applicable to the established facts." Wassink v. Hawkins, 763 P.2d 971, 973 (Alaska 1988). . . .

The Newtons describe Petersburg as a city where "constant drizzle" is "prevalent" except in the summer "when the rainfall is broken by periods of sun." They contend that the wet climate fosters the growth of a plant organism on exposed wooden boards, causing them to become dangerously slippery when wet. To guard against this tendency, the Newtons contend that permanent installation of some sort of anti-slip device is necessary. They argue that the general community standard in Petersburg is to install such devices.

Under the traditional common law rule governing the liability of a landlord, failure by the Magills to meet the community standard, assuming it exists, would be irrelevant. The traditional rule is that real property lessors are not liable to their tenants for injuries caused by dangerous conditions on the property. . . . There are exceptions to this rule of non-liability. If the dangerous condition is not reasonably apparent or disclosed, if it exists on a part of the premises which remains subject to the landlord's control, if the landlord has undertaken to repair the condition, or if the property is leased for a purpose which involves admission of the public, the landlord is subject to liability for negligence. None of these exceptions applies to this case.

The general rule of landlord immunity follows from the conception of a lease as a conveyance of an estate in land under which the lessee becomes, in effect, the owner for the term of the lease. As such, the lease was subject to the principle of *caveat emptor.* The tenant had to "inspect the land for himself and take it as he finds it, for better or for worse." William L. Prosser, Law of Torts §63 at 400 (4th ed. 1971).

The courts of a number of jurisdictions have begun to discard this common law rule, however, in favor of the principle that landlords are liable for injuries caused by their failure to exercise reasonable care to discover or remedy dangerous conditions. These courts have relied in part on statutory or common law warranties of habitability and in part on a belief that the rule of landlord immunity is inconsistent with modern needs and conditions. . . .

With the 1974 adoption in Alaska of the URLTA, the theoretical foundation of the traditional rule of *caveat emptor* has been undermined in this state as well. Landlords subject to the act have a continuing duty to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." AS 34.03.100(a)(1). This means that landlords retain responsibility for dangerous conditions on leased property.

The duty of a tenant is to "keep that part of the premises occupied and used by the tenant as clean and safe as the condition of the premises permit[s]." AS 34.03.120(1). This obligation exists as part of the same statute which defines the landlord's obligation to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." AS 34.03.100(a)(1). It follows that the legislature intended these obligations to be reconcilable. Reconciliation can be accomplished by interpreting the tenant's duty to pertain to activities such as cleaning, ice and snow removal, and other light maintenance activities pertaining to the safety of the premises which do not involve an alteration of the premises, whereas the landlord's duty relates to the physical state of the premises. This distinction is suggested by the phrase "as the condition of the premises permit[s]" in section 120(1). In context this must refer to the inherent physical qualities of the premises.

Our case law has also reflected the trend toward a more general duty of care for landlords. In Webb v. City & Borough of Sitka, 561 P.2d 731 (Alaska 1977), we rejected the prevailing common law view that a landlord's [sic landowner's] duty was controlled by the rigid classification of the person seeking compensation as a trespasser, licensee or invitee. Instead, we adopted a rule based on general tort law that an owner "must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk." Id. at 733.

We now further expand the landlord's duty of care in aligning Alaska with the jurisdictions following Sargent v. Ross, 308 A.2d 528 (N.H. 1973), and thus reject the traditional rule of landlord immunity. . . . We do this because it would be inconsistent with a landlord's continuing duty to repair premises imposed under the URLTA to exempt from tort liability a landlord who fails in this duty. The legislature by adopting the URLTA has accepted the policy reasons on which the warranty of habitability is based. These are the need for safe and adequate housing, recognition of the inability of many tenants to make repairs, and of their financial disincentives for doing so, since the value of permanent repairs will not be fully realized by a short-term occupant. The traditional rule of landlord tort immunity cannot be squared with these policies. . . .

Our rejection of the general rule of landlord immunity does not make landlords liable as insurers. Their duty is to use reasonable care to discover and remedy conditions which present an unreasonable risk of harm under the circumstances. Nor does our ruling mean that questions as to whether a dangerous condition existed in an area occupied solely by the tenant or in a common area, or whether the condition was apparent or hidden, are irrelevant. These are circumstances which must be accounted for in customary negligence analysis. They may pertain to the reasonableness of the landlord's or the tenant's conduct and to the foreseeability and magnitude of the risk. In particular, a landlord ordinarily gives up the right to enter premises under the exclusive control of the tenant without the tenant's permission. The landlord's ability to inspect or repair tenant areas is therefore limited. In such cases "a landlord should not be liable in negligence unless he knew or reasonably should have known of the defect and had a reasonable opportunity to repair it." Young v. Garwacki, 380 Mass. 162, 402 N.E.2d 1045, 1050 (1980).

The trial court observed in this case that slipperiness can be regarded as a hazard which comes within the tenant's maintenance duties rather than the duties of the landlord to keep the premises safe. A tenant can throw sand onto wet and slippery boards. On the other hand, this method has limitations, especially in an area of near constant rainfall. A jury could find that a landlord in such an area should take any one of a number of steps relating to the physical condition of the premises which would prevent a board walkway from becoming dangerously slippery when wet.

In our view genuine issues of material fact exist as to whether the appellees breached their duty to Darline Newton to exercise reasonable care in light of all the circumstances with respect to the condition of the walkway. Determination of whether that duty was breached should be left for the trier of fact. We therefore reverse the trial court's grant of summary judgment in favor of the Magills and remand this case for further proceedings.

NOTE TO NEWTON v. MAGILL

Landlords as Insurers. The *Newton* court raised the question of whether its holding would make landlords insurers — that is, liable to compensate tenants for all their injuries. The facts of the *Newton* case represent one circumstance in which the traditional rules would bar liability, but a reasonable care test might permit it. This could increase the liability of landlords. What proof required of the plaintiff under the new rule limits this liability?

Perspective: Best Cost-Avoider

The respective obligations of landlords and tenants to take reasonable care to avoid harms illustrate a wide range of cases where two parties might each have been in a good position to recognize the risks presented by some activity, to evaluate whether there are reasonable precautions available to minimize those risks, and to take action to avoid the risks if reasonable precautions are available. The traditional rules take a categorical approach, listing situations in which the landlord rather than the tenant would generally be the best cost-avoider. For instance, when the landlord but not the tenant knows of a danger, the landlord better appreciates the risk. When an area of the property is a common area like a shared stairwell, the landlord is in a better position than any single tenant to remedy unsafe conditions. When the landlord undertakes to make repairs, the landlord is in the best position to do so carefully. The evaluation of whether a landlord used reasonable care under the modern rules described in Newton v. Magill might also involve consideration of which party was in the best position to appreciate, evaluate, and avoid those risks. Under the modern rule, the "best cost-avoider" analysis is done by the jury on a case-by-case basis rather than by the categorical approach of the old rule. This raises the general question of whether the jury (using a case-by-case approach) or the court (using a categorical approach) is in a better position to do this analysis.

CHAPTER 11

SPECIAL DUTY RULES

I. Introduction

For a number of recurring circumstances, special rules control the application of the general principle that one has a duty to use reasonable care to protect foreseeable victims from foreseeable harms. "No-duty" or "limited-duty" rules limit application of the foreseeability test. Examples of this type of duty rule are found in tort law's treatment of negligent infliction of emotional distress. Other special duty rules are routinized applications of the general principles for establishing a duty. *Primary assumption of risk* rules are an important instance of this type of rule. This chapter considers the most important special duty rules.

II. Duty to Rescue or Protect

Tort law does not generally require one person to rescue another from harm, despite the foreseeability of harm to that other person. A classic example involves a person who sees a heavy object about to hit someone on the head. From the point of view of tort doctrine, there is no obligation to act to avert the impending calamity, even if the action would be easy and the harm it might avert is enormous. To many, tort law's refusal to require helpful actions sometimes seems immoral. Perhaps in response to this feeling, exceptions to the no-duty rule have developed. In addition, tort law has special rules defining the obligations of those who choose to become rescuers.

A. General No-Duty-to-Rescue Rule and Its Exceptions

Lundy v. Adamar of New Jersey, Inc. applies doctrines originally developed for common carriers and innkeepers to an invitee's claim that a casino was obligated to provide emergency medical treatment. The opinion also deals with the issue of the degree of care a rescuer is obligated to provide. *Good Samaritan* statutes affect this issue. The *Lundy* opinion highlights the significance of these statutes.

LUNDY v. ADAMAR OF NEW JERSEY, INC.

34 F.3d 1173 (3d Cir. 1994)

STAPLETON, J.

Appellant Sidney Lundy suffered a heart attack while a patron at appellee's casino, TropWorld Casino ("TropWorld"), in Atlantic City, New Jersey. While he survived, Lundy was left with permanent disabilities. Lundy and his wife here appeal on a summary judgment entered against them by the district court. . . .

The district court held that TropWorld's duty is, at most, to provide basic first aid to the patron when the need becomes apparent and to take reasonable steps to procure appropriate medical care. Because the court found no evidence that TropWorld was negligent in carrying out this duty to Lundy, it granted TropWorld's motion for summary judgment. . . . We will affirm.

On August 3, 1989, Lundy, a 66 year old man with a history of coronary artery disease, was patronizing TropWorld Casino. While Lundy was gambling at a blackjack table, he suffered cardiac arrest and fell to the ground unconscious. Three other patrons quickly ran to Lundy and began to assist him. The first to reach him was Essie Greenberg ("Ms. Greenberg"), a critical care nurse. Ms. Greenberg was soon joined by her husband, Dr. Martin Greenberg ("Dr. Greenberg"), who is a pulmonary specialist. The third individual who aided Lundy did not disclose his identity, but he indicated to Dr. Greenberg that he was a surgeon. . . .

Meanwhile, the blackjack dealer at the table where Lundy had been gambling pushed an emergency "call" button at his table which alerted TropWorld's Security Command Post that a problem existed. . . .

A sergeant in TropWorld's security force and a TropWorld security guard arrived at the blackjack table apparently within fifteen seconds of their receiving the radio message from the Security Command Post. . . . Upon arriving, the security guard called the Security Command Post on her hand-held radio and requested that someone contact the casino medical station, which was located one floor above the casino. Several witnesses agree that Nurse Margaret Slusher ("Nurse Slusher"), the nurse who was on-duty at the casino medical station at the time, arrived on the scene within a minute or two of being summoned. . . .

Nurse Slusher brought with her an ambu-bag, oxygen, and an airway. She did not, however, bring an intubation kit to the scene. Dr. Greenberg testified that he asked Nurse Slusher for one and she told him that it was TropWorld's "policy" not to have an intubation kit on the premises. . . . Nurse Slusher testified at her deposition that some of the equipment normally found in an intubation kit was stocked in TropWorld's medical center, but that she did not bring this equipment with her because she was not qualified to use it.

Nurse Slusher proceeded to assist the three patrons in performing CPR on Lundy. Specifically, Nurse Slusher placed the ambu-bag over Lundy's face while the others took turns doing chest compressions. The ambu-bag was connected to an oxygen source. Dr. Greenberg testified that he was sure that air was entering Lundy's respiratory system and that Lundy was being adequately oxygenated during the period when he was receiving both CPR treatment and air through the ambu-bag. Dr. Greenberg went on to say that the only reason he had requested an intubation kit was "to establish an airway and subsequently provide oxygen in a more efficient manner."

The TropWorld Security Command Post radio log reflects that an Emergency Medical Technician ("EMT") unit arrived at TropWorld by ambulance at approximately 11:03 p.m. . . .

Upon the arrival of the EMT unit, a technician, with the help of the two doctor patrons, attempted to intubate Lundy using an intubation kit brought by the EMT unit. Dr. Greenberg claimed that, due to Lundy's stout physique and rigid muscle tone, it was a very difficult intubation, and that there were at least a half dozen failed attempts before the procedure was successfully completed. After intubation, Lundy regained a pulse and his color improved. . . .

The district court held that TropWorld had fulfilled its duty to Lundy under New Jersey law. The court found that TropWorld had "immediately summoned medical attention for Mr. Lundy once it became aware of his need for it." Additionally, the court stated that ". . . TropWorld . . . fulfilled its duty to aid injured patrons by having at least a registered nurse available, trained in emergency care, who could immediately size up a patron's medical situation and summon appropriate emergency medical personnel and equipment by ambulance to respond to the patrons's (sic) emergency needs." . . .

Additionally, the court held that New Jersey's Good Samaritan Statute, N.J. Stat. Ann. §2A:62A-1 (West 1993), shielded TropWorld and its employees from liability for any acts or omissions they took while rendering care in good faith to Lundy. . . .

Generally, a bystander has no duty to provide affirmative aid to an injured person, even if the bystander has the ability to help. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts §56, at 375 (5th ed. 1984). New Jersey courts have recognized, however, that the existence of a relationship between the victim and one in a position to render aid may create a duty to render assistance. In Szabo v. Pennsylvania R.R. Co., 132 N.J.L. 331, 40 A.2d 562 (N.J. Err. & App. 1945), for example, New Jersey's highest court held that, in the absence of a contract or statute, an employer generally has no duty to provide medical service to treat an ill or injured employee, even if the illness or injury was the result of the employer's negligence. However, if the employee, while engaged in the work of his or her employer, sustains an injury rendering him or her helpless to provide for his or her own care, the employer must secure medical care for the employee. If a casino owner in New Jersey owes no greater duty to its patrons than an employer owes its employees while they are engaged in the employer's business, we think it clear that TropWorld did not fail in its duty to render assistance.

The Lundys insist, however, that TropWorld had a duty beyond that recognized in *Szabo*. They urge specifically that the Supreme Court of New Jersey would adopt the rule set forth in the Restatement (Second) of Torts §314A (1965). Section 314A states in pertinent part:

> (1) A common carrier is under a duty to its passengers to take reasonable action
>
> (a) to protect them against unreasonable risk of physical harm, and
>
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to its guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

We think it likely that the Supreme Court of New Jersey would accept the principles enunciated in §314A and would apply them in a case involving a casino and one

of its patrons. We need not so hold, however. The pertinent commentary following §314A indicates that the duty "to take reasonable action . . . to give . . . first aid" in times of emergency requires only that carriers, innkeepers and landowners procure appropriate medical care as soon as the need for such care becomes apparent and provide such first aid prior to the arrival of qualified assistance as the carrier's, innkeeper's or landowner's employees are reasonably capable of giving. Clearly, the duty recognized in §314A does not extend to providing all medical care that the carrier or innkeeper could reasonably foresee might be needed by a patron. . . .

Nurse Slusher was a registered, licensed nurse who had been trained in emergency care and who had fifteen years of nursing experience. The uncontradicted evidence was that, despite this training and experience, she was not competent to perform an intubation. It necessarily follows that the duty which the Lundys insist the New Jersey Supreme Court would recognize in this case would require casinos to provide a full-time on-site staff physician. Certainly, maintaining on a full-time basis the capability of performing an intubation goes far beyond any "first aid" contemplated by §314A. We are confident the New Jersey Supreme Court would decline to impose liability on TropWorld for failing to maintain that full-time capability.

The Lundys further claim that, even if there would otherwise be no duty to provide a level of care encompassing intubation, TropWorld voluntarily assumed a duty to provide such care and breached that duty by negligently failing to provide it. As we understand the argument, TropWorld voluntarily assumed this duty in two ways. First, by [having] a laryngoscope with intubation tube on the premises, TropWorld voluntarily assumed the duty of having it available for use on request. Second, by voluntarily undertaking to assist Mr. Lundy, TropWorld assumed a duty to use due care in providing that assistance and breached this duty when Nurse Slusher failed to bring the laryngoscope with intubation tube to Dr. Greenberg. In connection with this second argument, the Lundys rely upon the principles outlined in §324 of the Restatement (Second) of Torts which provides:

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
>
> (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
>
> (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

As we have indicated, TropWorld's medical center . . . did have a laryngoscope with intubation tube as part of its inventory of equipment. Nurse Slusher did not bring this equipment with her when she was summoned . . . , however. She brought only that equipment that she was qualified to use: the ambu-bag, oxygen, and an airway. At some point after her arrival on the scene, Dr. Greenberg asked for an intubation kit. While the Lundys do not expressly so state, we understand their contention to be that Nurse Slusher should have returned to the medical center at this point and retrieved the intubation tube for Dr. Greenberg's use and TropWorld is liable for her failure to do so. They suggest that her failure to do so was the result of an ill-considered TropWorld policy that she was not permitted to use intubation equipment.

We reject the notion that TropWorld, by [having intubation equipment on its premises], voluntarily assumed a duty to Mr. Lundy it would not otherwise have had.

The Lundys have referred us to no New Jersey case law supporting this proposition and we have found none.

The Lundys' argument based on §324 of the Restatement, ignores the fact that the principles restated therein have been materially altered by New Jersey's Good Samaritan Act, §2A:62A-1 N.J. Stat. Ann. That Act provides that anyone "who in good faith renders emergency aid at the scene of an . . . emergency to the victim . . . shall not be liable for any civil damages as a result of acts or omissions by such person in rendering the emergency care." We believe the Supreme Court of New Jersey would hold that this mandate protects TropWorld from liability in the situation before us.

The Lundys do not, and cannot, assert that there was bad faith here. Rather, they seek to avoid the effect of New Jersey's Good Samaritan Act by relying on what is known as the "preexisting duty" exception to the Act. Under this exception, the Act provides no immunity from liability if the duty allegedly breached by the volunteer was a duty that existed prior to the voluntary activity. We do not believe the preexisting duty exception is applicable under New Jersey law in a situation, like the present one, where the preexisting duty is a limited one and the alleged negligence is the failure to provide a level of assistance beyond that required by the preexisting duty.

We think this becomes apparent when one focuses on the purposes of the Good Samaritan Act and the preexisting duty exception and on the nature of the preexisting duty in this case. The purpose of the Good Samaritan Act is to encourage the rendering of assistance to victims by providing that the voluntary rendering of aid will not give rise to any liability that would not otherwise exist. The preexisting duty exception recognizes that fulfillment of this objective of the statute can be accomplished without the eradication of preexisting duties.

Nurse Slusher had no preexisting duty to Lundy apart from her role as an employee of TropWorld. . . . Nurse Slusher, if she had been a fellow patron, for example, would have had no preexisting duty obligation and she would have been fully protected by the Good Samaritan Act. Thus, the only relevant preexisting duty for purposes of applying the Act under New Jersey law is the preexisting duty owed by TropWorld to Mr. Lundy. That preexisting duty, as we have seen, was a duty limited to summoning aid and, in the interim, taking reasonable first aid measures. It did not include the duty to provide the medical equipment and personnel necessary to perform an intubation. It follows, we believe, that Nurse Slusher's conduct with respect to the providing or withholding of the intubation equipment on the premises was not conduct with respect to which she or TropWorld owed a preexisting duty to Lundy. It further follows that, if TropWorld is responsible for the assistance voluntarily provided by Nurse Slusher, it is protected by the Act from liability arising from her alleged negligence in failing to provide that intubation equipment. Accordingly, we conclude that TropWorld's motion for summary judgment was properly granted.

NOTES TO LUNDY v. ADAMAR OF NEW JERSEY, INC.

1. ***No Duty to Rescue.*** Understanding the *Lundy* opinion begins with recognizing the general rule that no person has a duty to rescue another from peril, even if that rescue could be accomplished easily. In one famous case, the defendant challenged his neighbor to jump into a pit that was filled with water. The neighbor jumped into

the water and drowned, and the defendant was protected from liability for having declined to rescue him. See Yania v. Bigan, 155 A.2d 343 (Pa. 1959). The rule is sometimes justified on the grounds that individual freedom of choice is a paramount good — autonomy triumphs over obligations to others with whom there is no special relationship. Another justification is that a requirement of altruism would have no logical stopping point — a victim who was not rescued could sue a huge number of people who failed to assist.

The *Lundy* plaintiffs tried to rely on the exceptions to the general rule. The first exception applies to common carriers, innkeepers, and possessors of land held open to the public. Anticipating difficulties with that exception, the plaintiffs also tried to rely on the exception applying to people who, although under no duty to help another in peril, attempt to help. How did the court in *Lundy* respond to each of these asserted exceptions to the general rule?

2. *Duty to Rescue in Special Relationships.* The *Lundy* court refers to the Restatement's position that imposes a duty to rescue in certain situations on innkeepers, common carriers, and possessors of land held open to the public. Perhaps responding to the harshness of the general rule, the law first recognized an obligation for common carriers and innkeepers to use reasonable care to aid their patrons. These businesses are sometimes required to be licensed to serve the public, and the duty to rescue may be viewed as an obligation that accompanies that license. The extension to possessors of land open to the public logically imposes obligations on others who seek the public's patronage. Limiting the obligation to these types of enterprises may be a logical way to prevent everyone from being obliged to rescue everyone else. How do these rationales apply to a casino operator?

3. *Voluntary Rescues.* An individual who decides to attempt to rescue another person must do so with some degree of care, even if he or she would have been free to ignore the person's need for help. It seems obvious that unreasonable conduct in assisting another person would be a basis for liability. The Restatement provision quoted in *Lundy* also recognizes liability for stopping assistance if the person being assisted would then be in a worse position than he or she was in prior to the effort to help. Good Samaritan statutes modify the application of a reasonable care duty to volunteer rescuers.

Statute: GOOD SAMARITANS

Ala. Code §6-5-332 (2002)

(a) When any doctor of medicine or dentistry, nurse, member of any organized rescue squad, member of any police or fire department, member of any organized volunteer fire department, Alabama-licensed emergency medical technician, intern or resident practicing in an Alabama hospital with training programs approved by the American Medical Association, Alabama state trooper, medical aidman functioning as a part of the military assistance to safety and traffic program, chiropractor, or public education employee gratuitously and in good faith, renders first aid or emergency care at the scene of an accident, casualty, or disaster to a person injured therein, he or she shall not be liable for any civil damages as a result of his or her acts or omissions in rendering first aid or emergency care, nor shall he or she be liable for any civil damages

as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person.

Statute: LIABILITY OF PHYSICIAN, DENTIST, NURSE, OR EMERGENCY MEDICAL TECHNICIAN FOR RENDERING EMERGENCY CARE

Miss. Code Ann. 1972 §73-25-37

No duly licensed, practicing physician, dentist, registered nurse, licensed practical nurse, certified registered emergency medical technician, or any other person who, in good faith and in the exercise of reasonable care, renders emergency care to any injured person at the scene of an emergency, or in transporting said injured person to a point where medical assistance can be reasonably expected, shall be liable for any civil damages to said injured person as a result of any acts committed in good faith and in the exercise of reasonable care or omissions in good faith and in the exercise of reasonable care by such persons in rendering the emergency care to said injured person.

NOTES TO GOOD SAMARITAN STATUTES

1. ***Purpose.*** Statutes of this type are designed to encourage individuals to offer assistance to others in emergencies. They may strike a balance between protecting defendants and assuring injured people that those who aid them will act with some care. Which of these statutes provides greater protection for rescuers?

The Mississippi Supreme Court stated that the state's Good Samaritan statute "fails miserably" and invited the legislature to amend it, but applied it as written in Willard v. Mayor and Aldermen of the City of Vicksburg, 571 So. 2d 972, 975 (Miss. 1990).

2. ***Persons Protected.*** These statutes differ in how they identify those whom their provisions will protect. How does the phrase "or any other person" in the Mississippi statute affect its coverage in comparison with the coverage provided in the Alabama statute?

3. ***Standard of Care Imposed.*** Statutes meant to encourage first aid may strike a balance between protecting defendants and assuring injured people that efforts to help them will be done with some care. Which of these two statutes provides greater protection for rescuers?

4. ***Prior Duty.*** The statute described in *Lundy* withdraws immunity if the duty allegedly breached by the volunteer existed prior to the voluntary activity. What would justify that limitation? Do the Alabama and Mississippi statutes incorporate it?

Statute: EMERGENCY MEDICAL CARE

Vt. Stat. Ann. tit. 12 §519(a) (2002)

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

Statute: GOOD SAMARITAN LAW DUTY TO ASSIST

Minn. Stat. §604A.01 Sub. 1 (2002)

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

Statute: DUTY TO RENDER ASSISTANCE

R.I. Gen. Laws §11-56-1 (2001)

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section is guilty of a petty misdemeanor and shall be subject to imprisonment for not more than six (6) months or by a fine of not more than five hundred dollars ($500), or both.

Statute: DUTY TO AID VICTIM OR REPORT CRIME

Wis. Stat. §940.34(2)(a) and (d)1 (2002)

(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim. . . .

(d) A person need not comply with this subsection if any of the following apply:

1. Compliance would place him or her in danger. . . .

NOTES TO DUTY TO AID STATUTES

1. ***Statutory Duty to Rescue.*** The above statutes are from the only states that appear to recognize a duty to rescue (though there are additional statutes requiring the reporting of crimes). These statutes create immunity from liability similar to the immunity described in the Good Samaritan laws. While England does not have a general duty to rescue, all civil law countries (except Sweden) apparently do, as well as all eastern European countries and most Latin American countries. See Edward Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. Sch. J. Intl. & Comp. L. 451 (2000) (comparing treatment of failure to rescue under American and French statutes).

2. ***Differences Among Statutes.*** While the Vermont and Minnesota statutes impose fines of $100 and $200, respectively, Wisconsin and Rhode Island impose fines up to $500 and also authorize jail terms of up to 30 days and six months, respectively. On whom is the duty imposed under the different states' statutes? What is a person on whom a duty is imposed obliged to do under the various statutes?

Perspective: Individualism, Altruism, and Duty to Rescue

Torts students are often shocked to learn that there is no duty of one person to take even easy steps to rescue another. This "no duty" rule has been the subject of a great deal of scholarly commentary, as the following two extracts illustrate.

> The first task of the law of torts is to define the boundaries of individual liberty. . . . [T]he liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses, and need not take into account the welfare of others.

Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 203-204 (1973).

> The individual receives two kinds of benefits from a law requiring easy rescue. First, pertaining to actual rescues, such a law increases the likelihood of his being rescued should he need to be. In exchange for this the individual suffers only minor inconvenience would he ever be required to rescue someone else. Second, even if a person is never in need of rescue himself, the individual still benefits from a law requiring easy rescue. In this case, the existence of such a law gives the individualist reason to believe that, should he be in need of rescue, the law requires action on his behalf. This knowledge makes him better able to plan his activities and, therefore, enhances his freedom. It is arbitrary and irrational for an individualist not to accept as a general legal duty the principle of easy rescue.

Robert Justin Lipkin, Comment: Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue, 31 UCLA L. Rev. 252, 290 (1983).

Perspective: Feminism and the Duty to Rescue

> I argue that "the recognition that we are all interdependent and connected and that we are by nature social beings who must interact with one another should lead us to judge conduct as tortious when it does not evidence responsible care or concern for another's safety, welfare, or health." Utilizing this analysis, the "no duty" doctrine might be transformed into a duty to exercise the "conscious care and concern of a responsible neighbor or social acquaintance," which would impose a duty to aid or rescue within one's capacity under the circumstances. Tort law would no longer condone the inhumane response of doing absolutely nothing to aid or rescue when one could save another from dying.

Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575, 580-581 (1993).

B. Obligations to Rescuers

One of tort law's most famous phrases is "danger invites rescue." Those words are quoted in McCoy v. American Suzuki Motor Corp. as part of the court's analysis of the duty owed to a rescuer by one whose conduct places a person in peril. Moody v. Delta Western, Inc. examines the scope of the "firefighter's rule," an important doctrine that limits liability to rescuers.

McCOY v. AMERICAN SUZUKI MOTOR CORP.

961 P.2d 952 (Wash. 1998)

SANDERS, J. . . .

At 5:00 p.m. on a cold November evening James McCoy drove eastbound on Interstate 90 outside Spokane as the car which preceded him, a Suzuki Samurai, swerved off the roadway and rolled. McCoy stopped to render assistance, finding the driver seriously injured. Shortly thereafter a Washington State Patrol trooper arrived on the scene and asked McCoy to place flares on the roadway to warn approaching vehicles. McCoy did so, but concerned the flares were insufficient, continued further and positioned himself a quarter-mile from the accident scene with a lit flare in each hand, manually directing traffic to the inside lane.

By 6:50 p.m., almost two hours after the accident, the injured driver and passenger of the Suzuki were removed and the scene was cleared, leaving only the trooper and McCoy on the roadway. McCoy walked back on the shoulder of the roadway to his car with a lit flare in his roadside hand. When McCoy was within three or four car-lengths of the trooper, the trooper pulled away without comment. Moments later McCoy was struck from behind while still walking on the roadway's shoulder by a hit-and-run vehicle.

McCoy and his wife filed a . . . complaint against . . . American Suzuki Motor Corporation and its parent corporation, Suzuki Motor Company, Ltd., for its allegedly defective Samurai which allegedly caused the wreck in the first place. . . .

This claim against Suzuki was brought under the Washington product liability act (PLA), RCW 7.72. McCoy alleged the Suzuki Samurai was defectively designed and manufactured, was not reasonably safe by virtue of its tendency to roll, and lacked proper warnings. McCoy also alleged these defects caused the principal accident, that he was injured while a rescuer within the purview of the "rescue doctrine," and Suzuki should therefore be held liable for his injuries.

Suzuki moved for summary judgment asserting: (1) the rescue doctrine does not apply to product liability actions; and (2) even if it does, McCoy must still, but cannot, prove Suzuki proximately caused his injuries. The trial court found the rescue doctrine applies to product liability actions but concluded any alleged defect in the Suzuki was not the proximate cause of McCoy's injuries and, accordingly, granted summary judgment of dismissal.

McCoy appealed the dismissal to the Court of Appeals which reversed in a published, split decision. The appellate court found the rescue doctrine applies in product liability actions just as it does in negligence actions. The court agreed with the trial court that McCoy's injuries were not proximately caused by Suzuki, however, held under the rescue doctrine an injured rescuer need not prove the defendant proximately caused his injuries. . . .

The Court of Appeals thus concluded McCoy alleged sufficient facts to avoid summary judgment of dismissal and, accordingly, remanded for trial. We granted review. . . .

The rescue doctrine is invoked in tort cases for a variety of purposes in a variety of scenarios. The doctrine, as here asserted, allows an injured rescuer to sue the party which caused the danger requiring the rescue in the first place. As Justice Cardozo succinctly summarized, the heart of this doctrine is the notion that "danger invites rescue." Wagner v. International Ry. Co., 232 N.Y. 176, 133 N.E. 437, 437, 19 A.L.R.1 (1921). This doctrine serves two functions. First, it informs a tort-feasor it is foreseeable a rescuer will come to the aid of the person imperiled by the tort-feasor's actions, and, therefore, the tort-feasor owes the rescuer a duty similar to the duty he owes the person he imperils. Second, the rescue doctrine negates the presumption that the rescuer assumed the risk of injury when he knowingly undertook the dangerous rescue, so long as he does not act rashly or recklessly.

To achieve rescuer status one must demonstrate: (1) the defendant was negligent to the person rescued and such negligence caused the peril or appearance of peril to the person rescued; (2) the peril or appearance of peril was imminent; (3) a reasonably prudent person would have concluded such peril or appearance of peril existed; and (4) the rescuer acted with reasonable care in effectuating the rescue. The Court of Appeals found McCoy demonstrated sufficient facts of rescuer status to put the issue of whether he met [those] four requirements . . . to the jury. Suzuki does not question this finding. Nor will we.

Suzuki argues the rescue doctrine may not be invoked in product liability actions. Suzuki contends the PLA supplants all common law remedies and contends the rescue doctrine is nothing more than a common law remedy. We disagree. The rescue doctrine is not a common law remedy. Rather, it is shorthand for the idea that rescuers are to be anticipated and is a reflection of a societal value judgment that rescuers should not be barred from bringing suit for knowingly placing themselves in danger to undertake a rescue. We can conceive of no reason why this doctrine should not apply with equal force when a product manufacturer causes the danger. . . .

McCoy argues the rescue doctrine relieves the rescuer-plaintiff of proving the defendant's wrongdoing proximately caused his injuries. McCoy asserts a rescuer may prevail in a suit by showing the defendant proximately caused the danger and that, while serving as rescuer, the plaintiff was injured. The Court of Appeals agreed stating the rescue doctrine "varies the ordinary rules of negligence."

The Court of Appeals erred on this point. [T]he rescuer, like any other plaintiff, must still show the defendant proximately caused his injuries. . . .

Here, we do not find the alleged fault of Suzuki, if proved, to be so remote from these injuries that its liability should be cut off as a matter of law. . . . Accordingly, we will not dismiss this case for lack of legal causation. Instead we remand the case for trial consistent with this opinion.

The Court of Appeals is therefore affirmed and McCoy is awarded his costs on appeal.

NOTES TO McCOY v. AMERICAN SUZUKI MOTOR CORP.

1. ***Significance of Rescue Doctrine.*** The rescue doctrine facilitates recovery by a rescuer against a defendant whose conduct created the need for a rescue by recognizing

the foreseeability of a rescuer and harm to that rescuer. These elements are usually associated with finding that there is a duty to a plaintiff. With respect to proximate cause, the doctrine's utility depends on each jurisdiction's treatment of that issue. Demonstrating foreseeability of the type of harm that resulted might be easier than proving that the defendant's negligence directly caused the harm or was a substantial factor in producing it.

2. *Problem: Anticipated Peril.* An individual who was watching someone pilot a hot air balloon noticed that wind was directing the balloon toward some high voltage power lines. As the balloon skimmed across the ground toward the lines, the observer seized the basket of the balloon, hoping to protect the pilot. The observer was badly injured when he came into contact with the power lines himself. He sought damages from the pilot, claiming that the pilot should have used a device on the balloon that could make it stop immediately. Should the rescue doctrine apply here? See Thompson v. Summers, 567 N.W.2d 387 (S.D. 1997) and Guille v. Swan, 19 Johns. 381 (N.Y. 1822).

MOODY v. DELTA WESTERN, INC.

38 P.3d 1139 (Alaska 2002)

MATTHEWS, J.

The question in this case is whether the so-called Firefighter's Rule applies in Alaska. The Firefighter's Rule holds that firefighters and police officers who are injured may not recover based on the negligent conduct that required their presence. For public policy reasons we join the overwhelming majority of states that have adopted the rule.

The facts of this case are undisputed. On or around July 25, 1996, a Delta Western employee left a fuel truck owned by Delta Western in a driveway in Dillingham. The keys were in the ignition, the door was unlocked, and the truck contained fuel and weighed over 10,000 pounds. Delta Western had a policy of removing the keys from the ignitions of its trucks. Delta Western enacted this policy because of past incidents involving the theft and unauthorized entry of its trucks.

Joseph Coolidge, who was highly intoxicated, entered the unlocked truck and proceeded to drive around Dillingham. He ran cars off the road, nearly collided with several vehicles, and drove at speeds exceeding seventy miles per hour. Brent Moody, the chief of the Dillingham Police Department, was one of the officers who responded to the reports of the recklessly driven fuel truck. The driver of the van in which Moody was a passenger attempted to stop the truck after moving in front of it, but Coolidge rammed the van, throwing Moody against the dashboard and windshield. Moody suffered permanent injuries.

Moody filed suit against Delta Western, alleging that the company (through its employee) negligently failed to remove the truck's keys from the ignition. In its amended answer, Delta Western argued that the "Firefighter's Rule" barred Moody's cause of action. Delta Western moved for summary judgment based on its Firefighter's Rule defense. The superior court granted Delta Western's motion, holding that the Firefighter's Rule bars police officers from recovering for injuries caused by the "negligence which creates the very occasion for their engagement."

Moody now appeals.

Nearly all of the courts that have considered whether or not to adopt the Firefighter's Rule have in fact adopted it. Only one court has rejected it. . . .

Modern courts stress interrelated reasons, based on public policy, for the rule. The negligent party is said to have no duty to the public safety officer to act without negligence in creating the condition that necessitates the officer's intervention because the officer is employed by the public to respond to such conditions and receives compensation and benefits for the risks inherent in such responses. Requiring members of the public to pay for injuries resulting from such responses effectively imposes a double payment obligation on them. Further, because negligence is at the root of many calls for public safety officers, allowing recovery would compound the growth of litigation.

Courts find an analogy in cases in which a contractor is injured while repairing the condition that necessitated his employment. In these cases, the owner is under no duty to protect the contractor against risks arising from the condition the contractor is hired to repair, and thus is not liable even if the condition was the product of the owner's negligence. This "contractor for repairs" exception to the general duty of reasonable care is grounded in necessity and fairness. Property owners should not be deterred by the threat of liability to the contractor from summoning experts to repair their property, regardless of why repairs are needed. Further, owners have paid for the contractor's expertise at confronting the very danger that injured him and should not have to pay again if the contractor is then injured. The same factors are found to apply with respect to the public's need to call for the services of public safety officers.

We agree with the reasoning of the modern courts and with the analogy to contractor cases. The Firefighter's Rule reflects sound public policy. The public pays for emergency responses of public safety officials in the form of salaries and enhanced benefits. Requiring members of the public to pay for injuries incurred by officers in such responses asks an individual to pay again for services the community has collectively purchased. Further, negligence is a common factor in emergencies that require the intervention of public safety officers. Allowing recovery would cause a proliferation of litigation aimed at shifting to individuals or their insurers costs that have already been widely shared. . . .

We thus conclude that the Firefighter's Rule applies in Alaska. We reach this conclusion based on the merits of the rule as accepted by the overwhelming majority of the courts of our sister states. It follows that summary judgment was properly granted.

NOTES TO MOODY v. DELTA WESTERN, INC.

1. ***Public Safety Workers in General.*** The firefighter's rule obviously applies to firefighters as well as to police officers. Where a landowner's negligence requires the presence of firefighters, the rule bars recovery by firefighters for injuries they suffer. See Zanghi v. Niagara Frontier Transp. Comm'n, 649 N.E.2d 1167 (N.Y. 1995). Sanitation workers, not paid to anticipate hazardous conditions, are not covered by the rule. See Ciervo v. City of New York, 715 N.E.2d 91 (N.Y. 1999).

2. ***Volunteers.*** In *Moody*, the court described the policy reasons for a related rule that protects homeowners from liability to contractors who are hired to repair the results of the homeowner's negligence. The court extends that reasoning to firefighters and police officers. Under the reasoning in *Moody*, should the firefighter's rule be

applied to a person injured while fighting a fire as an unpaid member of a volunteer fire department? See Roberts v. Vaughn, 587 N.W.2d 249 (Mich. 1998).

3. *Limitations on Application.* Jurisdictions typically withdraw the effect of the firefighter's rule in cases where a firefighter or police officer is injured while doing a routine inspection of a negligent defendant's premises. See Gray v. Russell, 853 S.W.2d 928 (Mo. 1993). Also, the rule does not protect defendants for harms associated with dangers different from the dangers that are typical of police or firefighting work. Concealing dangers or lying about them are examples of conduct for which a landowner will be liable to a firefighter when that conduct causes an injury. See Hack v. Gillespie, 658 N.E.2d 1046 (Ohio 1996). Do the reasons that support the rule in general also support limiting its application to emergency situations and the dangers normally associated with the profession?

Statute: PROFESSIONAL RESCUERS' CAUSE OF ACTION

N.J. Stat. §2A:62A-21 (2000)

In addition to any other right of action or recovery otherwise available under law, whenever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person or entity, other than that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's employer or co-employee, the law enforcement officer, firefighter, or first aid, emergency, ambulance or rescue squad member suffering that injury or disease, or, in the case of death, a representative of that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's estate, may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.

NOTES TO STATUTE

1. *Statutory Purpose.* Does this statute abrogate the firefighter's rule partially or completely?

2. *Problem: Effect of Statute.* In a New Jersey case that predates this statute, a police officer slipped on powdered sugar that had spilled on the floor of a donut shop. The officer was barred from recovery against the shop because he was carrying an injured person out of the shop when he was hurt, even though he would have been entitled to a cause of action if he had been in the shop as a customer. See Rosa v. Dunkin' Donuts, 583 A.2d 1129 (N.J. 1991). Would the statute have affected that result?

C. Protecting Third Parties from Criminal Attacks or Disease

In the medical context, some courts have taken positions that require affirmative acts by health care professionals who have an opportunity to protect strangers from danger.

Emerich v. Philadelphia Center for Human Development, Inc. describes the obligations of a physician who becomes aware that a patient might cause harm to others. Bradshaw v. Daniel resolves a claim that individuals other than the defendant doctor's patient were entitled to have the doctor warn them about possible harm they might suffer if information derived from treating the doctor's patient could have indicated to the doctor that they were in peril.

EMERICH v. PHILADELPHIA CENTER FOR HUMAN DEVELOPMENT, INC.

720 A.2d 1032 (Pa. 1998)

CAPPY, J.

We granted allocatur limited to the issues of one, whether a mental health professional has a duty to warn a third party of a patient's threat to harm the third party; two, if there is a duty to warn, the scope thereof; and finally, whether in this case a judgment on the pleadings was proper.

This admittedly tragic matter arises from the murder of Appellant's decedent, Teresa Hausler, by her former boyfriend, Gad Joseph ("Joseph"). At the time of the murder, Joseph was being treated for mental illness and drug problems. Appellant brought wrongful death and survival actions against Appellees. Judgment on the pleadings was granted in favor of Appellees by the trial court and was affirmed on appeal by the Superior Court.

A detailed recitation of the facts is necessary to analyze the complex and important issues before us. The factual allegations raised in Appellant's complaint, which we must accept as true, are as follows.

Ms. Hausler and Joseph, girlfriend and boyfriend, were cohabitating in Philadelphia. For a substantial period of time, both Ms. Hausler and Joseph had been receiving mental health treatment at Appellee Philadelphia Center for Human Development (the "Center" or "PCHD"). . . . Appellee Anthony Scuderi was a counselor at the Center. . . .

Joseph was diagnosed as suffering from, among other illnesses, post-traumatic stress disorder, drug and alcohol problems, and explosive and schizo-affective personality disorders. He also had a history of physically and verbally abusing Ms. Hausler, as well as his former wife, and a history of other violent propensities. Joseph often threatened to murder Ms. Hausler and suffered from homicidal ideations.

Several weeks prior to June 27, 1991, Ms. Hausler ended her relationship with Joseph, moved from their Philadelphia residence, and relocated to Reading, Pennsylvania. Angered by Ms. Hausler's decision to terminate their relationship, Joseph had indicated during several therapy sessions at the Center that he wanted to harm Ms. Hausler.

On the morning of June 27, 1991, at or about 9:25 a.m., Joseph telephoned his counselor, Mr. Scuderi, and advised him that he was going to kill Ms. Hausler. Mr. Scuderi immediately scheduled and carried out a therapy session with Joseph at 11:00 that morning. During the therapy session, Joseph told Mr. Scuderi that his irritation with Ms. Hausler was becoming worse because that day she was returning to their apartment to get her clothing, that he was under great stress, and that he was going to kill her if he found her removing her clothing from their residence.

Mr. Scuderi recommended that Joseph voluntarily commit himself to a psychiatric hospital. Joseph refused; however, he stated that he was in control and would not hurt Ms. Hausler. At 12:00 p.m., the therapy session ended, and, as stated in the complaint, Joseph was permitted to leave the Center "based solely upon his assurances that he would not harm" Ms. Hausler.

At 12:15 p.m., Mr. Scuderi received a telephone call from Ms. Hausler informing him that she was in Philadelphia en route to retrieve her clothing from their apartment, located at 6924 Large Street. Ms. Hausler inquired as to Joseph's whereabouts. Mr. Scuderi instructed Ms. Hausler not to go to the apartment and to return to Reading.

In what ultimately became a fatal decision, Ms. Hausler ignored Mr. Scuderi's instructions and went to the residence where she was fatally shot by Joseph at or about 12:30 p.m. Five minutes later, Joseph telephoned Mr. Scuderi who in turn called the police at the instruction of Director Friedrich.

Joseph was subsequently arrested and convicted of the murder of Ms. Hausler. Based upon these facts, Appellant filed two wrongful death and survival actions, alleging, inter alia, that Appellees negligently failed to properly warn Ms. Hausler, and others including her family, friends and the police, that Joseph presented a clear and present danger of harm to her.

The trial court granted judgment on the pleadings in favor of Appellees finding, inter alia, that the duty of a mental health professional to warn a third party had not yet been adopted in Pennsylvania, but that even if such a legal duty existed, Mr. Scuderi's personal warning discharged that duty. The Superior Court affirmed, reiterating that mental health care providers currently have no duty to warn a third party of a patient's violent propensities, and that even if such a duty existed, Appellant failed to establish a cause of action as his decedent was killed when she ignored Mr. Scuderi's warning not to go to Joseph's apartment.

Initially, we must determine if in this Commonwealth, a mental health care professional owes a duty to warn a third party of a patient's threat of harm to that third party, and if so, the scope of such a duty. While this precise issue is one of first impression for this court, it is an issue which has been considered by a number of state and federal courts and has been the subject of much commentary. [W]e determine that a mental health care professional, under certain limited circumstances, owes a duty to warn a third party of threats of harm against that third party. Nevertheless, we find that in this case, judgment on the pleadings was proper, and thus, we affirm the decision of the learned Superior Court, albeit, for different reasons.

Under common law, as a general rule, there is no duty to control the conduct of a third party to protect another from harm. However, a judicial exception to the general rule has been recognized where a defendant stands in some special relationship with either the person whose conduct needs to be controlled or in a relationship with the intended victim of the conduct, which gives to the intended victim a right to protection. See Restatement (Second) of Torts §315 (1965). Appellant argues that this exception, and thus, a duty, should be recognized in Pennsylvania.

Our analysis must begin with the California Supreme Court's landmark decision in Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976) which was the first case to find that a mental health professional may have a duty to protect others from possible harm by their patients. In *Tarasoff*, a lawsuit was filed against, among others, psychotherapists employed by the Regents of the

University of California to recover for the death of the plaintiffs' daughter, Tatiana Tarasoff, who was killed by a psychiatric outpatient.

Two months prior to the killing, the patient had expressly informed his therapist that he was going to kill an unnamed girl (who was readily identifiable as the plaintiffs' daughter) when she returned home from spending the summer in Brazil. The therapist, with the concurrence of two colleagues, decided to commit the patient for observation. The campus police detained the patient at the oral and written request of the therapist, but released him after satisfying themselves that he was rational and exacting his promise to stay away from Ms. Tarasoff. The therapist's superior directed that no further action be taken to confine or otherwise restrain the patient. No one warned either Ms. Tarasoff or her parents of the patient's dangerousness.

After the patient murdered Ms. Tarasoff, her parents filed suit alleging, among other things, that the therapists involved had failed either to warn them of the threat to their daughter or to confine the patient.

The California Supreme Court, while recognizing the general rule that a person owes no duty to control the conduct of another, determined that there is an exception to this general rule where the defendant stands in a special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct, citing Restatement (Second) of Torts §315-320. Applying that exception, the court found that the special relationship between the defendant therapists and the patient could support affirmative duties for the benefit of third persons.

The court made an analogy to cases which have imposed a duty upon physicians to diagnose and warn about a patient's contagious disease and concluded that "by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient."

The court also considered various public policy interests determining that the public interest in safety from violent assault outweighed countervailing interests of the confidentiality of patient-therapist communications and the difficulty in predicting dangerousness.

The California Supreme Court ultimately held:

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.

Following *Tarasoff*, the vast majority of courts that have considered the issue have concluded that the relationship between a mental health care professional and his patient constitutes a special relationship which imposes upon the professional an affirmative duty to protect a third party against harm. Thus, the concept of a duty to protect by warning, albeit limited in certain circumstances, has met with virtually universal approval.

> . . . [W]e find that the special relationship between a mental health professional and his patient may, in certain circumstances, give rise to an affirmative duty to warn for the benefit of an intended victim. We find, in accord with *Tarasoff*, that a mental health professional who determines, or under the standards of the mental health professional, should have determined, that this patient presents a serious danger to

another bears a duty to exercise reasonable care to protect by warning the intended victim against such danger.

Mindful that the treatment of mental illness is not an exact science, we emphasize that we hold a mental health professional only to the standard of care of his profession, which takes into account the uncertainty of such treatment. Thus, we will not require a mental health professional to be liable for a patient's violent behavior because he fails to predict such behavior accurately.

Moreover, recognizing the importance of the therapist-patient relationship, the warning to the intended victim should be the least expansive based upon the circumstances. . . .

Having determined that a mental health professional has a duty to protect by warning a third party of potential harm, we must further consider under what circumstances such a duty arises. We are extremely sensitive to the conundrum a mental health care professional faces regarding the competing concerns of productive therapy, confidentiality and other aspects of the patient's well being, as well as an interest in public safety. In light of these valid concerns and the fact that the duty being recognized is an exception to the general rule that there is no duty to warn those endangered by another, we find that the circumstances in which a duty to warn a third party arises are extremely limited.

First, the predicate for a duty to warn is the existence of a specific and immediate threat of serious bodily injury that has been communicated to the professional. . . .

Moreover, the duty to warn will only arise where the threat is made against a specifically identified or readily identifiable victim. Strong reasons support the determination that the duty to warn must have some limits. We are cognizant of the fact that the nature of therapy encourages patients to profess threats of violence, few of which are acted upon. Public disclosure of every generalized threat would vitiate the therapist's efforts to build a trusting relationship necessary for progress. Moreover, as a practical matter, a mental health care professional would have great difficulty in warning the public at large of a threat against an unidentified person. Even if possible, warnings to the general public would "produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public." . . .

Appellees offer two primary arguments as to why this court should not recognize any duty to warn a third party of a patient's threats of harm. First, Appellees argue that a duty to warn should not be imposed on a mental health professional because such a professional is no better able than anyone else to predict violent behavior. Appellees offer various studies in support of its argument that purport to prove that dangerousness cannot be predicted.

While this court is cognizant of the difficulties predicting whether a patient may truly pose a danger to others, this argument rings hollow for a number of reasons. First, . . . the legislature has determined, and this court has already found, that liability may attach for negligently discharging a dangerous patient. Subsumed in finding such liability is a failure to recognize that the patient was dangerous. . . .

Moreover, we are unpersuaded that difficulty in predicting violent conduct alone should justify barring recovery in all situations. The standard of care for mental health professionals adequately takes into account the difficult nature of the problem facing them. . . .

Appellees also argue that the strong policies underlying the protection of the therapist-patient privilege prohibit disclosure of confidential information, and,

thus, preclude the finding of a duty to warn. This court is aware of the critical role that confidentiality plays in the relationship between therapist and patient, constituting, as one author has described, the "sine qua non of successful psychiatric treatment." Nevertheless, we believe that the protection against disclosure of confidential information gained in the therapist-patient relationship does not bar the finding of a duty to warn. . . .

Indeed, the existence of a duty to warn is in accord with the limits on patient-therapist confidentiality recognized by the American Psychiatric Association and the American Medical Association. "When in the clinical judgment of the treating psychiatrist the risk of danger is deemed to be significant, the psychiatrist may reveal confidential information disclosed by the patient." American Psychiatric Association, The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry, (1995 ed.). . . .

Based upon the above, it is clear that the law regarding privileged communications between patient and mental health care professional is not violated by, and does not prohibit, a finding of a duty on the part of a mental health professional to warn an intended victim of a patient's threats of serious bodily harm. As succinctly stated by the court in *Tarasoff*, "The protective privilege ends where the public peril begins."

In summary, we find that in Pennsylvania, based upon the special relationship between a mental health professional and his patient, when the patient has communicated to the professional a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party and when the professional, determines, or should determine under the standards of the mental health profession that his patient presents a serious danger of violence to the third party, then the professional bears a duty to exercise reasonable care to protect by warning the third party against such danger.

Finally we must decide whether judgment on the pleadings was proper in this case. . . .

After consideration of the facts as pled regarding the circumstances surrounding the events of June 27, 1991, and after consideration of Mr. Scuderi's specific instructions designed to prevent the threatened harm, including the reasonable inferences that Ms. Hausler knew of Joseph's violent propensities and that she telephoned Mr. Scuderi in concern for her safety, we find that Mr. Scuderi's warning was reasonable as a matter of law. The warning was discreet and in accord with preserving the privacy of his patient to the maximum extent possible consistent with preventing the threatened harm to Ms. Hausler. Thus, Mr. Scuderi discharged any duty to warn.

While this matter evokes great sympathy, we agree with the lower courts that after examining the complaint in this case, it is clear that on the facts averred, as a matter of law, recovery by Appellant is not possible. Thus, judgment on the pleadings was proper.

For the foregoing reasons, we affirm the judgment of the Superior Court.

[Concurring and concurring and dissenting opinions omitted.]

NOTES TO EMERICH v. PHILADELPHIA CENTER FOR HUMAN DEVELOPMENT, INC.

1. ***Origin of Rule.*** The Restatement (Second) recognizes a person's duty to control his or her minor children, employees, dangerous persons in his or her custody,

and those on the person's land or using the person's chattels. See §§316-318. What are the similarities and differences between those circumstances and the relationship between a patient and a therapist?

2. ***Standard of Care.*** The *Emerich* court held that there would be a duty owed by the psychiatrist to the victim "under certain limited circumstances," which included the specificity of the threats. The court also considered the possibility that the psychiatrist did not, but should have, discovered the threat. Under the *Emerich* holding, could a psychiatrist be liable to the victim of a patient on a claim that, although the patient did not make an explicit threat, a psychiatrist whose treatment of the patient had conformed to the applicable standard of care would have understood that the patient was planning to harm the victim?

3. ***Required Response.*** The *Emerich* court held that as a matter of law, the defendant's response to the perceived risk was adequate. Following *Tarasoff*, the California legislature adopted a statute specifying that in cases where a psychotherapist's duty to warn and protect arises, that duty "shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency." Cal. Civil Code §43.92.

4. ***Practicality of Warnings.*** Where a potentially violent person makes a general threat, a duty to warn may not arise. In Thompson v. County of Alameda, 614 P.2d 728 (Cal. 1980), the court that decided *Tarasoff* rejected imposition of a duty to warn where a county released on furlough a young person who had been in custody in connection with his history of violence and sexual abuse. Despite his threat to kill an unnamed child, the county made no effort to provide warnings. The court concluded that generalized warnings would be difficult to give and would not likely be helpful.

Perspective: Reliability of Predictions of Dangerousness

The defendant in *Emerich* argued that there should not be any duty to warn because dangerousness cannot be predicted with any reliability. Barefoot v. Estelle, 463 U.S. 880, 921 (1983), involved psychiatric predictions of dangerousness relevant to whether the defendant should be executed. Justice Blackmun, dissenting, stated that "psychiatric predictions of long-term future violence are wrong more often than they are right." The American Psychological Association concluded at one time that "the validity of psychological prediction of violent behavior . . . is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments." *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 Am. Psychol. 1099, 1110 (1978). How reliable such predictions should be depends on the purpose for such predictions. The reliability appropriate for giving the death penalty might be different from the reliability required to give a warning. One expert, having reviewed the literature, found that psychiatrists and psychologists were accurate one-third of the time in their predictions of future violence among institutionalized patients who had

been diagnosed as mentally ill and had previously been violent. See generally David L. Faigman et al., 1 *Modern Scientific Evidence: The Law and Science of Expert Testimony* §9.2.1 (2d ed. 2002).

BRADSHAW v. DANIEL

854 S.W.2d 865 (Tenn. 1993)

ANDERSON, J.

We granted this appeal to determine whether a physician has a legal duty to warn a non-patient of the risk of exposure to the source of his patient's non-contagious disease — Rocky Mountain Spotted Fever. The trial court denied the defendant physician's motion for summary judgment, but granted an interlocutory appeal on the issue of the physician's legal duty. The Court of Appeals limited the record and held that the facts were insufficient to show that the risk to the non-patient of contracting Rocky Mountain Spotted Fever was such that a legal duty arose on the part of the physician. We disagree and conclude, for the reasons stated herein, that the physician had a legal duty to warn the non-patient of the risk of exposure to the source of the patient's non-contagious disease.

On July 19, 1986, Elmer Johns went to the emergency room at Methodist Hospital South in Memphis, Tennessee, complaining of headaches, muscle aches, fever, and chills. He was admitted to the hospital under the care and treatment of the defendant, Dr. Chalmers B. Daniel, Jr. Dr. Daniel first saw Johns on July 22, 1986, at which time he ordered the drug Chloramphenicol, which is the drug of choice for a person in the latter stages of Rocky Mountain Spotted Fever. Johns' condition rapidly deteriorated, and he died the next day, July 23, 1986. An autopsy was performed, and the Center for Disease Control in Atlanta conclusively confirmed, in late September 1986, that the cause of death was Rocky Mountain Spotted Fever. Although Dr. Daniel communicated with Elmer Johns' wife, Genevieve, during Johns' treatment, he never advised her of the risks of exposure to Rocky Mountain Spotted Fever, or that the disease could have been the cause of Johns' death.

A week after her husband's death, on August 1, 1986, Genevieve Johns came to the emergency room of Baptist Memorial Hospital in Memphis, Tennessee, with similar symptoms of chills, fever, mental disorientation, nausea, lung congestion, myalgia, and swelling of the hands. She was admitted to the hospital and treated for Rocky Mountain Spotted Fever, but she died three days later, on August 4, 1986, of that disease. It is undisputed that no patient-physician relationship existed between Genevieve Johns and Dr. Daniel.

The plaintiff, William Jerome Bradshaw, is Genevieve Johns' son. He filed this suit alleging that the defendant's negligence in failing to advise Genevieve Johns that her husband died of Rocky Mountain Spotted Fever, and in failing to warn her of the risk of exposure, proximately caused her death. . . .

Here, we are asked to determine whether a physician has an affirmative duty to warn a patient's family member about the symptoms and risks of exposure to Rocky Mountain Spotted Fever, a non-contagious disease. Insofar as we are able to

determine, there is no reported decision from this or any other jurisdiction involving circumstances exactly similar to those presented in this case.

We begin by observing that all persons have a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to others. . . .

In determining the existence of a duty, courts have distinguished between action and inaction. Professor Prosser has commented that "the reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs." Prosser, §56 at 373. . . .

Because of this reluctance to countenance nonfeasance as a basis of liability, as a general rule, under the common law, one person owed no affirmative duty to warn those endangered by the conduct of another. . . .

To mitigate the harshness of this rule, courts have carved out exceptions for cases in which the defendant stands in some special relationship to either the person who is the source of the danger, or to the person who is foreseeably at risk from the danger. . . . Accordingly,

> while an actor is always bound to prevent his acts from creating an unreasonable risk to others, he is under the affirmative duty to act to prevent another from sustaining harm only when certain socially recognized relations exist which constitute the basis for such legal duty. . . .

Decisions of other jurisdictions have . . . held that the relationship of a physician to his patient is sufficient to support the duty to exercise reasonable care to protect third persons against foreseeable risks emanating from a patient's physical illness. Specifically, other courts have recognized that physicians may be liable to persons infected by a patient, if the physician negligently fails to diagnose a contagious disease, or having diagnosed the illness, fails to warn family members or others who are foreseeably at risk of exposure to the disease. See Gammill v. United States, 727 F.2d 950, 954 (10th Cir. 1984) (physician may be found liable for failing to warn a patient's family, treating attendants, or other persons likely to be exposed to the patient of the nature of the disease and the danger of exposure); Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970) *cert. denied* 245 So. 2d 257 (Fla. 1971) (physician has a duty to use reasonable care to advise a patient's family members of the existence and dangers of a disease). . . .

For example, in *Hofmann,* supra, an action was brought against a physician by a child who had contracted tuberculosis as a result of the physician's negligent failure to diagnose the disease in his patient, the child's father. Reversing a summary judgment for the physician, the Florida District Court of Appeals held

> that a physician owes a duty to a minor child who is a member of the immediate family and living with a patient suffering from a contagious disease to inform those charged with the minor's well being of the nature of the contagious disease and the precautionary steps to be taken to prevent the child from contracting such disease and that the duty is not negated by the physician negligently failing to become aware of the presence of such a contagious disease. . . .

Returning to the facts of this case, first, it is undisputed that there was a physician-patient relationship between Dr. Daniel and Elmer Johns. Second, here, as in the

contagious disease context, it is also undisputed that Elmer Johns' wife, who was residing with him, was at risk of contracting the disease. This is so even though the disease is not contagious in the narrow sense that it can be transmitted from one person to another. Both Dr. Daniel and Dr. Prater, the plaintiff's expert, testified that family members of patients suffering from Rocky Mountain Spotted Fever are at risk of contracting the disease due to a phenomenon called clustering, which is related to the activity of infected ticks who transmit the disease to humans. Dr. Prater also testified that Dr. Daniel negligently failed to diagnose the disease and negligently failed to warn his patient's wife, Genevieve Johns, of her risk of exposure to the source of disease. Dr. Daniel's expert disputed these conclusions, but Dr. Daniel conceded there is a medical duty to inform the family when there is a diagnosis of the disease. Thus, this case is analogous to the *Tarasoff* line of cases adopting a duty to warn of danger and the contagious disease cases adopting a comparable duty to warn. Here, as in those cases, there was a foreseeable risk of harm to an identifiable third party, and the reasons supporting the recognition of the duty to warn are equally compelling here.

We, therefore, conclude that the existence of the physician-patient relationship is sufficient to impose upon a physician an affirmative duty to warn identifiable third persons in the patient's immediate family against foreseeable risks emanating from a patient's illness. Accordingly, we hold that under the factual circumstances of this case, viewing the evidence in a light most favorable to the plaintiff, the defendant physician had a duty to warn his patient's wife of the risk to her of contracting Rocky Mountain Spotted Fever, when he knew, or in the exercise of reasonable care, should have known, that his patient was suffering from the disease. Our holding here is necessarily limited to the conclusion that the defendant physician owed Genevieve Johns a legal duty. We express no opinion on the other elements which would be required to establish a cause of action for common-law negligence in this case.

Accordingly, the judgment of the Court of Appeals granting the defendant's motion for summary judgment is reversed, and this cause is remanded to the trial court for proceedings consistent with this opinion. . . .

NOTES TO BRADSHAW v. DANIEL

1. ***Beneficiaries of Duty.*** The duty recognized in *Bradshaw* is owed to family members of the physician's patient. A physician who was aware that a patient suffered from a contagious disease would have an obligation to warn members of that patient's family or individuals who might treat the patient, but would have no obligation to extend a warning to members of the public in general. See Gammill v. United States, 727 F.2d 950 (9th Cir. 1984). The disease in *Bradshaw* was not contagious. Why did the court conclude that there was a duty to the family in this case?

2. ***Problems: Range of Risks.*** Would the analysis in *Bradshaw* support imposition of liability in the following situations?

A. After an infant receives a dose of oral polio vaccine, some amounts of live polio virus may grow in the infant's digestive tract. This can be dangerous to adults who come into contact with the infant if the adults are not immune to polio. A physician did not explain this risk to the parents of an immunized baby, and one of the parents contracted polio from the baby in this manner. See Tenuto v. Lederle Laboratories, 687 N.E.2d 1300 (N.Y. 1997).

B. A taxi driver was called to a place of business to pick up one of its customers. The customer murdered him shortly after getting into the taxi. The driver's estate claimed that the business operator was aware that the murderer had just committed other crimes and sought to impose liability on the business for its failure to warn the driver about the customer's likely conduct. Would the analysis in Bradshaw v. Daniel support this claim? See Mangeris v. Gordon (DBA Velvet Touch Massage Salon), 580 P.2d 481 (Nev. 1978).

C. A physician concluded that a patient faced significant health risks because of eating a diet extraordinarily heavy in saturated fats but did not warn members of the patient's family that they, too, faced those health risks. Would the physician be liable to the family members if those health risks materialized?

III. Duty Limited by Type of Harm

For two types of damages, the causal link between the defendant's act and the plaintiff's harm has traditionally been thought of as too tenuous to allow recovery. One of these is emotional distress caused by a defendant's negligent conduct that did not simultaneously involve some physical harm or impact to the plaintiff. The other is "mere economic harm," a claim of financial loss related to conduct by the defendant that did not involve any physical harm to the plaintiff or the plaintiff's property. The difficulties in proof and courts' fear of fraud led courts to refuse to impose liability in these situations.

In another situation, the birth of a child, courts have dealt with the fundamental question of whether to recognize any harm at all when the child was unwanted. These cases involve claims related to the birth of children whom their parents did not want, either because a sterilization procedure failed or because of errors in genetic counseling or other prenatal work that would have led the mother to abort the pregnancy had the prenatal tests been done correctly. Courts recognized policy problems with allowing recovery in these cases as well.

A. Negligently Inflicted Emotional Distress

In cases where a defendant's negligent conduct causes the plaintiff to suffer a physical injury at the time of the defendant's conduct, all courts allow the plaintiff to recover damages for the immediate physical harm and also for emotional harm associated with that initial physical harm. On the other hand, courts have had difficulty with cases where a plaintiff suffers no initial physical injury due to a defendant's negligent conduct but claims that the defendant's conduct caused an emotional injury. Robb v. The Pennsylvania Railroad Co. traces the history of legal developments in cases involving emotional harm.

A related line of cases involves people who suffered emotional distress as a result of observing another being physically harmed. James v. Lieb explains the development of the concept of bystander recovery and applies it in a case involving a brother's observation of his sister's severe injury. Grotts v. Zahner treats the question of how close the

relationship must be between the bystander and the defendant's initial victim in order to support recovery. Rabideau v. City of Racine continues that inquiry and addresses the issue of emotional distress damages in cases of harm to property.

ROBB v. THE PENNSYLVANIA RAILROAD CO.

210 A.2d 709 (Del. 1965)

HERRMANN, J.

The question before us for decision is this: May the plaintiff recover for the physical consequences of fright caused by the negligence of the defendant, the plaintiff being within the immediate zone of physical danger created by such negligence, although there was no contemporaneous bodily impact?

Considering the record in the light most favorable to the plaintiff, the facts may be thus summarized:

A private lane leading to the home of the plaintiff, Dixie B. Robb, was intersected by a railroad right-of-way leased to the defendant, The Pennsylvania Railroad Company. On March 11, 1961, the plaintiff was driving an automobile up the lane toward her home when the vehicle stalled at the railroad grade crossing. A rut about a foot deep had been negligently permitted by the defendant to form at the crossing. The rear wheels of the automobile lodged in the rut and, although the plaintiff tried to move the vehicle for several minutes, she was unable to do so. While thus engaged in attempting to move the vehicle, the plaintiff saw the defendant's train bearing down upon her. With only seconds to spare, she jumped from the stalled vehicle and fled for her life. Immediately thereafter, the locomotive collided with the vehicle, hurled it into the air and demolished it. The plaintiff was standing within a few feet of the track when the collision occurred and her face was covered with train soot and dirt. However — and this is the nub of the problem — she was not touched by the train; there was no bodily impact; and she suffered no contemporaneous physical injury. Nevertheless, the plaintiff was greatly frightened and emotionally disturbed by the accident as the result of which she sustained shock to her nervous system. The fright and nervous shock resulted in physical injuries. . . .

The defendant moved for summary judgment taking the position that, assuming the defendant's negligence and its proximate causation of the plaintiff's fright and nervous shock, she may not recover because there was no "impact" and contemporaneous physical injury. The trial judge agreed and granted summary judgment in the defendant's favor, stating: "In spite of a modern trend to the contrary in other jurisdictions, I feel compelled to follow the 'impact theory' in this matter by reason of well established precedents in this State." The plaintiff appeals. . . .

There is sharp diversity of judicial opinion as to the right to recover for the physical consequences of fright in the absence of an impact and contemporaneous physical injury. . . .

The two schools of thought in the matter at hand evolved from two lines of cases originating about the turn of the century. The impact rule was established in America by the leading cases of Ewing v. Pittsburgh, etc. R. Co., 147 Pa. 40, 23 A. 340, 14 L.R.A. 666 (1892); Mitchell v. Rochester R. Co., 151 N.Y. 107, 45 N.E. 354, 34 L.R.A. 781 (1896); and Spade v. Lynn & Boston R. Co., 168 Mass. 285, 47 N.E. 88, 38 L.R.A. 512 (1897). These cases reflected the influence of the earlier English case of Victorian

Railways Commissioners v. Coultas, 13 App. Cas. 222 (1888), recognized generally as the first notable case to espouse the impact rule. . . .

The impact rule is based, generally speaking, upon three propositions expounded in the *Mitchell* and *Spade* cases:

1) It is stated that since fright alone does not give rise to a cause of action, the consequences of fright will not give rise to a cause of action. This is now generally recognized to be a non-sequitur, want of damage being recognized as the reason that negligence causing mere fright is not actionable. It is now generally agreed, even in jurisdictions which have adopted the impact rule, that the gist of the action is the injury flowing from the negligence, whether operating through the medium of physical impact or nervous shock.

2) It is stated that the physical consequences of fright are too remote and that the requisite causal connection is unprovable. The fallacies of this ground of the impact rule, viewed in the light of growing medical knowledge, were well stated by Chief Justice Maltbie in Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941). It was there pointed out that the early difficulty in tracing a resulting injury back through fright or nervous shock has been minimized by the advance of medical science; and that the line of cases permitting recovery for serious injuries resulting from fright, where there has been but a trivial impact in itself causing little or no injury, demonstrate that there is no insuperable difficulty in tracing causal connection between the wrongdoing and the injury via the fright.

3) It is stated that public policy and expediency demand that there be no recovery for the physical consequences of fright in the absence of a contemporaneous physical injury. In recent years, this has become the principal reason for denying recovery on the basis of the impact rule. In support of this argument, it is said that fright is a subjective state of mind, difficult to evaluate, and of such nature that proof by the claimant is too easy and disproof by the party charged too difficult, thus making it unsafe as a practical matter for the law to deal with such claims. This school of thought concludes that to permit recovery in such cases would open a "Pandora's Box" of fictitious and fraudulent claims involving speculative and conjectural damages with which the law and medical science cannot justly cope. . . .

In considering the expediency ground, the Supreme Court of Connecticut said in the *Orlo* case, supra:

". . . There is hardly more risk to the accomplishment of justice because of disparity in possibilities of proof in such situations than in those where mental suffering is allowed as an element of damage following a physical injury or recovery is permitted for the results of nervous shock provided there be some contemporaneous slight battery or physical injury. Certainly it is a very questionable position for a court to take, that because of the possibility of encouraging fictitious claims compensation should be denied those who have actually suffered serious injury through the negligence of another." . . .

It is our opinion that the reasons for rejecting the impact rule far outweigh the reasons which have been advanced in its support.

The cause of action and proximate cause grounds for the rule have been discredited in the very jurisdictions which first gave them credence. As stated by Holmes, C.J., for the Supreme Judicial Court of Massachusetts, the *Spade* decision did not result from "a logical deduction from the general principles of liability in tort, but as a

limitation of those principles upon purely practical grounds." Smith v. Postal Telegraph Cable Co., 174 Mass. 576, 55 N.E. 380, 47 L.R.A. 323 (1899). . . .

If more were needed to warrant a declination to follow the cause of action and the proximate cause arguments, reference to the fictional and mechanical ends to which the impact rule has been carried would suffice for the purpose. The most trivial bodily contact, itself causing little or no injury, has been considered sufficient to take a case out of the rule and permit recovery for serious physical injuries resulting from the accompanying fright. Token impact sufficient to satisfy the rule has been held to be a slight bump against the seat, dust in the eyes, inhalation of smoke, a trifling burn, jostling in an automobile; indeed any degree of physical impact, however slight. . . .

This leaves the public policy or expediency ground to support the impact rule. We think that ground untenable.

It is the duty of the courts to afford a remedy and redress for every substantial wrong. . . . Neither volume of cases, nor danger of fraudulent claims, nor difficulty of proof, will relieve the courts of their obligation in this regard. None of these problems are insuperable. Statistics fail to show that there has been a "flood" of such cases in those jurisdictions in which recovery is allowed; but if there be increased litigation, the courts must willingly cope with the task. As to the danger of illusory and fictional claims, this is not a new problem; our courts deal constantly with claims for pain and suffering based upon subjective symptoms only; and the courts and the medical profession have been found equal to the danger. Fraudulent claims may be feigned in a slight-impact case as well as in a no-impact case. Likewise, the problems of adequacy of proof, for the avoidance of speculative and conjectural damages, are common to personal injury cases generally and are surmountable, being satisfactorily solved by our courts in case after case.

We are unwilling to accept a rule, or an expediency argument in support thereof, which results in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged or a difficult problem of the proof or disproof of speculative damage may be presented. Justice is not best served, we think, when compensation is denied to one who has suffered injury through the negligence of another merely because of the possibility of encouraging fictitious claims or speculative damages in other cases. Public policy requires the courts, with the aid of the legal and medical professions, to find ways and means to solve satisfactorily the problems thus presented — not expedient ways to avoid them.

Accordingly, we decline to adopt the impact rule, as urged by the defendant in this cause. . . .

We hold, therefore, that where negligence proximately caused fright, in one within the immediate area of physical danger from that negligence, which in turn produced physical consequences such as would be elements of damage if a bodily injury had been suffered, the injured party is entitled to recover under an application of the prevailing principles of law as to negligence and proximate causation. Otherwise stated, where results, which are regarded as proper elements of recovery as a consequence of physical injury, are proximately caused by fright due to negligence, recovery by one in the immediate zone of physical risk should be permitted.

This view has the general approval of the writers on the subject and is now distinctly the majority rule. We are satisfied that it is the better rule, supported by reason, logic and fairness.

We conclude, therefore, that the Superior Court erred in the instant case in holding that the plaintiff's right to recover is barred by the impact rule. The plaintiff claims physical injuries resulting from fright proximately caused by the negligence of the defendant. She should have the opportunity to prove such injuries and to recover therefor if she succeeds. The summary judgment granted in favor of the defendant must be reversed and the cause remanded for further proceedings.

NOTES TO ROBB v. THE PENNSYLVANIA RAILROAD CO.

1. ***Distinguishing Emotional Consequences of Physical Harms.*** In all jurisdictions, a defendant who causes physical harm to a plaintiff will be liable in damages for both that physical harm and any emotional consequences of that harm. *Robb* and other negligent infliction of emotional distress cases present a different problem. In these cases, a plaintiff does not claim that sustaining a physical harm has led to emotional consequences. Rather, the plaintiff claims that an emotional response to the defendant's conduct has caused harmful consequences to the plaintiff. In *Robb*, the consequence that the plaintiff suffered was a physical harm. The *Robb* court did not have to consider whether a plaintiff who suffered only nonphysical consequences of the defendant's conduct could be entitled to recovery.

2. ***Shortcomings of the Impact Rule.*** The *Robb* opinion describes the types of minimal impact that impact rule jurisdictions were willing to treat as satisfying the impact requirement and therefore authorizing the plaintiff to recover for the consequences of emotional harm. Why does their relative insignificance ("slight bump," "jostling") contradict the purposes for which the impact rule was developed?

3. ***Definition of "Zone of Danger."*** The rule ultimately adopted by the court in *Robb* is called the *zone of danger* rule. The rule does not allow everyone who suffers an adverse emotional result from a defendant's conduct to attempt to prove causation. How does the *Robb* court's opinion determine which individuals, out of all the individuals who might suffer emotional reactions to a defendant's conduct, are eligible to seek damages? How was the plaintiff in *Robb* within a zone of danger created by the defendant's negligent conduct?

4. ***Justification of Zone of Danger Test.*** The *Robb* court rejects the position that requiring impact can weed out false claims of harmful emotional reactions to defendants' negligent conduct. Tort law, the court states, can use other methods to avoid "fictitious claims or speculative damages." How might the zone of danger requirement work to avoid the risks of false or imaginary claims?

JAMES v. LIEB

375 N.W.2d 109 (Neb. 1985)

WHITE, J. . . .

The following facts were alleged in the petition. On August 10, 1983, plaintiffs' son, Gregory Duwayne James, and their daughter, Demetria, were riding their bicycles north on 50th Street in Omaha, Nebraska. A garbage truck owned by the defendant

Watts Trucking Service, Inc., and driven by its employee, John Milton Lieb, was backing west on Spaulding Street. The truck backed into the intersection of 50th and Spaulding Streets, through a stop sign, and hit and ran over Demetria, killing her. Gregory helplessly watched the entire incident. As a result of witnessing his sister's peril, Gregory became physically ill and suffered, and will continue to suffer, mental anguish and emotional distress. . . .

The defendants demurred, contending that since plaintiffs' petition failed to allege that Gregory was within the "zone of danger" or in fear for his own safety, no cause of action for emotional distress had been asserted under Nebraska law. Based upon our prior holding in Fournell v. Usher Pest Control Co., 208 Neb. 684, 305 N.W.2d 605 (1981), the trial court dismissed the petition. . . .

. . . The majority in [*Fournell*] held that, under Nebraska law, to state a claim for negligent infliction of emotional distress or trauma, a plaintiff must first show that some type of physical injury resulted from the emotional trauma and, secondly, that he or she was within the "zone of danger or actually put in fear for his [or her] own safety." . . .

The "zone of danger" rule in general has been defended as a more rational means of determining liability than the "impact" rule which it replaced. . . .

However, in 1968 the California Supreme Court became the first jurisdiction to abolish the "zone of danger" rule and allow a bystander to recover for negligently inflicted emotional distress in its now landmark decision of Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). . . .

In *Dillon* the plaintiffs, a mother and daughter, both witnessed an accident in which another daughter was struck and killed by a negligent driver. Arguably, the sister of the victim was within the zone of danger; her mother was not. In the view of the California Supreme Court, the facts of *Dillon* illustrated the fallacy of the "zone of danger" rule, which would deny recovery to one plaintiff, the mother, and allow recovery to the daughter. In the court's view, relief for the trauma equally suffered by both plaintiffs upon the apprehension of the child's death should not be based on the happenstance of a few yards. . . .

The interest worthy of legal protection presented by bystander cases such as the one before us was best described by the New Jersey Supreme Court when it adopted *Dillon:*

> [T]he interest assertedly injured is more than a general interest in emotional tranquility. It is the profound and abiding sentiment of parental love. The knowledge that loved ones are safe and whole is the deepest wellspring of emotional welfare. Against that reassuring background, the flashes of anxiety and disappointment that mar our lives take on safer hues. No loss is greater than the loss of a loved one, and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure.

Portee v. Jaffee, 84 N.J. 88, 97, 417 A.2d 521, 526 (1980). We find the profound and abiding love for one's sibling to be no less significant.

In its analysis the *Dillon* court reversed its position on the concept of a limited duty precluding liability to a plaintiff outside the zone of physical danger. According to the court, "the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case." . . .

While recognizing that "no immutable rule" could establish the defendant's duty for every future case, the court suggested the following "guidelines" as aids in resolution of bystander claims:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. . . .

We adopt the foreseeability approach of *Dillon*, with the following comments and modifications.

First, of the three *Dillon* factors the relationship between the plaintiff and victim is the most valuable in determining foreseeability, and therefore the most crucial. [M]edical authorities are generally in agreement that a mere bystander who has no significant relationship with the victim will not suffer the profound, systematic mental and emotional reaction likely to befall a close relative as a result of witnessing or learning of the victim's death.

To satisfy this factor we choose not to require a relationship within a certain degree of consanguinity. . . . Rather, we will require that there be a marital or intimate familial relationship between the plaintiff and the victim. . . .

Our holding would not eliminate aunts, uncles, and grandparents from the class of potential plaintiffs, but would place upon them a heavier burden of proving a significant attachment.

Second, we address the factor that plaintiff's shock result from a "sensory and contemporaneous observance of the accident." No other aspect of the *Dillon* decision has drawn more attention than this factor. We agree with the observation of the Montana Supreme Court that if a "plaintiff is required to experience actual sensory perception of the accident, the requirement of proximity is necessarily satisfied." Versland v. Caron Transport, 671 P.2d 583, 586 (1983). It has been suggested that the requirements of physical proximity and "contemporaneous observation" impugn the integrity of the *Dillon* approach and that *Dillon* has merely replaced the arbitrary spatial boundary of the "zone of danger" rule with an arbitrary temporal boundary.

It is true in cases such as the one before us that the contemporaneous observation guideline would serve to assure the minds of a jury that the emotional injury is serious. However, if a sufficiently close relationship exists, the psychological reaction of the plaintiff in many cases could be the same or perhaps worse upon the hearing of the loss.

Rather, this guideline is, in effect, a policy consideration concerning the extent of the defendant's liability. As one court has stated, "Without such perception, the threat of emotional injury is lessened and the justification for liability is fatally weakened. The law of negligence, while it redresses suffering wrongfully caused by others, must not itself inflict undue harm by imposing an unreasonably excessive measure of liability." Portee v. Jaffee, 84 N.J. 88, 99, 417 A.2d 521, 527 (1980).

We believe that the Massachusetts Supreme Court has a better perspective on this criterion. . . .

> A plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead

> to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injury are equally foreseeable.

Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 518, 413 N.E.2d 690, 697 (1980).

In addition to proving a sufficiently close relationship, we hold that the emotional trauma, the foreseeable harm to be redressed, must result from either death or serious injury to the victim. While minor injuries to a loved one may trigger emotions of sorrow and anxiety, these emotions pale in comparison to the profound grief, fright, and shock experienced following an accidental death or serious injury.

Before concluding, we must also address the further requirement of a cause of action for emotional distress in *Fournell*, that plaintiff must evidence some concurrent physical injury resulting from the emotional trauma. Other courts adopting the *Dillon* approach, to a certain degree, have retained this feature of the "zone of danger" rule. We now reject this requirement for many of the reasons stated in the Chief Justice's dissent in *Fournell*, supra at 697, 305 N.W.2d at 611: "To . . . require that, before one who is mentally injured may recover, he must at least regurgitate once seems . . . to be imposing upon the law a requirement that makes little or no sense."

Ostensibly, the problem in this area is of proving to a jury that a reasonable person in the position of the bystander plaintiff has suffered a compensable injury. While physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the current state of medical science and advances in psychology. There are primarily three problems with this requirement: (1) It is overinclusive, since it could possibly lead to recovery for trivial claims of mental distress accompanied by physical symptoms; (2) It is underinclusive, since serious distress is arbitrarily deemed not compensable if not accompanied by physical symptoms; and (3) It encourages extravagant pleadings and distorted testimony.

In reaching our decision we are not unmindful of the several policy arguments advanced against the cause of action we have adopted. Typically, opponents of expanding liability in this area contend that (1) bystander recovery will inundate the courts with fictitious injuries and fraudulent claims; (2) courts will be deluged with a flood of litigation; (3) bystander recovery will unduly burden defendants with undue liability; and (4) once recognized, liability cannot reasonably be restrained. Each of these arguments have been adequately reflected by other courts. We add the following comments.

First, even courts opposed to recognizing this cause of action have acknowledged that the fear of fraudulent claims alone is an insufficient reason to deny all such claims. Furthermore, the "zone of danger" rule also carries with it the risk of fraudulent claims. "It is not hard to imagine plaintiffs and their attorneys falsely alleging that the claimant was in some small way injured by the defendant's negligence, or was within the zone of danger in order to present a valid cause of action." Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. Fam. L. 163, 174 (1977). Also, it is not unlikely that under a "zone of danger" rule plaintiffs would carefully draft pleadings so as to vaguely present a factual question that the plaintiff was also in peril.

Second, taking California as an example, experience shows that its courts have not been overwhelmed with litigation in this area.

Third, the "dollars and cents" argument that society cannot afford the costs that will ensue from recognizing liability for the demonstrable injury of emotional distress naturally resulting from defendant's negligent act has been aptly dispelled.

The possibility of increased insurance costs alone should not deny recovery for an otherwise valid claim.

Finally, we are not delayed by the specter that recognizing a cause of action for bystander recovery will naturally entail liability to every acquaintance of the victim. As we have emphasized, the class of bystanders limited to those with a marital or intimate familial status will sufficiently circumscribe the defendant's liability.

In summary, we hold that a plaintiff bystander has a cause of action for negligently inflicted foreseeable emotional distress upon a showing of marital or intimate familial relationship with a victim who was seriously injured or killed as a result of the proven negligence of a defendant. We thus find error in the district court's order sustaining the defendants' demurrer.

Reversed and remanded for further proceedings.

[Dissenting opinion omitted.]

NOTES TO JAMES v. LIEB

1. ***Bystander Recovery.*** In bystander recovery cases, the plaintiff suffers emotional distress in reaction to someone else's injury, rather than in reaction to being personally in peril.

2. ***Significance of Dillon v. Legg Guidelines.*** The *Dillon* court stated that three factors, or "guidelines," can establish the foreseeability to the defendant of the plaintiff's emotional distress. Those guidelines are the plaintiff's physical proximity to the injurious event, the plaintiff's contemporaneous observance of the event, and the relationship between the plaintiff and the direct victim of the defendant's conduct. Twenty-one years after deciding *Dillon*, the California Supreme Court held, in Thing v. La Chusa, 771 P.2d 814 (Cal. 1989), that those guidelines are required factors.

3. ***Plaintiff's Awareness of Direct Victim's Injury.*** Following *Dillon*, decisions in California interpreted the contemporaneous observance criterion with varied degrees of strictness. In Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969), the plaintiff mother was allowed to recover when she immediately arrived on the scene after the injury caused by an explosion that she had heard. In Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977), the plaintiff mother was denied recovery where she had arrived at the scene of an accident after its occurrence.

Numerous decisions have rejected negligent infliction of emotional distress claims where the plaintiff learned of the direct victim's injury in a telephone call. See, e.g., Cohen v. McDonnell Douglas Corp., 450 N.E.2d 581 (Mass. 1983), where the plaintiff learned of her son's death seven hours after an airplane crash and did not observe the crash or her son's injury. Denying a cause of action, the court noted that the plaintiff was informed by means of a telephone conversation at her home in Massachusetts and that "at all pertinent times, Nellie Cohen was more than 1,000 miles from the scene of the crash." Should the physical distance affect the court's analysis of the fact that the plaintiff received the information in a phone call?

4. ***Physical Manifestation of Emotional Distress.*** Many courts continue to require physical manifestation of emotional distress as an element of this cause of action. The *James* court's discussion of reasons why that requirement can be discarded are parallel to arguments used by courts in rejecting the impact rule for this category of cases. Where physical manifestations continue to be required, courts deal with problems of

defining "physical." Temporary physical responses, such as loss of bladder control may suffice. See Armstrong v. Paoli Memorial Hospital, 633 A.2d 605 (Pa. Super. Ct. 1993). Post-traumatic stress disorder, including weight loss and poor appetite, has been rejected as inadequate by one court in a jurisdiction that requires physical manifestations. See Wilson v. Sears, Roebuck & Co., 757 F.2d 948 (8th Cir. 1985).

5. ***Problem: Foreseeability of Non-Relative's Distress.*** While walking down a street, the plaintiff came upon Joanne Perkins, who had been negligently struck by a van operated by Airborne Freight Corporation. The plaintiff immediately went to Perkins's aid. On discovering that Perkins had no pulse, the plaintiff began to administer CPR and managed to restore Perkins's heartbeat on two brief occasions. Perkins was bleeding from her eyes, ears, nose, and mouth, as well as from other injured areas of her body, and the plaintiff became drenched in blood in the course of administering CPR. Public safety personnel soon responded to the accident, and the plaintiff watched as they placed Perkins in an ambulance and drove away. Perkins was taken to Massachusetts General Hospital and was soon pronounced dead. As a result of the failed rescue attempt, the plaintiff developed various symptoms of emotional distress that led to physical problems. The plaintiff apparently blamed himself for Perkins's death and was of the opinion that he has failed at the most important thing in his life. At the time of the accident, Perkins and the plaintiff were strangers. Should the "danger invites rescue" rule be of help to the plaintiff seeking damages for negligent infliction of emotional distress? See Migliori v. Airborne Freight Corp., 690 N.E.2d 413 (Mass. 1998).

Perspective: Negligent Infliction of Emotional Distress

A wide array of arguments can support treating negligently inflicted emotional distress like other negligently caused harms. If defendants do not pay for the emotional harm they cause, they will not have a proper incentive to take desirable precautions or to cut back their activities to an appropriate level. Also, emotional harms are no less speculative in terms of their existence and amount than other injuries for which recovery is allowed, such as pain and suffering accompanying immediate physical harm. See Peter A. Bell, *The Bell Tolls: Towards Full Tort Recovery for Psychic Injury*, 36 Fla. L. Rev. 333 (1992). If the existence and severity of emotional harm could be evaluated accurately by modern technology, would these arguments be sufficient to justify equal treatment of negligently inflicted emotional and physical harms?

GROTTS v. ZAHNER

989 P.2d 415 (Nev. 1999)

MUPIN, J.

Appellant, Kellie Grotts ("Grotts"), and her fiance were involved in an accident with respondent Gertrude Zahner ("Zahner"). Grotts commenced her action below

against Zahner seeking "bystander" emotional distress damages in connection with fatal injuries sustained by her fiance in the accident. The district court dismissed her claim of bystander emotional distress on the ground that she was not, as a matter of law, "closely related" to her fiance for these purposes. Grotts appeals.

A bystander who witnesses an accident may recover for emotional distress in certain limited situations. See State v. Eaton, 101 Nev. 705, 716, 710 P.2d 1370, 1377-78 (1985) (citing Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 916, 69 Cal. Rptr. 72 (Cal. 1968)). To recover, the witness-plaintiff must prove that he or she (1) was located near the scene; (2) was emotionally injured by the contemporaneous sensory observance of the accident; and (3) was closely related to the victim.

In State Department of Transportation v. Hill, 114 Nev. 810, 816, 963 P.2d 480, 483 (1998), a plurality of this court determined that "whether a plaintiff can recover [damages] for NIED [negligent infliction of emotional distress] after witnessing injury to another based on the plaintiff's relationship to the victim is generally a question of fact." Acknowledging that obvious cases will exist where the issue of "closeness" can be determined as a matter of law, the plurality concluded that the fact finder in most cases should be left with the task of assessing the nature and quality of the claimant's relationship to the victim for these purposes.

We now conclude, contrary to the plurality holding in *Hill*, that standing issues concerning "closeness of relationship" between a victim and a bystander should, as a general proposition, be determined based upon family membership, either by blood or marriage. Immediate family members of the victim qualify for standing to bring NIED claims as a matter of law. When the family relationship between the victim and the bystander is beyond the immediate family,[1] the fact finder should assess the nature and quality of the relationship and, therefrom, determine as a factual matter whether the relationship is close enough to confer standing. This latter category represents the "few close cases" where standing will be determined as an issue of fact, either by a jury or the trial court sitting without a jury. We therefore hold that any non-family "relationship" fails, as a matter of law, to qualify for NIED standing.

In this case, Grotts claims standing to lodge a "bystander" NIED claim because of her affianced relationship to the victim. Because she was not a member of his "family" by blood or marriage, we hold that she does not enjoy the type of "close relationship" required under *Eaton*.

For the above reasons, we affirm the trial court.

ROSE, C.J., dissenting.

Just a year ago, in State, Department of Transportation v. Hill, 114 Nev. 810, 963 P.2d 480 (1998), we drafted a less rigid and more equitable framework for deciding negligent infliction of emotional distress issues. The majority's departure from the framework set forth in *Hill* prevents that procedure from being tested in our district courts to determine its validity. I believe we are discarding this precedent prematurely. . . .

The rule adopted by the majority requires a relationship by blood or marriage before one can claim to have a close relationship for purposes of pursuing damages for negligent infliction of emotional distress. While this rule will be predictable, it will permit some people to pursue this claim who have no close relationship, and yet

[1] Family relationships beyond the first degree of consanguinity.

prohibit others who have a loving, close relationship with someone injured or killed from pursuing these claims merely because they are not related by blood or marriage.

The case at issue provides a good example. Kellie Grotts and John Colwell were very much in love and expected to marry in the near future. They were at the zenith of love and commitment. Numerous plays and novels have been written about the great loss suffered when this type of relationship ends with the death of one party. Yet the majority denies Kellie Grotts' claim for emotional distress caused as a result of witnessing the death of the love of her life and constant companion simply because their wedding date was a few months off. This same scenario could happen to an older man and woman who, for a variety of reasons, had lived together for years but were not formally married.

And the unfairness of the rule adopted today does not stop there. Anyone living in a non-traditional relationship will be denied the chance to recover emotional distress damages, while those living together with benefit of marriage will not suffer such prejudice. It is a fact of life that many gay men and lesbian women have partners with whom they have lived for decades and shared a close, loving relationship. These individuals will be denied the right to even claim damages for emotional distress for witnessing injury or death to their partner for no other reason than that they are not legally married, a status they cannot prevent. The closeness of two people should be judged by the quality and intimacy of the relationship, not by whether there is a blood relationship or whether a document has been filed at the court house. A segment of our population should not be denied legal redress simply because of their lifestyle.

The rule we adopted in *Hill* permits a judge to first scrutinize the claim of emotional distress to determine if the relationship is sufficiently close to create an issue of fact to present to a jury. If it is, the jury will then hear all the facts of the case, including the nature of the relationship existing between the plaintiff and the party injured or killed. We ask juries to make all sorts of difficult determinations and deciding the closeness of a relationship is a judgment juries are uniquely qualified to make. Leaving this factual determination to the jury would give Nevada a reasonably flexible rule that does not arbitrarily bar those who would otherwise be able to establish a close relationship. The majority of this court once saw the wisdom of this rule.

Accordingly, I dissent.

NOTES TO GROTTS v. ZAHNER

1. ***Non-Relatives as Eligible Plaintiffs.*** Courts that recognize bystander recovery ordinarily base that result on the idea that extreme distress upon seeing a serious injury to another human being is far more foreseeable if the immediate victim is a close relative of the bystander than if the immediate victim and the bystander are strangers. Some courts continue to treat these cases as the dissent in *Grotts* recommends. For example, cohabitants who proved a stable and significant relationship were deemed to qualify for this cause of action in Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994). The California Supreme Court rejects that result. See Elden v. Sheldon, 758 P.2d 582 (Cal. 1988).

2. ***Inadequacy of Foreseeability Alone.*** In a notable and horrible case, a plaintiff's close friend and neighbor entrusted her son to her, and the plaintiff took the child to a circus. A leopard attacked and killed the child, and the plaintiff witnessed that event. Despite the foreseeability of her distress, recovery against the circus was denied because

there was no intimate family connection between the plaintiff and the child. See Eyrich ex rel. Eyrich v. Dam, 193 N.J. Super. 244, 473 A.2d 539 (App. Div.), *cert. denied,* 97 N.J. 583, 483 A.2d 127 (1984).

RABIDEAU v. CITY OF RACINE

627 N.W.2d 795 (Wis. 2001)

BABLITCH, J.

Dakota was shot by a City of Racine police officer. He subsequently died from the injury. Dakota lived with Julie Rabideau (Rabideau), who witnessed the events leading to his death. Rabideau subsequently filed a claim for damages against the City of Racine (the City). Racine County Circuit Court Judge Allan B. Torhorst granted summary judgment to the City, and the court of appeals affirmed.

The primary question presented in this case is whether Rabideau is entitled to damages for emotional distress. Although the question of whether or not a bystander may recover damages after witnessing an accident is a legal question that this court has previously addressed, this particular case is distinguishable from others: Dakota was a dog, a companion to Rabideau. . . .

We begin our analysis by briefly reviewing the facts. Rabideau and Officer Jacobi were neighbors. On March 31, 1999, Officer Jacobi had just returned home. Across the street, Rabideau was returning home as well. Dakota jumped out of Rabideau's truck. He crossed the street to the Jacobi house where Jed, the Jacobi's Chesapeake Bay retriever, was in the yard.

There is significant disagreement between the parties concerning what subsequently occurred. The City argued that Dakota came onto the Jacobi property and attacked Jed. Officer Jacobi, it is contended, shouted at Dakota to no effect. The City argues that Officer Jacobi, fearing for the safety of Jed, and for the safety of his wife and child who were nearby, fired a number of shots with his service revolver. Dakota moved toward the street and turned his head and was snarling. Officer Jacobi, believing the dog was about to charge, fired a third time and struck Dakota.

On the other hand, Rabideau contends that Dakota was sniffing Jed, not biting or acting aggressively. She asserts that she called Dakota and was crossing the street to retrieve him when shots rang out.

Although both parties agree that three shots were fired, Rabideau maintains that Dakota was stepping off the curb toward her when he was hit by Officer Jacobi's second shot. Rabideau asserts that while Dakota was struggling to crawl away, Officer Jacobi fired again and missed.

Two days after the shooting occurred, Rabideau was informed that Dakota died. Upon hearing this news, she collapsed and was given medical treatment.

Rabideau filed a complaint in small claims court, which stated: "City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention." . . .

Rabideau argues that the tort of negligent infliction of emotional distress to a bystander should encompass the facts of this case. Our tort law recognizes a claim for damages where a bystander suffers great emotional distress after witnessing an accident or its gruesome aftermath involving death or serious injury to a close relative. The elements of the claim are: "(1) that the defendant's conduct [in the underlying

accident] fell below the applicable standard of care, (2) that the plaintiff suffered an injury [severe emotional distress], and (3) that the defendant's conduct was a cause-in-fact of the plaintiff's injury." Rabideau's complaint sets forth these elements.

Nevertheless, even if a plaintiff sets forth the elements of a negligence claim, a court may determine that liability is precluded by public policy considerations. Before a court makes such a determination, it is typically the better practice to submit the case to the jury. If, however, the facts of the case are not complex and the attendant public policy issues are presented in full, then this court may determine before trial if liability is precluded by public policy. Accordingly, we turn next to a consideration of the public policy concerns presented by this issue.

[T]wo concerns have historically shaped the development of the tort of negligent infliction of emotional distress. These concerns are (1) establishing that the claim is genuine, and (2) ensuring that allowing recovery will not place an unfair burden on the tortfeasor.

Where, as in the present case, the issue presented is negligent infliction of emotional distress on a bystander, three public policy factors [are] to be applied in an effort to establish that the claim is genuine, the tortfeasor is not unfairly burdened, and that other attendant public policy considerations are not contravened. First, the victim must have been killed or suffered a serious injury. Second, the plaintiff and victim must be related as spouses, parent-child, grandparent-grandchild or siblings. Third, "the plaintiff must have observed an extraordinary event, namely the incident and injury or the scene soon after the incident with the injured victim at the scene."

We need not address each of these factors because it is plain that the victim in this case is not related to Rabideau as a spouse, parent, child, sibling, grandparent or grandchild. Accordingly, she cannot maintain a claim for negligent infliction of emotional distress.

Rabideau urges that we extend this category to include companion animals. In her words, "anyone who has owned and loved a pet would agree that in terms of emotional trauma, watching the death of a pet is akin to losing a close relative." Further, she contends that we need not engage in an analysis of whether companion animals are "family," but should instead examine the rationale supporting the limitation to certain family members. Rabideau argues that the limitation of claims to family members is a means of assuring foreseeability as well as a reasonable limitation of the liability of a negligent tortfeasor. According to Rabideau, the bond between companion animals and humans is one that is sufficiently substantial to ensure that these concerns are met.

We agree, as we must, that humans form important emotional connections that fall outside the class of spouse, parent, child, grandparent, grandchild or sibling. We recognized this in Bowen [v. Lumbermens Mut. Cas. Co., 183 Wis. 2d 627, 517 N.W.2d 432 (1994)], and repeat here, that emotional distress may arise as a result of witnessing the death or injury of a victim who falls outside the categories established in tort law. However, the relationships between a victim and a spouse, parent, child, grandparent, grandchild or sibling are deeply embedded in the organization of our law and society. The emotional loss experienced by a bystander who witnessed the negligent death or injury of one of these categories of individuals is more readily addressed because it is less likely to be fraudulent and is a loss that can be fairly charged to the tortfeasor. The emotional harm occurring from witnessing the death or injury of an individual who falls into one of these relationships is serious, compelling, and warrants special recognition.

We concluded in *Bowen* that for the present time these tort claims would be limited; we reach the same conclusion in this case. We note that this rule of nonrecovery applies with equal force to a plaintiff who witnesses as a bystander the negligent injury of a best friend who is human as it does to a plaintiff whose best friend is a dog.

Had Rabideau been a bystander to the negligent killing of her best human friend, our negligence analysis would be complete. However, . . . the law categorizes dogs as property. We turn, therefore, to consider whether Rabideau can maintain a claim for negligent infliction of emotional distress arising from property loss.

In Kleinke v. Farmers Cooperative Supply & Shipping, 202 Wis. 2d 138, 145, 549 N.W.2d 714 (1996), we concluded that under Wisconsin's formulation of tort law, "it is unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to his or her property." This conclusion was founded upon public policy.

The public policy analysis in *Kleinke* drew upon the reasoning of *Bowen*. In *Bowen* this court listed six public policy factors addressed by courts when considering the authenticity and fairness of an emotional distress claim. These various public policy considerations set forth in *Bowen*, and cited in *Kleinke*, are:

> (1) Whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears too extraordinary that the negligence should have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or (6) whether allowance of recovery would enter a field that has no sensible or just stopping point.

In this case we need only examine one of the *Bowen-Kleinke* factors to conclude that there is no basis for recovery here. This factor concerns whether allowance of recovery would enter a field that has no sensible or just stopping point. Rabideau suggests that limiting liability to the human companion of a companion animal who is killed may satisfy this concern. We find this proposed resolution unsatisfactory. First, it is difficult to define with precision the limit of the class of individuals who fit into the human companion category. Is the particular human companion every family member? the owner of record or primary caretaker? a roommate? Second, it would be difficult to cogently identify the class of companion animals because the human capacity to form an emotional bond extends to an enormous array of living creatures. Our vast ability to form these bonds adds to the richness of life. However, in this case the public policy concerns relating to identifying genuine claims of emotional distress, as well as charging tortfeasors with financial burdens that are fair, compel the conclusion that the definition suggested by Rabideau will not definitively meet public policy concerns.

Based upon all the above, we conclude that Rabideau cannot maintain a claim for the emotional distress caused by negligent damage to her property.

NOTES TO RABIDEAU v. CITY OF RACINE

1. ***Significance of Emotional Relationship.*** In its analysis, the court refers to a plaintiff's close relatives, a plaintiff's close friends, and a plaintiff's companion animal. If the jurisdiction had a different position on recovery for emotional distress resulting

from seeing injury to a close friend, would that have supported the plaintiff's argument in *Rabideau?*

2. ***Distinguishing Between Harm to Individuals and Harm to Property.*** Are the reasons for denying emotional distress claims related to property damages different from or the same as the reasons for denying it when the emotional distress comes from seeing a close relative suffer a serious injury?

Perspective: Contractual Basis for Negligent Infliction Claims

Tort law has traditionally recognized recovery for emotional distress suffered without any immediate physical contact or harm in certain specific circumstances related to breach of contract.

> The first category of appropriate negligent-infliction cases . . . involves contractual relationships in which the defendant has assumed a contractual duty with respect to the mental well-being of the plaintiff. Cases dealing with mishandling of corpses, mistreatment of passengers by common carriers, and negligent telegraph companies are classic examples. Strictly speaking, these cases involve breaches of contract, but courts often analyze them in the rhetoric of negligence because the contractual duty is usually vaguely implied and subordinate to the main contractual relationship. Moreover, the plaintiff's emotional suffering usually resembles tort damages more closely than the usual economic loss associated with contract breach. . . . There probably is little harm in analyzing such a case in negligence terms, rather than in the rhetoric of breach-of-contract cases. It is important, however, not to lose sight of the contractual relationship between hospital and patient as the source of the underlying duty, and therefore of the limits that prevent the negligence concept in this context from becoming an all-purpose tort.

David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep Baby from Dissolving in the Bath Water?*, 34 Ariz. L. Rev. 439 (1992).

Without the special rules for these contractually based negligent infliction cases, would any of the various modern rules for recovery of damages for emotional distress allow recovery for family members emotionally harmed by a defendant who mishandled the corpse of an immediate family member or by defendant telegraph companies who negligently informed the family of the death of a loved one?

B. "Mere Economic" Harm

Cases in which a defendant's conduct causes physical harm to a plaintiff's property always allow recovery of economic damages. Where a plaintiff claims that a defendant's negligent conduct has caused the plaintiff to suffer harms that are entirely economic and that have occurred in the absence of a physical connection between the defendant and the plaintiff, courts have usually rejected those claims. As discussed in

532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc. and People Express Airlines, Inc. v. Consolidated Rail Corp., the central concern courts identify is the possibility of unlimited liability.

532 MADISON AVENUE GOURMET FOODS, INC. v. FINLANDIA CENTER, INC.

750 N.E.2d 1097 (N.Y. 2001)

KAYE, C.J.

The novel issues raised by these appeals — arising from construction-related disasters in midtown Manhattan — concern . . . a landholder's duty in negligence where plaintiffs' sole injury is lost income. . . .

Two of the three appeals involve the same event. On December 7, 1997, a section of the south wall of 540 Madison Avenue, a 39-story office tower, partially collapsed and bricks, mortar and other material fell onto Madison Avenue at 55th Street, a prime commercial location crammed with stores and skyscrapers. The collapse occurred after a construction project, which included putting 94 holes for windows into the building's south wall, aggravated existing structural defects. New York City officials directed the closure of 15 heavily-trafficked blocks on Madison Avenue — from 42nd to 57th Street — as well as adjacent side streets between Fifth and Park Avenues. The closure lasted for approximately two weeks, but some businesses nearest to 540 Madison remained closed for a longer period.

In 532 Madison Avenue Gourmet Foods v. Finlandia Center, plaintiff operates a 24-hour delicatessen one-half block south of 540 Madison, and was closed for five weeks. The two named plaintiffs in the companion case, 5th Avenue Chocolatiere v. 540 Acquisition Co., are retailers at 510 Madison Avenue, two blocks from the building, suing on behalf of themselves and a putative class of "all other business entities, in whatever form, including but not limited to corporations, partnerships and sole proprietorships, located in the Borough of Manhattan and bounded geographically on the west side by Fifth Avenue, on the east by Park Avenue, on the north by 57th Street and on the south by 42nd Street." Plaintiffs allege that shoppers and others were unable to gain access to their stores during the time Madison Avenue was closed to traffic. Defendants in both cases are Finlandia Center (the building owner), 540 Acquisition Company (the ground lessee) and Manhattan Pacific Management (the managing agent).

On defendants' motions in both cases, Supreme Court dismissed plaintiffs' negligence claims on the ground that they could not establish that defendants owed a duty of care for purely economic loss in the absence of personal injury or property damage, and dismissed the public nuisance claims on the ground that the injuries were the same in kind as those suffered by all of the businesses in the community. . . .

Goldberg, Weprin & Ustin v. Tishman Construction involves the July 21, 1998 collapse of a 48-story construction elevator tower on West 43rd Street between Sixth and Seventh Avenues — the heart of bustling Times Square. Immediately after the accident, the City prohibited all traffic in a wide area of midtown Manhattan and also evacuated nearby buildings for varying time periods. Three actions were consolidated — one by a law firm, a second by a public relations firm and a third by a clothing manufacturer, all situated within the affected area. Plaintiff law firm sought damages

for economic loss on behalf of itself and a proposed class "of all persons in the vicinity of Broadway and 42nd Street, New York, New York, whose businesses were caused to be closed" as well as a subclass of area residents who were evacuated from their homes. Plaintiff alleged gross negligence. . . .

Noting the enormity of the liability sought, including recovery by putative plaintiffs as diverse as hotdog vendors, taxi drivers and Broadway productions, Supreme Court concluded that the failure to allege personal injury or property damage barred recovery in negligence. . . .

The Appellate Division affirmed dismissal of the Goldberg Weprin complaint, concluding that, absent property damage, the connection between defendants' activities and the economic losses of the purported class of plaintiffs was "too tenuous and remote to permit recovery on any tort theory." The court, however, reinstated the negligence and public nuisance claims of plaintiffs 532 Madison and 5th Avenue Chocolatiere, holding that defendants' duty to keep their premises in reasonably safe condition extended to "those businesses in such close proximity that their negligent acts could be reasonably foreseen to cause injury" (which included the named merchant plaintiffs) and that, as such, they established a special injury distinct from the general inconvenience to the community at large. Two Justices dissented, urging application of the "economic loss" rule, which bars recovery in negligence for economic damage absent personal injury or property damage. The dissenters further concluded that the public nuisance claims were properly dismissed because plaintiffs could not establish special injury.

We now reverse in *532 Madison* and *5th Avenue Chocolatiere* and affirm in *Goldberg Weprin & Ustin.*

Plaintiffs contend that defendants owe them a duty to keep their premises in reasonably safe condition, and that this duty extends to protection against economic loss even in the absence of personal injury or property damage. Defendants counter that the absence of any personal injury or property damage precludes plaintiffs' claims for economic injury. . . .

As we have many times noted, foreseeability of harm does not define duty. Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act. . . .

In Strauss v. Belle Realty Co. (65 N.Y.2d 399, 492 N.Y.S.2d 555, 482 N.E.2d 34) we considered whether a utility owed a duty to a plaintiff injured in a fall on a darkened staircase during a Citywide blackout. While the injuries were logically foreseeable, there was no contractual relationship between the plaintiff and the utility for lighting in the building's common areas. As a matter of policy, we restricted liability for damages in negligence to direct customers of the utility in order to avoid crushing exposure to the suits of millions of electricity consumers in New York City and Westchester.

Even closer to the mark is Milliken & Co. v. Consolidated Edison Co. (84 N.Y.2d 469, 619 N.Y.S.2d 686, 644 N.E.2d 268), in which an underground water main burst near 38th Street and 7th Avenue in Manhattan. The waters flooded a subbasement where Consolidated Edison maintained an electricity supply substation, and then a fire broke out, causing extensive damage that disrupted the flow of electricity to the Manhattan Garment Center and interrupting the biannual Buyers Week.

Approximately 200 Garment Center businesses brought more than 50 lawsuits against Con Edison, including plaintiffs who had no contractual relationship with the utility and who sought damages solely for economic loss. Relying on *Strauss*, we again held that only those persons contracting with the utility could state a cause of action. We circumscribed the ambit of duty to avoid limitless exposure to the potential suits of every tenant in the skyscrapers embodying the urban skyline.

A landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them. We have never held, however, that a landowner owes a duty to protect an entire urban neighborhood against purely economic losses. A comparison of Beck v. FMC Corp. (53 A.D.2d 118, 121, 385 N.Y.S.2d 956, *aff'd* 42 N.Y.2d 1027, 398 N.Y.S.2d 1011, 369 N.E.2d 10) and Dunlop Tire and Rubber Corp. v. FMC Corp., (53 A.D.2d 150, 154-155, 385 N.Y.S.2d 971) is instructive. Those cases arose out of the same incident: an explosion at defendant FMC's chemical manufacturing plant caused physical vibrations, and rained stones and debris onto plaintiff Dunlop Tire's nearby factory. The blast also caused a loss of electrical power—by destroying towers and distribution lines owned by a utility—to both Dunlop Tire and a Chevrolet plant located one and one-half miles away. Both establishments suffered temporary closure after the accident. Plaintiffs in *Beck* were employees of the Chevrolet plant who sought damages for lost wages caused by the plant closure. Plaintiff Dunlop Tire sought recovery for property damage emanating from the blast and the loss of energy, and lost profits sustained during the shutdown.

In *Dunlop Tire*, the Appellate Division observed that, although part of the damage occurred from the loss of electricity and part from direct physical contact, defendant's duty to plaintiffs was undiminished. The court permitted plaintiffs to seek damages for economic loss, subject to the general rule requiring proof of the extent of the damage and the causal relationship between the negligence and the damage. The *Beck* plaintiffs, by contrast, could not state a cause of action, because, to extend a duty to defendant FMC would, "like the rippling of the waters, [go] far beyond the zone of danger of the explosion," to everyone who suffered purely economic loss.

Plaintiffs' reliance on People Express Airlines, Inc. v. Consolidated Rail Corp. (100 N.J. 246, 495 A.2d 107) is misplaced. There, a fire started at defendant's commercial freight yard located across the street from plaintiff's airport offices. A tank containing volatile chemicals located in the yard was punctured, emitting the chemicals and requiring closure of the terminal because of fear of an explosion. Allowing the plaintiff to seek damages for purely economic loss, the New Jersey court reasoned that the extent of liability and degree of foreseeability stand in direct proportion to one another: the more particular the foreseeability that economic loss would be suffered as a result of the defendant's negligence, the more just that liability be imposed and recovery permitted. The New Jersey court acknowledged, however, that the presence of members of the public, or invitees at a particular plaintiff's business, or persons traveling nearby, while foreseeable, is nevertheless fortuitous, and the particular type of economic injury that they might suffer would be hopelessly unpredictable. Such plaintiffs, the court recognized, would present circumstances defying any appropriately circumscribed orbit of duty. We see a like danger in the urban disasters at issue here, and decline to follow *People Express*.

Policy-driven line-drawing is to an extent arbitrary because, wherever the line is drawn, invariably it cuts off liability to persons who foreseeably might be plaintiffs.

The *Goldberg Weprin* class, for example, would include all persons in the vicinity of Times Square whose businesses had to be closed and a subclass of area residents evacuated from their homes; the *5th Avenue Chocolatiere* class would include all business entities between 42nd and 57th Streets and Fifth and Park Avenues. While the Appellate Division attempted to draw a careful boundary at storefront merchant-neighbors who suffered lost income, that line excludes others similarly affected by the closures — such as the law firm, public relations firm, clothing manufacturer and other displaced plaintiffs in *Goldberg Weprin*, the thousands of professional, commercial and residential tenants situated in the towers surrounding the named plaintiffs, and suppliers and service providers unable to reach the densely populated New York City blocks at issue in each case.

As is readily apparent, an indeterminate group in the affected areas thus may have provable financial losses directly traceable to the two construction-related collapses, with no satisfactory way geographically to distinguish among those who have suffered purely economic losses. In such circumstances, limiting the scope of defendants' duty to those who have, as result of these events, suffered personal injury or property damage — as historically courts have done — affords a principled basis for reasonably apportioning liability.

We therefore conclude that plaintiffs' negligence claims based on economic loss alone fall beyond the scope of the duty owed them by defendants and should be dismissed. . . .

Accordingly, in 532 Madison Avenue Gourmet Foods v. Finlandia Center, the order of the Appellate Division should be reversed with costs, the defendants' motion to dismiss the complaint granted and the certified question answered in the negative. In 5th Avenue Chocolatiere, et al. v. 540 Acquisition Co., the order of the Appellate Division should be reversed with costs, the defendants' motion to dismiss the complaint granted in its entirety and the certified question answered in the negative. In Goldberg Weprin & Ustin v. Tishman Construction, the order of the Appellate Division, insofar as appealed from, should be affirmed with costs.

NOTES TO 532 MADISON AVENUE GOURMET FOODS, INC. v. FINLANDIA CENTER, INC.

1. ***Principled Basis for Decision.*** The court states that making defendants liable only to those who suffer personal injury or property damage is a "principled basis" for handling economic loss claims. Does the court mean that its rule reflects some important policy factors, or does it mean that its resolution involves a doctrine that is easy to apply?

2. ***Fear of Immense Damages.*** Judge Irving Kaufman supported the traditional "mere economic loss" rule in Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 825 n.8 (2d Cir. 1968), using this hypothetical example:

> A driver who negligently caused such an accident would certainly be held accountable to those physically injured in the crash. But we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers who suffered provable losses because of the delay or to the wage earner who was forced to "clock in" an hour late. And yet it was surely foreseeable that among the many . . . who would be delayed would be truckers and wage earners.

How extreme would the total damages award likely be if even the prospective plaintiffs in this hypothetical were held to be entitled to compensation? In Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 U. Mich. J.L. Reform 403, 422-425 (1999), the author proposes calculations leading to the conclusion that the award might be "about $1.5 million, a significant sum, but hardly pauperizing in a world of multi-million dollar awards to one or two parties seriously injured in traffic accidents."

PEOPLE EXPRESS AIRLINES, INC. v. CONSOLIDATED RAIL CORP.

100 N.J. 246, 495 A.2d 107 (1985)

HANDLER, J.

This appeal presents a question that has not previously been directly considered: whether a defendant's negligent conduct that interferes with a plaintiff's business resulting in purely economic losses, unaccompanied by property damage or personal injury, is compensable in tort. . . .

On July 22, 1981, a fire began in the Port Newark freight yard of defendant Consolidated Rail Corporation (Conrail) when ethylene oxide manufactured by defendant BASF Wyandotte Company (BASF) escaped from a tank car, punctured during a "coupling" operation with another rail car, and ignited. The tank car was owned by defendant Union Tank Car Company (Union Car) and was leased to defendant BASF.

The plaintiff asserted at oral argument that at least some of the defendants were aware from prior experiences that ethylene oxide is a highly volatile substance; further, that emergency response plans in case of an accident had been prepared. When the fire occurred that gave rise to this lawsuit, some of the defendants' consultants helped determine how much of the surrounding area to evacuate. The municipal authorities then evacuated the area within a one-mile radius surrounding the fire to lessen the risk to persons within the area should the burning tank car explode. The evacuation area included the adjacent North Terminal building of Newark International Airport, where plaintiff People Express Airlines' (People Express) business operations are based. Although the feared explosion never occurred, People Express employees were prohibited from using the North Terminal for twelve hours.

The plaintiff contends that it suffered business-interruption losses as a result of the evacuation. These losses consist of canceled scheduled flights and lost reservations because employees were unable to answer the telephones to accept bookings; also, certain fixed operating expenses allocable to the evacuation time period were incurred and paid despite the fact that plaintiff's offices were closed. No physical damage to airline property and no personal injury occurred as a result of the fire.

According to People Express' original complaint, each defendant acted negligently and these acts of negligence proximately caused the plaintiff's harm. . . .

Conrail moved for summary judgment, seeking dismissal of the complaint and cross-claims against it; the motion was opposed by plaintiff, People Express, and defendants BASF and Union Car. The trial court granted Conrail's summary judgment motion on the ground that absent property damage or personal injury economic loss was not recoverable in tort. . . .

The Appellate Division granted plaintiff's interlocutory request for leave to appeal and reversed the trial court's order granting summary judgment. . . . This Court granted defendant Union Car's petition for certification, in which Conrail and BASF joined, and denied People Express' motion to dismiss the petition for certification. . . .

The single characteristic that distinguishes parties in negligence suits whose claims for economic losses have been regularly denied by American and English courts from those who have recovered economic losses is, with respect to the successful claimants, the fortuitous occurrence of physical harm or property damage, however slight. It is well-accepted that a defendant who negligently injures a plaintiff or his property may be liable for all proximately caused harm, including economic losses. . . . Nevertheless, a virtually per se rule barring recovery for economic loss unless the negligent conduct also caused physical harm has evolved throughout this century. . . .

The reasons that have been advanced to explain the divergent results for litigants seeking economic losses are varied. Some courts have viewed the general rule against recovery as necessary to limit damages to reasonably foreseeable consequences of negligent conduct. . . . The physical harm rule also reflects certain deep-seated concerns that underlie courts' denial of recovery for purely economic losses occasioned by a defendant's negligence. These concerns include the fear of fraudulent claims, mass litigation, and limitless liability, or liability out of proportion to the defendant's fault. . . .

Judicial discomfiture with the rule of nonrecovery for purely economic loss throughout the last several decades has led to numerous exceptions in the general rule. Although the rationalizations for these exceptions differ among courts and cases, two common threads run throughout the exceptions. The first is that the element of foreseeability emerges as a more appropriate analytical standard to determine the question of liability than a per se prohibitory rule. The second is that the extent to which the defendant knew or should have known the particular consequences of his negligence, including the economic loss of a particularly foreseeable plaintiff, is dispositive of the issues of duty and fault.

One group of exceptions is based on the "special relationship" between the tortfeasor and the individual or business deprived of economic expectations. Many of these cases are recognized as involving the tort of negligent misrepresentation, resulting in liability for specially foreseeable economic losses. Importantly, the cases do not involve a breach of contract claim between parties in privity; rather, they involve tort claims by innocent third parties who suffered purely economic losses at the hands of negligent defendants with whom no direct relationship existed. Courts have justified their finding of liability in these negligence cases based on notions of a special relationship between the negligent tortfeasors and the foreseeable plaintiffs who relied on the quality of defendants' work or services, to their detriment. The special relationship, in reality, is an expression of the courts' satisfaction that a duty of care existed because the plaintiffs were particularly foreseeable and the injury was proximately caused by the defendant's negligence.

The special relationship exception has been extended to auditors, see H. Rosenblum, Inc. v. Adler, . . . 93 N.J. 324, 461 A.2d 138 (independent auditor whose negligence resulted in inaccurate public financial statement held liable to plaintiff who bought stock in company for purposes of sale of business to company; stock subsequently proved to be worthless); surveyors, see Rozny v. Marnul, 43 Ill. 2d 54, 250

N.E.2d 656 (1969) (surveyor whose negligence resulted in error in depicting boundary of lot held liable to remote purchaser); termite inspectors, see Hardy v. Carmichael, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (Cal. Ct. App. 1962) (termite inspectors whose negligence resulted in purchase of infested home liable to out-of-privity buyers); engineers, see M. Miller Co. v. Central Contra Costa Sanitary Dist., 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (Cal. Ct. App. 1961) (engineers whose negligence resulted in successful bidder's losses in performing construction contract held liable); attorneys, see Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), *cert. den.*, 368 U.S. 987, 82 S. Ct. 603, 7 L. Ed. 2d 525 (1962) (attorney whose negligence caused intended beneficiary to be deprived of proceeds of the will was liable to beneficiary); notaries public, see Immerman v. Ostertag, 83 N.J. Super. 364, 199 A.2d 869 (Law Div. 1964); architects, see United States v. Rogers & Rogers, 161 F. Supp. 132 (S.D. Cal. 1958) (architects whose negligence resulted in use of defective concrete liable to out-of-privity prime contractor); weighers, see Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) (public weigher whose negligence caused remote buyer's losses was liable for loss); and telegraph companies, see Western Union Tel. Co. v. Mathis, 215 Ala. 282, 110 So. 399 (1926) (telegraph company whose negligent transmission caused plaintiff not to obtain contract was liable). . . .

Courts have found it fair and just in all of these exceptional cases to impose liability on defendants who, by virtue of their special activities, professional training or other unique preparation for their work, had particular knowledge or reason to know that others, such as the intended beneficiaries of wills . . . or the purchasers of stock who were expected to rely on the company's financial statement in the prospectus . . . would be economically harmed by negligent conduct. In this group of cases, even though the particular plaintiff was not always foreseeable, the particular class of plaintiffs was foreseeable as was the particular type of injury.

A very solid exception allowing recovery for economic losses has also been created in cases akin to private actions for public nuisance. Where a plaintiff's business is based in part upon the exercise of a public right, the plaintiff has been able to recover purely economic losses caused by a defendant's negligence. See, e.g., Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc) (defendants responsible for ship collision held liable to all commercial fishermen, shrimpers, crabbers and oystermen for resulting pollution of Mississippi River). . . . The theory running throughout these cases, in which the plaintiffs depend on the exercise of the public or riparian right to clean water as a natural resource, is that the pecuniary losses suffered by those who make direct use of the resource are particularly foreseeable because they are so closely linked, through the resource, to the defendants' behavior.

Particular knowledge of the economic consequences has sufficed to establish duty and proximate cause in contexts other than those already considered. In Henry Clay v. Jersey City, 74 N.J. Super. 490, 181 A.2d 545 (Ch. Div. 1962), *aff'd*, 84 N.J. Super. 9, 200 A.2d 787 (App. Div. 1964), for example, a lessee-manufacturer had to vacate the building in which its business was located because of the defendant city's negligent failure to maintain its sewer line while the line was repaired. While there was some property damage, the court treated the tenant's and owner's claims separately; the tenant's claims were purely economic, stemming from the loss of use of its property right, as in the instant case. Further, the city had had notice of the leak since 1957 and should have known about it even earlier. Duty, breach and proximate cause were found