# An Emotional Mess! Sorting Out Theories of Recovery for Emotional Distress and Consortium Damages (and Preview of Restatement Third)

I. Keys to understanding emotional distress claims:

A. Remember background of development: impact only –to zone of danger (Niederman v. Brodsky)– to bystander claims (Sinn v. Burd) – to new Restatement?

B. Whose claim is it?

1. Direct – primary "victim" See, Brown v. Philadelphia College of Osteopathic Medicine, 449 Pa. Super. 667, 674, 674 A.2d 1130, 1133 (1996) (plaintiff who was not attended to during her miscarriage was a victim of the negligence herself, not a bystander). Turner v. Beaver Medical Center, 454 Pa. Super. 645, 686 A.2d 830 (1996), the "bystander" plaintiff was forced to deliver her sister's dead baby when the hospital staff ignored her requests for assistance. The Court in Turner found that the plaintiff was so involved in the birthing process that she herself became a participant in the traumatic event, although the "victim" of the negligence was her sister. Id. at 834. Thus, she became "primary" victim. Tomikel v. PennDOT, 658 A.2d 861, 864 (Pa. Commw. 1995) (plaintiff-driver felt and heard impact with other vehicle, saw glass shatter that showered glass on passenger 2 yr old son) In Tomikel, defense argued that plaintiff was a *bystander* and could not recover because she did not witness injury to son who was unhurt and whom she did not actually see at impact but court found that because was involved in the accident herself, she was a primary victim and although physically unhurt could recover for the effect of mental trauma of the accident.)

a. personal injury
b. zone of danger

2. Derivative –

a. bystander/family member (defense in Tomikel)
b. consortium – see below

(Always better to be primary victim –argue that reasons for limitations apply only to secondary/bystander claims)

C. What is the underlying tort? (New Restatement approach)

1. personal injury

a. pain and suffering ("parasitic" damages)

b. loss of consortium*

*__consortium is not a claim for emotional and mental trauma,__ Jackson v. Travelers Insurance Co., 414 Pa. Super. 336, 344, 606 A. 2d 1384, 1388 (1992); Sinn v. Burd, 404 A. 2d 672, 675 n. 3(Pa. 1979)("Solatium, or solace, describes a type of monetary damages awarded the decedent's survivors to recompense them for their feelings of anguish, bereavement, and grief caused by the fact of the decedent's death. **Although most civil law nations provide such damages for the bereaved relatives, it has been steadfastly rejected by the common law."**)

**But "companionship" is clearly an element of the consortium claim,** see discussion in Daughen v. Fox, 372 Pa. Super. 405, 418-419, 539 A. 2d 858, 865 (1988)(denial of damages for loss of companionship due to death of dog!), since it arises out of the rights of each spouse in the marriage relationship to the companionship, society and affection of each other in their life together. Id., citing Burns v. Pepsi-Cola, 353 Pa. Super. 571, 576, 510 A. 2d 810, 812 (1986).

The term "services" is now understood to imply "whatever of aid, assistance, comfort and society the [spouse] would be expected to render … under the circumstances and in the condition in which they may be placed, whatever those may be." Bedillion v. Frazee, 408 Pa. 281, 183 A. 2d 341 (1962). See also Ball v. Johns-Manville Corp., 425 Pa. Super. 369, 379, 625 A. 2d 650, 655 (1993)(asbestos-related disease inhibited husband's normal activities, "including his ability to provide *companionship*…..")(emphasis added);

(Remember in death cases, spouse must bring loss of consortium as part of wrongful death case NOT separate consortium claim. However, if pre-death loss of consortium, spouse can also bring own action for pre-death time period.

2. "stand alone" infliction of emotional distress
   a. Intentional -direct
      -bystander

   b. negligent
      i. zone of danger /other "direct"
      ii. bystander

3. other torts with emotional component–defamation/invasion of privacy/false light/malicious prosecution –have their own requirements

C. Keep in mind: "Pure" emotional distress claims (outside the context of personal injury) are the exception rather than the rule. Despite liberalization Restatement draft comments emphasize this is still the case.

(And don't forget in any tort that involves communication: 1st Amendment implications)

II. Pain and Suffering

A. "Impact" requirement-

1. no matter how slight. Botek v. Mine Safety Appliance Corp., 531 Pa.160, 611 A.2d 1174 (1992) (plaintiff suffered physical injury, albeit relatively minor, due to mistaken inhalation of carbon monoxide, and "all of the consequent psychological and emotional pain … [was] compensable" ). Shumosky v. Lutheran Welfare Services of Northeastern PA, Inc. , 784 A.2d 196 (Pa. Super. 2001)(AIDS needle stick case)

2. courts often use as excuse to exclude claims in what are really "stand alone" cases See Doe v. Philadelphia Community Health Alternatives AIDS Task Force 745 A. 2d 25 (Pa. Super.,2000.) affirmed per curium, 564 Pa. 264, 767 A.2d 548 ( Pa. 2001)(influenza vaccines not impact; There was no allegation or proof that Plaintiff had a contractual or fiduciary relationship with PCHA. There was no proof that PCHA provided *medical treatment,* which would have put Plaintiff's cause of action within the realm of medical malpractice.)

OR find "impact" when they want to allow claim Tomikel v. PennDOT, 658 A.2d 861, 864 (Pa. Commw. 1995) (plaintiff-driver *felt and heard impact* with other vehicle, saw glass shatter

that showered glass on passenger son)(really a bystander case? See discussion above) See also Stoddard v. Davidson, 355 Pa. Super. 262, 513 A.2d 419 (1986) (jostling felt by occupants of vehicle when it ran over body of hit and run victim left in the road by defendant sufficient "physical impact").

2. frequently confused with physical injury or physical manifestation—which is a different issue. see, e.g., Banyas v. Lower Bucks Hospital, 293 Pa. Super. 122, 128-29, 437 A.2d 1236, 1239-40 (1981) (blending discussion of recovery for only emotional injuries with references to impact rule).

    a. Gregorio v. Zeluck, 451 Pa.Super. 154, 678 A.2d 810 (1996)(no cause of action where retained sponge case caused only odor) wrongly decided? Compare Colacicco v. Karumbaya, NO. 99 CV 2861 (Lackawanna C. P. January 2, 2004)(Nealon, J.)(Colacicco reportedly experienced emotional distress and mental anguish upon learning that a potentially infectious sponge had been left in his body without his consent following his 1994 surgery, but never actually developed infection) "…..While it is true that Colacicco never actually developed an infection from the retained sponge, he allegedly suffered four months of fear and anxiety that such an infection could occur. *See* Shumosky v. Lutheran Welfare Services of Northeastern Pennsylvania, Inc., 784 A.2d 196, 201-202 (Pa. Super. 2001) (nurse who was stuck by a needle used on an AIDS patient could recover parasitic damages for fear of possible development of AIDS); Murphy v. Abbott Laboratories, 930 F.Supp. 1083, 1087 (E.D. Pa. 1996) (same)".

B. Viable infant to pre-death

1. Hudak v. Georgy, 535 Pa. 152, 634 A.2d 600 (1993)(live birth made viability irrelevant; infant born alive "person" for purposes of wrongful death action)

2. viable fetus even though stillborn. Amadio v. Levin, 509 Pa. 199, 501 A. 2d 1085 (1985).

3. semi-conscious/vegetative state? see Terwilliger v. Kitchen, 781 A.2d 1201, 1210 n.9 (Pa. Super.2001) (accident victim had pulse and was moaning); Wagner v. York Hospital, 415 Pa. Super. 1, 608 A. 2d 496 (1992)(loss of life's pleasures instruction – component of pain and suffering—proper even though plaintiff in persistent vegetative state; evidence did not irrefutably establish

that he was totally unaware of his surroundings and no one could positively say what he was able to perceive)

4. current Pennsylvania case law is clear that death is the cut off for measurement of mental distress or pain and suffering. No compensation is not available for a "shortened life expectancy," or loss of life's pleasures occurring after death. The seminal case: Willinger v. Mercy Catholic Medical Center, 482 Pa. 441, 393 A. 2d 1188 (1978).

C. But not fright prior to impact? See Nye v. Commonwealth of Penna., 331 Pa. Super. 209, 480 A. 2d 318 (1984)(no recovery)(dicta); but see Commonwealth of Pennsylvania, Department of Transportation v. Phillips, 87 Pa. Commw. 504, 488 A. 2d 77 (1985) (damages from the moment of injury to the moment of death including the fright and mental suffering attributed to the peril leading to the decedent's death even where the deceased died instantly as a result of the accident.)

D. Remember (4) components: pain and suffering (including mental anguish); embarrassment and humiliation; loss of ability to enjoy the pleasures of life; and disfigurement.

III. Intentional Infliction of Emotional Distress

A. Is there such a tort in PA?

1. **The Supreme Court has never actually adopted the Restatement on this issue,** Taylor v. Albert Einstein Medical Center, 562 Pa. 176, 181, 754 A. 2d 650, 652 (2000)("although we have never expressly recognized a cause of action for intentional infliction of emotional distress……**we have cited the section as setting forth the minimum elements** necessary to sustain such a cause of action." ) Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 527 A.2d 988 (1987)(this Court has acknowledged, but never had occasion to adopt).

2. The Supreme Court has never come across a set of circumstances where it would find such a cause of action: Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970). (defendant, after striking and killing plaintiff's son with an automobile, failed to notify authorities or seek medical assistance and buried body in field where it was discovered two months later) recognized Restatement (Second) Section 46, but actually decided the case under the mistreatment of corpse precedents)

3. **Nevertheless, the Superior and Commonwealth courts appear to have found that an action of the intentional infliction of mental distress is cognizable in Pennsylvania**.
McNeal v. City of Easton, 143 Pa.Cmwlth. 151, 598 A.2d 638 (1991)(but tort not found- supervisors who failed to prevent plaintiff's co-workers from taunting him were unaware of workers' conduct); Hoffman v. Memorial Osteopathic Hospital, 342 Pa. Super. 375, 492 A. 2d 1382 (1985)(claim stated where physician dismissed patient's complaints, refused to assist him when he fell to the floor, and walked away, instructing staff not to pick him up);

B. Intent required:

1. intent to cause severe emotional distress
   a. have purpose or
   b. act knowing substantially certain to result

or

2. in reckless disregard of whether plaintiff would suffer such harm
   a. know of the risk or know facts which make it obvious
   b. fail to take precautions to eliminate or reduce risk.

C. Threshold of conduct:

1. Pennsylvania case law repeatedly recites the standard of conduct as "outrageous and extreme," that which goes "beyond all possible bounds of decency, and ….regarded as atrocious, and utterly intolerable in a civilized community." (Objective standard unless knowledge of peculiar susceptibility) Consistent with majority of jurisdictions and new Restatement

2. Court exercises heightened "screening" role to restrict the claims which go to the jury to only the most egregious and obvious of circumstances.

3. Paucity of cases in PA finding liability indicates that this tort is disfavored. Appellate examples are few and not of recent vintage:

   Field v. Philadelphia Electric Co., 388 Pa. Super. 400, 565 A.2d 1170 (1989) (power company which intentionally vented radioactive steam into a tunnel where the worker was working solely to keep a reactor operational while the worker was remedying a standing-water problem in an off-gas pipe tunnel, and whose company officials deliberately made two false statements to the worker to conceal those actions, could arguably be liable for IIED to the

worker who was exposed to high levels of radiation during work); Bartanus v. Lis, 332 Pa.Super. 48, 480 A.2d 1178 (1984)(Plainitiff's brother and sister-in-law told vicious lies about plaintiff to his son and acted to damage relationship between them to entice son to stay away from father); Hoffman v. Memorial Osteopathic Hospital, 342 Pa. Super. 375, 492 A. 2d 1382 (1985)(physician dismissed patient's complaints, refused to assist him when he fell to the floor, and walked away, instructing staff not to pick him up); Commonwealth v. Balistera, 329 Pa. Super. 148, 478 A.2d 5 (1984)( acts of sexual misconduct involving children); Banyas v. Lower Bucks Hospital, 293 Pa. Super. 122, 437 A. 2d 1236 (1981)(allegations that defendants intentionally fabricated records to suggest that plaintiff had killed a third party causing plaintiff to be indicted for homicide); Chuy v. Philadelphia Eagles Football Club, 595 F. 2d 1265 (3d Cir. 1979)(defendant's team physician released to press information that plaintiff was suffering from fatal disease, when physician knew the information was false).

4. Physical harm or physical manifestation?

   a. not under new Restatement.

   b. under PA law: Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 527 A.2d 988 (1987) -**mental distress requires "some objective proof"** which the majority opinion equates with medical evidence. Kazatsky, at 995. Justice Larson, concurring, notes that he would not establish a *per se* rule that *medical* evidence is required in *every* case, because there are situations that are so extreme that the enormity of the outrage carries with it the conviction of severe and serious mental distress which is neither feigned nor trivial. (For example, a child is tortured and murdered in his parent's presence).

   Dissent in Krysmalski by Krysmalski v. Tarasovich, 424 Pa. Super. 121, 134, 622 A.2d 298, 305 (1993) said "the supreme court imposed the requirement of expert medical evidence of the distress as a counterweight to the ease with which fraudulent claims of outrageous behavior could be brought." Id. at 316-17.

   c. some **subsequent cases have misconstrued "objective medical evidence" to mean a requirement of "physical harm" or "physical manifestation"** which is clearly not the same thing.

See Johnson v. Caparelli, 425 Pa.Super. 404, 626 A. 2d 668 (1993)("Appellants have established the third element since their complaint contains the requisite allegations of physical harm"); Swisher v. Pitz, 868 A. 2d 1228, 1230 (Pa.Super.2005) ("a plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct.") (citing Fewell v. Besner, 444 Pa. Super. 559, 665 A. 2d 577, 582 (1995), which, in turn, erroneously cited to Kazatsky); Hart v. O'Malley, 436 Pa.Super. 151, 647 A.2d 542 (1994)(again, improperly citing Kazatsky, as well as Love v. Cramer, 414 Pa. Super. 231, 606 A. 2d 1175 (1992), a negligence case).

Compare Banyas v. Lower Bucks Hospital, 293 Pa. Super. 122 437 A. 2d 1236 (1981)(averment of physical harm required for negligent infliction of emotional distress but *not* for intentional infliction of mental distress); Com. v. Balisteri**,** 329 Pa.Super. 148, 478 A.2d 5 (1984)(bodily harm is not a prerequisite for recovering under the tort of *intentional* infliction of mental distress); Bonson v. Diocese of Altoona-Johnstown, 67 Pa. D. & C. 419, 438 (May 11, 2004)(adopting Feb. 2, 2004 opinion)(while physical harm may be evidence, it is not a necessary element; rather there must be some objective proof of severe emotional distress.)

d. But emotional distress must be ***severe*** (vs. serious in NIED claims.)

D . Presence requirement

1. Pennsylvania law clearly follows the majority of jurisdictions which impose a "presence" requirement where the emotional disturbance is caused by the infliction of harm to a third party. See Taylor v. Albert Einstein Medical Center, 562 Pa. 176, 181, 754 A. 2d 650, 652 (2000)(mother of patient operated on by doctor who did not have consent to perform surgery was not present to observe the alleged outrageous conduct); Johnson v. Caparelli, 425 Pa. Super. 404, 625 A. 2d 668 (1993)(parents not present at time of sexual abuse). But see Bonson v. Diocese of Altoona-Johnstown, 67 Pa. C & C 419, 438 (May 11, 2004)(adopting Feb. 2, 2004 opinion) (outrageous conduct was directed at parents because diocesan officials encouraged parents to allow children to be in close proximity to abusive priests).

2. current Restatement draft eliminates explicit mention of requirement in black letter statement of the law, comments

"back door" the limitation

3. Also close relationship see Stoddard case, supra, where IIED case was dismissed because primary victim (left in road by defendant) was not related to plaintiffs whose car later ran over her body

IV. Negligent Infliction of Emotional Distress

A. New Restatement formulation deals separately with "direct" vs. bystander claims:

1. zone of danger –(Shumosky v. Lutheran Welfare Services of Northeastern PA, Inc., 784 A.2d 196 (Pa. Super. 2001) states it continues to exist as available in PA)

a. **new Restatement makes clear no requirement of impact; no requirement of physical injury or "physical manifestation**." – screening purpose served better by requirement of serious emotional harm, circumstances such that reasonable person would suffer serious emotional harm and credible evidence of such emotional harm.

b. "**immediate danger**" – excludes exposure to toxic substances or "subclinical effects" that do not rise to level of current bodily injury BUT exception for AIDS.

i consistent with PA latent disease cases, such as pleural thickening in asbestosis cases; Doe?)

ii. Shumonsky distinguishes Doe, because requires *actual* exposure to AIDs

2. special relationship cases

a. PA –"compelling circumstances" or pre-existing duty. Armstrong v. Paoli Memorial Hospital, 430 Pa. Super. 36, 633 A.2d 605, 610 (1993)(contractual or fiduciary duty not found)(mistaken ID of accident victim),

See e.g. Little v. York County Earned Income Tax Bureau, 333 Pa. Super. 8, 481 A.2d 1194 (1984) (plaintiff entitled to recover damages for mental distress and humiliation suffered when jailed as a result of Tax Bureau's negligent

breach of duty to public to provide correct information regarding payment of her taxes); Crivellaro v. PP&L, 341 Pa. Super 173, 491 A.2d 207 (1985) (negligent infliction of emotional distress claim permitted where plaintiff employee coerced by employer defendant to enter into drug and alcohol detoxification program); Vattimo v. Lower Bucks Hospital, Inc., 502 Pa. 241, 465 A.2d 1231 (1983) (plaintiff who set fire to room in mental health facility resulting in death of roommate and prosecution of plaintiff could maintain claim for mental distress damages against hospital for failure to adequately supervise even though plaintiff may have suffered no physical harm).

b. New Restatement speaks in terms of "designated categories of undertakings" and relationships where actor is in position of power or authority over another or in which serious emotional disturbance is likely, but does not clearly define.

i. comments mention mistreatment of corpse, misinforming of death of relative, hospital losing infant, injury of fetus…. and negligent diagnosis!

ii. Would Armstrong or Doe be decided differently under this formulation? What about sexual abuse cases?

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B. Bystander claims

1. Elements:

a. the plaintiff was located near the scene of the accident;

b. the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident; and

c. the plaintiff and the victim were closely related.

Sinn v. Burd, 486 Pa. 146, 170-71, 404 A.2d 672, 685 (1979).

2. "accident"- theory has been applied in malpractice context. See Love v. Cramer, 606 A. 2d 1175 (Pa. Super. 1992), where plaintiff

observed negligent failure to treat her mother's heart condition *and* later witnessed her mother's heart attack.

3. **"discrete and identifiable traumatic event?"** language used in Love, but was clearly in context of discussion of whether plaintiff had experienced emotional shock from immediate and direct, contemporaneous observation, rather than distant and indirect, witnessing of aftermath Compare Mazzagatti v. Everingham by Everingham, 512 Pa. 266, 516 A. 2d 272 (1986) (parent arrives on the scene after accident); . Bloom v. Dubois Regional Medical Center, 409 Pa. Super. 83, 597 A. 2d 671 (1991)(husband arrived to to find spouse hanging from shoestrings in hospital's psychiatric unit).

   a. **must be traumatic event, a "trigger," but not just death of loved one.** See Sinn v. Burd. 404 A.2d 672, 675 n. 3(Pa. 1979 ("Mrs. Sinn is not seeking damages to soothe her grief resulting from the loss of her child; instead, she seeks damages for the mental distress caused by the shock of actually witnessing her child being struck and killed. These damages are independent of her grief and bereavement.") BUT witnessing actual death not absolutely necessary. See Francart v. Smith, 2 Pa. D. & C.4th 585 (Chester Co. C. P. 1989)(death not a prerequisite for bystander recovery); Wein v. Dixon, Civ. NO. 96-01,744 (Lyc. Co. C. P. May 24, 1999)(Kieser, J.)

   b. But "discrete" as in single moment?

      Clearly not, based on Love (negligence and heart attack separated by six weeks) see also Neff v. Lasso, 382 Pa. Super. 487, 555 A. 2d 1304 (1989), (wife who did not view the actual accident, but saw a speeding vehicle heading for her husband's car, heard the collision and then immediately ran out of her home and viewed her husband unconscious on the lawn.) **"…to deny appellant's claim solely because she did not see the precise moment of the impact would ignore the plain reality that the *entire incident* produced the emotional injury..."** (emphasis added). This language from Neff was quoted with approval in Krysmalski by Krysmalski v. Tarasovich, 424 Pa. Super. 121, 130-131, 622 A.2d 298, 303-304 (1993), decided after Love, in holding that a claim was stated even if the plaintiff-mother was in a grocery store at the exact second of impact, but she heard the crash in the lot and knew that her children were at the scene.

c. **BUT compare Bloom**: "The gravamen of the observance requirement is clearly that the plaintiff….. must have observed the traumatic infliction of injury on his or her close relative at the hands of the defendant. The Supreme Court has drawn a line between cases involving observation of a traumatic event which has an immediate impact on the plaintiff and those not involving the observation of a traumatic event and where there is some **separateness between the negligence of the defendant and its ultimate impact on the plaintiff."**

"We have, for example, **denied recovery** to a plaintiff who allegedly experienced emotional distress in watching the slow progression of a horrible disease suffered by a close relative allegedly **because of acts by the defendants** which the plaintiff did not contemporaneously observe and *which* ***caused no single identifiable traumatic*** **event** that the plaintiff could observe."

d**. Not deteriorating condition** (creates "buffer").

See Bloom, above; Cathcart v. Keene Industrial Insulation, 324 Pa. Super. 123, 471 A. 2d 493 (1984)(no claim by wife for witnessing development of husband's asbestosis); Sonlin v. Abington Memorial Hospital, 748 A. 2d 213 (Pa. Super. 2000)(infant developed thrombosis from negligently placed catheter leading to leg amputation; parents informed of negligence and likely amputation 8 days before); Trimble Trimble v. Beltz, CV-98- 01720 (Lyc. Cty. C.P )(husband witnessed death from breast cancer),

4. contemporaneous *sensory* observation

a. Halliday v. Beltz, 356 Pa. Super. 375, 514 A. 2d 906 (1986) Husband and daughter were present in the hospital at time of negligently performed surgery but did not observe, therefore no recovery

b. need not actually be visual: see Neff v Lasso and Krysmalski, above. Neff did not hold that auditory alone would *necessarily* be sufficient.

c. Under Neff, the important and crucial element is the immediate and direct awareness of what had occurred. Cusmano v. Lewis, 55 Pa. D. & C.4th 1 (Westmoreland C. C. P. 2002) (parents did not witness shooting but fatally wounded child ran immediately from scene to parents and died in his father's arms.)

5. But observe what? negligence v. aftermath

a. Bloom see above -- plaintiff only saw aftermath. “the alleged negligence of defendants was an omission and involved no direct and traumatic infliction of injury on wife by defendants, so that husband did not observe any traumatic infliction of injury on his wife at the hands of defendants.”

b. But Love criticizes this formula (“Although it seems odd that the plaintiff must actually witness the negligent act itself and not just the resulting traumatic injury to the loved one, the law as it now stands dictates such a requirement”) See also Sears v. Hershey Medical Ctr., 10 Pa. D. & C. 4th 182,187 (Dauphin C. C. P. 1991)(“Why do you have to see the speeding car?”)

6. “awareness” or knowledge of negligence element

a. Trimble v. Beltz, CV-98- 01720 (Lyc. Cty. C.P. 11/12/99). observing negligence can only be traumatic if the plaintiff recognizes the negligence at the time?

b. Trimble cites Tiburzio-Kelly v. Montgomery, 452 Pa. Super. 158, 681 A. 2d 757 (1996), as support for the conclusion that the plaintiff must recognize the negligence at the time it is occurring, but Tiburzio was a case dealing with the question of whether a sensory and contemporaneous observance occurred, when plaintiff’s his sensation was auditory only and he was not present in the room during his wife’s caesarean section delivery. It did *not* hold that conscious recognition of *negligence* is a requirement. In *dicta* stated husband “was not aware of its [the screams] cause”

c. Trimble pointed to Love v. Cramer and fact that the plaintiff in that case had researched her symptoms. Timble, supra, at 10. The Court in Love, however, did not discuss that fact or make any ruling on that issue.

d. Furthermore, “negligence” is a legal term of art. Certainly, at the time a mother witnesses a car strike her child, she has no knowledge of whether the driver is in fact legally negligent. No one would seriously argue that recovery should be precluded without proof of such knowledge. See McElwee v. Leber, 57 Pa. D. & C.4th 378 (Lyc. C. C. P. 2002):

> "Whether or not a particular medical care provider acts negligently or not is always a difficult question. Indeed, in many cases, even experts disagree as to whether or not it is negligent. To put a burden on plaintiffs in a case such as this to be able to say that they were fully aware at the time the medical care was provided that it was negligent is unrealistic and also not required. What is required is that plaintiffs plead an awareness that what was happening to their daughter was wrong and that they recognized that there was something wrong or lacking at the time that the care was provided."

e. Judge Smith alludes in Trimble to the fact that that something less than actual knowledge or recognition of the conduct as "negligent" at the time it is occurring may be sufficient. Twice he speaks in terms of "suspicion:" **"The plaintiff cannot merely *be there* when the negligence occurs, without suspecting something is wrong, for there is nothing traumatic about that."** Trimble, supra, at 9 (emphasis in original) The Love decision, itself also talks about the plaintiff daughter's "concerns" – not her "knowledge." Love, supra at 1178.

7. close relationship

a. In Sinn v. Burd, 404 A. 2d 672 (1979), the holding was not that the plaintiff must be a member of the victim's immediate family or even a blood relative, but rather that the claim must be analyzed to determine "whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship." Id., 486 Pa. at 170, 404 A. 2d 672 at 685.

b. Blanyar v. Pagnotti Enterprises, Inc. 451 Pa. Super. 269, 679 A. 2d 790 (1996)(cousin not closely related enough, although allegations of close personal friendship)

C. Turner v. Beaver Medical Center, 454 Pa. Super. 645, 686 A.2d 830 (1996)(sisters; nothing that restricts "closely related" to a spouse, parent or child)

d. Brown v. Beltz, allegations that son-in-law lived next door to father-in-law, saw daily, and served as father figure, permitted to survive preliminary objections.

e. Restatement draft requires close *family* member but does not define and speaks of a "functional" test, particularly in light of social trend toward "new nuclear families" outside of formal legal family ties. Therefore, "live-in" companion may qualify but not babysitter?

8. physical manifestation?

a. Love seemed to accept as a requirement:

> "A review of Pennsylvania case law also makes plain that a plaintiff must allege physical harm to sustain an action for negligent infliction of emotional distress. *See* *Sinn v. Burd, supra* *Banyas v. Lower Bucks Hospital,* 293 Pa. Super. 122, 437 A. 2d 1236 (1981) *Houston v. Texaco, Inc.* 371 Pa. Super. 399, 538 A. 2d 502(1988). The amount of harm that must be alleged, however, is not as clear." (BUT see Sinn v. Burd comment below)

b. The line of cases imposing a "physical harm" standard are based upon Section 436A of the Restatement of Torts (Second), which states that if negligence results in emotional disturbance alone, without bodily harm or other compensable damage, the tortfeasor is not liable for such emotional distress. Comment c to this Section distinguishes "transitory, *non-recurring* physical phenomena... such as dizziness, vomiting and the like… ," that may accompany an emotional disturbance, but which "do not amount to any substantial bodily harm," **§436A,comment c**, from more **tangible and continuing effects**, noting that

> [L]ong continued nausea or headaches may amount to physical illness, which is bodily harm, and even long continued emotional disturbance, as for example in the case of repeated hysterical attacks, or mental aberration may be classified by the courts as illness, notwithstanding their mental character.

Id., Comment c.

c. Therefore, the **courts have looked for allegations that denote harm of a more substantial and continuing nature rather than merely the temporary physical reactions** that are sometimes exhibited at times of severe fright, shock, grief or humiliation. See e.g., Krysmalski v. Tarasovich, 622 A. 2d 298, 317-18, 424 Pa. Super. 121, 158(1993)(allegation that plaintiff

was physically sickened as she viewed her injured children is transitory, but additional averments of severe depression, acute nervous condition, flashbacks and nightmares, inability to sleep, which "are or may be of a serious and permanent nature" met the test)(dissent); Kelly v. Resource Housing of America, Inc., 614 A. 2d 423, 426 & 427-8, 419 Pa. Super. 393, 400 & 402-3 (1992)(allegation of nausea and illness "at the scene" not sufficient, in contrast to allegations in Love of continuing depression, nightmares and anxiety). Cases collected from other jurisdictions and cited with approval in Crivellaro v. Pennsylvania Power & Light, 341 Pa. Super. 173, 491 A. 2d 207(1985) refer to depression, nightmares, nervousness, insomnia and hysteria as physical symptoms warranting recovery. Id. at 180, 491 A.2d at 210.

Accord Brown v. Philadelphia College of Osteopathic Medicine, 674 A. 2d 1130, 1137 (Pa. Super. 1996).

d. medical evidence?

Compare Brown v. Philadelphia College, 449 Pa. Super. 667, 674 A. 2d 1130(1996) (plaintiff met her burden of proving emotional distress with psychiatric report) with Krysmalski v. Tarasovich, 424 Pa. Super. 121, ____, 622 A. 2d 298, 305 (1993)(**no medical evidence was necessary** to make out *bystander* claim **for negligent infliction of emotional distress)**.

In Krysmalski, plaintiff did not testify but evidence was that she was hysterical at the scene and unstable and distraught at the hospital thereafter. The majority cited the Supreme Court's decision in Kazatsky as requiring medical evidence **for intentional** infliction of emotional distress claims **only:**

> "…medical evidence is not required in an action for damages for negligent infliction of emotional distress. Our Supreme Court has held *that where a bystander witnesses injury to a close relative, the contemporaneous observance and close relationship guarantee the veracity of the claim….* In contrast [to IIED claims], the *Kazatsky* Court noted that it 'endorsed an recovery for serious mental distress to situations where a reasonable person normally constituted would be unable to adequately cope with the mental distress engendered by the circumstances of the event.' "

Krysmalski by Krysmalski v. Tarasovich, 424 Pa. Super. 121, 134, 622 A.2d 298, 305 (1993) See also, dissent in Krsymalski, id. at 316-317, distinguishing NIED claims from IIED claims, explaining

that " the supreme court imposed the requirement of expert medical evidence of the distress as a counterweight to the ease with which fraudulent claims of outrageous behavior could be brought." But no similar need in bystander claims. Id. at 316-17.

"The teaching of Krysmalski is either that physical harm/physical manifestations are no longer required in conjunction with an emotional distress claim or that evidence that one is 'noticeably and severely' affected, 'unstable and distraught,' and is in a 'hysterical state' are sufficient physical manifestations of injury." Gnan v. Schmidt, 35 Pa. D. & C.4th 299 (Elk C. C. P. 1996)

e. Furthermore, the requirement of physical manifestation is inconsistent with Sinn v Burd, which explicitly held that physical manifestations of emotional distress were not a prerequisite to recovery. "psychic injury is capable of being proven despite the absence of a physical manifestation of such injury." Sinn v. Burd, 486 Pa. at 160, 404 A. 2d at 679. The requirement of resulting physical injury (physical manifestation), "like the requirement of physical impact, should not stand as another artificial bar to recovery but merely be admissible as evidence of the degree of mental or emotion distress suffered." Id.

f. **Restatement draft: Bystander recovery not limited to case in which the emotional disturbance has caused illness or other bodily manifestations**. Other elements (contemporaneous observation; close relative) provide sufficient basis to have confidence in genuineness of mental distress.

V, Consortium claims –emotional elements

A. evidence of emotional impact on family member-

Although consortium does not equal recovery for emotional distress, evidence of the emotional impact on a family member ***may*** be admissible as proof of the ***value*** of the loss of society and companionship:

1, losses alleged are *personal* to the uninjured spouse, Darr Construction Co. v. Workmen's Compensation Appeal Bd.,552 Pa. 400, 408,715 A. 2d 1075, 1079-80 (1998),

2. the court must review the extent of the *deprivation to the spouse* and the *disruption to the spouse's family life*. Nudelman v. Nudelman, 436 Pa. Super. 44, 56, 647 A. 2d

233, 239 (1994); Burns v. Pepsi-Cola, 353 Pa. Super. 571, 576, 510 A. 2d 810, 813 (1986)( Damages for loss of consortium have no market value) although in most formulations of this language, the words "caused by the loss of services performed" are added to the directive. Compare language in Burns, supra, and Belardinelli v. Carroll, 773 F. Supp. 657, 661(D. Del. 1991)(applying Pa. Law) with Nudelman, supra.[1]

3. Cases have also considered evidence showing the impact of the event/accident/injury *on the uninjured spouse's condition* after the event in order to measure the loss. Barnes v. United States, 516 F. Supp. 1376 (W. D. Pa. 1981); , Reuter v. United States, 534 F. Supp. 731 (W.D. Pa. 1982);Belardinelli v. Carroll, 773 F. Supp. 657 (D. Del. 1991), Zimmerman v. Baker-Perkins, 707 F. Supp. 778, 780 (E. D. Pa. 1989)(wife evidence existed that stress and strain of injury caused some marital discord).

4. Ergo, the ***emotional*** impact would be relevant, but the closer one comes to testimony relating purely to emotional distress, divorced from changes in conduct, family life, etc., the more likely it is that a court would sustain an objection to the evidence as an "back door" attempt to introduce "stand alone" emotional distress on the part of a family member.

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[1] On the other hand, proof of the services, affection, etc. provided by the injured spouse prior to the tort is not an absolute requirement. It has been held that the fact of marriage is itself enough to support a recovery, because of the jurors' familiarity with the "ordinary affairs of life." Neuberg v. Bobowicz, 401 Pa. 146, 154, 162 A. 2d 662, 666(1960):

> That services in the ordinary sense were not rendered at all would be immaterial and irrelevant, except as the fact might, under some circumstances, tend to show a want of conjugal regard and affection and thereby mitigate the damages.

Id. at 665; Samuel v. Sanner, 198 F. Supp. 609, 612 (W.D. Pa. 1961). Proof of loss of consortium can be inferred from the facts surrounding the marriage without direct evidence on the point, and a plaintiff-spouse is not required to testify. Ball, supra, 625 A. 2d at 655 (cancer-stricken wife did not testify, but jury could reasonably have concluded from the whole record that Mr. Ball suffered from shortness of breath from pleural thickening that inhibited his normal activities including his ability to provide companionship and services to his wife.) See also Burns, supra, at 813.

B. parent/child issues in death actions.

1. It is has long been the law that a minor child may recover compensation for the *value* of the parent's services in the superintendence, attention to and care of his family and the education of his children of which they have been deprived by his death." Gaydos v. Domabyl, 301 Pa. 523, 530, 152 A. 549, ____ (1930). See also Machado v. Kunkel, 804 A.2d 1238 (Pa.Super. 2002)( Under Pennsylvania law, a child can recover in a wrongful death action for the loss of companionship, comfort, society and guidance of a parent) citing Steiner by Steiner v. Bell Telephone Co., 358 Pa. Super. 505, 510, 517 A. 2d 1348, 1356 (1986) aff'd. 518 Pa. 57, 540 A.2d 266 (1988).

2. Obviously, there is an emotional element involved: the value of a mother's housekeeping services, for example, certainly cannot be placed on the same footing as a cleaning lady for hire. See Spangler v. Helm's New York-Pittsburgh Motor Express, 396 Pa. 482, 485, 153 A. 2d 490, 492 (1959).

3. majority is not a dividing line for purposes of recovery for loss of services. See also Gaydos, supra, 301 Pa. at 537.

4. Therefore, damages may be available for adult children not as an *emotional* loss, that is, "solatium" in the sense of grief and mental anguish, but rather as a *pecuniary* loss, for the *services* of guidance, tutelege and companionship that continued even though the decedent's children had reached majority, see discussion in Burchfield v. M.H.M. Partnership, 43 Pa. D. &C. 4th 533 (Bradford Co. C. P. 1999), if a factual predicate can be established that the relationship continued and services were provided on a regular basis. See Saunders v. Consolidated Rail Corp., 632 F. Supp. 551, 553 (E. D. Pa. 1986)("services gifts, education, training and advice can all be elements of an individual's pecuniary loss" if received with frequency).

5. Judge Kieser has found the converse to be true, also, in Blair Mehta, 67 Pa. D. & C.4th 246 ( Lyc. C. C.P. 2004); followed in DiGregorio v. Glenn O. Hawbaker Inc. 71 Pa. D. & C.4th 263 (Butler C. C. P. 2004), and allowed recovery under the Wrongful Death Statute for the loss of the society and comfort that a deceased adult child would have afforded his parents, not in the sense of emotional pain and sense of loss caused

by the individual's death in the sense of “solatium, but in the sense of the loss of the everyday support: “…. the services a child may have provided a parent go beyond that a housekeeper could supply and may involve taking the parents to church, the store, on vacation or various activities, which, were it not for the child's attention and care, the parent would never enjoy.” Blair, supra, at 263.