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SPECIAL RELATIONSHIP BYSTANDER TEST: A RATIONAL ALTERNATIVE TO THE CLOSELY RELATED REQUIREMENT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS FOR BYSTANDERS

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An engaged couple was crossing Washington Street in downtown Indianapolis, Indiana, en route to the county clerk's office to apply for a marriage license. The bride-to-be noticed a tractor-trailer bearing down on her and her fiancé. Realizing that the truck was not going to stop, the woman grabbed her fiancé's hand in attempt to pull him out of the truck's path. The effort failed. The woman, who was not physically harmed, could only watch as the wheels of the truck ran over her would-be husband, killing him instantly. As a result of having witnessed the entire scene, the woman suffered severe emotional trauma. The trauma resulted in medical expenses, and to aid in payment she brought a claim against the driver for Negligent Infliction of Emotional Distress ("NIED"). The defendant moved for summary judgment, and the court held in his favor reasoning that the woman did not satisfy the relationship requirement for such claims of NIED.[1]

The above scenario is inspired by a real set of facts[2] and the result above precisely reflects the reality of the courts' interpretations of Indiana's "closely related" standard,[3] as well as many other states that follow the logic of the relative bystander test.[4] In this scenario, had the death of the man occurred not upon crossing the street to obtain a marriage license but mere moments later upon returning home as husband and wife, the fiancée (now wife) could have recovered for her emotional trauma. This ludicrous result stems from the California decision *Dillon v. Legg* and its progeny's policy considerations that rewrote the landscape for third-party recovery for NIED and have been

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[1] Smith v. Toney, 862 N.E.2d 656 (Ind. 2007) (holding under the Groves Test requiring that their relationship be "analogous to a spouse").

[2] *See generally* Trombetta v. Conkling, 187 A.D.2d 213 (N.Y. Sup. Ct.), *aff'd*, 626 N.E.2d 653 (N.Y. 1993).

[3] *See Smith*, 862 N.E.2d 656.

[4] *See*, *e.g.*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

adopted in the majority of jurisdictions.[5] The court in *Dillon* decided that in order to recover as a third-party bystander, the plaintiff must be "closely related" to the victim.[6]

Interpretations of the closely related standard have led courts to deny recovery to a host of seemingly deserving plaintiffs including fiancés,[7] homosexual partners,[8] cousins,[9] aunts,[10] nieces, nephews,[11] best friends,[12] and cohabiting couples.[13] There is an alternative to the closely related standard which already exists in tort law. If this tort standard is applied to NIED claims, it would permit recovery for these otherwise excluded classes of plaintiffs to recover without expanding the right of recovery to any unrelated parties who happen to witness a catastrophic scene and suffer emotional trauma. In order to more rationally provide recovery to affected persons, the requirement that a person seeking to pursue an NIED claim as a bystander have a "close" familial relationship to the victim should be replaced by an element that expands the pool of potential plaintiffs to persons who would have a sufficient "special relationship" as defined in the tortious duty to rescue context.

I. BACKGROUND OF NIED IN AMERICA

Historically, American courts have shown reluctance to permit recovery for purely psychic injury. Two states, Arkansas and Oklahoma, still do not recognize claims for emotional harm to bystanders.[14] Nevertheless, the modern trend has been to recognize such emotional harm as a compensable injury to a potential plaintiff. One author has noted that a likely cause for this rise in emotional distress claims stem from developments in the field of psychiatry that establish emotional harm as a "medical certainty."[15] In expanding emotional distress claims, courts have created three primary tests that are applied by different jurisdictions: (1) the physical impact test; (2) the zone of danger test; and (3) the relative bystander test.[16] The physical impact test requires that the plaintiff received a physical impact contemporaneous to the event that caused psychological harm.[17] Currently, this approach is observed by Florida, Georgia, Indiana,[18] Kentucky and Oregon.[19] The zone of danger test requires that the plaintiff had been placed in immediate risk of physical harm from the negligence of the defendant.[20] The zone of danger test is still the primary test in Alabama,

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[5] *Id.*
[6] *Id.* at 920.
[7] *See*, *e.g.*, Milberger v. KBHL, LLC, 486 F. Supp. 2d 1156 (D. Haw. 2007).
[8] *See*, *e.g.*, Coon v. Joseph, 237 Cal. Rptr. 873 (Cal. Ct. App. 1987).
[9] *See*, *e.g.*, Blanyar v. Pagnottie Enterprises, Inc., 679 A.2d 790 (Pa. Super. Ct. 1996).
[10] *See*, *e.g.*, Trombetta v. Conkling, 626 N.E.2d 653 (N.Y. 1993).
[11] *See*, *e.g.*, Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C. Cir. 2003).
[12] *See*, *e.g.*, Carlson v. Ill. Farmers Ins. Co., 520 N.W.2d 534 (Minn. Ct. App. 1994).
[13] *See*, *e.g.*, Elden v. Sheldon, 758 P.2d 582 (Cal. 1988).
[14] *See* FMC Corp. v. Helton, 202 S.W.3d 490 (Ark. 2005); Slaton v. Vansickle, 879 P.2d 929 (Okla. 1994).
[15] Caroline C. Kuresh, *New Jersey Development: The Extension of the Bystander Liability Doctrine for Emotional Distress to Unmarried Cohabitants: A Critique of Dunphy v. Gregor*, 48 RUTGERS L. REV. 497, 499 (1996) (citing Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging From Chaos*, 33 HASTINGS L.J. 583, 604 (1982)); Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969).
[16] Andy Clark, Comment, *"Interested Adults" with Conflicts of Interest at Juvenile Interrogations: Applying the Close Relationship Standard of Emotional Distress*, 68 U. CHI. L. REV. 903, 920 (2001).
[17] Clark, *supra* note 16.
[18] Indiana, while having adopted the relative bystander test, still allows for claims under the impact rule. *See* Smith v. Toney, 862 N.E.2d 656, 659-60 (Ind. 2007).
[19] Willis v. Gami Golden Glades, LLC, 967 So. 2d 846 (Fla. 2007); Strickland v. Hodges, 216 S.E.2d 706 (Ga. Ct. App. 1975); Nationwide Prop. & Cas. Ins. Co. v. Caple, 2008 Ky. App. Unpub. LEXIS 40, *5-6, 2008 WL 2696904 (Ky. Ct. App. July 11, 2008); Saechao v. Matsakoun, 717 P.2d 165 (Or. Ct. App. 1986).
[20] Clark, *supra* note 16.

Colorado, Delaware, Illinois, Kansas, Missouri, New York, North Dakota, Virginia and the District of Columbia.[21] The third test, the relative bystander test, is by far the most complex as well as the most widely adopted.

The relative bystander test was established in the California Supreme Court's decision, *Dillon v. Legg*.[22] In *Dillon,* the court determined that the "zone of danger" test was too restrictive, stating, "the concept of the zone of danger cannot properly be restricted to the area of those exposed to *physical* injury; it must encompass the area of those exposed to *emotional* injury."[23] To determine whether a plaintiff could recover where a negligent act caused severe emotional harm, the *Dillon* court provided three non-exclusive factors:

> (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.[24]

Although the result of the holding in *Dillon* was the creation of the relative bystander test, these "*Dillon* factors" were not the final word on the relative bystander test.

In 1989, twenty-one years after its decision in *Dillon*, the Supreme Court of California again addressed a case in which severe emotional harm to a plaintiff arose out of the negligent conduct of a defendant. The latter case was *Thing v. La Chusa,*[25] in which the court "discerned that *Dillon* had produced arbitrary and conflicting results and 'ever widening circles of liability.'"[26] The court in *Thing* altered the three enunciated *Dillon* factors and made them three required elements for a claim for NIED. The modified elements provided by *Thing* are:

> *if*, said 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, a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.[27]

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[21] AALAR, Ltd. v. Francis, 716 So. 2d 1141 (Ala. 1998); Colwell v. Mentzer Invs., Inc., 973 P.2d 631 (Colo. App. 1998); Pritchett v. Delmarva Builders, 1998 Del. Super. LEXIS 102, 4-5, 1998 WL 283376 (Del. Super. Ct. Feb. 27, 1998) (citing Robb v. Pa. R.R. Co., Del. Supr., 58 Del. 454, 210 A.2d 709 (1965)); Corgan v. Muehling, 143 Ill. 2d 296 (Ill. 1991); Grube v. Union Pac. R.R., 886 P.2d 845 (Kan. 1994); Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595 (Mo. 1990); Trombetta v. Conkling, 626 N.E.2d 653 (N.Y. 1993); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Litton v. Cann, 47 Va. Cir. 334 (Va. Cir. Ct. 1998); Williams v. Baker, 572 A.2d 1062 (D.C. 1990).

[22] *Dillon*, 441 P.2d 912.

[23] *Id.* at 920.

[24] *Id.*

[25] Thing v. La Chusa, 48 Cal. 3d 644 (Cal. 1989).

[26] Bird v. Saenz, 51 P. 3d 324, 327 (Cal. 2002).

[27] *Thing*, 48 Cal. 3d at 667-68.

The primary rationale for the alteration was not to limit the arbitrary and contradictory results that were created by *Dillon*, but rather, to limit the scope of liability.[28] Citing a prior decision the court recognized that although defendant's negligence had caused the injury, the court could not "ignore the social burden of providing damages . . . merely because the money to pay such awards comes initially from the negligent defendant or his insurer."[29] The court recognized that to permit recovery to such an extent would be "borne by the public generally," resulting in higher rates for insurance premiums and other costs.[30] The primary underlying policy for extending the pool of potential plaintiffs is the need to limit the scope of liability. This policy is most clearly reflected by the element that requires the plaintiff to be closely related to the injury victim.

The closely related prong ensures that an unrelated third-party observer cannot recover for witnessing the tragic death of a person whom that observer never knew. For example, this limitation makes sense in a hypothetical situation where a taxi driver negligently speeds through a traffic light in Times Square, and strikes and kills a pedestrian.[31] Without the closely related prong, any of the hundreds to thousands of persons who witnessed the horrific scene would be eligible to bring an NIED claim against the driver, were he or she able to satisfy the other two prongs. The result would be an astronomically high exposure to liability for the tortfeasor. It is this type of reasoning that has led the relative bystander test to be the most widely adopted. Currently Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia and Wisconsin all use some form of the relative bystander test as well as the closely related prong of that test.[32]

II. A SELECTED SAMPLE OF NIED CASES

Despite the predominate adoption of the relative bystander test, application of the closely related prong has been far from uniform.[33] Courts in all jurisdictions recognize that the relationships

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[28] *Id.*

[29] Borer v. American Airlines, Inc., 563 P.2d 858, 862 (Cal. 1977).

[30] *Id.*

[31] Disregarding for illustrative purposes that New York applies the zone of danger test and not the relative bystander test.

[32] Tommy's Elbow Room v. Kavorkian, 727 P.2d 1038 (Alaska 1986); Pierce v. Casas Adobes Baptist Church, 758 P.2d 1162 (Ariz. 1989); Bird v. Saenz, 28 Cal. 4th 910, 51 P.3d 324 (Cal. 2002); Clohessy v. Bachelor, 675 A.2d 852 (Conn. 1996); Kelley v. Kokua Sales & Supply, 532 P.2d 673 (Haw. 1975); Smith v. Toney, 862 N.E.2d 656 (Ind. 2007); Moore v. Eckman, 762 N.W.2d 459 (Iowa 2009); Cameron v. Pepin, 610 A.2d 279 (Me. 1992); Wargelin v. Sisters of Mercy Health Corp., 385 N.W. 2d 732 (Mich. Ct. App. 1986); Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764 (Minn. 2005); Ill. Cent. R.R. Co. v. Hawkins, 830 So. 2d 1162 (Miss. 2002); Treichel v. State Farm Mut. Auto. Ins. Co., 280 Mont. 443 (Mont. 1997); James v. Lieb, 375 N.W.2d 109 (Neb. 1985); Grotts v. Zahner, 989 P.2d 415 (Nev. 1999); St. Onge v. MacDonald, 917 A.2d 233 (N.H. 2007); Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994); Fernandez v. Walgreen Hastings Co., 968 P.2d 774 (N.M. 1998); Heiner v. Moretuzzo, 652 N.E.2d 664 (Ohio 1995); Sonlin v. Abington Mem. Hosp., 748 A.2d 213 (Pa. Super. Ct. 2000); Marchetti v. Parsons, 638 A.2d 1047 (R.I. 1994); Doe v. Greenville Cnty. Sch. Dist., 375 S.C. 63 (S.C. 2007); Nielson v. AT&T Corp., 597 N.W.2d 434 (S.D. 1999); Eskin v. Bartee, 262 S.W.3d 727 (Tenn. 2008); Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993); Johnson v. Rogers, 763 P.2d 771 (Utah 1988); Leo v. Hillman, 665 A.2d 572 (Vt. 1995); Colbert v. Moomba Sports, Inc., 176 P.3d 497 (Wash. 2008); Arbogast v. Nationwide Mut. Ins. Co., 427 S.E.2d 461 (W. Va. 1993); Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432 (Wis. 1994).

[33] The use of the closely related limitation is not exclusive to the relative bystander test. It is often used in a hybrid zone of danger context. The difference is not relevant to the analysis of this paper and shall not be discussed further.

between immediate family (i.e. parent, child, sibling, or spouse) satisfy the closely related prong.[34] However, outside of these clearly delineated relationships substantial variation between jurisdictions exists. Contrasting the California case *Elden v. Sheldon*[35] and the New Jersey decision in *Dunphy v. Gregor* illustrates this variance most clearly.[36] In *Elden*, the Supreme Court of California held that a cohabitational partner did not satisfy the closely related prong for NIED. In *Dunphy* the New Jersey Supreme Court held the exact opposite and permitted a cohabitational partner to recover for NIED. With respect to these differing decisions, one commentator speculated that "[t]he diametrically opposite treatment of similar claims, by courts in different jurisdictions, purporting to apply a similar test, probably goes a long way toward explaining the almost universal dissatisfaction with the state of NIED bystander doctrine."[37]

A. Stepgrandmother

The list of controversial decisions that hinged upon the closely related prong is not limited to *Dunphy* and *Elden*. In *Leong v. Takasaki,*[38] the Supreme Court of Hawaii held that the issue of whether a plaintiff was sufficiently closely related to the victim, his stepgrandmother, was a question that should proceed to the jury. In *Leong*, plaintiff was 10 years old and crossing a highway "walking hand-in-hand in the crosswalk"[39] with the mother of his stepfather. Plaintiff stood witness as his stepgrandmother was struck and killed instantly by defendant's automobile. Plaintiff suffered "nervous shock to his entire system," but no physical injuries.[40] Plaintiff shared a home with his stepgrandmother, and had "an extremely close" relationship with her stating "that she cared for him as if she were his natural grandmother."[41] The court held that the absence of blood relationship should not foreclose recovery, and reasoned that families in Hawaii often have strong ties among extended family and multiple generations.[42] The court fundamentally makes a tradition argument and recognized that such a relationship is a core part of the Hawaiian culture.

B. Fiancées and Cohabiting Partners

Some courts have also held that fiancées or cohabitating partners may satisfy the closely related prong. In *Dunphy*, for example, the court held that a cohabitating partner who was engaged to the victim could satisfy the closely related prong.[43] The couple in *Dunphy* became engaged in early 1988 and began cohabitating that same year.[44] In the fall of 1990 the fiancée watched as her future husband was struck by the Defendant as he changed the tire of a friend's car, ultimately dying of his injuries.[45] The court determined that plaintiff could recover, recognizing that the evaluation of whether parties are sufficiently closely related must engender several considerations, including:

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[34] Clark, *supra* note 16 at 922.
[35] Elden v. Sheldon, 46 Cal. 3d 267 (Cal. 1988).
[36] Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994).
[37] J. Mark Appleberry, *Notes and Comments: Negligent Infliction of Emotional Distress: A Focus on Relationships*, 21 AM. J.L. & MED. 301, 311 (1995).
[38] Leong v. Takasaki, 520 P.2d 758 (Haw. 1974).
[39] *Id.* at 760.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 766.
[43] *Dunphy*, 642 A.2d at 378.
[44] *Id.* at 379.
[45] *Id.*

> The duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and, . . . "whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements."[46]

Moreover, the court expressly rejected the argument that a "bright-line" rule was necessary to prevent fraudulent and meretricious claims.[47]

In a similar case, *Graves v. Estabrook*,[48] the Supreme Court of New Hampshire held that a fiancé could recover for NIED despite lack of a blood or marital relation. In *Graves*, the plaintiff was the fiancé of the victim and cohabitated with him for seven years. The plaintiff witnessed her fiancé being struck by an automobile, where he suffered injuries that led to his death the next day.[49] Following and citing *Dunphy*, the court concluded "that it is reasonable to infer that in the course of their lengthy cohabitation, the plaintiff and her fiancé enjoyed mutual dependence, common contributions to a life together, emotional reliance on each other, and attended to life's mundane requirements together."[50] As such, the court permitted recovery for the plaintiff.

Despite the arguments set forth in *Dunphy* and *Graves*, several courts have explicitly rejected NIED claims where the plaintiff was only a cohabitant with or engaged to the victim. In *Elden,*[51] the Supreme Court of California held that a cohabitating partner could not recover under NIED. In the winter of 1982, the plaintiff and his partner were involved in an automobile accident determined to have been caused by defendant's negligence. Plaintiff, the passenger in the victim's car, suffered emotional trauma from witnessing the death of his partner who was thrown from the vehicle.[52] The court held that the plaintiff could not recover because he did not satisfy the closely related prong of the relative bystander test. The court put forth three policy considerations in support of the holding and to justify using a bright-line rule requiring that partners be married: (1) the state's interest in marriage; (2) the "difficult burden on the courts;" and (3) "the need to limit the number of persons to whom a negligent defendant owes a duty of care."[53]

Two other cases finding marriage to be a bright-line rule for the closely related prong and thus holding fiancé to be an insufficient relationship are *Smith v. Toney*[54] and *Milberger v. KBHL, LLC*.[55] In *Smith,* upon a certified question from the Southern District of Indiana, the Supreme Court of Indiana held that a fiancée could not recover under NIED because a fiancé is not "analogous to a spouse."[56] The *Smith* court followed the same rationale as *Elden* for their decision.[57] In *Milberger,* the

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[46] *Id.* at 383.
[47] *Id.* at 384.
[48] Graves v. Estabrook, 818 A.2d 1235 (N.H. 2003).
[49] *Id.* at 1257.
[50] *Id.* at 1262.
[51] *Elden*, 46 Cal. 3d 267 at 269.
[52] *Id.*
[53] *Graves*, 818 A.2d 1235 at 1260 (citing *Elden*, 758 P.2d at 587-88).
[54] *Smith*, 862 N.E.2d at 657.
[55] Milberger v. KBHL, LLC, 486 F. Supp. 2d 1156 (D. Haw. 2007).
[56] *Smith*, 862 N.E.2d at 660.

federal district court for the District of Hawaii held that a fiancée could not recover under NIED for witnessing injuries to her future spouse. Plaintiff and her fiancé began dating in early 2002 and became engaged in early 2003, less than three months before the injury, but had not scheduled a wedding date.[58] The court followed the rationale of *Elden* and added that "[i]f the line is not drawn at married persons, it is unclear what types of unmarried partners could bring claims. It may be difficult to make meaningful distinctions between the numerous permutations that exist. . ."[59] The court distinguished the *Leong* decision's rationale as applying only to a cultural tradition in extended families.[60]

C. Homosexual Partners

Much like fiancées and cohabitating partners, courts have typically been reticent to expand the closely related prong into the realm of homosexual couples. In *Coon v. Joseph,*[61] a California appellate court held that a homosexual partner could not recover under NIED and further elaborated that only a parent-child, grandparent-grandchild, or legally recognized marriage would satisfy the closely related prong.[62] The plaintiff and the victim had lived together for a year and maintained an "intimate, stable and 'emotionally significant' relationship as 'exclusive life partners.'"[63] Despite the intimacy of the relationship between the victim and the plaintiff, the court reasoned that recognizing an intimate homosexual relationship "would render ambivalent and weaken the necessary limits on a tortfeasor's liability mandated by *Dillon*."[64]

D. Cousins, Aunts, Uncles, Nieces and Nephews

Yet another area in which courts have not expanded the closely related standard is the realm of cousins and niece-nephew relationships vis-à-vis aunts and uncles. In *Blanyar v. Pagnotti Enterprises* a Pennsylvania Superior Court held that a minor cousin could not recover for emotional distress suffered after he saw his cousin drown.[65] The court acknowledged that while the plaintiff suffered emotional distress, it declined to grant the child recovery under the law. Furthermore, the court boldly recognized that a friend watching another friend die may suffer the same emotional injury as the plaintiff.[66] Nevertheless, the court, following the rationale of *Trombetta v. Conkling*, held that the law cannot recognize the cousin relationship as satisfying the closely related prong of the relative bystander test.[67] In *Trombetta,* a woman was crossing the street with her aunt who was struck by a truck and killed.[68] The relationship between the plaintiff and her aunt was an uncharacteristically close one. Indeed, the plaintiff's mother had died when she was eleven years old and her aunt had become a maternal figure. The aunt lived nearby and the two saw each other on a daily basis.[69]

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[57] *Id.* at 660-61.
[58] *Milberger*, 486 F. Supp. 2d at 1158.
[59] *Id.* at 1167.
[60] *Id.* at 1166.
[61] Coon v. Joseph, 192 Cal. App. 3d 1269, 1270 (Cal. Ct. App. 1987).
[62] *Id.* at 1275.
[63] *Id.* at 1272.
[64] *Id.* at 1275.
[65] Blanyar v. Pagnottie Enterprises, 679 A.2d 790, 794 (Pa. Super. Ct. 1996).
[66] *Id.*
[67] *Trombetta*, 626 N.E.2d at 654.
[68] *Id.*
[69] *Blanyar*, 679 A.2d at 793 (citing *Trombetta*, 626 N.E.2d at 654).

Nevertheless, New York's highest court held strong to the bright-line rule requiring plaintiff and victim be of the same immediate family.

Based on this selected sample of NIED cases that are decided on the nature of the plaintiff-victim relationship, it is readily apparent that there is a drastic disparity from jurisdiction to jurisdiction. Some jurisdictions trend toward the bright-line rule of immediate family, others are willing to expand the bright-line rule to steady relationships, and yet others have determined that the issue of relationship is a matter to be resolved by the finder of fact. No other prong of the relative bystander test has permitted such disparate resolutions.

III. NEED FOR A NEW STANDARD

The need for certainty in the law is an unquestionably strong policy supporting the creation and reliance of a bright-line rule establishing "closely related" to mean only immediate family. This was the position argued by Justice Garibaldi in her dissent in *Dunphy*, where she stated that "once courts disregard marital status in recognizing a cause of action, 'no clear principle exists to limit liability.'"[70] However, the value of mere certainty cannot outweigh the need for recovery of persons seriously debilitated by the loss of loved ones. As one author stated, "tort damages in general serve important societal functions."[71] The American economic and political systems do not independently provide for treatment to severely injured persons.[72] The purpose of tort law is "to make the plaintiff whole."[73] Absent recovery for injured persons, this purpose cannot be satisfied, leaving many without compensation for valid emotional injuries.

Courts that limit the class of persons who can satisfy the closely related prong have cited three fundamental policy rationales: "(1) promoting the strong state interest in the marriage relationship; (2) preventing an unreasonable burden on the courts; and (3) limiting the number of persons to whom a negligent defendant owes a duty of care."[74] These policies do not rationally justify the limited class of potential plaintiffs that is created by the closely related prong of the relative bystander test.

A. State Interest in Marriage

When scrutinized, the first rationale - the promotion of the state interest in the marriage relationship - lacks substance. In his dissent in *Elden*, Justice Broussard contested this rationale noting that "a person who would not otherwise choose to marry would not be persuaded to do so in order to assure his or her legal standing in a future personal injury action . . ."[75] The court in *Dunphy* agreed with the reasoning of Justice Broussard stating that merely allowing NIED claims for unmarried couples to go forward would not remove marriage from "its preferential status under the law."[76] Furthermore, no rationale based upon requiring a couple to be married supports the assertion

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[70] David Sampedro, *When Living as Husband and Wife Isn't Enough: Reevaluating Dillon's Close Relationship Test in Light of Dunphy v. Gregor*, 25 STETSON L. REV. 1085, 1112 (1996) (*quoting Dunphy*, 642 A.2d at 383 (Garibaldi, J., dissenting)).
[71] David Paul Bleistein, *Foreseeability in Chains: Towards a Rational Analytical Framework for Accident and Medical Malpractices Cases of Negligent Infliction of Emotional Distress in California*, 29 LOY. L.A. L. REV. 343, 347 (1995).
[72] *Id.*
[73] Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 534 (9th Cir. 1962).
[74] *Smith*, 862 N.E.2d at 661.
[75] *Dunphy*, 617 A.2d at 1248 (quoting *Elden*, 758 P.2d at 591 (Broussard, J., dissenting)).
[76] *Id.* at 1250.

that an engaged couple should not satisfy the closely related prong. To apply the preference for marriage argument to fiancés is to punish a couple that has chosen to marry, but has not finalized the marriage process. Indeed, it would undermine marriage by providing an incentive to marry hastily rather than remain engaged just to be eligible to recover in tort law for injury. In the case of homosexual partners, the lack of access to marriage could completely deprive an otherwise stable and loving couple from recovery. Furthermore, the policy in support of marriage has no logical impact upon why a cousin or aunt-niece relationship ought to be barred from recovery for emotional distress.

As recognized by the court in *Dunphy*, creation of a bright-line rule "that allows all married couples to recover, but denies recovery to all non-married couples regardless of the significance of their relationship and depth of emotional injuries, is a perversion of the principles of tort law."[77] No greater injustice could exist than to permit a wife who filed for divorce to recover for emotional distress while denying a fiancé from recovering under the same set of facts. In the former case, the loving bond of the relationship has been severed. While the soon to be ex-wife may suffer emotional distress from watching her husband die, there can be no question that, with regard to emotional bonds, the injury ought not to be recognized as stronger than the latter scenario. In the case of the fiancé, the relationship is strong enough that the couple has made the commitment to bind themselves together, where as the soon to be ex-wife has opted out of that commitment. Nevertheless, a bright-line rule would permit such a disparity. It is for this reason that the *Dunphy* court recognized that the emphasis in satisfying the closely related prong ought to be placed on the "presence of . . . emotional bonds" rather than mere legal status.[78]

On its face, the underlying rationale in the decision in *Leong* demonstrates precisely why a bright-line rule such as marriage is in fundamental contrast to tort law. In *Leong*, the Supreme Court of Hawaii recognized that Hawaiian culture has a tradition of extended families and adoption. As a result, the Court allowed the claim to go forward for the jury to determine whether the relationship between a child and his stepgrandmother was sufficient to satisfy the close relationship.

In the United States, the cultural acceptance of unmarried couples has blossomed in recent years. In 2007, 39.7% of all childbirths in the United States were outside of wedlock. This represented a 26% increase since 2002.[79] To ignore that unmarried couples have become a significant part of the American culture as a whole is to disregard reality.

B. Burden on the Court

The existence of a bright-line rule supports the second policy rationale: to alleviate the burden on the courts. As stated in *Dillon*, the case that created the relative bystander test, the court "cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong."[80] Additionally, the increase in the number of cases would not be overly

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[77] Alisha M. Carlile, Note*, Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391, 406 (2005).
[78] *Id.* at 405.
[79] Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, NCHS Data Brief, No. 18 (May 2009), http://www.cdc.gov/nchs/data/databriefs/db18.pdf (last visited December 3, 2010).
[80] *Dillon*, 441 P.2d at 919.

burdensome causing the dreaded floodgates of litigation to burst open.[81] The *Dunphy* court recognized that courts were equipped to handle such cases. The court also recognized that courts are skilled in making determinations about the nature and quality of relationships between cohabitational partners as they already must perform such an analysis in loss of consortium cases.[82]

In support of the policy argument that the courts would be overburdened, many have argued that courts would be required to probe into the private details of the relationship.[83] The *Dunphy* court expressly rejected this position noting that such an analysis would need to occur regardless of the qualifications placed upon the closely related prong.[84] The court responded to this concern by recognizing that in the case of loss of consortium the law had already recognized the capability of juries to determine the quality of relationships.[85] The *Dunphy* court was not alone in this recognition, as the holding of *Leong* determined that the issue of the relationship between the plaintiff and his stepgrandmother was an issue to be decided by the jury.[86]

C. Limiting Persons to Whom a Negligent Tortfeasor Owes a Duty of Care

The third policy argument used to support a strict interpretation of the closely related prong is that any looser interpretation would require a negligent tortfeasor to owe a duty of care to far too great a number of persons. The limiting factor in bystander recovery for NIED has always been foreseeability. As stated by the *Dillon* court, "In order to limit the otherwise potentially infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which *to defendant* at the time were *reasonably foreseeable*."[87] The *Dunphy* court recognized that "the increase in non-marital cohabitation makes it foreseeable that victims of negligent acts could share close emotional ties with someone to whom they are not married."[88] Indeed, any relationship of an intimate common nature should be reasonably foreseeable. To say that defendant should only be held liable if the person watching the victim is a son/daughter, mother/father, or husband/wife is to recognize a superhuman ability for a negligent defendant to be able to assess on first sight the relationship between the victim and the emotionally distressed loved one.[89] As recognized by the *Blaynar* court, a friend watching another friend die may suffer the same emotional injury as the plaintiff.[90] The court which opted for a narrow view of the closely related prong explicitly recognized without citation or without dispute that a friend may well suffer emotional injury. The limitation on the over-expansion of liability to the negligent plaintiff is the existence of a foreseeable relationship. However, it is absurd to hold that the only relationships in which it would-be foreseeable for one witness of another seriously injured or killed to suffer severe emotional harm are those of immediate family. Moreover, to hold that the defendant can somehow recognize the status of the witness before the harm is caused to the victim is to present a windfall

[81] Sampedro, *supra* note 70, at 198-200, 204 (for discussion of the relatively minor increase of plaintiffs that would occur with a more broad standard).
[82] *Dunphy*, 642 A.2d at 375.
[83] *Id.* at 376.
[84] *Id.*
[85] *Id.*
[86] *Leong*, 441 P.2d at 981.
[87] *Dillon*, 68 Cal. 2d at 739 (emphasis added).
[88] Carlile, *supra* note 77, at 406.
[89] As it is a question of what is foreseeable from the defendant's vantage point as noted by the *Dillon* court.
[90] *Blanyar*, 679 A.2d at 790.

for the negligent defendant.[91] That is to say, the defendant in the initial hypothetical, in which the victim was killed while crossing the street in Indiana to wed his fiancée, would recognize a windfall once he realized that the woman with the victim was not yet his wife. By mere virtue of the tortfeasor's timing he or she could not be held liable to the plaintiff. Had the tortfeasor struck the victim only a few minutes later, once he had signed the marriage papers, then that same tortfeasor would have been liable to the plaintiff.

D. Other Alternatives

Numerous scholars have offered alternatives to the current application of the relative bystander test. One author offered a test in which many of the traditional factors of bystander NIED are made "objective factors" and given numerical values.[92] The model makes no single factor dispositive, but requires courts to assess the relative strength of the claim based on a numerical calculation.[93] Another author offered a solution to the closely related prong only in the case of cohabitational partners by providing an eleven factor balancing test.[94] The factors are:

> 1) the duration of the relationship and whether it was continuous; 2) how long they cohabitated; 3) whether they were engaged to be married at the time of the accident; 4) whether the couple represented themselves as husband and wife in public; 5) whether the couple had married since the accident; 6) the exclusivity of their sexual relationship; 7) whether the couple had any children together or whether children from a previous marriage lived in the household; 8) whether the couple shared property and assets; 9) whether the couple filed joint or separate income tax returns; 10) if any life insurance policies existed, whether the couple named each other as beneficiary; and, 11) "their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements."[95]

However, no single alternative addresses the full spectrum of problems associated with NIED claims. The model proposing a numerical calculation is wholly unpractical and very few courts would be inclined to substitute their own judgment for that of a preset mathematical calculation. The problem with an eleven factor balancing test is that it only addresses cohabitational partners and ignores the other varying forms of relationships that are unjustly excluded from NIED claims.

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[91] As a woman accompanying a man and wearing a ring on her finger would appear to all the world as a wife. Thus, even were defendant able to perceive at the very moment of striking the fiancé all of the information about him perceivable through sight, defendant would be well to conclude that the woman was indeed the victim's wife and not merely a wife-to-be.

[92] *See Id.*

[93] Dennis G. Bassi, Note, *It's All Relative: A Graphical Reasoning Model for Liberalizing Recovery for Negligent Infliction of Emotional Distress Beyond the Immediate Family*, 30 VAL. U. L. REV. 913, 955 (1996).

[94] Sampedro, *supra* note 70, at 1118-19 (outlining the approach used in North Carolina, with more enumerated factors in the proposal than in North Carolina); *See also* Sorells v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 675 (N.C. 1993) (treating elements of *Dillon* as non-dispositive factors to be balanced).

[95] Sampedro, *supra* note 70, at 1118-19.

IV. NEW STANDARD – SPECIAL RELATIONSHIP BYSTANDER TEST

The primary problem with the alternatives that have been offered to the closely related prong is that they interject new considerations into the law. Courts have seemed to be most responsive and apt to change where they are not asked to create a new area of law, but rather to merely adapt an existing principle of law to a new context. This is most clearly illustrated in *Dunphy*, where the court could look to how the law already addressed the area of loss of consortium and see that the adaptations called for by the plaintiff would not require the court to undertake a task it was not already willing to perform. Thus, the ideal new standard would be an adaptation of another area of tort law into the NIED context. This approach is not inherently novel.

In Wyoming, a plaintiff may recover as a bystander under NIED if: (1) the defendant was negligent; (2) the defendant's negligence proximately caused the psychic injury to the plaintiff; (3) the primary victim either died or suffered serious bodily injury; (4) the plaintiff observed the impact or the immediate result in an unaltered condition; and (5) that the plaintiff be of a class of persons who could bring an action under Wyo. Stat. Ann. §§ 1-38-102 and 2-4-101.[96] Section 1-38-102 is Wyoming's wrongful death statute permitting recovery to husbands, wives, children, parents, and siblings[97] of the deceased and in conjunction with section 2-4-101, the rules for intestate succession, allowing recovery for grandparents, aunts, uncles, and cousins.[98] The Wyoming approach does not solve the problems of NIED as addressed above, but it does illustrate a situation in which a court, in this case the Supreme Court of Wyoming, looked to another area of law for a suitable standard.

The area of law where a solution may be found is that of the duty to rescue. The closely related prong of the relative bystander test ought to be replaced, as it was in Wyoming, to expand the pool of potential plaintiffs to any person who has a sufficient special relationship so as to create a tortious duty to rescue the victim. For purposes of simplicity, this proposed new standard will be referred to as the special relationship bystander test. Traditionally, in the realm of duty to rescue one does not have a duty to rescue a stranger. As provided by the Seventh Circuit Court of Appeals, "[t]here is no tort liability for failing or refusing to be a Good Samaritan, as the cases say[.]"[99] However, courts have extended liability for failing to aid a person where the court recognizes that a legally cognizable relationship exists between the injured person and the bystander.[100] Some recognized special relationships are:

> common carrier-passenger; innkeeper-guest; innkeeper-stranger (a duty to protect a stranger from injury by a guest); employer-employee; ship-crewman; shopkeeper-business visitor; host-social guest; jailer-prisoner; school-pupil; drinking companions; landlord-trapped trespasser; safety engineer-laborer; physician-patient; psychologist-stranger (a duty to protect a stranger from harm at the hands of the psychologist's patient); manufacturer-consumer; landlord-tenant; parole board-stranger (a duty to

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[96] Gates v. Richardson, 719 P.2d 193, 200-01 (Wyo. 1986).
[97] *See* Butler v. Halstead, 770 P.2d 698, 699-7000 (Wyo. 1989) (recognizing that the statute applies to siblings, though not explicitly named).
[98] *Butler*, 770 P.2d at 700.
[99] Shadday v. Omni Hotels Mgmt. Corp., 477 F.3d 511, 513 (7th Cir. 2007) (citing Stockberger v. United States, 332 F.3d 479, 480-81 (7th Cir. 2003)).
[100] Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1233 (1992).

> protect strangers from a released prisoner); husband-wife; parent-child; and tavern keeper-patron.[101]

Of these special relationships, many are not applicable to the area of NIED, and most stem from parties that are related by economic or contractual ties.[102] Chiefly, the common carrier-passenger, innkeeper-guest, innkeeper-stranger, employer-employee, ship-crewman, shopkeeper-business visitor, jailer-prisoner, school-pupil, landlord-trapped trespasser, safety engineer-laborer, physician-patient, psychologist-stranger, manufacturer-consumer, landlord-tenant, and parole board-stranger do not have any sufficient tie on their own between the party with a duty to rescue the ultimate victim outside of the economic spectrum. The much more relevant relationships are the ones that are "found simply because of an associative tie between the persons."[103]

To establish a sufficient special relationship for the purposes of NIED this associative tie must exist between the persons upon which the special relationship is based. The rationale behind this limitation of the special relationship category is the same as has been accepted by most every court applying the relative bystander test: the need to limit recovery to persons who are foreseeable parties to suffer emotional distress. The sufficient special relationships for the purpose of NIED should be parent-child, husband-wife, grandparent-grandchild, siblings, and social companions.

The special relationship between husband and wife is a generally settled area of law. A husband has a duty to come to the aid of his wife and vice versa.[104] It is also well settled that a parent has a duty to come to the aid of his or her child; this is especially evident in the realm of criminal law.[105] The special relationship for a grandparent to a grandchild is created where the grandparent is "in charge" of the child.[106] Convincing a court to recognize these three special relationships would not be contentious. These are the relationships that are universally recognized as satisfying the closely related prong of the relative bystander test as currently applied. The purpose of replacing the closely related prong is not to constrict the pool of potential plaintiffs, but rather to expand it.

Unlike, the parent-child, grandparent-grandchild, and husband-wife relationships, the social companion relationship provides the basis for expansion of the closely related prong and thus would be more difficult to convince a court to recognize. In the realm of duty to rescue, courts were not expansive in their recognition of special relationships through the early part of the twentieth century.[107] However, as the century went on, courts became more and more apt to recognize duties between parties for special relationships. Perhaps the most expansive view stems from the Michigan case *Farwell v. Keaton*.[108]

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[101] Angela Hayden, *Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws Good Ideas?*, 6 NEW ENG. INT'L & COMP. L. ANN. 27, 46 (2000).
[102] McClain, *supra* note 100, at 1234.
[103] *Id.*
[104] *See* Regan v. Stromberg, 285 N.W.2d 97 (Minn. 1979).
[105] Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 401 (1998) (citing *Regan*, 285 N.W.2d at 99).
[106] *Id.* (Recognizing that a child would fall under a disability and under the control of the grandparent and thus would satisfy the same test as provided in this section.).
[107] Stewart, *supra* note 105, at 397.
[108] Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976).

In *Farwell*, the Supreme Court of Michigan addressed the issue of whether two persons on a joint social venture owed a duty to rescue each other. The court held that they did. The facts in *Farwell* are important to understand to identify what constitutes a social companion relationship. Farwell and his friend Siegrest drove to a trailer rental lot, and, [109] while there and waiting for another friend, consumed alcohol.[110] Siegrest and Farwell followed two females to a "restaurant down the street."[111] The females complained to their friends about Farwell's and Siegrest's presence which resulted in the pair being chased back to the trailer rental lot.[112] Siegrest managed to escape, but Farwell did not. Farwell was found "severely beaten" by Siegrest under a car.[113] Siegrest applied ice to Farwell's head and "drove him around for approximately two hours[.]"[114] Farwell fell asleep in the car, where he remained after Siegrest drove the car to Farwell's grandparents' home.[115] Siegrest attempted to wake Farwell, but was unsuccessful,[116] and left him in the car where he was discovered by his grandparents the next morning.[117] The grandparents immediately took Farwell to the hospital where he died three days later from an epidural hematoma.[118]

The Supreme Court of Michigan recognized that courts had been apt not to recognize a duty to rescue absent some special relationship.[119] Nevertheless, the court found that this was a circumstance in which the law would recognize a duty amongst the parties. The court reasoned that "Farwell and Siegrest were companions on a social venture."[120] As such, the court viewed that there was an implicit understanding that such companions would render assistance to each when peril threatens one or the other.[121] The court then found that a reasonable person would agree that such a duty exists.[122]

Michigan is not alone in finding a duty to rescue under somewhat similar facts. In *People v. Oliver*, the California Court of Appeals [123] held that a woman had a duty to come to the aid of a man she had met in a bar and allowed to use her bathroom to ingest heroin.[124] Even though the woman had just met the man, the court recognized that a special relationship existed for her to come to his aid.[125] By failing to do so, the court found that she breached her duty to rescue him and was criminally liable.[126]

To summarize, the proposal is to replace the closely related prong of the relative bystander test with the "special relationship" that is recognized in duty to rescue law creating the special

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[109] *Id.* at 219.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 221.
[120] *Id.* at 222.
[121] *Id.*
[122] *Id.* (citing Prosser, Torts (4th ed), § 53, p 324).
[123] People v. Oliver, 258 Cal. Rptr. 138 (Cal. Ct. App. 1989).
[124] *Id.* at 143.
[125] *Id.* at 147-49.
[126] *Id.* at 152-53.

relationship bystander test. That is, a plaintiff should be able to recover under NIED as a bystander where he or she: (1) is present at the scene of the injury-producing event at the time it occurs and is then aware it is causing injury to the victim; (2) as a result suffers serious emotional distress beyond that which would-be anticipated in a disinterested witness; and (3) is a parent, child, grandparent, grandchild, husband, wife, or a social companion with a legally cognizable special relationship requiring him or her to come to the aid of the victim. This substituted standard does not tear down the levee protecting the court from the flood of litigation. It does not permit every person witnessing the event to recover for emotional distress, but rather it allows a person who knows the victim and has a relationship so significant that the law already recognizes a duty between the would-be plaintiff and the victim to recover for his or her emotional distress.

V. SPECIAL RELATIONSHIP BYSTANDER TEST AND FORESEEABILITY

Critics would no doubt argue that a person who would have a "special relationship" under this special relationship bystander test but not satisfy the closely related prong under the relative bystander test would not be a foreseeable plaintiff. However, it is ludicrous to argue that a person who must come to the aid of the victim is not a person who could be foreseeable to the negligent tortfeasor. No less a legal authority than Justice Benjamin Cardozo, while still on the Court of Appeals of New York, recognized that a rescuer is foreseeable:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. *The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.*[127]

In delivering this often cited decision[128] in *Wagner v. International R. Co.*,[129] an opinion read by virtually every American law student, Justice Cardozo held that the law recognizes a person who comes to rescue an injured person as foreseeable to the tortfeasor. Thus, it must flow from this conclusion that if a rescuer is foreseeable a person who has a duty to rescue must be explicitly foreseeable.

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[127] Wagner v. International R. Co., 232 N.Y. 176, 180 (N.Y. 1921) (citing Ehrgott v. Mayor of City of N.Y., 96 N.Y. 264, 280, 281 (N.Y. 1884)) (emphasis added).

[128] *See*, *e.g.*, Badalamenti v. U.S., 160 F.2d 422 (2d Cir. 1947); Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085 (4th Cir. 1985); Carter v. U.S., 248 F. Supp. 105 (E.D. Okla. 1965); Dillard v. Pittway Corp., 719 So. 2d 188 (Ala. 1998); Zimny v. Cooper-Jarrett, Inc., 8 Conn. App. 407, 513 A.2d 1235 (1986); George A. Fuller Constr. Co. v. Elliott, 92 Ga. App. 309, 88 S.E.2d 413 (1955); Star Transp., Inc. v. Byard, 891 N.E.2d 1099 (Ind. Ct. App. 2008); Clinkscales v. Nelson Sec., Inc., 697 N.W.2d 836 (Iowa 2005); Shideler v. Habiger, 172 Kan. 718, 243 P.2d 211 (1952); Lowrey v. Horvath, 689 S.W.2d 625 (Mo. 1985); Kiamas v. Mon-Kota, Inc., 196 Mont. 357, 639 P.2d 1155 (1982); Rasmussen v. State Farm Mut. Auto. Ins. Co., 278 Neb. 289, 770 N.W.2d 619 (2009); Ruiz v. Mero, 189 N.J. 525, 917 A.2d 239 (2007); Padilla v. Hooks Int'l, 99 N.M. 121, 654 P.2d 574 (N.M. Ct. App. 1982); Britt v. Mangum, 261 N.C. 250, 134 S.E.2d 235 (1964); Marks v. Wagner, 370 N.E.2d 480 (Ohio Ct. App. 1977); Rosensteil v. Lisdas, 253 Ore. 625, 456 P.2d 61 (1969); *Pachesky v. Getz*, 353 Pa. Super. 505, 510 A.2d 776 (1986); Ouellette v. Carde, 612 A.2d 687 (R.I. 1992); Brown v. National Oil Co., 233 S.C. 345, 105 S.E.2d 81 (S.C. 1958); Southwestern Hydrocarbon Co. v. Thompson, 355 S.W.2d 823 (Tex. App. 1962); Franklin v. Lowe, 389 P.2d 1012 (Wyo. 1964).

[129] *Wagner,* 232 N.Y. at 180.

Therefore, a person with a sufficient special relationship so as to be under a duty to rescue must be foreseeable.

VI. RE-EXAMINATION OF SELECTED CASES UNDER THE SPECIAL RELATIONSHIP BYSTANDER TEST

The primary purpose in creating a new standard is to solve the problem of the frustratingly contradictory results in NIED bystander cases, as well as to prevent ludicrous results that stun the average person such as the initial hypothetical. The special relationship bystander test provides for a more rational and expansive plaintiff pool while not constricting the class of plaintiffs that would already be recognized under the relative bystander test. To illustrate the impact of the special relationship bystander test, it will be applied to the facts of the previously discussed selected sample of NIED bystander cases under the relative bystander test.

A. *Leong v. Takasaki*

Recall that in *Leong* the Supreme Court of Hawaii held that the question of whether a child who witnessed his stepgrandmother being struck by a vehicle was sufficiently closely related to the victim as to provide for recovery under the relative bystander test for NIED claims is a question for the jury.[130] Applying the special relationship bystander test would result in the child being able to proceed on his NIED claim as a matter of law. The three parts of the special relationship bystander test would-be satisfied. First, the child was present at the scene when his stepgrandmother was struck by the vehicle and appeared to have perceived what happened to her.[131] Second, he alleged that he suffered "nervous shock to his entire system[.]"[132] Finally, he was a social companion with the woman walking hand-in-hand with his stepgrandmother and would satisfy the grandparent-grandchild relationship, but that would not be necessary.[133] There is no question that he would satisfy the social companion relationship as he was on an excursion with the stepgrandmother. He had ridden the bus with her to this destination and had not just merely stumbled upon her.[134] As a result his claim would be able to proceed under the special relationship bystander test where it was otherwise left for a jury determination under the relative bystander test.

B. *Dunphy v. Gregor*

Recall in *Dunphy* that the Supreme Court of New Jersey held that a fiancée could proceed on an NIED claim where she witnessed her fiancé, who was changing a tire, being struck by a car resulting in fatal injuries. Under the relative bystander test, the *Dunphy* court took the rare approach of holding that a fiancé could satisfy the closely related prong of the test. The result would be the same under the special relationship bystander test. She was undoubtedly a social companion with her future husband and was with him when they came to aid a friend in need of a tire change.[135] There is no question that she would be able to recover under the special relationship bystander test, as she

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130 *Leong*, 520 P.2d at 758.
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Dunphy*, 642 A.2d at 378.

already satisfied the other two prongs of the test having satisfied them under the relative bystander test.

C. *Graves v. Estabrook*

Much like *Dunphy*, in *Graves* the court held that a fiancée could satisfy the closely related requirement of the relative bystander test. In this case, the plaintiff was engaged to the victim and following him in her car while he was on his motorcycle immediately in front of her. She witnessed and was aware of the severity of the injury caused to her fiancé when he was struck by the defendant. She suffered severe emotional harm from watching her love suffer his fatal injury. By following him to a shared destination they were companions, albeit in a different vehicle, on a common social venture. Therefore, she would satisfy the special relationship bystander test and would be able to recover. Thus, the result would remain the same.

D. *Elden v. Sheldon*

In *Elden*, the Supreme Court of California applied the bright-line rule approach, requiring that the plaintiff and victim be married, to the "closely related" prong of the relative bystander test and denied recovery to a cohabitational partner where the plaintiff and victim were unmarried. In this case, the special relationship bystander test would change the result and the application of the special relationship bystander test would permit recovery to the cohabitational partner. The plaintiff was present with the victim in the same vehicle at the time of the injury. He witnessed the injury to his partner and, as a result, suffered emotional distress. Because the two knew one another, were in the same vehicle, were traveling to the same place the pair were clearly social companions on a common social venture, and therefore would satisfy the special relationship requirement of the special relationship bystander test. Thus, the plaintiff would have been able to recover in this case were the special relationship bystander test used in lieu of the relative bystander test.

E. *Smith v. Toney*

In *Smith*, the Supreme Court of Indiana applied their version of the relative bystander test to deny a claim by the plaintiff for NIED.[136] This case saw a woman attempt to recover for NIED due to the loss of her fiancé.[137] The victim had been at the residence of the plaintiff until approximately 3:30 am before he left to return home.[138] Around 6:00 am the plaintiff discovered that victim had not called her.[139] This was because he had been involved in a fatal accident between 3:30 am and 3:53 am and declared dead by 4:05 am.[140] In this circumstance, the result would not change by applying the special relationship bystander test. Had she been present at the scene contemporaneously with the victim, and had she reason to be with the victim at the time, then perhaps plaintiff could have recovered under the special relationship bystander test. However, she was not present and did not witness the injury caused to her fiancée. Thus, she could not recover under either test. This case illustrates that the expansion under the special relationship bystander test does not create a complete open door to claims. Merely having a relationship with the victim does

[136] *Smith*, 826 N.E.2d at 658.
[137] *Id.* More precisely, it advised a judge for the U.S. District Court for the Southern District of Indiana to do so.
[138] *Id.*
[139] *Id.*
[140] *Id.*

not alone grant recovery for all claims for the resulting emotional distress. The other two prongs of the test act to limit the liability of the negligent tortfeasor.

F. *Milberger v. KBHL, LLC*

Recall that in *Milberger* a federal district court in Hawaii held that a fiancée could not proceed on a claim for NIED under the relative bystander test. The result would be different under the special relationship bystander test. The fiancée who witnessed the victim suffer the injury and as a result suffered emotional distress was in Hawaii on a trip with the victim. They were on vacation together, unquestionably a common social venture. They were also clearly companions on this venture as they traveled, stayed, and snorkeled together while on this vacation. There would be no question that her claim could have gone forward under the special relationship bystander test where it failed under the relative bystander test.

G. *Coon v. Joseph*

In *Coon*, a California appellate court held that a homosexual cohabitating partner could not recover for emotional distress after witnessing the victim being physically assaulted by the defendant bus driver. Under the relative bystander test, the California court applied the bright-line rule that the plaintiff was not married to the victim and thus could not recover for his emotional distress. Under the special relationship bystander test, assuming that the emotional damage sustained by the plaintiff was sufficiently severe and that the injury to the victim would be found sufficient, a court would allow the claim to proceed. The two partners were traveling together and were attempting to board the same bus for the purpose of reaching the same location. Therefore, the special relationship bystander test would have allowed this homosexual couple to recover where the relative bystander test expressly denied recovery by virtue of their lack of marital ties to each other, something which they had no legal power to change.

H. *Blanyar v. Pagnottie Enterprises, Inc.*

Recall in *Blanyar* the court held that a child was denied recovery for NIED after witnessing his cousin drown because he was not sufficiently closely related to the victim. The result under the relative bystander test in denying the plaintiff recovery is a result that offends general notions of justice. Had the court applied the special relationship bystander test then the child would likely not have been deprived recovery for his life altering injuries. The facts, as set out in the case, are limited. However, the facts are sufficient to show that the two children were together on the same piece of property as well as together when the plaintiff witnessed the victim drown. The two were together at the time and the two were likely playing together.[141] If this were the case then they were companions on a social venture satisfying the special relationship standard. The two by playing together were companions and the act of playing itself is the social venture. Therefore, the special relationship bystander test would have most likely permitted recovery in this case, changing the result and comporting to perceptions of justice.

[141] Admittedly, this is reading into facts that are not laid out in the opinion.

I. *Trombetta v. Conkling*

The facts of *Trombetta* most certainly would allow recovery under the special relationship bystander test where recovery was not permitted under the relative bystander test. Recall that in *Trombetta* a niece who had lost her mother and who looked up to her aunt as a maternal figure was denied recovery where she witnessed this aunt struck and killed in front of her. The court held that the niece-aunt relationship was not sufficiently close under the relative bystander test. Under the special relationship bystander test, they were companions traveling together on a common social venture. Thus, the niece would be able to recover.

The key that would see most of the above discussed decisions alter in outcome is the interpretation of the social companionship on a common social venture. This provision is expansive and rises above the mere familial bonds of the closely related standard. It is superior because it removes the abhorrent and manifestly unjust results that have prevented a mere child from being granted recovery to help him where the innocence of youth was destroyed by the tragic demise of his cousin and playmate; or a niece from watching a woman, who was as dear to her as her own mother, succumb to the sleep of death before her eyes.

VII. CONCLUSION

The current majority rule for NIED bystander recovery, the relative bystander test, has led to conflicting and outrageous results through the application of the closely related prong of the test. Courts have denied recovery to plaintiffs with serious psychic injuries stemming from witnessing the death of a loved one. To create a more rational result in these cases courts should adopt the special relationship bystander test and replace the closely related prong with the special relationship standard from the tortious duty to rescue. Doing so would permit recovery for all persons who could recover under the relative bystander test and expand the potential pool of plaintiffs to a limited number of deserving other persons including homosexual partners, fiancées, and cousins. The result would be more consistent and more just outcomes in cases where persons have suffered legitimate and severe emotional distress. By expanding the potential pool of plaintiffs to persons who already have a tortious duty to rescue, the limitation on NIED claims that the plaintiff be a foreseeable party is still satisfied and the flood gates of litigation would not be flung wide open.