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American courts traditionally have been suspicious of emotional distress injury claims.[1] Most jurisdictions still deny recovery for negligently inflicted emotional distress injuries unless plaintiffs can prove they have suffered some accompanying physical injury, illness or other physical consequence.[2] Jurisdictions that allow plaintiffs who have not suffered physical consequences to recover for negligent infliction of emotional distress (NIED)[3] usually impose other barriers to recovery.[4] Two major reasons have been advanced to justify these additional obstacles: (1) emotional distress claims may be fraudulent; and (2) excessive liability may be imposed upon defendants whose culpability may be relatively minor.[5] Based upon these considera-

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1. Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 604 (1982).

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 54, at 361 & n.21 (5th ed. 1984).

3. "[T]he negligent causing of emotional distress is not an independent tort but the tort of negligence . . . ." 6 B. WITKIN, SUMMARY OF CAL. LAW, *Torts*, § 838 (9th ed. 1988). "The traditional elements of duty, breach of duty, causation, and damages apply. [¶]Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability." Slaughter v. Legal Process & Courier Serv., 209 Cal. Rptr. 189, 196 (1984), *quoted with approval*, Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278, 281 (Cal. 1989).

When courts limit recovery in NIED actions based on policy reasons, they are effectively holding that the defendant does not owe the plaintiff a duty to protect the plaintiff from emotional harm.

4. KEETON ET AL., *supra* note 2, § 54, at 360-61.

5. *Id.*; Julie A. Davies, *Direct Action for Emotional Harm: Is Compromise Possi-*

tions, courts have carefully circumscribed liability for intangible emotional distress injuries.[6]

NIED law in California has changed dramatically during the past two decades. In 1968, in the landmark case *Dillon v. Legg*,[7] California rejected the majority rule that strictly limited recovery in NIED actions.[8] California expanded recovery by allowing plaintiffs to recover for NIED as long as their emotional distress injuries were reasonably foreseeable.

In the twenty years following *Dillon*, California NIED cases were confusing and inconsistent.[9] In 1989, in response to these often contradictory cases, the California Supreme Court reversed its trend toward expansive liability and severely limited recovery in NIED actions. In *Thing v. La Chusa*,[10] the California Supreme Court established strict criteria that "bystanders"[11] must meet to recover for NIED. These criteria prevent most bystanders from recovering emotional distress damages. However, in *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*[12] and *Burgess v. Superior Court*,[13] the California Supreme Court held that these prerequisites are limited to "bystander" witnesses and do not apply to "direct" victims.[14] Direct victims can recover in California in circumstances in which bystander witnesses are barred from recovering.

This article examines the direct victim/bystander dichotomy. Part I summarizes and critiques the development of the "direct victim" theory. Part II analyzes the California appellate court opinions decided after *Thing* and *Marlene F.* that have discussed the direct victim/bystander distinction. Parts III and IV review the California Supreme Court's most recent discussions of NIED in *Christensen v. Superior Court*[15] and *Burgess v. Superior Court*.[16] Part V recommends a new approach to resolve the courts' inconsistent treatment of bystander and direct victim NIED actions.

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ble, 67 WASH. L. REV. 1, 3 (1992). In addition, courts have been concerned about litigating trivial claims.

6. Christensen v. Superior Court, 820 P.2d 181, 207 (Cal. 1991) (Kennard, J., concurring and dissenting).

7. 441 P.2d 912 (Cal. 1968).

8. Prior to *Dillon*, California had followed the more restrictive zone of danger rule.

9. Thing v. La Chusa, 771 P.2d 814, 823-24 (Cal. 1989).

10. *Id.* at 814.

11. A bystander is a person who suffers emotional distress as a result of witnessing a negligent defendant cause injury to a third party. *Id.* at 815.

12. 770 P.2d 278 (Cal. 1989).

13. 831 P.2d 1197 (Cal. 1992).

14. A direct victim is a person who has a preexisting relationship with a negligent defendant. *Id.* at 1201.

15. 820 P.2d 181 (Cal. 1991).

16. 831 P.2d 1197 (Cal. 1992).

PART I
HISTORY OF THE DIRECT VICTIM THEORY

A. Creation of the Dichotomy: Dillon and Molien

In *Dillon v. Legg*,[17] the California Supreme Court rejected the well-established rule that strictly limited recovery of emotional distress damages. It expanded recovery by holding that foreseeability of the risk of emotional distress is of primary importance in establishing the existence of a duty to bystanders in NIED actions.[18] To determine whether emotional distress damages are reasonably foreseeable, and thus whether a duty is owed, the court created three guidelines for lower courts to consider:

> (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.[19]

Twelve years later, in *Molien v. Kaiser Foundation Hospitals*,[20] the California Supreme Court complicated the law in this area. The court apparently created a new "direct victim" class of plaintiffs and held that the *Dillon* foreseeability guidelines did not apply to them.[21]

In *Molien*, a doctor incorrectly diagnosed his patient's illness. The doctor told his patient she contracted syphilis and directed her to inform her husband and have him tested for the disease. The court allowed the husband to recover from the doctor for the emotional distress he suffered as a result of the misdiagnosis. Although the husband did not have any direct relationship or contact with the physician, the court held the husband could recover his emotional distress damages as a direct victim of the doctor's conduct. The court allowed the husband to recover as a direct victim because his emotional distress was foreseeable given the doctor's misdiagnosis of a disease that is normally transmitted through sexual relations.[22]

Although *Molien* allowed a direct victim to recover even though he did not meet the *Dillon* guidelines, the *Molien* opinion provided little direction for lower courts with respect to the direct victim/bystander

17. 441 P.2d 912 (Cal. 1968).
18. *Id.* at 919.
19. *Id.* at 920.
20. 616 P.2d 813 (Cal. 1980).
21. *Id.* at 816.
22. *Id.* at 817.

distinction. "*Molien* neither established criteria for characterizing a plaintiff as a 'direct' victim, nor explained the justification for permitting 'direct' victims to recover when 'bystander' plaintiffs could not."[23]

In the years following *Dillon* and *Molien*, California bystander and direct victim NIED cases were confusing and contradictory. The lower courts failed to apply consistently the *Dillon* guidelines and they had great difficulty differentiating direct victims from bystanders.[24] California's NIED law was so ambiguous that courts described it as an "amorphous nether realm"[25] and stated that the law contained "murky waters."[26]

B. Continuation of the Nether Realm: Thing and Marlene F.

In 1989, the California Supreme Court attempted to resolve the inconsistencies in NIED actions in *Thing v. La Chusa*[27] and *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*[28] Although these cases delineated clear rules regulating bystander cases, they failed to clarify the murky waters surrounding direct victim actions.[29]

Thing v. La Chusa clarified the circumstances under which a bystander could recover for NIED.[30] In *Thing*, the court turned the *Dillon* foreseeability guidelines into doctrinal barriers when it established three prerequisites to recovery for bystanders in NIED actions. These prerequisites bar recovery for emotional distress unless the plaintiff: "(1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress . . . ."[31]

The court based its holding in *Thing* on policy considerations that the supreme court believed compelled it to place limitations on California's trend toward unlimited liability.[32] These policy considera-

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23. Thing v. La Chusa, 771 P.2d 814, 823 (Cal. 1989).

24. *Id.* at 823-24.

25. Newton v. Kaiser Hosp., 228 Cal. Rptr. 890, 893 (Cal. Ct. App. 1986).

26. Thing v. La Chusa, 231 Cal. Rptr. 439, 444 (Cal. Ct. App. 1986), *superseded*, Thing v. La Chusa, 771 P.2d 814 (Cal. 1989). The supreme court believed the waters were further muddied by post-*Molien* cases. *Thing*, 771 P.2d at 824.

27. 771 P.2d 814 (Cal. 1989).

28. 770 P.2d 278 (Cal. 1989).

29. The California Supreme Court clarified some of these inconsistencies in *Burgess v. Superior Court*, 831 P.2d 1197 (Cal. 1992). *See infra* text accompanying notes 135-143.

30. In *Thing*, the mother of a young accident victim sued a negligent driver for the emotional distress she suffered when she arrived on the scene moments after the accident occurred and she saw her bloody and unconscious child lying in the roadway. *Thing*, 771 P.2d at 815.

31. *Id.* at 829-30 (footnotes omitted).

32. *Id.* at 826-27.

tions included the need to limit the potential for liability out of proportion to culpability,[33] the intangible nature of the loss,[34] the inadequacy of monetary damages to make the loss whole,[35] the difficulty in measuring damages[36] and the societal cost of attempting to compensate the plaintiff.[37] The court also criticized the unpredictable results of the *Dillon* foreseeability guidelines and indicated that certainty and predictability needed to be returned to NIED cases.[38] The court concluded that "societal benefits of certainty in the law, as well as traditional concepts of tort law, dictate limitation of bystander recovery of damages for emotional distress."[39]

In *Thing*, the court noted that the overwhelming majority of emotional distress that members of our society endure is not compensable.[40] Nevertheless, the court believed that certain NIED cases should remain actionable. As a result, the court limited recovery to plaintiffs who suffer severe emotional distress as a result of contemporaneously observing the defendant injure a close relative.[41] Courts can easily apply this bright line test. It also limits recovery in NIED actions to plaintiffs who are most deserving of recovery. These plaintiffs have endured an "abnormal life experience" by witnessing an injury to a close relative and are most likely to suffer the greatest emotional harm.[42]

The same policy considerations that led the court to establish bright line tests in bystander cases also apply to direct victim actions.

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33. *Id.* at 826.
34. *Id.* at 828-29.
35. *Id.* at 827.
36. *Id.*
37. *Id.* at 826-27. Many of the policy considerations that suggest courts should limit liability in NIED cases also suggest that courts should limit liability in other negligence actions as well, especially those in which the plaintiff seeks recovery for physical injury and emotional distress. However, when plaintiffs demonstrate clear physical injuries, courts are more willing to compensate them for their additional emotional distress damages.
38. *Id.* at 815.
39. *Id.*
40. *Id.* at 829.
41. In *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988), a case that foreshadowed *Thing* by seven months, the California Supreme Court held that cohabitants living in the equivalent to a marriage relationship could not recover as bystanders because a cohabitant relationship could not satisfy the "closely related" requirement. *Id.* at 586. The court articulated three policy reasons to justify its holding: (1) the state's strong interest in the marriage relationship; (2) judicial efficiency and economy; and (3) the need to limit the class of persons to whom a negligent defendant owes a duty of care. *Id.* at 586-88.
42. *Thing*, 771 P.2d at 828 n.9 (quoting Ochoa v. Superior Court, 703 P.2d 1, 5 n.6 (Cal. 1985)).

However, in *Marlene F.*,[43] a case decided two weeks prior to *Thing*, the California Supreme Court declined to apply the type of limitations delineated in *Thing*—or other prerequisites to recovery—to direct victim cases. Instead, the court expanded the "amorphous nether realm" surrounding NIED actions by allowing plaintiffs who did not meet the *Thing* prerequisites to recover based upon their special relationship with the defendant. *Marlene F.* continued to allow direct victims to recover for NIED in circumstances in which bystanders would be denied recovery. Unfortunately, the *Marlene F.* opinion failed to provide any guidelines to help the lower courts differentiate between bystanders and direct victims.

In *Marlene F.*, the court allowed two mothers to recover for NIED from a therapist who sexually abused their children. The mothers initially sought counseling for their children. However, the therapist began treating the mothers as well as their sons because he believed the children's psychological problems arose in part from difficulties in the parent/child relationship. When the mothers learned that the therapist had sexually abused their sons, they brought an action to recover their emotional distress damages. The court did not allow the mothers to recover as bystanders because they were not percipient witnesses to the injury causing event. However, it held the mothers could recover because of their "special relationship" with the therapist.

The *Marlene F.* opinion contained a lengthy discussion of the *Molien* direct victim theory and concluded that the therapist directed his tortious conduct against the mothers as well as their sons.[44] However, the court never explained how the *Molien* direct victim rule justified recovery in *Marlene F.* In *Molien*, the doctor directed his tortious conduct (misdiagnosing a disease) at the husband because the doctor told his patient to convey the misdiagnosis to her husband and have him tested. In contrast, in *Marlene F.*, the therapist directed the tortious conduct (sexually abusing the children) at the children and not at the mothers. In fact, the therapist presumably sought to hide the tortious conduct from the mothers. Despite these clear differences in the facts, the majority opinion failed to explain how the direct victim theory established in *Molien* supported the mothers' right to recover in *Marlene F.*

Although the *Marlene F.* opinion stated a clear rule controlling recovery in NIED actions, it failed to explain how that rule applied to the mothers who brought the suit. According to the supreme court, "[d]amages for severe emotional distress . . . are recoverable in a negligence action when they result from the breach of a duty owed the

43. 770 P.2d 278 (Cal. 1989).
44. *Id.* at 283.

plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two."[45] In *Marlene F.*, the majority opinion classified *Molien* as a case in which the defendant assumed a duty to convey accurate information to the husband. Because the doctor breached his assumed duty, the court concluded the husband was a direct victim of the doctor's negligence.[46] However, the *Marlene F.* majority opinion did not explain how the therapist's duty to the mothers arose. It did not indicate whether the therapist assumed a duty to them, whether the duty was imposed by law, or whether it arose out of the therapeutic relationship.

The *Marlene F.* opinion complicated rather than clarified the direct victim theory. After *Marlene F.*, the lower courts had no clear guidelines or criteria to determine what type of contact or relationship with a defendant qualifies the plaintiff as a direct victim rather than a bystander.

The ambiguities in the *Marlene F.* opinion were due primarily to underlying differences among the justices about the meaning and viability of the direct victim theory. The *Marlene F.* majority opinion and Justice Eagleson's concurring opinion exposed the sharp disagreement among the justices regarding the circumstances in which the direct victim doctrine should apply and whether the direct victim/bystander dichotomy should even exist.

The three concurring justices believed the majority's reliance on a direct victim analysis was irrelevant. Instead, they concluded that the therapist's professional malpractice entitled the mothers to recover. The concurring justices emphasized that the mothers were patients of the therapist and the therapist owed them a duty "to refrain from conduct that foreseeably may aggravate the condition for which treatment was sought or inhibit the therapist's ability to successfully treat the patient."[47] The concurring justices concluded that the sexual abuse of the children violated the therapist's professional duty. In a sharp criticism of the majority opinion, the concurring opinion stated:

> I do not, however, agree that a "direct victim" theory of liability or *Molien* has any relevance to the plaintiffs' right to recover. . . . As the majority recognize, *Molien* did not establish an independent cause of action for infliction of serious emotional distress. Since there was no breach of a professional relationship between the defendant and the plaintiff, the justification for permitting

45. *Id.* at 282.
46. *Id.*
47. *Id.* at 288 (Eagleson, J., concurring).

> recovery in that case was the defendant's assumption of a duty to the plaintiff when he directed that his diagnosis of a sexually transmitted disease be communicated to plaintiff . . . . The majority's reliance on *Molien* in this case, and its suggestion that permitting recovery is somehow novel although not a "dramatic step" are inexplicable. The explanation in *Molien* that the plaintiff was a "direct victim" did no more than distinguish and explain why the *Molien* plaintiff had not stated a cause of action as a "bystander" victim whose emotional distress injury was caused by observation of an injury to another.[48]

The justices' sharp disagreement about the meaning and significance of the direct victim theory is also apparent from the opinions in *Thing v. La Chusa*.[49] *Thing* exemplifies a classic bystander witness case in which a mother arrived on the scene of an accident moments after a negligent driver caused severe injuries to her young son. Although the direct victim theory had no relevance to the court's holding in *Thing*, the majority opinion, authored by Justice Eagleson, again criticized *Molien* as a case which "neither established criteria for characterizing a plaintiff as a 'direct' victim, nor explained the justification for permitting 'direct' victims to recover when 'bystander' plaintiffs could not."[50] The opinion also noted that "[t]he subtleties in the distinction between the right to recover as a 'bystander' and as a 'direct victim' . . . have contributed in some measure to the present difficulty in defining the scope of an NIED action."[51]

Justice Mosk, the author of *Molien*, indicated in his dissenting opinion in *Thing* that he believed the "majority fail[ed] to understand *Molien*."[52] He could not understand why "the majority seem[ed] to have some trouble with *Molien* limiting recovery to the 'direct victim' of the doctor's negligence . . . . The court [in *Molien*] made it abundantly clear that 'the alleged tortious conduct of defendant was directed to [the husband] as well as to his wife.' Thus, both were direct victims."[53]

The language in the *Thing* majority and dissenting opinions is even more confusing given that both opinions make absolutely no reference to *Marlene F.*, a case that the supreme court decided two weeks prior to *Thing* and that clearly relied upon the direct victim theory. Instead of clarifying the direct victim rules, the opinions in *Marlene F.* and *Thing* created confusion in the lower courts about whether the California Supreme Court approved the direct victim/bystander dichotomy. For example, in *Schwarz v. Regents of the University of California*,[54] the Second District Court of Appeal analyzed the supreme court's opinion in *Thing* and stated: "[T]he Supreme Court

48. *Id.* at 288-89 (Eagleson, J., concurring) (citation omitted).
49. 771 P.2d 814 (Cal. 1989).
50. *Id.* at 823.
51. *Id.*
52. *Id.* at 837 (Mosk, J., dissenting).
53. *Id.* (Mosk, J., dissenting) (citation omitted).
54. 276 Cal. Rptr. 470 (Cal. Ct. App. 1990).

intends to dismantle entirely the 'direct victim' distinction."[55] Despite this perceived rejection of the direct victim/bystander dichotomy, based upon *Marlene F.*, the Second District ultimately concluded: "As matters stand now, we deem it wise to assume a 'direct victim' theory, as illuminated and limited by *Marlene F.* and *Ochoa v. Superior Court*,[56] remains viable."[57]

PART II
APPELLATE COURT INTERPRETATION AND APPLICATION OF *THING* AND *MARLENE F.*

After the California Supreme Court's holdings in *Marlene F.* and *Thing*, the appellate courts consistently denied recovery in NIED cases to nonpercipient witnesses who failed to claim direct victim status.[58] Because the *Thing* requirements were clearly stated and easily applied, the appellate courts were able to consistently resolve most of the bystander witness cases.[59]

However, problems remained in cases in which plaintiffs alleged they were entitled to relief under a direct victim theory. Many appellate courts denied recovery to plaintiffs who claimed direct victim status because of the policy reasons for limiting relief in NIED actions that the California Supreme Court discussed in *Thing*.[60] In contrast, other courts allowed plaintiffs to recover based on a direct victim theory.[61] The holdings and reasoning in these cases indicate

55. *Id.* at 476.

56. In *Ochoa*, a minor died due to negligent medical treatment that the mother had observed. The mother was allowed to recover as a percipient witness under *Dillon*, but the court held she was not a direct victim of the doctor's negligence. The supreme court held the mother was not a direct victim because the doctor's negligence was "directed primarily at the decedent." Ochoa v. Superior Court, 703 P.2d 1, 10 (Cal. 1985).

57. *Schwarz*, 276 Cal. Rptr. at 477 (citations omitted).

58. *See, e.g.*, Fife v. Astenius, 284 Cal. Rptr. 16 (Cal. Ct. App. 1991); Ortiz v. HPM Corp., 285 Cal. Rptr. 728 (Cal. Ct. App. 1991); Breazeal v. Henry Mayo Newhall Memorial Hosp., 286 Cal. Rptr. 207 (Cal. Ct. App. 1991).

59. Some minor areas of bystander witness cases still require further clarification. *See, e.g.*, Wilks v. Hom, 3 Cal. Rptr. 2d 803 (Cal. Ct. App. 1991) and In re: Air Crash Disaster Near Cerritos, California, No. 91-55464, 1992 U.S. App. LEXIS 5863 (9th Cir. 1992), amended, 1992 U.S. LEXIS 17951 (9th Cir. 1992). These cases focused on the contemporaneous observation requirement.

60. *See, e.g.*, Burger v. Pond, 273 Cal. Rptr. 709 (Cal. Ct. App. 1990); Golstein v. Superior Court, 273 Cal. Rptr. 270 (Cal. Ct. App. 1990); Schwarz v. Regents of the University of California, 276 Cal. Rptr. 470 (Cal. Ct. App. 1990); Holliday v. Jones, 264 Cal. Rptr. 448 (Cal. Ct. App. 1989).

61. *See, e.g.*, Christensen v. Superior Court, 271 Cal. Rptr. 360 (Cal. Ct. App. 1990), *superseded*, 810 P.2d 181 (Cal. 1991); Anisodon v. Mercy Hosp. and Medical Center, 285

that *Thing* and *Marlene F.* failed to clarify the "amorphous nether realm" that existed in NIED direct victim cases.

In determining whether to grant relief in the direct victim cases, the appellate courts focused primarily on four different factors: (1) the foreseeability of the emotional distress damages; (2) the person at whom the defendant's conduct was directed; (3) the existence of a contract; and (4) the nature of the services the defendant provided.

A. Foreseeability of Emotional Distress Damages

Although *Thing* generally rejected foreseeability as an appropriate limiting factor in bystander cases, the court, in *Quesada v. Oak Hill Improvement Company*,[62] focused on the foreseeability of the risk of emotional distress damages and granted recovery.[63] In *Quesada*, the Fifth District Court of Appeal allowed a sister and niece to recover from a funeral home for "negligent mishandling of a corpse."[64] The plaintiffs sued the funeral home after the home received the wrong body from the county coroner and buried it over the protestations of the decedent's relatives. Although the sister and niece did not have a duty to dispose of the decedent's remains and were not parties to the funeral home contract, they claimed that they were the foreseeable direct victims of the negligent mishandling of the corpse.[65] The court allowed the plaintiffs to recover based upon the foreseeability of their emotional distress damages. The court never specifically analyzed whether these plaintiffs should recover as direct victims or bystander witnesses; it merely stated that they could recover because their emotional distress was foreseeable.

In contrast to *Quesada*, the Fourth District Court of Appeal held

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Cal. Rptr. 539 (Cal. Ct. App. 1991), *review granted*, 819 P.2d 842 (Cal. 1991) *review dismissed*, 1992 Cal. LEXIS 4220 (Cal. 1992); Quesada v. Oak Hill Improvement Co., 261 Cal. Rptr. 769 (Cal. Ct. App. 1989).

62. 261 Cal. Rptr. 769 (Cal. Ct. App. 1989).

63. In addition, in Ballinger v. Palm Springs Aerial Tramway, 269 Cal. Rptr. 583 (Cal. Ct. App. 1990), *review denied and opinion withdrawn by order of court*, 1990 Cal. LEXIS 4503 (Cal. 1990), the court also focused on the foreseeability of the risk and allowed recovery. In *Ballinger*, passengers on the descending trip of the Palm Springs tramway sued for NIED when a portion of the tram fell through the roof and hit one of the passengers who subsequently died. The court allowed plaintiffs, who had not suffered any physical injury and were not related to the injured passenger, to recover as direct victims because their emotional distress damages were foreseeable. The court held: "It was reasonably foreseeable that even those passengers who were not physically hit by pieces of glass and were not physically injured would suffer severe emotional distress from the experience. Thus, plaintiffs qualify as 'direct victims' under the *Molien* rationale." *Id.* at 589.

64. The negligent mishandling of human remains is not a separate tort; it is convenient terminology descriptive of the context in which the negligence occurred. Christensen v. Superior Court, 820 P.2d 181, 188-89 (Cal. 1991). The tort with which the court is concerned is negligence. Just like NIED, it requires the same elements as a negligence action: duty, breach, causation and damages.

65. *Quesada*, 261 Cal. Rptr. at 773.

that foreseeability of emotional distress injury was not a sufficient basis for imposing liability. In *Holliday v. Jones*,[66] a trial court had previously convicted Holliday of involuntary manslaughter in connection with his wife's death. After the appellate court reversed his conviction because of the incompetence of his first attorney, he was retried and acquitted. Subsequently, Holliday's children sued their father's first attorney for NIED.[67] Based upon *Molien*, the trial court awarded damages to the children as foreseeable victims.[68] The appellate court reversed the trial court. Although the appellate court agreed that the children were foreseeable victims, the court held the defendant had no duty to protect the children from emotional harm. The *Holliday* court stated:

> It would appear that in order to recover for negligently inflicted emotional distress damages, a plaintiff must either have a special relationship to the defendant (*Marlene F.*), be the direct object of some aspect of the defendant's conduct (*Molien*) or personally witness a negligently caused physical injury to a closely related primary victim (*Dillon*; *Ochoa*; *Thing*).[69]

The court denied recovery to the children because they failed to fit into any of the three categories: they could not recover based on a special relationship because they had no contractual or other relationship with the attorney; they could not recover as direct victims because the attorney's malpractice was not "directed" at them; and they could not recover as bystanders because they did not witness any physical injury to their father.[70] According to the *Holliday* court, direct victim status could not be based solely on whether the emotional distress damages were foreseeable.[71]

B. Conduct Directed at the Plaintiff

Five lower court cases[72] focused on the language in *Molien* that

66. 264 Cal. Rptr. 448 (Cal. Ct. App. 1989).

67. The father in *Holliday* also sued to recover his emotional distress damages. The court allowed the father to recover because it found a fundamental personal right, his liberty, was at stake and emotional distress damages necessarily result from loss of liberty. *Id.* at 456.

68. *Id.* at 449.

69. *Id.* at 453.

70. *Id.*

71. *Id.*

72. *See also* Ballinger v. Palm Springs Aerial Tramway, 269 Cal. Rptr. 583, 589 (Cal. Ct. App. 1989), *review denied and opinion withdrawn by order of court*, 1990 Cal. LEXIS 4503 (Cal. 1990). In *Ballinger*, the court allowed recovery because it found the defendant's conduct was directed at the tram passengers. The court did not explain how the negligent failure to maintain a tramway in proper working order is "by its very nature" directed at the passengers who were not struck.

found the defendant liable to the husband because "the alleged tortious conduct of defendant was directed to him as well as the wife."[73] Because *Molien* did not explain how to determine whether conduct is directed at a particular plaintiff, these cases appear inconsistent.

In *Martin v. United States of America*,[74] a mother asserted she was entitled to recover as a direct victim because of a child care center's agreement to care for her child. In *Martin*, a child was kidnapped and raped while she was in the care of a day care center. The mother asserted she was entitled to recover as a direct victim based upon the special relationship between a parent and a day care provider. This special relationship claim was based on the unique nature of a day care center's standing *in loco parentis*.[75] Although the court found the mother's claim compelling, it denied her recovery as a direct victim. The court based its holding on the policy reasons expressed in *Thing* for limiting liability and promoting certainty in the law. The court held that the negligent supervision of the child was conduct "directed at" the child and not at the mother.

Similarly, in *Schwarz v. Regents of the University of California*,[76] the court rejected a father's claim that he should recover as a direct victim or based on a special relationship. The father brought suit against his son's psychotherapist when the boy's mother moved the son to another country based on the therapist's advice. After analyzing the court's reasoning in *Thing* and *Marlene F.*, the *Schwarz* appellate court held that the father could not recover as a bystander[77] or as a direct victim.[78] The court denied recovery to him as a direct victim because it found that the therapist's services were rendered primarily to benefit the son and any benefit to the father was secondary.

The facts in *Schwarz* were very similar to those of *Marlene F.* In both cases, parents sued their children's therapists. In denying recovery to the father, the *Schwarz* court distinguished *Marlene F.* and held that *Marlene F.* should be limited to its specific circumstances. In *Marlene F.*, the therapist treated the mothers as well as the sons in the context of the family relationship; additionally, the mothers alleged that the therapist's sexual misconduct disrupted the family relationship. Although the therapist's conduct in *Schwarz* also disrupted the family relationship, the *Schwarz* court distinguished *Marlene F.* because of the differing therapeutic goals. In *Schwarz*,

73. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 817 (Cal. 1980).
74. 779 F. Supp. 1242 (N.D. Cal. 1991).
75. *Id.* at 1248.
76. 276 Cal. Rptr. 470 (Cal. Ct. App. 1990).
77. He could not recover as a bystander because he did not observe the alleged injury-producing event (the encouragement of and failure to take any steps to stop the mother from implementing her plan to remove the son from the country and conceal his whereabouts). *Id.* at 476.
78. *Id.* at 483.

the therapist directed the therapy at treating the son, while in *Marlene F.*, a major goal of the therapy was to ameliorate the family dysfunction in general. Therefore, the *Schwarz* court concluded: "The clear implication is that the court would *not* have viewed the [*Marlene F.*] mothers as 'direct victims' had the therapist treated the sons only for the purpose of resolving the sons' individual emotional problems, even if these problems led to family difficulties, rather than treating the parent-child family problems themselves."[79]

In contrast to *Schwarz*, in *Jacoves v. United Merchandising Corp.*,[80] the appellate court held that a triable issue of fact existed as to whether parents could qualify as direct victims of their son's negligent psychiatric hospital treatment. In *Jacoves*, parents sued a hospital for NIED after their son committed suicide. The parents alleged that the hospital was negligent when it released the son. Although the son was the defendant's primary patient, the parents alleged they were entitled to recover because they were the intended beneficiaries of the group therapy, they were treated as patients in family therapy sessions and they were utilized as active instrumentalities in their son's treatment.[81] Although *Jacoves* was factually similar to *Schwarz*, the *Jacoves* court did not dismiss the parents' claim. It concluded that whether the hospital owed the parents a direct duty was at least a triable issue of fact.

Another California appellate court opinion, *Anisodon v. Superior Court of San Diego County*,[82] also involved questions concerning a family unit receiving treatment. In *Anisodon*, the court addressed whether a mother and father could recover as direct victims from doctors who made an improper uterine incision during a cesarean section. The improper incision ultimately led to serious physical injuries to the child. The mother alleged that she should recover her emotional distress damages as a victim of medical malpractice because she received an improper incision. The improper incision allowed the mother to allege that the incision, "along with the condition of her daughter," caused her severe emotional distress. Because the mother received the improper incision, the court found that the doctors directed the negligent medical care at both the mother and the child and the mother could recover as a direct victim.

79. *Id.* at 477-78.

80. B052163, 1992 Cal. App. LEXIS 1058 (Cal. Ct. App. 1992).

81. *Id.* at *15.

82. 285 Cal. Rptr. 539 (Cal. Ct. App. 1991), *review granted*, 819 P.2d 842 (Cal. 1991), *review dismissed*, 1992 Cal. LEXIS 4220 (Cal. 1992).

The court analogized the mother's situation during the delivery to the mothers' situation in *Marlene F.*:

> [T]he [*Marlene F.*] mothers were treated as part of a family unit, whose individual interests were unavoidably harmed when another member of the family was harmed in the course of the joint treatment.
>
> We believe a principled reading of the authority, particularly *Marlene F.*, requires us to conclude that Mother, under these circumstances of labor and delivery, was part of a family unit which received joint treatment, such that medical negligence directed at herself and her infant during the birth process may be pled to have caused harm to the mother's individual interests.[83]

The court denied recovery to the father because it found that he was not a direct object of the negligent medical care. The court stated:

> [W]e can only conclude that in no sense was the allegedly negligent medical care "by its very nature" directed at him. He was not required to take further action with regard to examination of his person, as was Mr. Molien. He was not a patient, nor for the specialized purposes of the theory enunciated in *Marlene F.*, a member of the family unit that was undergoing joint treatment . . . . While Father's emotional distress from these sad facts is unquestionably as real and as deep as is that of the child's mother, Father simply does not qualify as a patient in joint treatment to whom particular duties were owed.[84]

In *Burger v. Pond*,[85] the fiancée of an attorney's client sued for NIED as a direct victim of the attorney's negligence because she was an intended beneficiary of the attorney's services. The attorney attempted to obtain a divorce for his client so the client could marry the plaintiff. The plaintiff asserted that as a result of her "direct contact" with the attorney, a "special relationship" existed which created a duty of care.[86] The court held that she was not a direct victim under *Molien* because the attorney had not directed any conduct toward her. Although the plaintiff had direct contact with the attorney and the attorney knew of the plaintiff's concerns, the court held that these facts did not support her claim of a special relationship or direct victim status.[87]

C. Existence of a Contractual Relationship

Prior to *Marlene F.*, two cases, *Andalon v. Superior Court*[88] and *Newton v. Kaiser Foundation Hospital*,[89] allowed parents to recover as *Molien* direct victims based on defendants' contractual obligations to care for the plaintiffs' children. In contrast, *Martinez v. County of Los Angeles*,[90] another pre-*Marlene F.* case, held that a contract for

83. *Id.* at 546.
84. *Id.* at 547 (citation omitted).
85. 273 Cal. Rptr. 709 (Cal. Ct. App. 1990).
86. *Id.* at 713.
87. *Id.* at 717.
88. 208 Cal. Rptr. 899 (Cal. Ct. App. 1984).
89. 228 Cal. Rptr. 890 (Cal. Ct. App. 1986).
90. 231 Cal. Rptr. 96 (Cal. Ct. App. 1986).

delivery and care of a child does not entitle the parents to recover as direct victims.

In *Marlene F.*, the California Supreme Court did not consider whether a duty can be premised solely on the existence of a contract. It limited its discussion of the issue to a footnote and stated: "[T]he existence of a contract to provide care for the children *bolsters* the mothers' showing that the therapist also owed them a duty of care, but their claim does not rest solely, or even necessarily, on that contract."[91] The post-*Marlene F.* appellate cases that considered whether a contractual relationship could lead to recovery under a direct victim theory either rejected a contract-based duty or did not resolve the issue because the plaintiffs were entitled to recover based on other aspects of their relationship with the defendants.[92]

Like *Marlene F.*, the courts in *Anisodon v. Mercy Hospital and Medical Center*[93] and *Jacoves v. United Merchandising Corp.*[94] did not analyze the impact of the contractual relationship. In *Anisodon*, the court found it unnecessary to "rely on the two other characterizations made in Mother's pleading of the doctor/patient relationship as contractual or 'special.' "[95] Instead, it found the alleged contractual relationship merely "bolster[ed]" the showing of a duty.[96] In *Jacoves*, the court dismissed in a footnote the parents' claim that they were intended beneficiaries of their son's admission contract with a hospital. The court found the parents' claim did not depend on the contract relationship.[97]

In *Golstein v. Superior Court*,[98] parents of a nine-year-old who died as a result of a negligent administration of an overdose of radiation

91. Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278, 283 n.7 (Cal. 1989).

92. *See also* Saari v. Jongordon Corp., 7 Cal. Rptr. 2d 82 (Cal. Ct. App. 1992). In *Saari*, the plaintiff and his longtime companion entered into a contract with a crematorium to cremate the companion's body and return the ashes to the plaintiff. When the crematorium failed to comply with the contract terms, the plaintiff sued to recover his emotional distress damages. The court allowed the plaintiff to recover his emotional distress damages based upon the crematorium's breach of the contract. The court did not determine whether the contract affected the plaintiff's NIED action because it concluded that the plaintiff was entitled to recover his emotional distress damages in his breach of contract cause of action. *Id.* at 86.

93. 285 Cal. Rptr. 539 (Cal. Ct. App. 1991), *review granted*, 819 P.2d 842 (Cal. 1991), *review dismissed*, 1992 Cal. LEXIS 4220 (Cal. 1992).

94. B052163, 1992 Cal. App. LEXIS 1058 (Cal. Ct. App. 1992).

95. *Anisodon*, 285 Cal. Rptr. at 546.

96. *Id.*

97. *Jacoves*, at *15 n.12.

98. 273 Cal. Rptr. 270 (Cal. Ct. App. 1990).

also sought recovery for their emotional distress based upon their contract with the doctor. The court rejected the parents' claim that the contract created a duty. However, the *Golstein* opinion contained little analysis regarding whether the contractual relationship should give rise to a duty of care. Instead, the court mentioned *Newton*[99] and *Andalon*,[100] the two cases that preceded *Marlene F.* and allowed recovery based upon a contractual relationship. It then denied recovery because it incorrectly concluded that *Marlene F.* declined to follow these cases.

D. Uniqueness of the Services the Defendant Is Providing

Two appellate cases allowed recovery based upon the unique nature of the services the defendant was providing. In *Quesada v. Oak Hill Improvement Company*[101] and *Christensen v. Superior Court*,[102] the appellate courts permitted decedents' relatives to recover from mortuaries and crematoriums for the mishandling of human remains because of the unique services that the defendants provided.[103] Although the relatives appeared to be bystander victims who should have been denied recovery because they were not percipient witnesses to the injury-producing event, these courts allowed recovery.

In *Christensen*, the defendants mishandled the remains of approximately 16,000 decedents and removed organs from approximately one thousand decedents. Defendants allegedly "mutilated decedents' remains by removing and 'harvesting' organs and body parts; performed multiple cremations; . . . commingled decedents cremated remains with those of other decedents, and with nonhuman residue; extracted gold and other metals from decedents' remains; [and] misappropriated decedents' valuables and personal effects."[104] The mishandling occurred over a seven-year period and the plaintiffs learned of the defendants' conduct from a media broadcast.

The plaintiffs sued for NIED[105] and the appellate court concluded that the plaintiffs could recover because they fit within the *Marlene*

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99. 228 Cal. Rptr. 890 (Cal. Ct. App. 1986).

100. 208 Cal. Rptr. 899 (Cal. Ct. App. 1984).

101. 261 Cal. Rptr. 769 (Cal. Ct. App. 1989).

102. 271 Cal. Rptr. 360 (Cal. Ct. App. 1990), *superseded*, 820 P.2d 181 (1991). The supreme court also treated the mishandling of dead bodies as *sui generis*. *See infra* text accompanying notes 112-118.

103. Many jurisdictions have allowed recovery in negligent handling of corpse cases without imposing strict prerequisites to recovery. The jurisdictions that allow recovery in these cases base their holdings on the likelihood of genuine and serious mental distress which arises when a loved one's corpse has been mishandled. KEETON ET AL., *supra* note 2, § 54, at 362.

104. *Christensen*, 271 Cal. Rptr. at 364.

105. Plaintiffs also sued for intentional infliction of emotional distress and other statutory and tort causes of action that are not relevant to this discussion.

F. "special relationship category."[106] The special relationship in *Christensen* arose from the defendants' agreement to care for a decedent[107] and was based on the premise that human remains symbolize "a sacred trust for the benefit of all who may, from family or friendship, have an interest in [them]."[108]

The court rejected the defendants' claim that *Thing* requires the plaintiffs' presence at the mishandling to recover for NIED. The *Christensen* court distinguished its facts from those in *Thing* because it found that the *Christensen* plaintiffs had a special relationship with the defendants that entitled them to recover. The court found a special relationship existed even though the *Christensen* plaintiffs were not parties to a contract with the defendants. This special relationship existed between the defendants and all close relatives of the decedents and allegedly arose from the defendants' acceptance of the decedents' bodies for burial.

The appellate courts treated the cases involving the mishandling of human remains as *sui generis*. The *Christensen* court acknowledged that its ruling allowed recovery for mishandling remains when it would deny recovery if the defendants had injured a living person.[109] It justified the unique treatment by borrowing a phrase from death penalty litigation: "Death is qualitatively different."[110]

As noted above, appellate courts continued to struggle with NIED actions after *Marlene F.* and *Thing*. These supreme court opinions failed to provide clear guidelines for lower courts to determine whether a plaintiff qualifies as a direct victim. The "amorphous nether realm" created in *Dillon* and *Molien* continued because *Marlene F.* and *Thing* complicated rather than clarified the direct victim rules. The California Supreme Court had another opportunity to resolve these difficulties by establishing clear guidelines when it decided *Christensen*,[111] but it failed to do so.

106. *Id.* at 374.
107. *Id.*
108. *Id.* (quoting Huntly v. Zurich General A. & L. Ins. Co., 280 P. 163, 166 (Cal. Ct. App. 1929)).
109. A "mortuary may be liable for negligently mishandling human remains although the same mortuary would not have been liable to absent family members if the mortuary's driver had negligently caused the decedent's death." *Id.* at 376.
110. *Id.* (quoting People v. Hernandez, 763 P.2d 1289, 1318 (Cal. 1988)).
111. Christensen v. Superior Court, 820 P.2d 181 (Cal. 1991).

PART III
CHRISTENSEN V. SUPERIOR COURT

When the California Supreme Court decided *Christensen*, it apparently approved the appellate court's treatment of "dead body cases" as *sui generis*. The California Supreme Court allowed family members of the decedent to recover for NIED but modified the appellate court's determination of the protected class.[112] The California Supreme Court allowed individuals who had no statutory right to control the disposition of the decedent's remains and no contractual relationship with the defendants to recover. The only limitations to recovery were that the plaintiffs must be close family members, must be aware that funeral and/or crematory services were being performed, and must be the persons for whom the funeral/crematory services were being performed.[113]

The court held the *Thing* limitations on bystander recovery did not apply to the *Christensen* plaintiffs because those limitations applied only to the bystander-witness scenario and not to the mishandling of human remains.[114] It limited the *Thing* prerequisites to cases involving "negligent conduct of a defendant with whom the plaintiff had no preexisting relationship, and to whom the defendant had not previously assumed a duty of care beyond that owed to the public in general."[115] The court reasoned that the general principles underlying tort law do "not compel a conclusion that the limitations deemed appropriate in *Dillon v. Legg* and *Thing v. La Chusa* to limit recovery by bystanders should apply in other situations, and *particularly in that presented here.* [¶]*The unique context in which this dispute arises is relevant to its resolution.*"[116]

The *Christensen* court reiterated the three circumstances that establish a duty of care in NIED actions: (1) defendant's assumption of a duty; (2) imposition of a duty as a matter of law; or (3) imposition of a duty based upon a special relationship.[117] The California Supreme Court held the *Christensen* defendants liable because they:

> assumed a duty to the close relatives of the decedents for whose benefit they were to provide funeral and/or related services. They thereby created a special relationship obligating them to perform those services in the dignified and respectful manner the bereaved expect of mortuary and crematory operators.

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112. *Id.* at 183.

113. *Id.* at 199. The court did not specify who was included in the class of persons for whom the defendant performed the services. It excluded from the class infants and those who were not born at the time the defendant rendered the services. The court concluded that the defendant would not owe a duty to infants and the unborn because they are not foreseeable victims. Beyond excluding this group, the court did not further define this class.

114. *Id.* at 190.

115. *Id.* at 189.

116. *Id.* at 190 (emphasis added).

117. *Id.* at 193.

> The existence of this duty distinguishes the negligence action pleaded here from those of the bystander-witnesses who were plaintiffs in *Thing v. La Chusa* and *Dillon v. Legg*.[118]

The *Christensen* defendants can be distinguished from the *Thing* and *Dillon* defendants because the defendants in these later cases had no prior contact with either the plaintiff or anyone closely related to the plaintiff. However, the court failed to distinguish the *Christensen* defendants from the defendants in *Ochoa*,[119] *Golstein*,[120] *Anisodon*,[121] *Holliday*,[122] *Burger*,[123] *Martin*,[124] or *Schwarz*.[125] In each of these cases, the defendant had prior contact with the plaintiff or with the plaintiff's close relative. Unless one accepts the premise that "death is qualitatively different," the court's conclusion that mortuary defendants assume a duty to close family members appears inconsistent with its conclusion that no duty is assumed to close relatives when a doctor treats a close relative's medical needs, when a therapist counsels a close relative, or when an attorney provides legal services to a close relative.

The court also used the contract with the mortuary as a basis to impose a duty.[126] The court referred to cases in which plaintiffs who were not in privity of contract with the defendant could recover as third party beneficiaries of the contract. The court found liability based upon the contract because in *Christensen* the contract was intended to benefit the plaintiffs and the damages were foreseeable.[127]

Although the California Supreme Court concluded that the existence of the contract and the assumption of the duty should lead to liability in the unique context of mishandling human remains, it failed to identify which other contractual relationships give rise to a duty of care. It also failed to explain the relationship between assumed duty, direct victim, and special relationship status. Instead, the court held that liability was appropriate in *Christensen* because the unique context of mishandling human remains satisfies the policy reasons that determine whether a duty should be imposed. These

118. *Id.* at 193-94 (citations omitted).
119. 703 P.2d 1 (Cal. 1985).
120. 273 Cal. Rptr. 270 (Cal. Ct. App. 1990).
121. 285 Cal. Rptr. 539 (Cal. Ct. App. 1991), *review granted*, 819 P.2d 842 (Cal. 1991), *review dismissed*, 1992 Cal. LEXIS 4220 (Cal. 1992).
122. 264 Cal. Rptr. 448 (Cal. Ct. App. 1989).
123. 273 Cal. Rptr. 709 (Cal. Ct. App. 1990).
124. 779 F. Supp. 1242 (N.D. Cal. 1991).
125. 276 Cal. Rptr. 470 (Cal. Ct. App. 1990).
126. Christensen v. Superior Court, 820 P.2d 181, 194 (Cal. 1991).
127. *Id.*

policy reasons include: (1) the foreseeability and certainty of injury in funeral-related services;[128] (2) the moral blame attached to engaging in purposefully mishandling human remains;[129] (3) the relatively light burden to the community because of the limited potential class of plaintiffs;[130] and (4) the imposition of liability that is proportionate to the defendant's culpability.[131]

As Justice Kennard's concurring and dissenting opinion in *Christensen* indicates, the weighing of the above policy reasons is inconsistent with the California Supreme Court's prior decisions. Although defendants can clearly foresee emotional distress damages if they mishandle a loved one's remains, foreseeability fails as a useful guideline or a meaningful restriction on the scope of an NIED action.[132] For example, parents who learn that their child has been permanently disabled by an automobile accident or as a result of a negligently performed medical procedure also suffer foreseeable emotional distress, but they are denied recovery unless they are percipient witnesses who meet the *Thing* requirements.[133] Furthermore, mishandling of human remains is no more blameworthy than driving at high speeds while intoxicated at the risk of death to highway users.[134]

In *Christensen*, as in *Marlene F.*, the court allowed recovery without articulating clear guidelines for the appellate courts to apply. The court concluded that the defendants' assumption of a duty led to a special relationship which led to an imposition of liability. However, it did not explain why a mortician burying or cremating a body has assumed a duty to all close relatives who are aware the services are being provided while a therapist or doctor treating a minor child has not assumed a duty to the child's parents.

PART IV
BURGESS V. SUPERIOR COURT

The California Supreme Court modified and explained the direct victim theory of recovery in its most recent decision, *Burgess v. Superior Court*.[135] In *Burgess*, the court allowed a mother to recover from a physician whose negligence during delivery caused physical injury to the child. The court concluded that the mother was a direct victim of the doctor's negligence because the physician committed malprac-

128. *Id.* at 196.
129. *Id.* at 197.
130. *Id.* at 198.
131. *Id.* at 199.
132. *Id.* at 206 (Kennard, J., concurring and dissenting).
133. *Id.* at 212.
134. *Id.*
135. 831 P.2d 1197 (Cal. 1992).

tice during his treatment of the mother. As a result, the mother was entitled to recover her emotional distress damages.

Although the court allowed the mother to recover for NIED, the court limited her damages. The mother could recover for the distress she suffered as a result of participating in the "abnormal event" of a negligent delivery and reacting to the unexpected outcome of her pregnancy.[136] However, she could not recover for the emotional distress she suffered as a result of the loss of her child's consortium.[137] Furthermore, in dicta, the court indicated that fathers generally would be denied recovery in negligent delivery actions unless they meet the *Thing* prerequisites to bystander recovery.[138] According to the court, fathers in negligent delivery actions are not entitled to recover as direct victims because they generally cannot establish the requisite physician-patient relationship.[139]

The *Burgess* majority opinion[140] modified the direct victim rule by limiting *Molien* to its facts. The majority opinion criticized the direct victim designation for its tendency to "obscure, rather than illuminate"[141] the relevant analysis in NIED actions. It focused its criticism of *Molien* on the "perception that *Molien* introduced a new method for determining the existence of a duty, limited only by the concept of foreseeability."[142] The court held:

> To the extent that *Molien* stands for this proposition, it should not be relied upon and its discussion of duty is limited to its facts. As recognized in *Thing*, "[I]t is clear that foreseeability of the injury alone is not a useful 'guideline' or a meaningful restriction on the scope of [an action for damages for negligently inflicted emotional distress.]"[143]

The court attempted to clarify the underlying rationale for the direct victim theory by limiting the direct victim classification to plaintiffs who are owed a duty based upon a preexisting relationship. According to the court, the existence of this preexisting relationship

136. *Id.* at 1209.

137. Parents may not recover damages for loss of filial consortium in California. Baxter v. Superior Court, 563 P.2d 871 (Cal. 1977).

138. The California Supreme Court did not resolve a father's right to recover because the father in *Burgess* was dismissed during the discovery proceedings. *Burgess*, 831 P.2d at 1209.

139. *Id.* at 1204 n.8.

140. Six of the seven justices joined the majority opinion. Justice Mosk concurred in the result but did not join the majority. He found the majority's criticism of *Molien* an "uncalled for" criticism and its reliance on its own "aberrational" *Thing* majority opinion "arrogant". *Id.* at 1210 (Mosk, J., concurring).

141. *Id.* at 1200.

142. *Id.* at 1201.

143. *Id.*

distinguishes a direct victim from a bystander.[144]

The court cited *Christensen* and *Marlene F.* to support its holding that plaintiffs qualify as direct victims if they can establish a negligent breach of a duty based upon a preexisting relationship.[145] The plaintiffs in *Marlene F.* clearly had a preexisting relationship because of their status as patients of the therapist. Similarly, the mother in *Burgess* had a preexisting physician-patient relationship. The plaintiffs' preexisting relationship in *Christensen* is not as clear. In *Christensen*, many of the plaintiffs did not have any prior contact or relationship with the defendants. Nevertheless, the court based the plaintiffs' direct victim status on the defendants' assumption of a duty. According to the court's opinion in *Christensen*, the defendants' assumption of a duty created a special relationship that established the plaintiffs' direct victim status. However, *Christensen*, *Marlene F.*, and *Burgess* do not provide guidelines to determine the circumstances under which a defendant has assumed a duty. In addition, the court has not explained why morticians have assumed a duty to a decedent's close relatives while physicians, therapists and lawyers have not assumed a duty to their clients' close relatives.

The court's direct victim designation also fails to limit direct victim status to appropriate preexisting relationships. Not all plaintiffs with preexisting relationships are entitled to recover for NIED. For example, breach of duty in a legal malpractice case does not generally lead to recovery of emotional distress damages.[146]

Burgess appears to be a continuation of the court's tendency to treat each NIED case as *sui generis*. The court imposed a duty in *Marlene F.* and *Burgess* because the plaintiffs' preexisting special relationships established their status as direct victims. It imposed a duty in *Christensen* because the unique nature of the services the mortuary provided led to an assumed duty and direct victim status. These decisions do not provide a comprehensive theory that lower courts can use in future factually dissimilar cases. To ensure that lower courts will consistently resolve future cases, the court must develop a comprehensive theory that delineates the circumstances under which plaintiffs are entitled to recover for NIED.

As one appellate court recently noted:

> Nowhere is the application of duty principles more heterodox than in the assemblage of cases pertaining to recovery for emotional distress. The effort to force disparate cases with loose family resemblance into a tight, coherent conceptual scheme has bedeviled this area of decisional law.[147]

Unfortunately, the California Supreme Court's most recent decisions

144. *Id.*
145. *Id.*
146. Merenda v. Superior Court, 4 Cal. Rptr. 2d 87 (Cal. Ct. App. 1992).
147. *Id.* at 90.

fail to provide the coherent, comprehensive framework that the lower courts need to rationally and consistently decide NIED actions. Until the California Supreme Court provides such a framework, the lower courts will continue to struggle to determine the circumstances under which a defendant has assumed a duty and the types of relationships that justify the imposition of liability for NIED.

PART V
SOLUTION

Regardless of whether a plaintiff seeks recovery for emotional distress damages as a bystander or as a direct victim, the issue underlying every liability determination is whether the law imposes a duty on the defendant to protect the plaintiff from emotional harm. In bystander cases, the California Supreme Court clearly identified the policy reasons that led it to strictly limit the class of bystander plaintiffs to whom defendants owe a duty.[148] The court adopted a bright line test: (1) to insulate society from the tremendous costs that would be incurred if it allowed expansive liability; (2) to limit defendants' exposure to liability to an amount in proportion to their culpability; and (3) to promote certainty in the law, as well as judicial efficiency and economy. The court also stressed the unique nature of emotional distress injuries: they involve intangible losses, courts have difficulty quantifying them, and monetary damages do not adequately compensate victims.[149]

These policy concerns, which justified limiting the class of plaintiffs to whom a defendant owed a duty in NIED bystander witness cases, are equally applicable in other NIED actions. However, the court ignored these policy considerations in *Marlene F.*, *Christensen*, and *Burgess* when it failed to develop a consistent comprehensive theory of recovery. Although the court generally limited the class of plaintiffs who can recover as direct victims to those plaintiffs who have a preexisting relationship with the defendant, it failed to establish which types of preexisting relationships can support direct victim status. Furthermore, it failed to explain the relationship between direct victim status and recovery based on an assumed duty (as in *Christensen*), or recovery based on a special relationship (as in *Marlene F.*). For direct victims, the court appears to have abandoned its desire to promote certainty and judicial efficiency, in favor of a case-by-case or ad hoc approach.

148. *See supra* notes 32-39 and accompanying text.
149. Thing v. La Chusa, 771 P.2d 814, 828-29 (Cal. 1989).

Responding to the policy reasons discussed above, the California Supreme Court, in *Thing*, limited the class of plaintiffs who could recover in bystander NIED cases to those plaintiffs who are likely to suffer the most trauma. The court acknowledged that close relatives foreseeably will suffer emotional distress when they learn of a loved one's injury. Similarly, bystanders foreseeably will be distressed when they witness an injury inflicted on an unrelated third party. However, the court decided that simply being a member of one of these two groups will not entitle a plaintiff to recover any emotional distress damages. Only plaintiffs who are close relatives of the injury victim *and* who are percipient witnesses to the injury producing event can recover under *Thing*. These plaintiffs have endured an abnormal life experience and are particularly susceptible to emotional harm. Based upon a balancing of policy concerns, the California Supreme Court has determined that these plaintiffs should be the only class of bystander plaintiffs entitled to recover their emotional distress damages.

In response to the same policy considerations that controlled its decision in *Thing*, the court should establish similarly strict prerequisites for recovery in direct victim cases. Presumably, the court does not intend to allow all victims with preexisting relationships to recover NIED damages. Allowing all plaintiffs with a preexisting relationship to recover as direct victims would not adequately insulate society from the costs of expansive liability, limit defendants' exposure to an amount proportionate to their culpability, or avoid the litigation of trivial claims. Balancing policy factors in each case to determine whether a defendant has assumed a duty, as the court did in *Christensen*, will not promote certainty and judicial efficiency.

Clearly, not all preexisting relationships should lead to recovery in direct victim actions. Just as the California Supreme Court limited bystander recovery to those plaintiffs who are particularly susceptible to emotional distress, the court should limit recovery in the direct victim cases to those plaintiffs who are particularly likely to suffer severe emotional harm. The issue, then, is to determine which plaintiffs are the most susceptible to emotional distress injury.

Plaintiffs who have a preexisting relationship with the defendant or who are closely related to an individual who has a preexisting relationship with the defendant should recover for NIED if one of the *primary purposes* of the preexisting relationship is to protect the plaintiff's emotional well-being. These are the types of relationships in which plaintiffs are most susceptible to emotional distress because these plaintiffs have relied on the defendant to protect them from emotional injury. Plaintiffs should recover as direct victims under the primary purpose test if: (1) the plaintiff or an injury victim

closely related to the plaintiff has a preexisting relationship with the defendant; (2) one of the primary purposes of the preexisting relationship is to protect the plaintiff's emotional tranquility; and (3) as a result of defendant's tortious conduct, the plaintiff suffers severe emotional distress. This test satisfies the policy concerns the court expressed in *Thing*. Requiring a close relationship will limit the plaintiff class. Limiting the types of preexisting relationships that qualify for direct victim status to those that are intended to protect the plaintiff's emotional tranquility will insure that liability is proportionate to culpability. Requiring proof of serious distress will avoid the litigation of trivial claims. In addition, because this test is consistent with the bystander limitations established in *Thing*, the primary purpose test will promote certainty and judicial efficiency.

If the courts had applied the proposed primary purpose standard in the recent California cases, they could have more easily reached consistent results. In *Christensen*[150] and *Quesada*,[151] the cases involving the mishandling of corpses, the courts stressed the special obligations of those dealing with the families of a decedent and the need for sensitivity when dealing with the family's emotions. "[T]he relationship between the family of a decedent and a provider of funeral-related services exists in major part for the purpose of relieving the bereaved relatives of the obligation to personally prepare the remains for burial or cremation."[152] "A decent respect for their [the decedent's relatives] feelings is implied in every contract for . . . services."[153] The courts should impose liability in mishandling of corpse cases not because "death is qualitatively different," but because one of the primary purposes of the services is to protect the emotional needs of the decedent's close relatives.

Similarly, courts can use the proposed rule to consistently resolve cases involving misconduct by therapists. The court should have imposed liability in *Marlene F.*[154] because one of the primary goals of the therapy was to protect the emotional well-being of the mothers and the sons, both of whom were involved in the therapeutic relationship. In *Schwarz*,[155] the primary purpose of the relationship was to treat the son. By meeting with the father, the therapist intended

150. 820 P.2d 181 (Cal. 1991).
151. 261 Cal. Rptr. 769 (Cal. Ct. App. 1989).
152. *Christensen*, 820 P.2d at 190 (Cal. 1991).
153. *Id.* at 196.
154. 770 P.2d 278 (Cal. 1989).
155. 276 Cal. Rptr. 470 (Cal. Ct. App. 1990).

to aid in the treatment of the son, rather than protect the father's emotional health. Therefore, the father in *Schwarz* should not have recovered. *Jacoves*[156] is a more difficult case to resolve. Although the primary goal of the therapy was to treat the son, the parents alleged that the therapy was also intended to benefit them. Although one of the purposes of the therapy may have been to alleviate the parents' anxiety over their son's emotional well-being, it was not likely to have been a primary purpose of the therapy and the parents should not recover.

In the cases involving attorney malpractice, *Holliday*[157] and *Burger*,[158] the courts should have denied recovery to the fiancée and the children because the attorney did not intend to protect the emotional well-being of these plaintiffs through the attorney-client relationship. In *Holliday*, the children were foreseeable victims but the purpose of the criminal representation was not to protect their emotional well-being. Similarly, in *Burger*, the attorney intended to represent and protect the interests of the client and not the emotional security of his fiancée.

Under the proposed test, the mother in *Martin*[159] should not have recovered. The primary purpose of the relationship between the mother and the day care center was to care for the child. Although the mother's emotional distress damages were foreseeable, a primary purpose of the relationship was not to care for her emotional needs.

Medical malpractice suits generally create the most troublesome cases because health concerns, especially those related to birth and death, are often intimately connected with emotional concerns. As a result, people requiring medical treatment for themselves or a close relative will often seek emotional reassurance as well. Medical treatment cases often present very compelling circumstances for allowing recovery. However, courts should generally deny recovery in these types of actions because the primary purpose of the physician's treatment is to protect the patient's health and not the emotional well-being of the patient's close relatives.

Plaintiffs, like the mother in *Burgess*, who suffer emotional distress damages as a result of medical malpractice directed at them should recover. Similarly, plaintiffs closely related to medical injury victims who qualify as percipient witnesses should recover as bystander witnesses. However, plaintiffs who cannot meet either of these prerequisites should not recover their emotional distress damages.

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156. B052163, 1992 Cal. App. LEXIS 1058 (Cal. Ct. App 1992).
157. 264 Cal. Rptr. 448 (Cal. Ct. App. 1989).
158. 273 Cal. Rptr. 709 (Cal. Ct. App. 1990).
159. 779 F. Supp. 1242 (N.D. Cal. 1991).

Two types of NIED actions based upon medical malpractice arise repeatedly: actions by parents based upon harm inflicted on their child and actions by parents based upon negligence during childbirth and delivery. In the cases not involving childbirth, the California Supreme Court has denied recovery to parents suing for NIED unless the parents meet the bystander prerequisites.[160] Until *Burgess*, the lower court holdings in negligent childbirth cases were inconsistent.[161] In *Burgess*, the California Supreme Court determined that the physical link between the mother and her child and the emotional nature of pregnancy and delivery justified imposing liability on the physician for the mother's emotional distress damages.[162]

Although the physical link between a mother and her fetus is unique, the emotional link is not unique. The emotional interest that a pregnant mother has in the well-being of her fetus is not necessarily any greater than the emotional interest that a father has in the health of his fetus, a mother has in the health of her two-week-old child, or a wife has in the health of her husband of fifty years. The California Supreme Court has denied recovery for NIED to plaintiffs who suffer emotional distress when their close relatives are victims of medical malpractice. It has also indicated that fathers may not recover as direct victims in negligent delivery cases. It should similarly limit a pregnant mother's right to recover under the primary purpose test. A mother delivering a child should recover damages for the emotional distress she suffers as a result of any medical malpractice in her treatment. Her recovery should not be related to the distress she suffers from her child's injuries.

The parents in *Golstein*[163] should not have recovered because the doctor intended to cure the child through radiation treatments and did not intend to protect the parents' emotional well-being. *Anisodon*[164] presents compelling facts, but the mother's recovery should be limited. Under the primary purpose test, the mother should only recover the emotional distress damages she suffered from receiving an improper uterine incision. She should not recover for the emotional distress that resulted from her child being

160. Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985)

161. *Compare* Newton v. Kaiser Found. Hosp., 228 Cal. Rptr. 890 (Cal. Ct. App. 1986) *and* Andalon v. Superior Court, 208 Cal. Rptr. 899 (Cal. Ct. App. 1984) *with* Martinez v. County of Los Angeles, 231 Cal. Rptr. 96 (Cal. Ct. App. 1986).

162. *Burgess*, 831 P.2d at 1202, 1203 (Cal. 1992).

163. 273 Cal. Rptr. 270 (Cal. Ct. App. 1990).

164. 285 Cal. Rptr. 539 (Cal. Ct. App. 1991), *review granted*, 819 P.2d 842 (Cal. 1991), *review dismissed*, 1992 Cal. LEXIS 4220 (Cal. 1992).

harmed.[165] The father in *Anisodon* should not recover because the primary purpose of the physician-patient relationship was not to protect his emotional well-being.

Although many persons are foreseeable emotional distress victims, the *Thing* prerequisites strictly limit the class of bystander plaintiffs who can recover for NIED to those most susceptible to emotional injury. Similarly, the primary purpose test will limit the class of direct victim plaintiffs entitled to recover to those who are most vulnerable to emotional distress. Although many other plaintiffs will forseeably suffer emotional harm, they should not recover based on the policy reasons the court emphasized in *Thing*. The primary purpose test will limit defendants' liability to an amount in proportion to their culpability, will insulate society from the costs of expansive liability, and will promote certainty in the law, as well as judicial efficiency and economy.

CONCLUSION

Just as the court rejected principles of general foreseeability in favor of bright line tests for bystander NIED cases, the court should establish more specific guidelines for direct victim actions. The recent California Supreme Court cases allowing recovery in direct victim cases fail to provide any meaningful criteria for the lower courts to apply.

This article proposes a three-part primary purpose test: (1) the plaintiff or an injury victim closely related to the plaintiff must have a preexisting relationship with the defendant; (2) one of the primary purposes of the preexisting relationship must be to protect the plaintiff's emotional tranquility; *and* (3) as a result of defendant's tortious conduct, the plaintiff must suffer severe emotional distress. The application of this three-part test will lead to consistent results and will limit defendants' exposure to an amount proportionate to their culpability.

165. Even if the mother is allowed to recover under the *Burgess* test, her recovery for NIED should be minimal. In *Burgess*, the court limited the recoverable damages to those that resulted from participating in a negligent delivery. At the time of delivery, the mother in *Anisodon* was unaware that any negligence in the delivery resulted in physical damage to her child. The mother discovered that the doctor's failing to make a larger uterine incision caused her child's problems three years after the delivery. Anisodon was unaware she participated in an "abnormal event" until three years after the event occurred.