuttle exploded, but no one suggests that an actor who negligently caused the explosion should be liable for that distress." *Id.* at cmt. f.

¹⁴ See Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"* 79 S. CAL L. REV. 265, 276 (2007) (arguing that reasonable foreseeability of harm is the primary principle informing duty determinations in negligence law, and rightly so).

II. Negligent Infliction of Emotional Distress as a Taxonomical Problem

Liability for negligent infliction of emotional distress is one of the preeminent taxonomical puzzles in our present day law of torts. Disagreement over whether recovery for NIED is a matter of duty or a matter of proximate cause— or over whether some NIED cases are proximate cause cases whereas others are duty cases¹⁵— permeates discourse in this particular corner of tort law. Put differently, commentators are divided over whether negligent infliction of emotional distress is a freestanding tort or a doctrine delineating the extent of a defendant's responsibility for breaching a preexisting duty of due care, a duty grounded, essentially, in other considerations.

In the duty model of NIED, negligent infliction of emotional distress is a freestanding tort, and the structure of tort liability for emotional distress roughly parallels the structure of tort liability for misrepresentation. Both torts protect important interests: one guards our interest in emotional tranquility; the other guards our interest in not being deceived. Both provide protections against different modes of interference with the interests that they protect. Misrepresentation is a distinct wrong which can be committed in three distinct ways: deliberately, carelessly, and innocently. Some liability for misrepresentation is liability for intentional wrongdoing in the strong and intuitively familiar sense of the term: liability for deliberate, willful deception.¹⁶ Other liability for misrepresentation is a species of liability for negligence, liability for misleading statements that would not have been made had reasonable care been exercised.¹⁷ Still other misrepresentation liability is a species of strict liability. Here, the deception is at once deliberate and morally innocent.¹⁸ Interference with emotional tranquility can likewise be

¹⁵ Compare John Goldberg and Benjamin Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. Cal. L. Rev. 329, 357 (2006) ("California's expansion of duty famously includes the recognition of new duties to take care not to cause others emotional harm, [but] even under California law there was no basis for concluding that a restaurant such as KFC owed a duty to take care to avoid causing emotional harm to a patron such as Brown in a situation such as the one it faced") with Dilan A. Esper & Gregory C. Keating, *Putting Duty in its Place*, 41 Loyola L. Rev. 1225, 1264-65, 1292-93 (2008) (treating the issue in KFC as one of extent of liability because the pertinent duty was predicated on foreseeable risk of physical harm). The KFC case is *Kentucky Fried Chicken, Inc. of California v. Superior Court*, 927 P.2d 1260 (Cal. 1997). The Third Restatement takes the position that some NIED cases are "proximate cause" whereas others are "duty."

¹⁶ In plain English, liability for intentional misrepresentation is liability for fraud.

¹⁷ The freestanding tort of negligent misrepresentation imposes liability upon certain classes of persons who, in the course of their occupations, supply information for the guidance of a limited class of other persons for use in their business transactions. Liability extends beyond intentional misrepresentations to misrepresentations made without adequate investigation. See, e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th. Cir. 1987) (Posner, J.).

¹⁸ The liability imposed on innocent misrepresentations is intimately connected with contract law. Some, but not all of it, is warranty liability. See KEETON ET AL., *TORT AND ACCIDENT LAW*, 270-76 (4th ed. 2004).

deliberate as it is under the tort of intentional infliction of emotional distress (IIED) or negligent, as it is in the case of NIED.

In the case of misrepresentation, negligent misrepresentation is distinguished from its sister torts by the fact that it is grounded on a freestanding duty of care, a duty owed by some people to other people to conduct themselves carefully when providing information.¹⁹ Negligent misrepresentation is committed by failing to exercise such care. Liability for negligent misrepresentation thus attaches to a particular mode of conduct— falling short of the standard of due care— and that mode of conduct is distinct both from the deliberate deception that is the hallmark of intentional misrepresentation and from the innocent mistake that characterizes misrepresentations subject to strict liability.

Legal scholars who conceive of negligent infliction of emotional distress as a freestanding tort take liability for the infliction of emotional distress to have the same basic structure as the misrepresentation torts.²⁰ IIED and NIED are freestanding torts, bound together by their shared end of protecting people's interest in "emotional tranquility,"²¹ and they differ in the same way that intentional misrepresentation differs from negligent misrepresentation. Intentional infliction of emotional distress aims at shattering plaintiff's emotional tranquility (or recklessly risks it); NIED shatters plaintiff's tranquility through conduct that is inadvertent, inattentive, or otherwise insufficiently careful.

This conception of NIED assigns preeminence to determinations of duty. The duty not to inflict severe emotional distress cannot be a general one— owed by everyone to everyone else. Just as everyone does not owe everyone else a duty not to make careless statements²², so too

¹⁹The duty attaches to the performance of particular occupational roles and is owed by persons who, in the course of their occupations or professions, supply "information for the guidance of others in their business transactions" and to those for whose specific guidance the information is supplied. *Penrod v. Merrill, Lynch, Pierce, Fenner & Smith*, 385 N.E.2d 376, 381 (1979). Lawyers, accountants and land surveyors are among those whose occupational responsibilities sometimes bring them under the jurisdiction of the tort.

²⁰The Restatement (Third) itself tends to express this view of NIED insofar as the two sections on NIED (§§ 46 & 47) follow the one section covering IIED (§ 45). This suggests a single interest, protected against different forms of invasion. § 47, however, lends itself to characterization as proximate cause because it presents its domain as a domain where liability for emotional harm is parasitic on liability for physical harm to others. The view of NIED as an independent tort protecting the interest in emotional tranquility against negligent invasion may well be the prevailing view among commentators. In the cover letter accompanying his article *Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) §§ 45- 47*, 16 VA. J. SOC. POL'Y & L. 141 (2008), Professor John Diamond describes the article as "addressing the tort of negligent infliction of mental distress."

²¹This description of the interest protected by NIED liability appears in the RESTATEMENT (THIRD) OF TORTS § 46 cmt. 1 (2001). Comment I addresses the fact that other torts (e.g., defamation, invasion of privacy, malicious prosecution) "protect specific aspects of emotional tranquility."

²²See, e.g., *Greycas v. Proud*, 826 F.2d at 1564-65. "When . . . the Supreme Court of

everyone does not— and *cannot*— owe to everyone else an obligation not to shatter their emotional tranquility carelessly. Every plane crash and indeed every severe car crash might trigger massive liability to those traumatized by the event. Every emotionally difficult interaction, from ending an intimate personal relationship to firing an employee, would have to be conducted with the utmost delicacy, or perhaps avoided entirely. Scope of duty questions regarding *who* owes a legal obligation to exercise reasonable care not to inflict severe emotional harm, and *to whom* they owe that obligation are (on this account of the law) central to NIED doctrine in way which parallels their centrality to negligent misrepresentation doctrine.

The alternative to conceiving of liability for negligent infliction of emotional distress as a freestanding tort is to conceive of it as a doctrine delineating the scope of defendant's liability for breach of a preexisting duty of care. On this view, severe emotional distress is a *form of harm* to which liability for breach of a duty grounded on the protection of other interests sometimes extends. Taxonomically speaking, NIED is proximate cause not duty. *Dillon v. Legg* is a case in point. Upon witnessing her young daughter's death at the hands of the defendant's negligent driving, the plaintiff mother recovered for the severe emotional trauma that she suffers, but not because the defendant breached a freestanding duty not to inflict severe emotional trauma on the mothers of small children. The duty that defendant breached was a duty to drive carefully and that duty was predicated on the prospect that negligent driving is likely to cause serious physical harm and even death.

Stated differently, liability for negligent infliction of emotional distress in *Dillon* is not concerned with the existence and basis of the defendant's *obligation* but with the *scope of his responsibility* for the harm he has done by his breach of that obligation. NIED doctrine is concerned with whether the scope of the defendant's responsibility for the breach its duty of care *extends to purely emotional harms*. Tellingly, it answers that question in a discriminating way, holding that defendant's financial responsibility for the breach of its duty of care extends to some— but not to all— of those who are left physically intact but emotionally shattered by a defendant's negligence. Negligent infliction of emotional distress is thus a doctrine which determines the extent of the defendant's liability, not the existence of the defendant's obligation.

Locating NIED in proximate cause is attractive in part because it situates the doctrine in the location most conducive to thinking about the proper scope of liability. Liability for negligent infliction of severe emotional distress presents a difficult problem in no small part because it is

Illinois . . . held for the first time that negligent misrepresentation [by persons who supply information to others for business purposes] was actionable despite the absence of a contract . . . the court was careful to . . . limit the scope of liability.” Elsewhere in the opinion Judge Posner makes the following remark about the generally restricted scope of liability for negligent misrepresentation of economically valuable information: “Professor Bishop suggests that courts were worried that imposing heavy liabilities on producers of information might cause socially valuable information to be underproduced. See *Negligent Misrepresentation Through Economists’ Eyes*, 96 L.Q. Rev. 360 (1980).” *Id.* at 1564. With respect to risks of physical harm, the normal American rule is that everyone *does* owe everyone else a duty of reasonable care. See the discussion in the text *infra* at note 26.

plain that such liability must be carefully bounded and controlled.²³ Bounding liability is the principal task of proximate cause doctrine. Duty doctrine, by contrast, is preoccupied with the question of when conduct ought to be subject to obligation in tort instead of being parceled out to contract, property or the domain of legally unregulated conduct. Duty doctrine is inherently more general in character, and thus inherently less well-suited to tailoring the contours and extent of responsibility so that they define a fair and manageable orbit of responsibility. Duty's primary role is to determine the existence of obligation, not to specify when obligation reaches its outer perimeter.

To be sure, this forward looking claim that proximate cause doctrine is better suited to addressing the chief problem presented by liability for negligent infliction of emotional distress—namely, that such liability must be limited and its contours drawn with discernment—is not by itself sufficient reason to classify NIED as a proximate cause doctrine and not a duty one. We also need to ask the backward looking question: Which of these categorizations better fits the cases?

A. Duty and Proximate Cause Distinguished

Interpretively, the critical question here is whether the defendant's obligation of care in NIED cases arises primarily out of the prospect of emotional distress on the part of persons' in plaintiff's position, or primarily out of other concerns. Duty is a protean term in the law of negligence but its primary meaning has to do with the existence of obligation in tort, *whether the defendant's conduct is governed by the law of negligence or not*.²⁴ Put differently,

²³Many decades ago, when mental tranquility was first being recognized as an interest that tort law should protect, Dean Prosser commented that 'some boundary short of foreseeability must necessarily be set.' William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH L. REV. 874 (1939). RESTATEMENT (THIRD) OF TORTS § 47 Reporter's Note cmt. f (2001). Commentators have raised legitimate worries that— if acceptable limits on recovery for emotional harm cannot be fashioned— liability for emotional harm may have to be abolished entirely. See e.g., Jane Stapleton, *In Restraint of Tort*, in 2 THE FRONTIERS OF LIABILITY 83 (P. Birks, ed., 1994).

²⁴For discussion see Esper & Keating, *supra* note 14, at 273-75. Duty is also used in other senses and, indeed, is sometimes used to address problems that are quite plainly proximate cause problems. *Id.* at 288-89. In a personal communication with the author, the Reporters for the Restatement assert that it is difficult to reconcile the article's "analysis with the heavy duty hand wielded by courts in policing NIED cases." (Personal Communication with the author, April 15, 2008.) The Reporters are quite right that courts use the language of duty extensively in NIED cases. On some defensible reading of duty, my argument is, no doubt, about duty not proximate cause. I think, however, that the cause of clarity is well served by generally confining the use of duty to discussions of duty in its primary sense as a doctrine concerned with whether the defendant is under an obligation to conform its conduct to the negligence standard of reasonable care. The important question, then is whether duty *in its primary sense* exists in NIED cases primarily because severe emotional distress is likely to be inflicted unless persons in the position of defendants exercise reasonable care. That question cannot be settled simply by pointing to judicial rhetoric deploying the term "duty." After all, *Dillon v. Legg* uses the language of duty and it is

duty doctrine is concerned with the choice of the legal norm that regulates the conduct at issue. Duty questions ask us to inquire into the advisability of imposing an obligation of reasonable care on some class of persons, with respect to some class of risks, for the benefit of another class of persons. Duty questions invite us to consider such possibilities as leaving risk of pure emotional injury legally unregulated, or leaving pure economic loss to the law of contract.²⁵ These decisions paint with a broad brush. When a duty determination must be made, broad reflection on the urgency of the interest at issue—the physical integrity of the person, people’s legitimate economic expectancies, their emotional tranquility—and the legal protection that the interest at issue is owed, are the order of the day. More contextual and nuanced considerations come to the fore when proximate cause judgments about the extent of defendant’s responsibility must be made.

The Generality of Duty

The canonical negligence duty is the duty not to expose others to unreasonable risk of physical harm, and it helps to anchor our inquiry by recalling the essential features of that duty. The duty of care with respect to risks of physical is highly general and deeply entrenched. The Wisconsin Supreme Court, for example, has proclaimed that “everyone has a duty of care to the whole world.”²⁶ The California Supreme Court, echoing a 130 year-old statute, has remarked that “[i]n this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct.”²⁷ *The Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* states:

[A]n actor ordinarily has a duty to exercise reasonable care. That is equivalent to saying that an actor is subject to liability for negligent conduct that causes physical harm. Thus, in cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of this ordinary duty.²⁸

For their part, commentators have recognized a general duty to exercise reasonable care at least since the time of Oliver Wendell Holmes.²⁹ To be sure, recent retrenchment in the law of torts

clearly concerned with the extent of defendant’s liability, not with the existence of its obligation. See *infra* note 62 and accompanying text.

²⁵ See e.g., *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986), discussed in the text *infra* at note 43.

²⁶ *Miller v. Wal-Mart Stores, Inc.* 580 N.W.2d 233, 238 (Wis. 1998) (“[T]he proper analysis of duty in Wisconsin is as follows: The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act....”) (internal quotation omitted).

²⁷ *Randi v. Muroc Joint Unified School Dist.*, 929 P.2d 582, 588 (Cal. 1997); see also Cal. Civ. Code § 1714(a) (West 2002) (originally enacted in 1872, prescribing that everyone owes to everyone else a duty of ordinary care).

²⁸ RESTATEMENT (THIRD) OF TORTS § 6 cmt. f (2001).

²⁹ See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 13 (1985) (citing *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873), an unsigned article all but universally attributed to Holmes). Case law began to recognize the modern duty of due care in the 1830’s. *Id.* at 15; see *Brown v. Kendall*, 60 Mass. 292, 296 (1850) (Shaw, C.J.). But the duty was not general in the 19th

may represent an attempt to shrink the domain of negligence law, but even these developments leave intact a general duty to exercise reasonable care to avoid inflicting physical harm.³⁰

Existence of Obligation versus Extent of Responsibility

Proximate cause doctrine is concerned not with the question of what legal standard governs the defendant's conduct (not with the *existence of an obligation* of reasonable care) but with the *extent of liability* for failure to discharge an acknowledged obligation. When, for example, a defendant is: (1) subject to a tort duty of reasonable care; (2) breaches that duty; and (3) through its breach physically injures some plaintiffs and inflicts pure economic loss on other plaintiffs, the question arises whether liability extends to those who have suffered pure economic loss.³¹ This is a question of "proximate cause" and the inquiry it invites is very different from a duty inquiry, as the Restatement (Third) recognizes.³² It is more fact-intensive and particular. "Proximate cause" doctrine is decidedly more specific in its pronouncements than duty doctrine is. There is a general duty to exercise reasonable care to avoid physical harm to others, but only *some* economic losses are recoverable under proximate cause doctrine.³³

"Proximate cause" doctrine picks and chooses among very similar cases, extending and contracting liability in ways that are perennially vulnerable to the charge of being unprincipled. It does so because proximate cause doctrine's chief preoccupation is defining an appropriate orbit of liability, an orbit that is neither so large that it is both unmanageable and disproportionate to the wrong done, nor so small that it is inadequate as redress for the wrong done and insufficient as an incentive to discharge the duty of due care. Because it performs a role different from the role of duty doctrine, the questions that proximate cause doctrine invites differ from the questions that duty doctrine asks.

century because it was hedged in by property and contract. *See, e.g.,* Robertson v. Mayor, Etc., of the City of New York, 7 Misc. 645, 646 (N.Y. Common Pleas 1894) (reciting that landowners owe licensees and trespassers no affirmative duties to keep the premises safe); Losee v. Clute, 51 N.Y. 494, 496-97 (1873) (holding that manufacturer of dangerous boiler owes no duty of reasonable care to anyone other than its employees); Thomas v. Winchester, 6 N.Y. 397, 407-08 (1852) (noting that sellers of goods had no general duty to those who they were not in privity of contract with); Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49, 59 (1842) (Shaw, C.J.) (holding that employer has no duty to take precautions that would protect employee from injury at the hands of his or her fellow employees); Rex v. Smith, 2 Car. & P. 449, 456, 172 Eng. Rep. 203, 207 (Gloucester Assizes 1826) (holding caretakers of mentally disabled man owed no duty to tend to his health). It was not until the 20th Century that the duty of reasonable care became a highly general legal obligation. *See* text accompanying notes 12-31, *infra*.

³⁰ *See* Esper & Keating, *supra* note 14.

³¹ *See e.g.,* Barber Lines A/S v. M/V Donau Maru 764 F.2d 50 (1st Cir. 1985).

³² Compare RESTATEMENT (THIRD) OF TORTS § 7 (2001) with § 29 (2001).

³³ *Donau Maru*, for instance, lists nine exceptions to the general rule that there is no recovery for pure economic loss. 764 F.2d at 56 (1) accompanying physical harm; 2) intentionally caused harm; 3) defamation; 4) injurious falsehood; 5) medical costs paid by a different family member; 6) negligent misstatements about a financial matters; 7) master and servant; 8) telegraph-addressee; and 9) commercial fishermen as special "favorites of admiralty").

Duty cases are primarily concerned with the general kind of legal protection owed various kinds of interests. When we purchase a product, is our interest in seeing our physical integrity respected owed the protection of tort law or contract law? And is the same protection owed our interest in seeing our legitimate economic expectations honored? When duty exists, obligation in tort exists. Tort, not contract or property, determines the rights of the parties. Proximate cause cases are concerned with specifying the scope of the defendant's responsibility when it breaches an acknowledged tort obligation. They are preoccupied with discriminating among harms suffered and with making judgments about where the fair and effective boundaries of liability lie.

B. Duty and Proximate Cause in NIED Cases

The classification of liability for negligent infliction of emotional distress as either duty or proximate cause thus selects the prism through which we perceive the issues at hand. Inconveniently, however, NIED cases take two different forms and, as a result, do not go gently into either box. These two different forms may be called “bystander” cases and “preexisting relationship” cases, respectively.³⁴ Bystander NIED cases are defined by two essential properties. First, they involve accidents among strangers. Second, the emotional distress that they address is parasitic on risk of physical injury.³⁵ Preexisting relationship cases are also defined by two key essential properties. First, the parties to these cases are bound together by a preexisting relationship, and the emotional distress arises when the defendant fails to discharge some duty integral to that relationship. Second, liability for emotional harm is not parasitic on the prospect of physical harm. Breach of duty does not endanger anyone physically.

The natural way to conceptualize both of the fact patterns where emotional distress is parasitic on physical injury is as proximate cause puzzles, not as duty puzzles. The duty breached is both clear and unproblematic—it is the traditional negligence duty not to put others at unreasonable risk of physical harm. Indeed, duty, breach, and cause-in-fact are all plainly present. Yet the cases themselves are problematic even though duty is plain. The harm culpably risked (physical injury) is different from the harm actually inflicted (severe emotional distress). This discrepancy between the reasons we have for counting the conduct culpable and the harm that conduct causes

³⁴ See RESTATEMENT (THIRD) OF TORTS § 46(a) & § 47 (2001).

³⁵ The Restatement (Third) further subdivides bystander cases into smaller categories. In the first of these subcategories, the plaintiff is negligently put at risk of physical harm and fortuitously escapes such harm, only to suffer severe emotional distress from his or her physical peril. In the second, physical injury befalls someone else and the plaintiff seeking recovery for pure emotional harm is a witness to that injury. The sharp division between these two kinds of cases is contestable. The second class of cases arose out of judicial criticism of the arbitrariness of the “zone of danger” test as it works to limit recovery in the first class of cases. See *Dillon v. Legg*, 441 P.2d 912, 915 (1968) (criticizing the “zone of danger” rule as “hopelessly artificial[]” and indefensible and overruling it). Fundamentally, the two kinds of cases are similar, because recovery for emotional distress is parasitic on culpable imposition of risk of physical harm. But see RESTATEMENT (THIRD) OF TORTS §46 cmt. b (2001) (arguing that the two kinds of cases are fundamentally different).

puts a hard question to us. Does liability for breach of a duty not to negligently inflict physical harm extend to encompass responsibility for pure emotional injury? Taxonomically, this is a problem of proximate cause; it is a question about the proper scope of liability, not a question about the legal standard to which defendant must conform his or her conduct.

The second kind of NIED case is more difficult to classify. It is defined by the existence of a preexisting relationship between plaintiff and defendant— and by the fact that risk of physical peril is *not* required. The essential question in these cases is whether the emotional distress “occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.”³⁶ Cremating a corpse which was meant to be buried, misdiagnosing a married patient as infected with a serious social disease, and misplacing the child created by in vitro fertilization are cases in point. These are not accidents among strangers. They are accidents that arise in the course of ongoing relationships to which important legal obligations have already attached. The puzzle here seems deeper: should we say that these cases, too, are proximate cause cases, because they are about the extent of liability for breach of an independently established duty of care? Or should we say that these are “duty” cases because they recognize a freestanding obligation of care with respect to the emotional tranquility of certain classes of persons?

Why Preexisting Relationship Cases are Proximate Cause Cases

We should say, I believe, that preexisting relationship cases are proximate cause cases, albeit unusual ones. From a proximate cause perspective, the peculiarity of the preexisting relationship cases lies in the fact that the worry they address is the exact *opposite* of the worry that animates most of proximate cause doctrine. Proximate cause case law is haunted by the specter of excessive liability and is therefore preoccupied with placing “controllable limits on liability.”³⁷ This is, indeed, exactly the worry behind limits on recovery in those NIED cases where the right to recover for emotional distress is parasitic on the culpable imposition of risk of physical harm. Without some arbitrary cutoff, liability for emotional distress might extend indefinitely and therefore excessively.³⁸

³⁶ *Id.* at cmt c. notes “Unlike Subsection (a) recovery under this Subsection does not require that the defendant have created a risk of bodily harm to the plaintiff.” Comment d. further specifies these cases by saying that the preexisting relationship “line of cases recognizes an exception to the general no-liability rule when an actor undertakes to perform specified obligations, engages in specified activities, or is in a specified relationship fraught with risk of emotional disturbance.”

³⁷ *Straus v. Belle Realty Co.*, 482 N.E.2d 34, 38 (1985).

³⁸ “There is a recurring (and new) theme in these materials: the use of arbitrary lines to limit recovery for emotional disturbance. See especially RESTATEMENT (THIRD) OF TORTS §47 (2001), which limits bystander recovery for emotional disturbance to those who contemporaneously perceive an accident causing injury to a family member of the bystander. In many instances, one could persuasively argue that such restrictions on recovery are no more appropriate or rational than an alternative limitation and so, in that sense, are arbitrary. We agree with that assessment—while cautioning that, given the ubiquity of emotional disturbance, lines must be drawn.” *Id.* at Reporter’s Memorandum, xxi. Cf. *Dillon v. Legg* 441 P.2d 912, 922 (1968); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF L.

Preexisting relationship NIED cases address an extent of liability problem, but the problem they address is not excessive liability. “When the defendant owes an independent duty of care to the plaintiff, there is no risk of unlimited liability to an unlimited number of people. Liability turns solely on relationships accepted by the defendant, usually under a contractual arrangement.”³⁹ The extent of liability problem in “preexisting relationship” NIED cases is thus not too much but *too little liability*. Precisely because the defendant’s failure to discharge its obligations does not result in physical injury *to anyone* no liability *at all* would be the normal result in these cases— unless we recognize liability for negligent infliction of emotional distress.⁴⁰

Recall that duty is about the existence of obligation whereas proximate cause is about the extent of liability. Duty doctrine determines the legal standard to which an actor is subject; duty doctrine imposes obligations of conduct. The negligence duty of care requires people to conduct themselves reasonably. Proximate cause doctrine determines the scope of the actor’s responsibility for harm done through failure to comply with an obligation imposed by the doctrine of duty. Preexisting relationship NIED cases are proximate cause cases, not duty ones, because they are about the extent of the defendant’s responsibility for failing to comply with obligations which originate independently of the law of liability for negligent infliction of emotional distress.

Preexisting relationship NIED cases *do not impose new obligations of conduct on anyone*. Preexisting relationship NIED cases extend the liabilities— not the obligations— of actors who fail to discharge duties they owe quite apart from the law of negligent infliction of emotional distress. They expand the set of *harms* for which the parties they govern must bear responsibility when they fail to discharge their preexisting duties. And they do so, in important part, because they are prompted by a proximate cause consideration: absent liability for emotional distress most of these wrongdoers will bear no financial responsibility at all for the harm that they have negligently inflicted. The obligations at issue in preexisting relationship NIED cases originate antecedently to— and independently of— the liability recognized by the NIED cases themselves. NIED is thus fundamentally different from the tort of negligent misrepresentation. That tort imposes new obligations of conduct and these obligations are independent of any contractual relations.⁴¹

REV. 209, 356 (1979) (“The rules about the tort of intentional infliction of emotional harm might, if they were enforceable, modify every aspect of private social intercourse.”).

³⁹ RESTATEMENT (THIRD) OF TORTS §46 cmt. d (2001)(quoting DAN B. DOBBS, THE LAW OF TORTS § 312, at 849 (2000)).

⁴⁰ Cf. now Justice, then Judge, Breyer’s explanation of why we permit recovery for pure economic losses in negligent misrepresentation cases such as *Barber Lines A/S v. M/V Donau Maru* 764 F.2d 50, 56 (1st Cir. 1985) (“Awarding damages for financial harm caused by negligent misrepresentation is special in that , without such liability, tor law would not exert significant financial pressure to avoid negligence; a negligent accountant lacks physically harmed victims as potential plaintiffs . . .”).

⁴¹ Recall that Judge Posner in *Greycas v. Proud* alludes to the “Supreme Court of Illinois . . . [holding] for the first time that negligent misrepresentation [by persons who supply information to others for business purposes] was actionable despite the absence of a contract . . .” The moment that contract

The next section of this paper unpacks the pertinent conception of duty, with an eye towards distinguishing duty from proximate cause, existence of obligation from extent of liability. The following three sections explain why all cases of liability for negligent infliction of emotional distress can be seen as proximate cause or extent of liability cases. A brief final section examines tort as a body of law concerned with responsibility for doing *harm* and explains why emotional harm can be the kind of harm to which the law of tort ought to extend its protections.

III. The Role of “Duty” in Modern Negligence Law⁴²

When a court recognizes a duty of care it determines that the norms of negligence law determine the rights and obligations of the parties who stand before it, joined together by the defendant’s infliction, and the victim’s suffering, of a particular injury. It also determines that, going forward, similarly situated potential injurers and victims will have the rights and obligations to one another governed by the law of negligence. When a court determines that no duty of care exists, it determines either that some other body of law— contract law or property law, say— determines the rights of the parties to the harm, or that *no* body of law does. In this latter case, the harm is legally unregulated.


To bring the role of duty doctrine into sharper focus, consider a case where a design defect causes a turbine installed on a ship to fail. Suppose first that the product failure only damages the turbine itself, thereby inflicting an economic loss on the owner and purchaser of the turbine. In this circumstance, contract law will govern the purchaser’s claim against the seller of the turbine. The injury involved— physical damage to the product itself— is likely to be treated as a form of “pure economic loss,” and pure economic losses do not give rise to a cause of action for negligence. Pure economic losses arising out of product failures fall squarely within the domain of contract law.⁴³ Suppose next that the product failure causes the product to explode and the

independent obligations are recognized is the moment when the tort of negligent misrepresentation comes into existence in Illinois, as far as the provision of business information to third persons is concerned. The imposition of new obligations is the essence of the matter. Duty is the essence of the doctrine.

⁴² This section is adapted, with minor modifications, from Esper & Keating, *supra* note 14, at 273-78.

⁴³ I adapt this example from *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986). In *East River Steamship*, the U.S. Supreme Court rejected products liability and negligence claims in admiralty law made by charterers of a ship against the manufacturer of its turbines for defects in the turbines which necessitated repairs. The Court explained that the traditional functions of tort law were not served by allowing such an action:

The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the “cost of an injury and the loss of time or health may be an overwhelming misfortune,” and one the person is not prepared to meet.... In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured....

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explosion physically injures the purchaser, who happened to be in the vicinity of the turbine at the time it blew up. In this circumstance, the purchaser will have a tort claim against the seller. Physical injury to natural persons is as much the concern of tort law as pure economic loss is the concern of contract law.

Now consider a third possibility: that the turbine fails in a frightening but physically harmless way, thereby inflicting emotional distress on the purchaser, who just happens to witness the turbine's distressing demise. In this circumstance, the purchaser's emotional injury will generally go without redress. Notwithstanding the expansion of liability for NIED, it remains the case even today that *pure* emotional harm usually falls into a legally unregulated domain of "no duty"—people generally have no duty to exercise reasonable care to avoid emotional distress to others. Tort law does not normally extend its protections against accidental injury so far, and no other body of law typically steps into the breach, protecting the purchaser's emotional tranquility in the way that contract law generally protects her economic expectancies.⁴⁴ Liability does not extend to encompass pure emotional injury because the turbine has failed in a physically harmless way.

To be sure, it has not always been well-settled that accidental physical harm is presumptively the province of tort. Contemporary tort law recognizes a more extensive duty of reasonable care than nineteenth century tort law did, because it is the heir to the twin revolutions of *MacPherson v. Buick* and *Rowland v. Christian*.⁴⁵ *MacPherson* overthrew privity of contract in the critical domain of product accidents (the doctrine had barred suits by product users against manufacturers where the product had been sold through an intermediary, such as a car dealership), allowing tort law to follow its own premise that "where danger is to be foreseen, there is a duty to avoid the injury."⁴⁶ *Rowland* spawned a less sweeping overthrow of the

Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." The maintenance of product value and quality is precisely the purpose of express and implied warranties.

Id. at 871-72 (citations omitted)

⁴⁴ In both these areas—emotional distress and pure economic loss—*intentional* inflictions of harm are tortious; only the negligent infliction of such harm usually goes uncompensated. See *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268 (Cal. 2004) (plaintiff could sue for fraud but not negligence in a case involving a defective helicopter part which could have led to a fatal accident).

⁴⁵ *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.); *Rowland v. Christian* 443 P. 2d 561 (Cal. 1968). The developments, of course, are much broader than these cases. On the demise of "privity of contract," see Prosser *supra* note 23.

⁴⁶ *MacPherson*, 111 N.E. 1050. Prior to *MacPherson*, reasonable foreseeability of physical injury was the first and principal determinant of the existence of a duty of care within the constricted domain ceded to tort. See, e.g., *Blyth v. Birmingham Waterworks Co.*, 159 Eng. Rep. 1047 (Exch. 1856). Many contemporary American jurisdictions take reasonable foreseeability of physical injury to be, in general, the necessary and sufficient condition of a tort duty of care, the key to the obligation to exercise reasonable care. The Wisconsin Supreme Court, for example, writes:

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categories— invitee, licensee, and trespasser— by which the duties owed to entrants on real property were determined in the nineteenth century and the first two-thirds of the twentieth⁴⁷ and set in motion a slow and somewhat halting movement towards a single standard of care rooted in tort. Tort has triumphed over contract and property, and tort law— not contract or property law— generally determines the duties that people owe to each other with respect to the reasonably foreseeable risks of physical harm that their acts and activities create.

Within this framework, duty is not exactly a vestigial organ, but it is a shadow of its former self. In the 19th century, large domains of “no duty” were created by the hold of property and contract law over important realms of accidental injury. When workplace accidents, product accidents, or injuries to entrants onto land were at issue, tort law could not follow its own premise that reasonable foreseeability of risk of physical injury gives rise to duty, because property and contract trumped tort and cut off its duties of care.⁴⁸ At the outset of the 21st

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

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

⁴⁷ Rowland, 443 P.2d at 565.

⁴⁸ The materials in KEETON et. al., *supra* note 18, at 254-59, 271-279, & 662-69, illustrate or discuss the structure of accident law in the late nineteenth century. Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 944-54, gives an excellent overview of the relation of the fault principle to various domains of “no duty”, showing that the general duty of reasonable care supposedly characteristic of late nineteenth century tort law governed only over accidents among strangers producing physical harm. Outside that domain, the tort duty of reasonable care was preempted by domains of “no duty” governing: (1) all entrants onto land except for invitees; (2) workplace and product accidents; and (3) purely emotional and economic harms. Liability to entrants on land was controlled by property conceptions; workplace and product accidents were controlled by

century, “no-duty” doctrine still nibbles around the edges of the reconfigured tort-contract and tort-property boundaries, and still enables courts to snatch cases away from juries in a variety of unusual circumstances.⁴⁹ But the boundaries are far different and the terrain controlled by tort far larger. So “duty” performs its old function, but in a more modest way.

In product liability law, for example, the recently developed “no duty” doctrine that there is no tort claim for damage caused to a defective product itself⁵⁰ helps to locate the boundaries between tort and contract, and self-consciously so. The normative and conceptual edge on the ruling is the conclusion that damage to the product itself—a kind of *physical* damage—is best thought of as a kind of purely economic loss, properly governed by the law of contract, designed as it is to regulate the economic expectations of the parties. “No duty” doctrine also continues to fix tort’s boundaries with property, but here, too, the modern cases nibble along a perimeter that concedes far more terrain to tort. Although the triumph of tort over property in cases involving entrants onto land came later and is less complete than tort’s triumph over contract in cases involving product accidents,⁵¹ in the wake of cases like *Rowland v. Christian*⁵² the categories of licensee and invitee are gradually being abandoned, and the particular duties of care owed to persons who once fell into these categories are slowly being replaced by a general duty of reasonable care.⁵³

contract conceptions; and pure emotional and economic harms were legally unregulated. *See also* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* at 208-210 (1977) (describing how the doctrine of assumption of the risk excluded tort duties of care from the workplace). The grip of “no duty” ideas was so strong that even those who drove the movement to recognize a general duty of reasonable care and thereby bring modern negligence law into existence (preeminently, Oliver Wendell Holmes and the members of the “legal science” movement) preferred “doctrines limiting liability... to those expanding it.” WHITE, *supra* note 29, at 50.

⁴⁹ Esper & Keating, *supra* note 14, at 276-77.

⁵⁰ *See East River Steamship v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986). The damage to property—to the ship’s turbine—was treated as an instance of pure economic loss. *Id.* at 870; *accord Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987); *cf. Seely v. White Motor Co.*, 403 P.2d 145, 149 (Cal. 1965) (applying economic loss rule to bar strict liability claim for damage to product itself). Not every jurisdiction subscribes to the *East River Steamship* “damage to the product itself” rule. *See, e.g., Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1180 (Alaska 1993) (reaffirming rule that damages may be awardable for damage to the product itself if defendant’s conduct caused a safety risk that could have harmed lives as well as property); *see also Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268 (Cal. 2004) (holding economic loss rule does not bar claim for product damage resulting from fraud rather than negligence).

⁵¹ WILLIAM L. PROSSER & W. PAGE KEETON, *PROSSER AND KEETON ON TORTS* 432-33 (1984); DANIEL B. DOBBS, *THE LAW OF TORTS* 615-16 (2000); KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 186, 228 (2007) (noting, *inter alia*, that no courts retain privity of contract in product liability law whereas some courts do retain the categories in entrants onto real property cases).

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

⁵³ *See, e.g.,* 740 Ill. Comp. Stat. 130/2 (West 1995); *Mallet v. Pickens*, 522 S.E.2d 436, 446 (W.Va. 1999); *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 605 (Iowa 1998); *Nelson v. Freeland*, 507 S.E.2d 882, 892 (N.C. 1998); *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996); *Jones v.*

IV. NIED and the Place of Proximate Cause in Modern Negligence Law

The expansion of the duty of care under the principle that reasonable foreseeability of harm gives rise to a duty of care is the impetus both for the expansion of liability for emotional distress and for the conviction that such liability must be limited. *Dillon v. Legg*, the most important and modern of NIED cases, instructs California courts to decide if liability for emotional harm exists by determining “whether the accident and harm was *reasonably* foreseeable”.⁵⁴ That emphasis on reasonable foreseeability of harm as the test of liability for harm causes the same California court to recoil and restrict liability a mere twenty years later:

... The Dillon experience confirms, as one commentator observed, that “[foreseeability] proves too much Although it may set tolerable limits for most types of physical harm, it provides virtually no limit for nonphysical harm. It is apparent that reliance on foreseeability of injury alone . . . is not adequate when damages are sought for an intangible injury. In order to avoid limitless liability out of all proportion to the degree of defendant’s negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.”⁵⁵

In short: foreseeability proves too much. Making foreseeability of pure emotional harm the test of duty is self-defeating. Instead of giving liability for emotional harm a secure place in our law of negligence, it sets us searching for ways to curtail such liability.

The proper parallel to NIED cases, then, is not the freestanding tort of negligent misrepresentation, nor even the economic loss rule as a rule of duty, but the economic loss rule as a rule of proximate cause. The economic loss rule functions as a rule of duty when it *fixes the standard of conduct* which governs the rights and responsibilities of the parties with respect to some domain, such as the domain of product failures which do not endanger physical safety. It functions as a rule of proximate cause when it determines the *extent of the liability* of defendants

Hansen, 867 P.2d 303, 310 (Kan. 1994); *Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993); *Poulin v. Colby College*, 402 A.2d 846,849 (Me. 1979); *O’Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D. 1977); *Cates v. Beauregard Elec. Coop.*, 328 So.2d 367, 371 (La. 1976); *Basso v. Miller*, 352 N.E.2d 868,871 (N.Y. 1976); *Mounsey v. Ellard*, 297 N.E.2d 43, 47 (Mass. 1973). The trend towards eliminating these categorical distinctions has been carried to the point where the Colorado Supreme Court held that a statute which attempted to reinstate the categories lacked even a rational basis and was thus unconstitutional. *Gallegos v. Phipps*, 779 P.2d 856,863 (Colo. 1989).

⁵⁴ *Dillon v. Legg*, 441 P. 2d 912, 921 (Cal. 1968) (emphasis in original). This inquiry into reasonable foreseeability of harm is guided only by three factors—the proximity of the emotionally harmed plaintiff to the accident, the directness of the plaintiff’s observance of the accident, and the closeness of the relationship between the emotionally and physically harmed persons.

⁵⁵ *Thing v. La Chusa*, 771 P.2d 814, 826-27 (Cal. 1989); Robert Rabin, *Tort Recovery for Negligently Inflicted Emotional Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1526 (1985) is the commentator cited. The RESTATEMENT (THIRD) OF TORTS quotes this passage at Reporter’s Note cmt. f (2001).

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in who were subject to and did breach a tort duty of care. In these cases it limits recovery on the part of plaintiffs who have suffered economic loss without physical injury, and it does so because liability for reasonably foreseeable negligent economic loss would be unacceptably great.

The number of persons suffering foreseeable financial harm in a typical accident is likely to be far greater than those who suffer traditional (recoverable) physical harm. The typical downtown auto accident, that harms a few persons physically and physically damages the property of several others, may well cause financial harm (e.g., through delay) to a vast number of potential plaintiffs. . . . To use the notion of ‘foreseeability’ that courts use in physical injury cases to separate the financially injured allowed to sue from the financially injured not allowed to sue would draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases . . .⁵⁶

The logic at work here is the classic logic of proximate cause, preoccupied with constructing a manageable orbit of liability. Its concern is *not* with *the standard of* conduct that governs the rights of the parties to the case before it, but with *the kind of harm* for which defendant will be liable. The standard of conduct is settled: the negligence duty of reasonable care determines the rights and responsibilities of the parties. The question is whether liability for failing to conform one’s conduct to the demands of that standard should make one responsible to those who are left physically intact but emotionally or economically damaged as a result of one’s misconduct. The inquiry called for is not an inquiry into the character of the obligation at issue. The inquiry called for is an inquiry into the kind of injury at issue. NIED cases are therefore best conceptualized as proximate cause cases, not as duty ones.

To be sure, the line here between duty and proximate cause is subtle. Both kinds of cases involve explorations of the interests before the court. In duty cases, that inquiry is undertaken with an eye to determining what body of law (if any) ought to apply to the conduct in question. In proximate cause cases, that inquiry is undertaken to determine if liability ought to extend to the harm at hand. And the two inquiries interpenetrate: the kind of harm risked is central to determining whether a duty of care should obtain. The subtle difference between duty and proximate cause nonetheless matters. If obligation is the issue at hand we ought to think about the grounds pertinent to the recognition of obligation. If the significance of harm is the matter at hand we ought to think about the factors that bear on its significance. The two inquiries diverge and the taxonomical classification of NIED cases therefore matters.

If we classify NIED cases as duty cases we invite courts to predicate liability for emotional distress on reasonable foreseeability of emotional distress. Paradoxically, perhaps, this expansive criterion for recognition of responsibility for emotional injury actually tends to constrict the development of such responsibility. The prospect of putting people under an obligation of due care whenever emotional distress is a reasonably foreseeable consequence of failing to exercise such care prompts courts to fear excessive responsibility and to retreat from reasonable foreseeability as a criterion of responsibility.⁵⁷ A general duty to exercise reasonable

⁵⁶ Barber Lines A/S v. M/V Maru, 764 F.2d 50, 54 (1985) (1st Cir., Breyer, J.).

⁵⁷ See, e.g., Chizmar v. Mackie, 896 P.2d 196, 203 (1995) (“We do not believe that the traditional tort principle of reasonable foreseeability, standing alone, properly defines the scope of a defendant’s duty

care not to inflict *physical harm* on others imposes manageable burdens on us. A general duty to exercise reasonable care not to inflict emotional distress on others, would be almost literally unbearable, even if the distress involved were limited to severe emotional distress.

Duncan Kennedy drives this point home in little noted passage in his paper on Blackstone. “The rules about the tort of intentional infliction of emotional harm might, if they were enforceable, modify every aspect of private social intercourse.”⁵⁸ Kennedy’s primary target here is jurisprudential. He is out to shatter the comfortable assumption that legal norms have some natural extension. We tend to think that the equal protection clause harbors great critical power, but that the law of intentional torts does not. The equal protection clause can upend deeply entrenched social practices such as segregated education, but the tort of intentional infliction of emotional distress can merely nibble around the edges of our social lives. Kennedy’s point is that, in principle, the tort norms protecting peace of mind could upend industrial civilization. For our purposes, the point gets its power from the fact that we do, in fact, find it unthinkable that tort norms protecting peace of mind could be widely applied.

Proof of this point can be found in the NIED cases themselves. Courts have been quite sensitive to the fact that the conduct of mundane commercial activities would be sharply altered by a general, stringent duty to exercise reasonable care:

... to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer, and discipline employees. Although many of these acts are necessarily unpleasant for the employee, an employer must have latitude to exercise these rights in a permissible way, even though emotional distress results.⁵⁹

Personal life is at least as fraught with intensely distressing actions. If we are to have religious practices like shunning and marital practices like divorce we must be prepared to accept the *intentional* infliction of severe emotional distress.⁶⁰ Even the tort of intentional infliction of emotional distress must be cabined (as it is by the requirement that the distress result from

in an action for damages for negligently inflicted emotional distress.”(citation omitted)). Cf. Judge Breyer’s comment on liability for pure economic loss in *Donau Maru*, 764 F.2d at 54 (“To use the notion of ‘foreseeability’ that courts use in physical injury cases to separate the financially injured allowed to sue from the financially injured not allowed to sue would draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases . . .”).

⁵⁸Duncan Kennedy, *The Structure of Blackstone’s Commentaries on the Constitution*, 28 Buffalo L. Rev. 209, [pinpoint cite needed] (1979). The kind of emotional harm that Kennedy has in mind includes but is broader than the kind of emotional harm I discuss in the text.

⁵⁹ GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 612 (Tex. 1999).

⁶⁰ See e.g., *Paul v. Watchtower Bible and Tract Society*, 819 F.2d 875, 884 (9th Cir. 1987) (holding that the Jehovah’s Witnesses’ practice of shunning is “privileged” conduct)(“The constitutional guarantee of the free exercise of religion requires that society tolerate the type of harms suffered by Paul.. .”); *Whelan v. Whelan*, 588 A.2d 251, 252(1991)(“The defendant was undoubtedly correct when he pointed out at oral argument that virtually all dissolutions of marriage involve the infliction of emotional distress. For the tort of intentional infliction of emotional distress to be established . . . the plaintiff must allege and prove conduct considerably more egregious than that experienced in the rough and tumble of everyday life or, for that matter, the everyday dissolution of marriage.”).

“outrageous” conduct) if we are to preserve liberties we prize. We must be at liberty to distress others— and *severely*— if we are to be free to break off intimate personal relations and to practice certain religions. A blanket prohibition on the intentional infliction of severe emotional distress would stifle essential personal freedoms.

A general duty not to inflict emotional distress carelessly would be even more stifling than an expansive interpretation of the tort of intentional infliction of emotional distress. If we were to prohibit the negligent infliction of emotional distress, it is not clear that we could continue to conduct many ordinary activities. Industrial life is a horror, an endless source of psychological trauma. That, indeed, is the Rousseauian insight at the heart of Professor Kennedy’s observation. You do not have to be neurasthenic to see the point, though you probably have to be exceedingly romantic to act on it.

Many ordinary activities— like flying planes or driving cars— inevitably inflict violent and horrifying harms. Automobile accidents are capable of snuffing out small children’s lives, paralyzing, disfiguring, killing, maiming and burning people to horrible deaths. Ordinary plane crashes are quite capable of ending hundreds of lives in split seconds of terror. Witnessing such events is mortifying and traumatic and, in an age of television, we may all become unwilling witnesses to these horrors.⁶¹ This unfortunate fact is simply an inevitable byproduct of the fact that essential modern activities harness the enormous destructive power of modern machinery. We need the activities and, therefore, we must generally bear the distress they cause when they go awry. We cannot seriously contemplate a general duty not inflict emotional distress negligently unless we are prepared to retreat, with Kennedy and Rousseau, to a simpler life and a pastoral world.

The unacceptability of a general duty not to inflict reasonably avoidable emotional distress thus threatens to give us a stillborn doctrine. The path out of this predicament lies in abandoning entirely the attempt to conceptualize NIED cases as duty cases, and in reconceptualizing negligent infliction of emotional distress as a doctrine of proximate cause, not duty. If we classify NIED cases as proximate cause cases, we avoid new duties entirely. We focus on the victim’s harm and its relation to the defendant’s already established wrongdoing. We ask courts to decide whether liability for a breach of an existing duty ought to extend to the emotional harm at hand. And we do so with the presumption that liability cannot extend to all of those emotionally harmed by the negligence of others, and with the tool kit of a doctrine designed to fix the scope of liability at our disposal.

Because negligent infliction of emotional distress cases *are* cases where courts are extending and withholding liability on the basis of judgments about such things as the urgency of the harm at issue, the extent of the defendant’s responsibility for that harm, and the proper scope of liability, it is descriptively proper to classify them as proximate cause cases. Courts, moreover, have this one right. Because negligent infliction of emotional distress cases are cases where courts *ought* to be asking about the character of the plaintiff’s harm and not about the character

⁶¹ Recall the Restatement (Third) of Tort’s remark about the explosion of the space shuttle Challenger, quoted *supra* note 13.

of the defendant's obligation, it is prescriptively proper to classify them as proximate cause cases not as duty cases. Or so I shall argue.

V. Why NIED Cases are Proximate Cause Cases

As we have seen, NIED cases fall into two distinct categories. The first category involves plaintiffs who are physically unharmed but emotionally traumatized by the negligent imposition of a risk of physical injury. The second category involves plaintiffs who have preexisting relationships with the parties whose negligence inflicts emotional injury on them. In the former class of cases—let us call them “bystander” cases—duty exists because physical injury to a class of persons including the plaintiff is reasonably foreseeable, and gives rise to a duty of care. In the latter class of cases—let us call them preexisting relationship cases—duty exists independent of the law of torts. It arises out of the antecedent interactions of the parties. In both kinds of cases, liability for emotional injury arises as a question about the extent of the defendant's liability for the consequences of a breach of an independently established duty of care.

*Dillon v. Legg*⁶², “the seminal decision establishing a right of bystander recovery for negligence,”⁶³ illustrates the point that the duty owed and breached in such cases is the duty not to impose an unreasonable risk of physical injury. That duty of care fixes the standard of conduct to which the defendant must conform his or her conduct, and protects a class of persons that includes the plaintiff. Fortuitously, the plaintiff escapes physical injury but suffers emotional devastation. The question before the court is therefore whether breach of duty should give rise to liability for severe emotional distress—whether risk of physical injury wrongfully imposed should result in liability for severe (and eminently foreseeable) emotional distress actually inflicted.⁶⁴

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

⁶³ RESTATEMENT (THIRD) OF TORTS § 47 Reporter's Note cmt. c (2001). Although it is unprepared to drop duty language entirely, the Restatement (Third) characterizes *Dillon* as the canonical case establishing the “derivative nature of bystander claims” for NIED. *Id.* Comment a. to § 47 notes that “29 American jurisdictions [including California] now follow *Dillon* or some modified version of the *Dillon* approach.”

⁶⁴ For other cases that meet this description (physical harm risked, severe emotional distress inflicted) see *Battala v. State*, 176 N.E.2d 729, 729–30 (N.Y. 1961) (permitting recovery of emotional damages by an infant plaintiff who was placed in a chair lift at a ski resort by an employee who

In answering that question courts attend to a host of considerations commonly found in proximate cause cases. Courts ask if liability and wrongdoing are proportional— with or without liability for pure emotional harm. They ask how severe the emotional harm is— whether it is distinguishable from “normal” emotional distress. They ask the straightforwardly instrumental question of whether the imposition of liability for pure emotional or economic loss is advisable in part as an incentive to induce other potential injurers to exercise appropriate care. And they ask the most prominent of proximate cause questions: will extending liability to cover emotional distress result in excessive liability?

To be sure, courts also ask a question that is often cast in terms of duty: they assert that the “essential question [is] whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.”⁶⁵ They frame the question in front of them as a question about “the type[] of injury.”⁶⁶ Indeed, the *Dillon* court presents itself as overthrowing the concept of duty, duty being an illicit “legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards.”⁶⁷ “Duty,” as the *Dillon* court castigates it, is an arbitrary limit on liability. The limit is arbitrary because by 1968 it is plain that the scope of defendant’s liability ought to be determined by reasonable foreseeability of harm. The law ought to work itself pure, cast off the shackles of outdated doctrine, and let liability extend as far as reasonable foreseeability of harm says it should.

“Duty” is being used in a familiar sense here, but it is not being used in its primary sense. The project of *Dillon* as the court describes it is a project whose domain is “proximate cause” in its primary sense. Its domain is extent of liability. To use “duty” in a secondary sense to describe this domain invites confusion. In short: the issue in *Dillon* is not the existence of the defendant’s obligation— a tort duty of reasonable care is incontrovertibly owed— but whether liability for breach of that duty extends to those who suffer only severe emotional harm. This fact pattern presents a classic question of proximate cause. Its focus is on the character of the plaintiff’s harm, and whether defendant’s responsibility for breach of duty extends to that harm. Its focus is *not* on the existence and character of defendant’s obligation.

Preexisting relationship NIED cases— examples include cases involving therapists and patients, doctors and patients, morticians and the families of those they bury, and messengers and

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

⁶⁵ *Dillon*, 441 P.2d at 917.

⁶⁶ *Id.* at 924.

⁶⁷ *Id.* at 916.

those they misinform⁶⁸— are similar in this key respect. Early cases in this line contemplated grounding duties of care not to inflict emotional distress on reasonable foreseeability of such distress, but more recent cases have circumscribed NIED liability by restricting it cases which involve negligent breach of independently established duties of care. Present case law largely limits “a plaintiff’s right to recover emotional damages caused by mere negligence . . . to those cases where the defendant owes the plaintiff a preexisting duty.”⁶⁹ This transforms liability for negligent infliction of emotional distress from a matter of duty into a matter of proximate cause.

*Molien v. Kaiser Foundation Hospitals*⁷⁰— addressing a husband’s claim for emotional distress arising out of the allegedly negligent misdiagnosis of his wife’s illness as syphilis— illustrates the early tendency to conceptualize preexisting relationship NIED cases as duty cases. In permitting the husband’s action to proceed, the California Supreme Court stressed two points. First, it emphasized that “emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress.”⁷¹ Second, it underscored the foreseeability of the husband’s distress: “the risk of harm to plaintiff was reasonably foreseeable to defendants. It is easily predictable that an erroneous diagnosis of syphilis . . . would produce marital discord and resultant emotional distress to a married patient’s spouse.”⁷² This language is and was naturally read to invite the recognition of a general duty avoid negligently inflicting reasonably foreseeable emotional harm. The prospect of that outcome prompted the California Supreme Court to change course:

The broad language of the *Molien* decision . . . has subjected *Molien* to criticism from various sources, including this court. The great weight of this criticism has centered up the

⁶⁸ E.g., *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995) (permitting recovery for NIED in a case where defendant doctor negligently misdiagnosed plaintiff as having AIDS and asserting that outside the context of bystander cases “a plaintiff’s right to recover emotional damages caused by mere negligence should be limited to those cases where the defendant owes the plaintiff a preexisting duty”). The court also noted that “[a] growing number of jurisdictions have adopted this approach.” *Id.* In *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28, 29 (App. Div. 2001), a malpractice claim against fertility clinic which mistakenly implanted plaintiff’s embryo into the uterus of another woman was allowed to proceed, even though plaintiffs sought to recover only for emotional harm because “[d]amages for emotional harm can be recovered even in the absence of physical injury ‘when there is a duty owed by defendant to plaintiff, [and a] breach of that duty result[s] directly in emotional harm.’” *Id.* (quoting *Kennedy v. McKesson Co.*, 448 N.E. 2d 1332, 1334 (N.Y. 1983) (alterations in the original)). In *Guth v. Freeland*, 28 P.3d 982 (Haw. 2001), plaintiff family members were permitted to recover for emotional distress caused by defendant morgue’s mishandling of the body of plaintiff’s mother. “[T]he duty to use reasonable care in the preparation of a body for funeral, burial, or crematory services . . . runs to the decedent’s immediate family members . . .” *Id.* at 990. “Many courts have . . . recognized that the nearest relatives of the deceased have a quasi-property right in the deceased’s body that arises from their duty to bury the deceased.” *Id.* at 986 n.4. See also the cases listed in the RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (2001).

⁶⁹ *Chizmar*, 896 P.2d at 203.

⁷⁰ 616 P.2d 813, 817-21 (Cal. 1980).

⁷¹ *Id.* at 816.

⁷² *Id.* at 814, 817.

perception that *Molien* introduced a new method for determining the existence of a duty, limited only by the concept of foreseeability. To the extent that *Molien* . . . stands for this proposition, it should not be relied upon and its discussion of duty is limited to its facts. . . . 'It is clear that foreseeability of injury alone is not a useful 'guideline' or a meaningful restriction on the scope of [a NIED claim]'. *Thing v. LaChusa*, 48 Cal. 3d 644, 771, P.2d 814 (Cal. 1989).⁷³

Following up on this criticism and limitation of *Molien*, the *Burgess* court held that— setting bystander claims aside— NIED claims will lie only in those “cases where a duty arising from a preexisting relationship is negligently breached.”⁷⁴ The question of when a duty to guard against the prospect of emotional harm arises is to be settled by the understandings of the parties themselves and by other branches of law.

To be sure, courts must characterize the understandings of the parties and the obligations to which they give rise under other bodies of law. This exercise of judicial judgment is, however, quite different from a direct inquiry into duty. A direct inquiry into duty involves determining if independent tort principles of obligation— such as the principle that reasonable foreseeability of harm will give rise to an obligation to guard against that harm— call for the imposition of a duty to guard against the careless infliction of emotional distress. This direct inquiry into duty is the very inquiry that the *Molien* court undertook, and that the *Burgess* court repudiated.

The *Burgess* approach is generally consistent with the practice of other courts. Alaska, for example, limits “a plaintiff’s right to recover emotional damages caused by mere negligence . . . to those cases where the defendant owes the plaintiff a preexisting duty.”⁷⁵ “Texas courts generally do not recognize a legal duty to avoid negligently inflicting mental anguish However, the Supreme Court of Texas has noted that mental anguish damages may be compensable when they are a foreseeable result of a breach of duty arising out of certain ‘special relationships’, including ‘a very limited number of contracts dealing with intensely emotional noncommercial subjects such as preparing a corpse for burial.’”⁷⁶ New York and New Jersey cases put similar weight on the existence of a preexisting, independent duty of care.⁷⁷

⁷³ *Burgess v. Superior Court*, 831 P.2d 1197, 1201 (Cal. 1992). *Cf. Bro v. Glaser*, 27 Cal. Rptr. 2d 894, 919 (Ct. App. 1994) (“Foreseeability is useless in fixing duty . . . emotional distress is always foreseeable. Thus, if the risk is foreseeable in every instance, some other criterion for establishing duty must be relied upon.”). This passage is quoted at greater length in the RESTATEMENT (THIRD) OF TORTS § 47 Reporter’s Note cmt. f (2001). The Restatement lists a number of recent cases from diverse jurisdictions “recognize[ing] that direct reference to foreseeability would inappropriately lead to excessive and unworkable liability for emotional disturbance.”

⁷⁴ *Id.*

⁷⁵ *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995).

⁷⁶ *Freeman v. Harris County, Texas*, 183 S.W.3d 885, 890 (2006).

⁷⁷ *Perry-Rogers v. Obasaju*, 282 A.D.2d 231 (2001); *Menorah Chapels v. Emanuel Needle*, 899 A.2d 316, 325-27 (2006).

The gist of this approach to preexisting relationship NIED cases is plain enough. The parties have entered into a relationship marked by special obligations. Ensuing responsibility for emotional harm arises from the nature of the parties' undertaking, not from an independent tort principle holding that reasonable foreseeability of emotional harm triggers a duty to use due care to avoid such harm. Duty arises out of the reasons the preexisting relationship provides for recognizing such responsibility, reasons generally recognized and accepted by the parties themselves. These relationships are set apart from ordinary commercial interactions by the presence of special fiduciary or confidential obligations. These obligations, in turn, implicate the emotional tranquility of the potential plaintiffs, but the obligations themselves are not essentially obligations to promote the potential plaintiffs' peace of mind. Peace of mind is essentially a byproduct of defendant's discharge of their obligations.

Consider the duty of care that physicians owe patients. That duty is both multifaceted, and especially stringent. It involves a duty of confidentiality, and a fiduciary obligation to promote the health and well-being of the patient. That fiduciary obligation, however, is mostly a heightened instance of the general duty of due care. Physical injury is the more obvious and worrisome risk of negligent medical care and, at its core, injury to one's health is a form of physical injury. The duty of care which physicians breach when they commit malpractice is a duty primarily concerned with protection against physical harm. Indeed, with the exception of psychiatrists, the special and stringent duties that physicians owe their patients are only peripherally duties to promote the emotional well-being of their patients. One might in fact conjecture that physicians may be licensed to inflict somewhat *more* than the normal level of emotional distress. The special obligation of physicians is to promote the patient's health⁷⁸, and this may involve disclosing distressing news. Few things are more emotionally traumatic than being told one has a life-threatening ailment, yet physicians may find themselves obligated to deliver such emotionally devastating news clearly and unflinchingly. It therefore seems that the professional role responsibilities of physicians give them special leeway to inflict emotional distress intentionally. Conduct which causes severe emotional distress—and which might otherwise be outrageous—may be eminently reasonable when it is undertaken by a physician in the course of her professional role.

Even more tellingly, the problem presented by the physician NIED cases is an extent of liability problem. Absent liability for emotional distress, liability will not extend *far enough* because there will be no liability *at all*. Consider the *in vitro* fertilization case of *Perry-Rogers v. Obasaju*⁷⁹: neither the plaintiff "parents" nor the embryo are physically harmed and no one else is owed a duty of care. If the "parents" cannot recover there will be no recovery by anyone.

⁷⁸ See, e.g., *Arato v. Avedon* 858 P.2d 598, 602, 607 (1993) (holding that physicians do not have duties to disclose "all facts which materially affect the patient's rights and interests", but only to disclose "to the patient information material to an informed treatment decision").

⁷⁹ In *Perry-Rogers*, 723 N.Y.S.2d at 29, a malpractice claim by a woman and her spouse against a fertility clinic which mistakenly implanted plaintiff's embryo into the uterus of another woman was allowed to proceed, even though plaintiffs sought to recover only for emotional harm because "[d]amages for emotional harm can be recovered even in the absence of physical injury 'when there is a duty owed by defendant to plaintiff, [and a] breach of that duty result[s] directly in emotional harm.'"

Absent liability for negligent infliction of emotional distress, the extent of liability will be inadequate because liability will not exist. If the prospect of liability is the incentive to honor one's duties in tort—and the structure of the law supposes this to be the case—it will not do for breach of duty to generate no liability at all.

Negligent misdiagnosis cases constitute another important instance of preexisting relationship NIED liability, and they too involve breaches of duty which do not inflict physical injury on anyone. Unless the plaintiff (or her spouse) who has been negligently misdiagnosed as HIV-positive can recover for her emotional trauma, there will be no recovery at all.⁸⁰ Negligent misdiagnosis does not cause physical injury *to someone else*. And even if it did, it is by no means obvious why any such injured “bystander” would have been owed a duty of care. Strong duties to patients often preclude any duties to others.⁸¹

It may seem that the difficulty in these cases lies in saying just what duty is at work. For reasons I shall explain in the final section of this paper, I believe that there is something important in this intuition.⁸² But it is unpersuasive to argue that the defendants in these cases owe the plaintiffs a special duty to care for their emotional tranquility. It cannot be that the duty physicians owe patients in these cases is a duty not to upset the patients. The duty owed is a duty not to “mistreat” them, a duty to practice medicine competently. Practicing medicine competently will preclude the distress experienced by these plaintiffs, but the primary interests patients have in seeing that physicians treat them competently are not properly described as interests in emotional tranquility.

People whose embryos are mistakenly implanted in unidentified others experience emotional distress because they face the prospect “that the child they wanted so desperately . . . might be born to someone else and they might never know his or her fate.”⁸³ The pertinent duty is grounded in the prospect of this and related harms, e.g., in being deprived “of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child, and by their separation from the child for more than four months after his birth.”⁸⁴ Plaintiffs’ emotional distress is not so much the injury inflicted by failure to discharge the duty as it is the natural and reasonable reaction to suffering that harm.

Similarly, the emotional trauma involved in being told that one is HIV-positive (and with no inkling that having contracted HIV was even a possibility) is the trauma consequent on

⁸⁰ See e.g., *Chizmar v. Mackie* 896 P.2d 196 (Alaska, 1995).

⁸¹ This point is a truism in the context of cases contemplating the liability of lawyers to nonclients. Stringent duties to clients serve as a reason to restrict duties to third parties, on the ground that the two sets of duties tend to conflict. See e.g., *Pelham v. Greisheimer*, 440 N.E.2d 96 (Ill. 1982).

⁸² The proximate cause inquiry requires determining whether the *harm* in question is one for which recovery should be allowed. This determination of whether the protections of tort should extend to the plaintiff’s emotional injury is more particular than, but nonetheless has something in common with duty law’s determination of the type of legal protection owed a particular kind of interest (e.g., the interest in physical integrity, or the interest in legitimate economic expectancies).

⁸³ *Perry Rogers*, 723 N.Y.S.2d at 232.

⁸⁴ *Id.* at 231.

confronting the impending harms one now faces: debilitating disease, premature death and possibly irreparable damage to personal relationships.⁸⁵ Emotional distress marks harm, but it is more the symptom of harm than the harm itself. There is a difficulty here, but it is not really a difficulty about duty. It is a difficulty concerning just what counts as morally and legally significant “harm.” Duty is actually quite straightforward: it is the widely accepted duty to practice medicine competently.

The “dead body” cases appear more difficult, in part because courts do speak of solicitude for the sensibilities of surviving family members.⁸⁶ The duty thus appears to be grounded at least partially on the prospect of emotional distress ensuing from negligent conduct. That, however, is tangential to tort law’s concern with the cases. Tort law takes the duty as it finds it, allowing the character of the parties’ undertaking to determine the distinctive obligations involved. Tort law views these cases from proximate cause perspective and from that perspective, the cases are structurally similar to the negligent misdiagnosis and in vitro fertilization cases. They lack physically harmed victims⁸⁷, and they involve a contractual relationship different from and more important than ordinary commercial contracts.

Explaining exactly what makes mishandling of the dead a serious wrong is difficult. The impersonal value that requires respect for the dead, including proper disposal of dead bodies, is neither easy to articulate nor easy to justify. Calling the interest at stake a “quasi-property right”⁸⁸ is crude at best. But it is easy to see that the duty to exercise care in tending to the disposal of the dead does not arise simply from the prospect of emotional distress on the part of the family in the event that a dead body is mishandled. Many businesses cause their customers foreseeable emotional distress by failing to discharge their contractual duties adequately. If the prospect of emotional distress alone sufficed to trigger duty in tort, liability for negligent infliction of emotional distress would be pervasive. It is not. Liability for mishandling the dead is a special case and the responsibility assumed in burying the dead is almost a fiduciary one:

As a society we want those who are entrusted with the bodies of our dead to exercise the greatest of care. Imposing liability within the limits described will promote that goal. Further, those who come in contact with the bereaved should show the greatest solicitude; it is beyond a simple business relationship— they have assumed a position of special trust toward the family.⁸⁹

⁸⁵ *Chizmar v. Mackie*, 896 P.2d 196, 205 (Alaska 1995).

⁸⁶ *See e.g., Menorah Chapels v. Emanuel Needle*, 899 A.2d 316, 325-27 (2006). This is eminently sensible, of course. Grieving family members are especially vulnerable to further emotional distress. Taking it to be the only reason underlying duty in these cases is a mistake, however, for reasons I explain in the text.

⁸⁷ *See Guth v. Freeland*, 28 P.3d 982, 989 (2001) (noting that if the decedent’s immediate family members cannot recover, “there will often be no one to hold defendants accountable for their negligent handling of dead bodies. A defendant does not owe a duty of care to the decedent, who is not himself actually harmed by the defendant’s actions.”).

⁸⁸ *Id.* at 986, n. 4.

⁸⁹ *Quesada v. Oak Hill Improvement Co.*, 261 Cal. Rptr. 769, 774 (1989), quoted in *Guth*, 28 P.3d at 989.

It seems reasonable, moreover, to suppose that the family's distress arises in part from its sense of having failed to discharge its obligation to ensure a decent burial. Here, emotional trauma has its source in large part in shame at failing to discharge a last, moral duty to a loved one. The mortician, in agreeing to perform services, has knowingly accepted delegation of that duty. Family and undertaker, then, are both bound by the same duty. The duty attaches to their roles, albeit for different reasons. Undertakers owe duties of care *to the families* of the dead whose bodies they handle because those families have delegated—and those undertakers have assumed—a part of the families' duties to give the dead a decent burial. The special gravity of this value and the harm to the family attendant on failure to honor that value, justify the law's intervention.

Let us, then, sum up what we have said so far about preexisting relationship NIED cases. In making liability for emotional distress available, the law is acting to see that an especially important obligation is honored, and that especially great emotional harms do not go unredressed. It takes that duty as it finds it, and acts to honor and reinforce it. The law of torts is brought to bear to lend appropriate support to a preexisting duty, and it lends that support by tailoring liability to the moral significance of the obligation. This is the law of torts in its proximate cause aspect.

Further evidence that negligent infliction cases are proximate cause cases is supplied by other arguments that courts use to justify the imposition of liability in such cases, and to calibrate its extent. One prominent argument is an argument of relative culpability and proportionality: “Unlike an award of damages for intentionally caused emotional distress which is punitive, the award for NIED simply reflects society's belief that a negligent actor bears some responsibility for the effect of his conduct on persons other than those who suffer physical injury.”⁹⁰ Put differently, the argument is that defendant's *culpable risk imposition* is the basis for concluding that it is *only just* for the defendant to bear some responsibility for the terrible emotional harm that he has wrought by his breach of his duty of care to the plaintiff.

To be sure, there is an edge on this argument. The argument can be taken to say that it is only just for the extent of the defendant's liability to exceed the scope of his duty. That is a controversial claim, but it is, plainly, a controversial claim that sounds in proximate cause not duty. It appeals to the intuition at the heart of Judge Andrews' *Palsgraf* dissent: that justice favors placing the cost of a harmful but unforeseeable outcome at the feet of the party culpably responsible for causing the harm.⁹¹

This ground of liability violates precepts dear to defenders of the purity of “private law”: culpable risk creation is the ground of liability and the principle of responsibility at work sounds not in corrective but in retributive justice.⁹² It is unjust for a severely injured victim to be

⁹⁰ *Thing v. La Chusa*, 771 P.2d 814, 829 (Cal. 1989).

⁹¹ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

⁹² WEINRIB, *supra* note 10 at 158-64 (1995) expresses the corrective justice objection to making risk imposition the basis of liability in an unqualified way: Predicating liability on culpable risk creation violates the correlativity required by corrective justice. Correlativity requires that the harm suffered by the plaintiff be the same harm culpably risked by the defendant. When this is not the case, the defendant

saddled with the full cost of her injury while the party responsible for inflicting it escapes scot-free. The intuition on which these doctrines rest is that a finding of “no liability” would be inadequate (not proportionate) to the wrong done to the plaintiff by the defendant. That intuition sounds more in retribution than in repair. But the lesson here is that our law of torts is not the pure expression of corrective justice that Ernest Weinrib, for one, takes it to be.⁹³ Here, it prefers the competing claims of retributive justice.⁹⁴ Considerations of retributive justice do not, of course, justify the imposition of the duty of reasonable care in the first place, but that simply underscores the fact that different considerations are relevant to the existence of obligation and the extent of liability. Retribution is only possible once a wrong has been committed.

The recurring emphasis that the preexisting relationship cases place on the need to recognize liability for emotional distress so that there will be some people in a position to sue also underscores the proximate cause character of these cases.⁹⁵ Here the instrumental side of

has not violated the plaintiff's right; and all that the defendant has done is violate some other person's right to be free of unreasonable risk of physical injury. This emphasis on strict correlativity of doing and suffering-of defendant's wrong and plaintiff's right-leads Professor Weinrib to object both to the relaxation of factual causation, and to proximate cause doctrines which impose liability for injuries which do not fall within the scope of the defendant's negligence. *See id.* at 153-57 (insisting on traditional factual causation of harm and objecting to “probabilistic causation” and the imposition of liability on the basis of culpable risk creation); *id.* at 160-61 (praising Cardozo's *Palsgraf* opinion and criticizing Andrews' opinion).

Professors Goldberg and Zipursky jointly object to imposing liability in cases where there is duty, breach, cause in fact and injury, but where the injury inflicted is not the injury against which the duty was directed. *See* John C. P. Goldberg and Benjamin Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1828-29 (“Our negligence law does not give a plaintiff a right of action against anyone who injured him, but only against a defendant who breached a duty not to injure him.” (footnote omitted)). To sustain this thesis, they do and must construe negligent infliction cases as “limited duty” cases. *Id.* at 1832-34.

⁹³ WEINRIB, *supra* note 10, at 153–54. “Private law” is not pure in the way that Weinrib imagines, as his critics have pointed out. *See* John Gardner, *The Purity and Priority of Private Law*, 46 U. TORONTO L.J. 459, 470 (1996) (criticizing Weinrib’s thesis that the “form taken by a part of private law must be the form taken by the whole of private law.”); Kenneth W. Simons, *Justification in Private Law*, 81 CORNELL L. REV. 698 (1995) (reviewing *THE IDEA OF PRIVATE LAW* and arguing that an adequate account of tort law must be pluralistic).

⁹⁴ For a brief discussion, see TONY HONORE, *RESPONSIBILITY AND FAULT* 85–90 (1999). *See also* Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387, 390–91, 406 (David. G. Owen ed., 1995) (noting both that notions of proportionality and retributive justice cannot be entirely expunged from the law of torts even though the justice of tort law is not primarily the justice of retribution).

⁹⁵ This justification is prominent in the “dead body,” the negligent misdiagnosis, and the in vitro fertilization cases. *See e.g.*, *Guth v. Freeland*, 28 P.3d 982, 989 (Haw. 2001); *Chizmar v. Mackie*, 896 P.2d. 196 (Alaska 1995); *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28 (App. Div. 2001). *Cf.* Judge Breyer in *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 56 (1st Cir. 1985).

Contract concerns also justify the availability of negligent infliction of emotional distress liability as a way around the problem that the dead person cannot sue when her corpse is mishandled. Obviously, the mortician is paid to perform a professional service, up to professional standards, and liability is

proximate cause doctrine shows its face. It matters that duties of care be honored in practice, and we therefore have reasons sounding in deterrence to see to it that those whose negligence fortuitously inflicts only severe emotional distress do not escape scot-free. This concern with fixing the scope of liability at a level that will deter wrongful conduct is quintessentially a concern of proximate cause doctrine.⁹⁶ It is also instrumental in its flavor, and properly so. The law of torts ought to care about its own efficacy. The prospect of liability supplies an incentive to respect the rights of others. The absence of any such prospect provides a temptation to disregard the rights of others.

Last, but not least, it is worth reminding oneself that emotional distress arising out of breach of contractual duties is commonplace and commonly not actionable. Spending the night in an airport, missing one's connection to another flight and failing to arrive at a relative's wedding on time, losing one's luggage for a week, and spending three days in transit instead of one are all emotionally draining and upsetting events. If there *were* a general duty to exercise reasonable care with respect to the emotional tranquility of others, there would be many, many more claims for negligent infliction of emotional distress. But this kind of emotional distress—the distress attendant on many breaches of fairly ordinary consumer contracts—does not give rise to liability for NIED. This vast swath of cases belies the idea that the liabilities we do recognize are grounded simply on the prospect of emotional distress itself. If that were the case, we would expect to see much more liability for negligent infliction of emotional distress.

The contrast between garden variety commercial and consumer transactions where breach of duty does not give rise to claims for freestanding emotional distress and those cases where breach of duty does give rise to such claims, has something else instructive to tell us, namely, that there must be something special about the emotional distress in those cases where we do permit recovery. In those cases, emotional stress and distress are not the just costs of living in the kind of high-pressure world in which we live, a world where some more than exasperating glitches and affronts must be expected, borne, and shrugged off. In the cases where recognize liability, the distress must be something that we aren't expected to step up to the plate and just shoulder. The emotional distress at issue must be a significant kind of harm.

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

*Molien v. Kaiser Foundation Hospitals*⁹⁷ stressed two points in justifying the recognition of a duty to guard against the emotional distress of a spouse consequent upon a misdiagnosis of syphilis. First, the court emphasized that “emotional injury may be fully as severe and

necessary to ensure that the service paid for is provided. Thus NIED fills a gap where breach of contract remedies may not be adequate to ensure that contracts are performed.

⁹⁶ DOBBS, *supra* note 51, at 443 (“Proximate cause rules are among those rules that seek to determine the appropriate scope of a negligent defendant's liability.”); PROSSER & KEETON, *supra* note 51 at 273 (identifying proximate cause as being concerned with the “scope of liability”).

⁹⁷ 616 P.2d 813, 817-21 (Cal. 1980).

debilitating as physical harm, and is no less deserving of redress.”⁹⁸ Second, the court underscored the foreseeability of the husband’s distress.⁹⁹ Courts have retreated from *Molien’s* premise that reasonable foreseeability of emotional distress may suffice to give rise to an independent obligation to conduct oneself carefully to avoid inflicting such distress. Determinations of duty have been delegated to the understandings of the parties and to other branches of law. Responsibility for evaluating the gravity of the harm before the court has, however, remained with the law of negligent infliction. The basic question to which the proximate cause classification of NIED liability directs our attention is: Does liability extend to this kind of harm?

Proximate cause cases addressing liability for pure emotional harm— like proximate cause cases addressing liability for pure economic loss— discriminate. They extend liability to some emotionally traumatized plaintiffs and not to others. Instrumental and retributive arguments affect the distinctions that the courts draw, but so too does the nature of the harm in question. Indeed, when we ask if liability should extend cover some harm it is natural to regard the seriousness of the harm as the first consideration to which we should direct our attention. To round out our understanding of liability for emotional distress we must turn the question of what makes some emotional distress and not other emotional distress serious enough to support liability in tort.

NIED liability does not encompass liability for an enormous amount of “normal” emotional suffering, and some of that suffering is not trivial. The emotional distress which gives rise to liability is special, distinguishable from the normal background of emotional distress that accompanies much of ordinary life. “[A] negligent airline that causes the death of a beloved celebrity can foresee genuine emotional disturbance on the part of the celebrity’s fans but no court would permit recovery for emotional disturbance under these circumstances.”¹⁰⁰ We would limit liability to the special distress suffered by close family members, and even then permit it only if they witnessed the fatal crash. Here, proximate cause determinations with respect to liability for pure emotional harm parallel proximate cause determinations with respect liability for pure economic loss. In both cases, the loss must be special in some way, distinct from the normal background of economic loss and emotional suffering that goes unredressed.¹⁰¹

⁹⁸ *Id.* at 816.

⁹⁹ *Id.* at 814, 817.

¹⁰⁰ RESTATEMENT (THIRD) OF TORTS § 47 cmt. f (2001). The example occurs in a discussion of the fact that foreseeability of harm does not explain and justify the contemporaneous perception of the accident and close family relationship limitations on bystander NIED liability.

¹⁰¹ See e.g., *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 56 (1st Cir. 1985) (listing nine exceptions to the general rule of nonliability for pure economic loss); *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (commercial fisherman and not anyone else “whose economic or personal affairs were discommoded” by a massive oil spill may recover for pure economic loss); *In re One Meridian Plaza Fire Litigation*, 820 F. Supp. 1460, 1480 (E.D. Pa. 1993) (explaining and applying the “peculiar harm” rule of public nuisance law, which permits recovery of pure economic loss but limits it to those who “have suffered a harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”); *Thing v. La Chusa*, 771 P.2d 814, 829 (1989) (“[I]t is appropriate to restrict recovery to those persons who will suffer an emotional impact

The discriminating character of liability for emotional harm is a direct consequence of the fact that a general duty to avoid emotional distress imposes unacceptably great burdens. But the fact that liability for emotional distress must be limited does not itself illuminate the distinctions that courts do and should draw. To pin down what is distinctive about the emotional distress to which liability extends, we need to ask outright why some emotional distress justifies the imposition of liability whereas other emotional distress does not. We need to inquire more deeply into both the workings of proximate cause law and the character “harm” as a phenomenon of legal significance. The law of negligence is a law of “harms”, a law of responsibility for harm wrongly done.¹⁰² Canonically, harm in the law of torts has meant “physical harm”, in contradistinction both to pure economic loss and pure emotional harm. Why, then, has liability for emotional harm expanded even though we are plainly unprepared to recognize a general duty not to inflict emotional distress?

In sorting out those emotional harms to which liability should extend, the law of proximate cause performs a role which connects it to the law of duty, instead of differentiating it from the law of duty.¹⁰³ The law of duty is concerned with the kind of legal protection owed various interests—people’s interest in the physical integrity of their persons, their interest in legitimate economic expectancies, their interest in the free use of their property, their interest in emotional tranquility, and so on. NIED cases determine that *some* emotional harm is entitled to the protection of tort law. The work being done by proximate cause doctrine thus resembles work done by duty doctrine at a more general level. By fixing the scope of liability—and by generally excluding economic loss and emotional injury from that scope—the rules of proximate cause help to define just what counts as “harm” for the purposes of tort law.

For the most part, the rules of proximate cause covering the types of harms to which liability extends reinforce the status of physical harm as the canonical case of harm, around which the duty of care is constructed. The economic loss and emotional harm rules are themselves corollaries of the rule that liability in negligence is liability for physical harm, and their general tendency is to confirm the priority of physical harm. The slow expansion of liability for NIED is significant not because it portends the end of tort law’s preoccupation with physical harm, but because it expands tort law’s conception of harm to encompass *some* nonphysical harm. This development has something to teach us about both tort law and harm.

beyond the impact that can be anticipated whenever one learns that a relative is injured, or dies, or the emotion felt by a ‘disinterested’ witness. The class of potential plaintiffs should be limited to those who because of their relationship suffer the greatest emotional distress.”).

¹⁰² Although she is not concerned with “harm” as a morally distinctive category, Jane Stapleton is making a closely related point when she writes “It is a truism that a fundamental requirement for a claim in negligence is that the plaintiff has suffered some past “damage.” A breach of duty by the defendant is not enough. The cause of action will not accrue until actionable damage occurs. This damage is said to form the gist of the action.” Jane Stapleton, *The Gist of Negligence*, 104 LAW QUARTERLY L. REV. 213, 213 (1988).

¹⁰³ Recall that the law of duty differs from the law of proximate cause in that the primary role of the law of duty is to fix the legal standard that governs the rights and responsibilities of the parties. The law of duty establishes a tort relationship.

We have long understood the law of torts to be a law of responsibility for harm done, and harm has occupied a central place in liberal moral and political thought as least since John Stuart Mill penned *On Liberty*. Surprisingly little contemporary tort scholarship, however, talks about harm¹⁰⁴ and we lack a well-developed account of tort law's relation to harm. So we must turn back to moral and political theory. Contemporary philosophical thinking about harm is split between two leading accounts of its character and significance. One account holds that harm should be understood as a setback to a legitimate interest, which interest is protected by a legal right. The notion of an "interest" is squishy, but the basic idea is clear enough. Harm matters because it makes someone worse off in an important way. Harm sets well-being back to a significant extent, more than the mere frustration of a preference or the absorption of a cost does.¹⁰⁵

The competing account of harm connects it to autonomy. On this account, harm is special because it violates our sovereignty.¹⁰⁶ Harm does not just increase the cost of our activities or hinder us in our pursuit of our objectives. In its core and morally most significant forms harm drives a wedge between our wills and our lives. Harm "involves conditions that that generate a significant chasm or conflict between one's will and one's experience. . . ." We *suffer* harm. It is to be endured. Harm is *done to* us and, in its core forms— serious physical injury or pain, illness, disability, and death— done devastatingly. It is, as the Molien court says, "severe and debilitating."¹⁰⁷ We are not agents when we are experiencing harm, we are victims. We are not the masters of our physical persons or the authors of our experiences. We are subjects of intensely unpleasant experiences thrust upon us, which we cannot master with our minds or our wills. Or, we are subjects of conditions (broken bones, disabled limbs, impaired organs, chronic pain . . .) which thwart and negate our agency.

Emotional distress "may be fully as severe and debilitating as physical harm."¹⁰⁸ That, of course, is the simplest and best reason to recognize liability for emotional harm. But matters are not quite so simple. Emotional distress differs from physical harm in fundamental and categorical way. Our emotional reactions to events are mediated by our minds. Emotional injury may thus be the product— not the negation— of our agency. Emotional reactions may be much more subject to our minds, our wills and our control. We can teach ourselves to toughen up and not be so sensitive and we can steel ourselves against even exceedingly unpleasant experiences. Our sensibilities are subject to shaping by our wills and our reactions to events can

¹⁰⁴ But not none. See e.g., Scott Hershovitz, *Two Models of Tort and Takings*, 94 VA. L. REV. 1147 (2006) (arguing that the law of torts is a law of "harms" not, as law and economics asserts, a law of "costs").

¹⁰⁵ This account is defended and deployed by Scott Hershovitz, *id.* It is generally identified with work by Joel Feinberg. See, e.g., JOEL FEINBERG, FREEDOM AND FULFILLMENT 3 (1992).

¹⁰⁶ For a conception along these lines, see Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117 (1999). The idea that harm is linked (negatively) to autonomy goes back at least as far as Mill. In our time, it is carried forward by work by Joseph Raz and Judith Thomson as well as by Shiffrin's work

¹⁰⁷ Molien v. Kaiser Foundation Hospitals, 616 P.2d 813, 814 (Cal. 1980).

¹⁰⁸ *Id.*

be made responsive to our considered judgments about how we should react. If we are told by the law that it will not treat our emotional distress as worthy of tort protection, to a significant degree we can learn to protect ourselves by mastering our emotions. We can learn to treat even the most exasperating delays in the course of air travel with relative calm, and we probably should. Life is full of aggravation and disappointment, much of it the cost of activities we value. We need to cope, not complain.

Tellingly, the emotional harm that the law of NIED recognizes tends to be harm that we either cannot or should not steel ourselves against. Parents are not supposed to steel themselves against the kind of emotional agony they suffer when they witness the accidental death of their child at the hands of a careless driver. The reaction is anything but idiosyncratic. Indeed, we would regard a parent who was indifferent to such an event as appalling. The agony arises out of an appropriate emotional attachment and vulnerability. To protect oneself against such harm by cultivating an indifference to one's child would be deeply disturbing and, indeed, inhuman. A parent who has the kind of attachment to her child that we regard as fitting and valuable will be emotionally devastated by witnessing the child's sudden death at the hands of someone's negligence. Deep attachments bring deep vulnerabilities.

Similarly, we think it emotionally wrong for parents to be to be indifferent to which infant they acquire at the end of an in vitro fertilization process, or to the fate of a being that they have brought into the world. "I would like a child and they are all interchangeable as far as I'm concerned", is an off-putting remark at best. It is, moreover, morally right to care about a being one has brought into the world, and morally right to want to assume a large measure of responsibility for the well-being of a human being that one has created.¹⁰⁹ Perhaps we should get over endowing our coffee mugs with special significance just because we own them, but we should not get over developing attachments to, appreciation of, and responsibility towards our offspring.

This characteristic of the emotional distress to which liability extends in the parenting cases— that it arises out of worthy emotional attachments and vulnerabilities— is a general characteristic of the emotional distress to which liability extends. We do not regard emotional distress at a mortician's botching of the burial of one's loved ones as the kind of hurt feeling that grown people get over. We believe, on the contrary, that people may rightly experience enduring guilt and shame over their perceived failure to discharge an important moral obligation, and that they are understandably emotionally fragile in the wake of a loved one's death. Nor do we regard severe post-traumatic stress suffered as a result of "serving as a rescuer at a gruesome train wreck" as the product of a delicate sensibility which needs to be hammered into tougher stuff.¹¹⁰ We have ample reason to believe that people may not be able to steel themselves against such horrors, and good reason to be grateful that we do not live among the kind of beings who are emotionally untroubled by prolonged exposure to such injury and agony.

¹⁰⁹ See Shiffrin, *supra* note 106.

¹¹⁰ *Dillon v. Legg*, 441 P.2d 912, 923 (Cal. 1968)(quoting *Chadwick v. British Railways Board*, 1 W.L.R. 912 (1967) (opinion by Denning, L.J.)).

In these canonical cases of recovery for NIED, emotional distress has the exceptional characteristic of not being something people should be expected to master, or to suffer uncomplainingly. Moreover, in part because these are emotional harms against which we are *not* expected to steel ourselves, the occurrence of these harms is likely to be experienced as a visceral and devastating assault on the self. Witnessing the violent death of one's child is the kind of horror that most of us hope never to have to endure. The suffering here will not be mediated and mastered by our minds. If anything, our minds will exacerbate the agony. We will have cultivated our vulnerability. The emotional agony rightly experienced in those cases where the law of NIED recognizes recovery may, therefore, resemble physical agony in its brutality. This is important. Physical agony is a core instance of physical harm and physical injury is the canonical harm against which negligence law seeks to protect us. The law of negligence is therefore consistent with its deepest commitments when it extends liability to the kinds of emotional distress that it does. Liability for some emotional harm ought to have a secure place in our law.

Equally important, the philosophical account of harm as an assault on autonomy fits the law of negligent infliction of emotional distress hand and glove. The severe emotional distress against which the law of NIED seeks to protect us undoes our autonomy in the same way that physical injury does. In their core forms, both inflict agonizing experiences upon us, experiences which we should not be expected to master. In their core forms, both kinds of harm disable our agency and alienate us from our experiences in acute and intensely unpleasant ways. This resemblance does and should guide the law. Subject to constraints of proportionality and manageability, liability for negligently inflicted emotional distress ought to extend to those emotional harms against which we should not or cannot be expected to steel ourselves, and which are disable our agency by making us the victims of severe distress that we have not authored and can only suffer.

VII. Putting NIED Cases in Their Proper Place

Taxonomy, I argued at the outset of this paper, matters. In powerful and non-obvious ways, the classificatory choices that we make in organizing cases and doctrines shape our understanding both of those cases and doctrines themselves, and of the larger bodies of law in which they figure. Our classificatory choices help to determine the development of the law going forward. They promote some principles and demote others; they treat some doctrines as central and others as peripheral. For this reason, Restatements reshape and revise the law that they purport only to clarify. Classifying NIED cases as proximate cause cases— and *not* as duty ones— is both correct and important. First, if not foremost, situating the cases in proximate cause fits the contours of case rulings and rhetoric better than situating them in duty does. In bystander cases like *Dillon*, liability for NIED is plainly parasitic on the general tort duty not to inflict physical harm carelessly. The natural and proper way to classify these cases, therefore, is as proximate cause cases. Their topic is extent of liability, not existence of obligation. Similarly, in preexisting relationship cases like *Chizmar* and *Perry-Rogers*, liability for negligent infliction of

emotional distress is liability for breach of a duty of care established and existing independent of the law of NIED itself. These cases, too, are proximate cause cases.

Second, slotting NIED cases into the pigeonhole of proximate cause frames the question they present, and orients courts, in a way which is conducive to solving the principal problem presented by liability for emotional harm. NIED liability must be limited, not general. “[S]ome boundary short of foreseeability must be set” for liability for negligent infliction of emotional distress if any liability at all is to flourish.¹¹¹ If liability for emotional harm cannot be cabined in some coherent way, it may have to be abolished entirely.¹¹² Slotting NIED doctrine into duty exacerbates the problem presented by liability for negligently inflicted emotional harm. Foreseeability of harm is the primary test of obligation to avoid harm, yet in the case of emotional distress foreseeability invites too much liability.

Instead of orienting courts in a way which encourages them to fashion a manageable and just domain of liability for emotional harm, conceptualizing such liability as a duty issue invites an unmanageably large and unjust domain of liability. Conceptualizing liability for emotional distress as a doctrine of proximate cause, by contrast, domesticates the problem that NIED presents. Determining an appropriate orbit of liability is the principal task of proximate cause doctrine. Proximate cause concepts, principles and policies equip courts with the normative and conceptual tools they need to articulate appropriate boundaries for NIED liability.

Last, but certainly not least, proximate cause doctrine provides a framework which enables courts to do justice to our moral intuition that there are severe emotional harms for which negligent defendants bear some responsibility.¹¹³ Emotional harm can be as devastating as grievous physical injury, and as worthy of redress. No liability for emotional distress, negligently inflicted, is at least as troubling as too much liability. Legitimate concerns about excessive liability should not be twisted into a cover for callousness and cruelty. We therefore need a doctrine which provides courts not only with the tools to curtail liability for emotional harm, but also with the tools to extend the imposition of liability for such harm.

Proximate cause doctrine fits this bill. It directs our attention to the plaintiff’s harm— not to the existence or absence of the defendant’s obligation. It asks if the defendant’s responsibility for breach of a recognized obligation should extend to redressing that harm. This is the right question to ask. In principle— and independent of legitimate concerns about the proportionality and manageability of liability— responsibility for breach of a duty of care ought to extend to those emotional injuries that resemble physical injury and pain in their severe and disabling character, and which undermine our autonomy in the fundamental way that physical harm does. Liability for negligent infliction of emotional distress ought to extend to those emotional harms which ought not be borne uncomplainingly, and which shatter the lives of those who suffer them.

¹¹¹ William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH L. REV. 874 (1939); RESTATEMENT (THIRD) OF TORTS § 47 Reporter’s Note cmt. f (2001).

¹¹² See e.g., Stapleton, *supra* note 23, at 83.

¹¹³ Recall *Thing v. LaChusa* “. . . the award [of damages] for NIED . . . reflects society’s belief that a negligent actor bears some responsibility for the effect of his conduct on persons other than those who suffer physical injury.” 771 P.2d 814, 829 (Cal. 1989).