Post-Moresi Negligent Infliction of Emotional Distress

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COMMENTS

Post-Moresi Negligent Infliction of Emotional Distress

I. INTRODUCTION

Since 1903, Louisiana courts have allowed recovery for a wide variety of negligent infliction of emotional distress cases, but the development of this cause of action has been ad hoc and has followed no unifying principles. In 1990, the Louisiana Supreme Court decided Moresi v. State Department of Wildlife and Fisheries and held that Louisiana recognizes a cause of action for negligent infliction of mental disturbance without accompanying physical injury so long as there is an "especial likelihood of genuine and serious mental distress." For the first time, there was a formula that could apply to any fact pattern to determine whether a plaintiff might have a claim under this cause of action. Therefore, Moresi prescribed a general rule for negligent infliction of emotional distress (NIED).

Earlier in 1990, the same court had already adopted a rule providing the remedy for “bystander” recovery for NIED in Lejeune v. Rayne Branch Hospital. A bystander was defined as someone who suffered pain and anguish due to injury to a third party. Recovery was limited to those who viewed the injury causing event or came upon the scene soon thereafter and before the victim’s condition had changed substantially. The emotional distress had to be serious and reasonably foreseeable, based largely on the severity and manner of harm suffered by the trauma victim. And finally, the bystander had to be closely related to the trauma victim.

In 1991, largely as a result of Lejeune, the Louisiana Legislature passed Louisiana Civil Code article 2315.6. This article fixed the requisite relational proximity requirement between the plaintiff and the trauma victim, dropped the requirement that the distress victim come upon the scene before substantial change in the trauma victim’s condition, and...
provided that bystander recovery was possible "only in accordance with this [article]."  

Since then, Louisiana has observed a jurisprudential rule of law granting an independent cause of action for negligent infliction of emotional distress subject to a positive law exception governing bystander recovery. One can easily imagine a factual situation that would constitute a valid cause of action under *Moresi*, but in which recovery would be denied due to its failure to meet the requisites of bystander recovery under Article 2315.6.  

In the abstract it is perfectly proper and customary to have specific exceptions to general rules of law. However, where the policies behind each are in conflict and where the results can seem unreasonably incongruous, the principle containing the smallest benefit to public policy should give way and/or new rules should be developed.

For example, a hypothetical step-mother visits her comatose step-son in the hospital and observes that he has recently suffered multiple rodent bites about his head and body, it would appear that Article 2315.6 would create an arbitrary barrier to her recovery for mental anguish negligently inflicted by the hospital. Clearly, the *Moresi* test is satisfied, as there is an "especial likelihood of genuine and serious mental distress" arising from circumstances guaranteeing the claim is not spurious. Yet, such a distress victim would fail to state a cause of action given that bystander recovery is exclusively governed by Article 2315.6 that denies recovery to step-parents.

The purpose of this article is to explain the current status of NIED as a cause of action in Louisiana. To this end, it will assess the impact of *Moresi* and evaluate the policies underlying both the NIED general rule and the Article 2315.6 exception in order to suggest their proper relationship. Additionally, this article will seek to determine whether bystander recovery per Article 2315.6 is in fact the exclusive remedy if the distress victim can establish that the negligent tortfeasor owed an independent, direct duty of care to protect against such emotional distress, notwithstanding that the bystander otherwise invokes Article 2315.6. First, to better understand the context of this comment, a brief examination of the development of NIED as a cause of action under the common law is in order.

II. NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS UNDER THE COMMON LAW

Prosser and Keeton divide NIED into three general categories: mental disturbance alone, mental disturbance with physical injury, and mental

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13. *See infra* note 156.
disturbance with physical injury to another.\footnote{14} Additionally, they address NIED as an independent cause of action.\footnote{15}

\textbf{A. Mental Disturbance Alone}

A great majority of courts deny recovery where the defendant's negligence causes mental distress unaccompanied by physical injury, illness, or other physical consequences, and where there is no other basis for tort liability.\footnote{16} Over the last hundred years or so, two groups of cases have developed into exceptions to this general rule—against telegraph companies for negligent transmission of death messages and against defendants who negligently mishandle corpses.\footnote{17} While mental disturbance alone will only infrequently be a serious wrong worthy of redress, where the severity is sufficiently attested by the circumstances of the case, recovery is proper.\footnote{18} Thus, according to Prosser and Keeton, recovery should not be limited to the two types of cases listed above, but should extend to other cases whose facts suggest that the distress is real and serious.\footnote{19} Generally, what these cases will "have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious."\footnote{20}

Professors Maraist and Galligan suggest that requiring an especial likelihood of mental distress serves to avoid opening the litigation floodgates and to deter fraudulent claims.\footnote{21} The requirement also has the effect of conserving judicial resources such as time and effort by avoiding many difficult cause-in-fact decisions that are also particularly subject to erroneous disposition.\footnote{22}

\textbf{B. Mental Disturbance with Physical Injury}

Where the defendant's negligence causes physical injury, courts have historically allowed compensation for the purely mental elements accompanying it—fright, apprehension, nervousness, and humiliation are common examples.\footnote{23}
These are called “parasitic damages.” In these cases, the physical harm serves as the guarantee that the mental injury is genuine and not feigned.

Some jurisdictions require physical impact upon the plaintiff’s person. In addition to “untenable notions of causal connection, the theory appears to be that the ‘impact’ affords the desired guarantee that the mental disturbance is genuine.” However, because it is possible to assure genuine mental disturbance when the plaintiff escapes impact by only an inch, substantial justice can be served without reliance upon the impact doctrine. As a result, most courts have repudiated the requirement of impact and regard as sufficient that the distress be certified by some physical manifestation.

C. Mental Disturbance with Physical Injury to Another

Until recently, most courts denied recovery where the mental disturbance was not caused by the plaintiff’s fear for his own safety, but by distress at witnessing physical injury to another. Obviously, any court adhering to the impact doctrine did so because there has been no physical impact upon the plaintiff’s person. Other courts deny recovery because they find the defendant owed the plaintiff no duty of care since it was unforeseeable that the plaintiff would suffer any harm as a result of the defendant’s conduct. However, many courts allow bystander recovery when the plaintiff was personally within the zone of danger. In these situations, courts find that the defendant owes a duty of care to the plaintiff who narrowly escapes physical injury but suffers emotional distress by witnessing the physical injury which befalls the trauma victim—in the classic case a mother observing the death of her child. The seminal English case which American courts have followed, Hambrook v. Stokes Brothers, involved just such an accident. Due to the defendant’s negligence in driving a vehicle into the plaintiff’s path, she was herself threatened with physical harm but only suffered mental harm through fright at the peril to her child. The court held that “with an initial breach of duty

24. Id. See Marais and Galligan, supra note 3, § 5-8, at 124.
26. Id.
27. Id.
28. Id. at 364.
29. Id.
30. Id. at 365.
31. Id.
32. Id.
33. Id.
34. Id. at 366.
35. [1925] 1 K. B. 141.
to her established, it becomes merely a matter of the unexpected manner in which the foreseeable harm has occurred, so that recovery should be allowed.\textsuperscript{37}

That the plaintiff herself must be in some foreseeable danger may be an artificial and arbitrary requisite for recovery given that such a plaintiff not in the zone of danger but somewhere in the vicinity may suffer mental distress every bit as serious.\textsuperscript{38} As a result, some courts have allowed recovery to bystanders suffering mental distress at witnessing trauma negligently inflicted on others from positions of complete safety.\textsuperscript{39} This theory, known as the bystander proximity doctrine, was developed in the California Supreme Court in the 1968 case, \textit{Dillon v. Legg}.\textsuperscript{40} In essence, the doctrine stands for the proposition that the bystander may be foreseeable, and, therefore, owed a duty of care if there exists physical, temporal, and relational proximity between the plaintiff bystander and the scene, the accident, and the trauma victim respectively.\textsuperscript{41}

\textbf{D. NIED as an Independent Cause of Action}

At least two states “have taken the final step and permitted a general negligence cause of action for the infliction of serious emotional distress” without regard to whether the plaintiff or any other person suffered physical injury or illness as a result.\textsuperscript{42} This approach remains in the minority as most courts disfavor it.\textsuperscript{43} Reluctance to “take the final step” stems from the same concerns that have dominated the tumultuous development of NIED generally: fear of compensating for trivial or temporary harm, fear of false claims, and perceived unfairness of burdening a negligent defendant for consequences somewhat remote from the wrongful act.\textsuperscript{44} While real, these problems can be met by requiring objective proof of injury, requiring some guarantee of genuineness, and by asking if fairness will permit leaving the burden of loss upon the innocent victim.\textsuperscript{45}

\footnotesize{\textsuperscript{37} Id.\textsuperscript{38} Id. at 366.\textsuperscript{39} Id.\textsuperscript{40} 441 P.2d 912, 920 (Cal. 1968). The plaintiff [mother] witnessed the defendant’s automobile negligently strike and kill one daughter and narrowly miss another as the children were crossing the street. The guidelines established by this case to govern bystander NIED were later converted into fixed rules of law. \textit{See infra} text accompanying note 81.\textsuperscript{41} Id.\textsuperscript{42} Keeton et al., \textit{supra} note 14, § 54, at 364-65.\textsuperscript{43} \textit{See id.} at n.55 for a list of cases representing some of such courts: Massachusetts, Nebraska, North Carolina, Maine, Mississippi, Oregon, and Colorado.\textsuperscript{44} Id. at 360-61.\textsuperscript{45} Id. at 361.}
III. NEGLECTFUL INFILCTION OF EMOTIONAL DISTRESS IN THE LOUISIANA JURISPRUDENCE AND LAW

A. Bystander Proximity Doctrine

An 1855 Louisiana Supreme Court case established a no recovery rule in Louisiana bystander NIED actions that largely remained intact until its 1990 reversal in *Lejeune v. Rayne Branch Hospital*. In *Lejeune*, the distress victim was a wife who visited her comatose husband, the third party trauma victim, soon after he had been severely bitten by rodents while in the defendant hospital’s care. She observed that his face was covered with holes and was told by a nurse that they were caused by rat bites. The Supreme Court affirmed the trial and appellate court findings that the plaintiff stated a cause of action. While the court purposely did not decide the proximity of relationship between the trauma and distress victims necessary to allow the plaintiff to recover, it did establish four guidelines to limit recovery so as to avoid the potential administrative nightmare that could result from opening the litigation floodgates too wide:

1. The claimant must either view the accident or injury-causing event or come upon the scene soon thereafter and before substantial changes occur in the victim’s condition.
2. The trauma victim must suffer such harm that it can reasonably be expected that one in the plaintiff’s position would suffer serious mental anguish from the experience.
3. The emotional distress must have been both serious and reasonably foreseeable and it must also be both severe and debilitating.

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46. This comment will not address parasitic disturbance, the impact rule, or the zone of danger rule under Louisiana law.
1. Parasitic disturbance: These damages are awarded so frequently by every jurisdiction as to be regarded as a settled area of the law. This is largely because “with a cause of action established by the physical harm . . . it is considered that there is sufficient assurance that the mental injury is not feigned.” Keeton et al., supra note 14, § 54, at 363; see also Maraist and Galligan, supra note 3, § 5-8, at 124.
2. Impact rule: Louisiana does not require “impact” upon the plaintiff’s person as do many common law jurisdictions. Maraist and Galligan, supra note 3, § 5-8, at 124; Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 564 (La. 1990).
3. Zone of danger rule: This rule is not applicable in Louisiana because it is merely “another way of saying that the wrongful conduct was directed at both the trauma victim and the mental anguish victim, or it is a proxy for the ‘[e]special likelihood’ of mental distress test adopted by the Louisiana Supreme Court in *Moresi*.” Maraist and Galligan, supra note 3, § 5-8, at 126.
48. *Lejeune*, 556 So. 2d at 569.
49. *Id.* at 561-62.
50. *Id.* at 562.
51. *Id.* at 571.
52. *Id.* at 570-71. The court concluded that a spouse would satisfy any appropriate standard.
4) The claimant must have a close relationship with the trauma victim.  

Later in 1990, the Louisiana Supreme Court, in a plurality opinion, decided *Clomon v. Monroe City School Board* which held that where the defendant owed the bystander an independent statutory duty which encompassed the duty to protect against the risk of mental distress, the plaintiff need not satisfy any pre-accident relationship test with the trauma victim in order to state a cause of action. Therefore, the statutory duty rendered *Lejeune* inapplicable.  

However, another rationale for this conclusion was raised in Justice Hall's concurrence. Simply put, Justice Hall found *Lejeune* inapplicable because Clomon, the plaintiff, was a participant in the accident and not a mere bystander, and because her distress resulted from having been involved in a traumatic ordeal and not from witnessing the event. The Louisiana Third Circuit Court of Appeal adopted this rationale in deciding *Guillory v. Arceneaux* which involved an accident in which a trauma victim unrelated to the claimant was killed partly because of the defendant's negligence. Though the claimant was unrelated to the deceased and suffered no physical injury, the court allowed recovery because Guillory participated in the accident as driver of the car that struck and killed the deceased who had been negligently placed on the road by the defendant's conduct.

Against the backdrop of *Lejeune*, *Clomon*, and *Guillory*, the Louisiana Legislature, in 1991, adopted Louisiana Civil Code article 2315.6. While

53. Id. at 570.
54. 572 So. 2d 571, 575-76 (La. 1990). The plaintiff's automobile struck and killed a four-year-old school boy. He had entered her path after the bus driver and bus attendant discharged him from the bus, deactivated the warning device prematurely, and drove away, leaving the victim to cross the street alone.
55. Id.
56. Id. at 579 (Hall, J., concurring).
58. Id. at 997.
59. A. The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury:
   (1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.
   (2) The father and mother of the injured person, or any of them.
   (3) The brothers and sisters of the injured person, or either of them.
   (4) The grandfather and grandmother of the injured person, or either of them.
B. To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable. Damages suffered as a result of mental anguish or emotional
Article 2315.6 largely codified *Lejeune*, there are two substantial differences. First, under Article 2315.6 the plaintiff must either view the accident or come upon the scene soon thereafter, but he need not do so before substantial change occurs in the victim's condition as was required under *Lejeune*.*60* Secondly, the legislature drew a bright line in establishing the relationship required between the distress and trauma victims.*61* The list of beneficiaries under Article 2315.6 is broader than those allowed in wrongful death or survival actions.*62* Article 2315.6 does not preempt by class, so multiple plaintiffs may all recover if they otherwise satisfy the article, despite the fact that they represent more than one of the recognized classes of beneficiaries.*63*

Additionally, although there was some debate over the matter, the better view is that rather than overruling *Clomon* and *Guillory*, Article 2315.6 does not apply to these cases because the plaintiffs were not bystanders, but actual accident participants owed an independent duty of care by the defendants to protect against such mental distress as was inflicted.*64* Thus, bystander recovery in Louisiana is best understood by analysis of both *Lejeune*, since it represents a jurisprudential NIED bystander rule,*65* and of Article 2315.6, the legislative adoption of that rule.*66*

One cannot consider the meaning and scope of Article 2315.6 without first reviewing Louisiana Civil Code article 2315 and the ancient civilian principles for which it stands: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Simply put, this fundamental civil law principle has been a basic tenet of Louisiana tort law since 1808 and it "represents the very foundation upon which all tort law in Louisiana has been constructed . . . ."*67* "The general tenor of Article 2315, creating a cause of action in favor of injured parties against those by whose fault the injury happened, makes that article universal in its operation unless a specific exception is established by law."*68* Thus, absent a statutory directive or a compelling public interest, the courts should recognize no exceptions. Read in pari materia with Article 2315,*69* Article 2315.6 prescribes just such a limitation on the

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*distress for injury to another shall be recovered only in accordance with this Article.*


*60.* Marais and Galligan, *supra* note 3, § 5-8, at 129.

*61.* Id. at 130.


*63.* See *supra* note 59.

*64.* Dupuy, *supra* note 1, at 578-79.

*65.* See *supra* text accompanying notes 4-8.

*66.* See *supra* text accompanying note 9.


*69.* It is necessary to read Article 2315.6 in pari materia with Article 2315 or there would be no fault requirement since Article 2315.6 does not address fault.
application of the general rule and thus represents a statutory exception based on a superseding societal policy—the need to limit liability exposure and fraudulent claims. The most fundamental basis of this societal policy is that there must be limits on recovery for bystander mental distress victims given that “[i]t would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it . . . .” In the bystander context, the danger of fictitious claims and the necessity of guarantees of genuineness are even greater than in other NIED scenarios.

Therefore, to allow for bystander recovery as required by its civil law heritage while simultaneously limiting it in an effort to maintain a proper balance, the Louisiana Supreme Court developed the Lejeune guidelines which, as was noted earlier, were largely codified by Article 2315.6. Thus, Article 2315.6 represents Louisiana’s adaptation of the bystander proximity doctrine first espoused in 1968 by the California Supreme Court in Dillon v. Legg. It is designed to allow redress of genuine bystander emotional distress while not opening the litigation floodgates too far.

However, in 1989, Dillon was modified by Thing v. La Chusa. Thing provided the Louisiana Legislature with an updated analysis of NIED bystander recovery, and Louisiana borrowed heavily from the California experience in selecting the language with which to codify Lejeune. The Dillon proximity doctrine was intended to assist California courts in determining whether emotional distress injuries were reasonably foreseeable. In Dillon, the California Supreme Court “enunciated ‘guidelines’ that suggested a limitation on the action to circumstances like those in the case before it”: First, whether the plaintiff was located near the scene of the accident; second, whether the distress resulted from the plaintiff’s sensory and contemporaneous observance of the accident; and third, whether the plaintiff and the trauma victim were closely related. However, in Thing, the court acknowledged that the guidelines had resulted in a “‘case-to-case’ or ad hoc approach to development of the law that . . . has not only produced inconsistent rulings in the lower courts, but has provoked considerable critical comment by scholars who attempt

70. Dupuy, supra note 1, at 574.
72. Keeton et al., supra note 14, § 54, at 366.
73. Id.
74. See supra text accompanying notes 60-63.
75. Lejeune, 556 So. 2d at 564-66.
76. Id. at 566.
77. 771 P.2d 814 (Ca. 1989).
78. Lejeune, 556 So. 2d at 565.
79. Thing, 771 P.2d at 820.
80. Id.
81. Id.
to reconcile the cases." In an effort to define the parameters of bystander recovery and to "avoid[ ] the limitless exposure to liability that the pure foreseeability test of 'duty' would create" as evidenced by the post-Dillon decisions, the court converted the Dillon guidelines into fixed rules of law.

It is clear that when Louisiana codified Article 2315.6, the Legislature was not only mindful of its own desire to limit liability under the article, but also of California's twenty-year experiment during which bystander NIED cases were unsatisfactorily governed by a general rule of recovery premised on foreseeability. Thus, Article 2315.6 was designed to preclude limitless exposure and to promote uniform decisions. In short, the Legislature sought to accomplish these goals by establishing that, as a matter of law, a tortfeasor owes a duty of care to protect a bystander from mental anguish occasioned by observance of an injury to a third party only if the requirements of Article 2315.6 are met.

B. NIED as an Independent Cause of Action

As a result of both common law influence and its civil law heritage, Louisiana has deviated from the general common law rule of denying recovery for emotional distress without physical injury in cases that indicate on their face the potential for mental distress. Like the common law, these cases include negligent transmission of death messages by telegraph companies and negligent mishandling of corpses. Other situations, however, have also triggered the theory: failure to install, maintain, or repair consumer products; failure to take photographs or develop film; negligent property damage witnessed by the owner; and where the plaintiff was in great fear for his personal safety. Obviously, these claims will be heavily fact specific such that the court is assured of the harm's severity and genuineness.

Because the court in Moresi concluded that "the plaintiff's mental disturbance was not severe, or related to personal injury or property damage, and [that] the plaintiffs were not in great fear for their personal safety," it disallowed the NIED claim. As a result, the particular facts of Moresi are relatively

82. Id. at 825.
83. Id. at 821.
84. Id. at 829-30. Bystander NIED recovery was limited to those circumstances where 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 . . . ." Id. at 829-30.
85. Dupuy, supra note 1, at 569-70.
86. See supra note 75.
87. See supra text accompanying note 82.
89. Id.
90. Id.
91. Id. Two months after two of the plaintiffs were arrested for failure to properly tag taken ducks, state game agents mistakenly left a message intended for someone else on the plaintiff's
unimportant except as an indicator of how high the court has placed the bar for NIED claims. But the test adopted by the court to assess the NIED claim is of tremendous significance. Basically, Justice Dennis, in writing for the Moresi court, adopted "wholesale" the language of Prosser and Keeton in holding that NIED claims, in order to be actionable, must have an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." The court then disposed of the Moresi NIED claim since it did "not fall within any category having an especial likelihood of genuine and serious mental distress, and thus, lack[ed] any recognized elements guaranteeing the genuineness of the injury claimed." In so doing, the Supreme Court established a general rule governing NIED claims and thereby moved Louisiana into the company of a distinct minority of states that recognize NIED as an independent cause of action.

IV. ANALYSIS

A. Moresi Applied to Recently Developed Categories of NIED Claims

As stated earlier, there seem to be only two categories of NIED claims: 1) those where the defendant's negligence is aimed at a third person trauma victim, but the plaintiff suffers mental anguish as a result (bystander cases), and 2) by default, all other cases. The former must satisfy Article 2315.6 to be valid, the latter, Moresi. Recall that Moresi comprises a jurisprudential rule based on Article 2315, prior case law, and upon the need to serve the societal interest of denying spurious NIED claims. Perhaps the significance of Moresi is best illustrated by the emergence of two categories of cases. The first is where the defendant's negligent conduct exposes the victim to a realistic fear of contracting a deadly disease such as cancer or Acquired Immune Deficiency Syndrome (AIDS)—phobia cases. The second category, perhaps more properly considered as a subset of the first, is where the defendant breaches a duty owed to the plaintiff to prevent the exposure to a deadly disease by way of a third person—channel cases.

camphouse door. The message read: "We missed you this time but look out next time." Moresi, 567 So. 2d at 1096.
92. Moresi, 567 So. 2d at 1096; Keeton et al., supra note 14, § 54, at 362.
93. Moresi, 567 So. 2d at 1096.
94. See supra text accompanying note 42.
95. Dupuy, supra note 1, at 566; see supra text accompanying note 11.
96. See supra text accompanying notes 88-96.
1. Phobia Cases

The third circuit considered an AIDS phobia case in *Bordelon v. St. Frances Cabrini*. This was a case in which a hospital negligently gave a patient someone else's blood during surgery. The plaintiff subsequently "suffered severe emotional anguish about the possibility of contracting AIDS." The court held that the plaintiff stated a valid cause of action for NIED, but it did so after applying a duty-risk analysis and without relying directly upon *Moresi*. The court recognized that "[a]ny recovery for mental anguish tort damages must be based on La. Civil Code article 2315 .... The duty-risk analysis is used to assist our courts in determining whether one may recover under article 2315." However, the spirit, if not the letter, of *Moresi* guided the court such that its decision would undoubtedly satisfy the requirement that the circumstances serve as a guarantee that the claim was not spurious and that the harm was both severe and genuine. This was done through a careful inquiry into the risk and resulting harm suffered by the plaintiff relative to the scope of the hospital’s duty to prevent such harm. Since the plaintiff’s mental anguish was easily associated with the defendant’s negligent conduct in giving her someone else’s blood, an inquiry that was heavily fact specific, the risk and resulting harm were within the scope of protection afforded by the duty breached. In fact, the court concluded that under the particular circumstances, it was foreseeable that the plaintiff could develop a genuine and reasonable fear of contracting AIDS. The court’s ultimate conclusion that plaintiff’s fear could be reasonable despite her failure to allege that the blood administered to her was in fact contaminated with AIDS is suspect and inconsistent with that court’s later handling of channel cases as will be discussed below. While the court probably would have reached the same result, its failure to explicitly invoke the *Moresi* test suggests that at least one circuit does not regard *Moresi* as the test by which non-bystander NIED claims must be measured.

In 1993 the Fifth Circuit considered a phobia case in *Straughan v. Ahmed*. In this case, however, the court expressly evaluated the claim of

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97. 640 So. 2d 476 (La. App. 3d Cir. 1994).
98. Id. at 477.
99. Id. at 479.
100. Id. at 478.
101. Id.
102. Id. at 479.
103. Id.
104. Id.
105. Id. at 477-78.
106. 618 So. 2d 1225 (La. App. 5th Cir.), writ denied, 625 So. 2d 1033 (1993). The defendant doctor negligently failed to follow up after discovering a lump in plaintiff’s right breast. Plaintiff was diagnosed with breast cancer two years later. The plaintiff recovered $40,000.
cancer phobia under the *Moresi* test. Specifically, it found that the plaintiff's cancer phobia had developed due to physician negligence. The court held that the NIED damages were recoverable because there existed an "especial likelihood of genuine and serious mental distress . . . guarantee[ing] that the claim [was] not spurious."

2. Channel Cases

The fourth circuit applied the *Moresi* NIED test in *Vallery v. Southern Baptist Hospital*, a case in which a hospital failed to advise the plaintiff that in the performance of his security guard duties he would restrain a patient infected with AIDS. Despite the fact this patient bled on Vallery, the hospital did not tell him of his possible exposure to the virus until the next day. Though the worker compensation exclusive remedy provision barred Vallery's tort claim against the hospital, because Vallery had sexual relations with his wife after possible exposure to AIDS but prior to the hospital's warning to that effect, Mrs. Vallery brought an action in NIED. Because the alleged damages were particular to Mrs. Vallery, this claim was not subject to the worker's compensation statute. The court wrote that "[a] case in which a plaintiff alleges (and subsequently proves) a genuine and reasonable fear of contracting an incurable and fatal disease meets the *Moresi* requirements." Clinical diagnosis of the disease in the plaintiff is not necessary to prove the NIED claim. The plaintiff must prove that the deadly instrumentality, the virus, was present, that the third party was exposed to it, and that there was an additional channel of exposure from the third party to the plaintiff. While fear may be genuine without a channel, requiring a channel serves to ensure the fear is also reasonable and "far more than a speculative worry" and also serves to prevent a "flood of ill-justified litigation."

In another factually similar channel case involving the Human Immunodeficiency Virus (HIV) and/or Hepatitis B, the third circuit in *Stewart v. St. Frances Cabrini Hospital* relied upon *Vallery* to deny recovery. The court held that where the plaintiff failed to allege the needle was contaminated with any infectious disease, or that there was a channel of infection running to her

107. *Id.* at 1229.
108. *Id.*
109. *Id.*
110. 630 So. 2d 861 (La. App. 4th Cir. 1993), writ denied, 634 So. 2d 860 (1994).
111. *Id.* at 862-63.
112. *Id.* at 864.
113. *Id.* at 866.
114. *Id.* at 865.
115. *Id.* at 866.
116. *Id.*
117. *Id.* at 867.
118. 698 So. 2d 1 (La. App. 3d Cir. 1997).
from her spouse who had been stuck by the needle, the complaint was insufficient for want of reasonable factual basis for the claim of NIED.\footnote{119} Reversing the trial court’s denial of the defendant’s peremptory exceptions and remanding to allow the plaintiff to amend her petition and state a valid cause of action, the appellate court recognized the plaintiff’s fear as genuine, but stated that “not every fear is compensable” and that hers was “steeped in speculation.”\footnote{120}

In Boutin v. Oakwood Village Nursing Home, the third circuit held that the plaintiffs failed to allege or demonstrate a channel for bacterial infection from the nursing home resident and thus the complaint was insufficient under the Vallery test.\footnote{121} Since contact with the resident’s infected sores or body fluids was required to transmit the infection to the plaintiffs, and because the plaintiffs neither alleged nor proved such contact, the trial court’s dismissal was upheld.\footnote{122}

Under the Moresi test, then, Louisiana appellate courts will award damages for phobia and channel cases when “there are special circumstances that guarantee that the claim is not spurious.”\footnote{123} As evidenced by Stewart and Boutin, however, it is fair to say that these courts will deny recovery where Moresi is not satisfied.\footnote{124} Thus, perhaps it is fair to say that the Moresi decision provides adequate guidance to courts in deciding whether new categories of cases “have . . . an especial likelihood of genuine and serious mental distress”\footnote{125} such that recovery under Article 2315 can be allowed without fear of opening the litigation floodgates to spurious claims.

B. The Proper Interpretation of Article 2315.6

In the preceding channel cases, courts applied Moresi to NIED causes of action when the defendant’s misconduct was not aimed primarily at the plaintiff, but rather at a third party.\footnote{126} Yet, Article 2315.6 did not prevent recovery because the courts found that the defendants owed direct, independent duties to the plaintiffs. The question then, is whether Article 2315.6 can be avoided by any plaintiff who is otherwise a bystander simply because they can prove the defendant owes an independent duty of care to prevent the NIED.

The very language of Article 2315.6 contemplates a plaintiff who suffers emotional distress “as a result of [an]other person’s injury.”\footnote{127} By definition, when the plaintiff suffers any injury, including mental distress unaccompanied

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119. Id. at 3.
120. Id.
121. 692 So. 2d 1289, 1291 (La. App. 3d Cir.), writ denied, 695 So. 2d 1358 (1997).
122. Id. at 1291.
123. Maraist and Galligan, supra note 3, § 5-8, at 125.
124. See supra text accompanying notes 118 and 122.
126. See supra text accompanying notes 110-122.
by physical harm, that was caused by the defendant's breach of a duty of care owed directly and independently to the plaintiff, the plaintiff suffers, not as a result of another's injury, but as a result of her own injury. Furthermore, the article's provision that expressly limits bystander NIED recovery exclusively to Article 2315.6 also refers to "[d]amages suffered as a result of mental anguish or emotional distress for injury to another . . . ."128 Thus, the wording of Article 2315.6 expressly renders that article inapplicable to any case wherein the defendant owes the plaintiff an independent, direct duty to prevent the NIED.

In dictum, Judge Carter, writing for the first circuit in Norred v. Radisson Hotel Corporation, seems to adopt such an interpretation.129 The court disallowed an action under Article 2315.6 concluding the plaintiff’s distress was not sufficiently "severe and debilitating" to satisfy the article.130 However, the court then proceeded to analyze the facts under Moresi because "in order for [plaintiff] to be entitled to damages for negligent infliction of emotional distress, an independent, direct duty must have been owed to her by the defendants . . . ."131 Though the court resolved this issue in the affirmative, it nevertheless denied recovery because, again, the plaintiff did not prove the resulting mental distress was "genuine and serious."132 Central to answering the question posed above is not the ultimate denial of recovery, but rather the court’s methodology in assessing the claim under both Article 2315.6 and Moresi, despite the fact that the plaintiff was a bystander in the classic sense.133 Therefore, Norred stands for the proposition that where a bystander plaintiff establishes an independent and direct duty owed to her by the defendant, an NIED claim is not limited to disposition under Article 2315.6. In certain situations, the positive law exception gives way to the jurisprudential general rule. The importance of Norred should not be overstated since it is only one case decided by one of the courts of appeal. On the other hand, Norred takes on additional weight when the court’s analysis in Clomon is viewed in the light of basic civilian statutory interpretation.

The Louisiana Supreme Court, after Moresi and Lejeune, but before the Legislature enacted Article 2315.6, decided in Clomon that where the defendant owes a statutory duty to the plaintiff to protect against NIED due to a third party trauma victim, the Lejeune bystander recovery limitation test is inapplicable.134 Moreover, the exceptions to Lejeune’s control of bystander NIED claims is not

128. La. Civ. Code art. 2315.6(B).
129. 665 So. 2d 753 (La. App. 1st Cir. 1995). The plaintiff alleged mental distress due to her entry into the hotel room wherein her husband had previously been robbed.
130. Id. at 759.
131. Id. at 759-60.
132. Id. at 760.
133. The plaintiff came upon the scene of her husband’s robbery shortly after it occurred. See id. at 759.
134. See supra text accompanying note 55.
limited to statutory duties owed the plaintiff, but extends to all direct and independent duties. In Clomon, Justice Dennis, speaking for the court, stated:

_Lejeune_ does not govern every class of claim for emotional damage due to third party injury. _Lejeune_ addressed only the most typical class, a suit by a plaintiff emotionally distressed by his loved one's injury against a tortfeasor based purely on a breach of the latter's general duty of due care. In formulating rules to establish a guaranty of merit for this broad class of claims, the _Lejeune_ court did not intend to modify or interrupt the development of rules or decisions permitting recovery for emotional distress from a tortfeasor who owed the plaintiff a special, direct duty created by law, contract or special relationship.\(^\text{135}\)

That _Lejeune_ did not apply where the defendant owed the plaintiff a direct, independent duty of care represented a jurisprudential precept underlying the _Lejeune_ jurisprudential rule. Given that this precept was specifically enunciated in _Clomon_, it was at least tacitly approved by the legislature since Article 2315.6 did not in any way repudiate it. “[L]egislative approval and codification of a broad, general jurisprudential principle carries with it approval of, or acquiescence in, contemporaneously developed auxiliary rules used by the courts to implement the principle, unless there is a contrary provision.”\(^\text{136}\) “To reach a different conclusion would be to follow the common law tendency to restrict the field of application of a statute as much as possible, rather than the traditional civil law doctrine of implementing the law by interpretation and analogy.”\(^\text{137}\)

That Article 2315.6 does not apply when there is an independent, direct duty of care owed to the plaintiff by the defendant is a straightforward and simple concept. The difficulty lies in articulating those circumstances from which such a duty arises. Another look at the California experience is instructive.

In a case decided just two weeks before rendering _Thing v. La Chusa_, the California Supreme Court did not apply the type of limitations delineated in _Thing_ to a direct victim case.\(^\text{138}\) “Instead, the court . . . allow[ed] plaintiffs who did not meet the _Thing_ prerequisites to recover based upon their special relationship with the defendant.”\(^\text{139}\) The opinion did not “provide any guidelines to help the lower courts differentiate between bystanders and direct victims.”\(^\text{140}\) In the same law review article, Professor Greenberg posited that recovery in direct victim cases should be limited to those plaintiffs who are

137. Id. at 1199.
140. Id.
particularly likely to suffer severe emotional harm in order to promote the same societal policies underlying bystander recovery.\textsuperscript{141} She concluded that a bright line test for direct, independent duties is required, and she proposed a three-part test: first, the plaintiff or the trauma victim closely related to the plaintiff must have a preexisting relationship with the defendant; second, a primary purpose of this relationship must be to protect the plaintiff's tranquility; and third, the plaintiff must suffer severe emotional distress.\textsuperscript{142}

As Moresi provides for the third test it need not be considered further. However, whether the existence of a direct duty can be fairly made to depend upon a preexisting relationship between the parties is a dubious proposition. A defendant will often be aware that his conduct will expose bystanders to serious injury, but he may not know the particular person who is subsequently injured, much less have a relationship with them. Yet, to conclude that such a defendant owed no duty of care to the distress victim is to effectively turn a blind eye towards his negligent conduct. Additionally, to entertain the query of whether a defendant is in a particular relationship that has for one of its primary purposes the object of protecting the plaintiff's emotional tranquility seems unworkable. But the strength of this approach is apparent given that where it is satisfied, the bystander was doubtlessly owed a direct duty of care by the tortfeasor to protect against the distress. This is so because, as the California Supreme Court stated in \textit{Molien v. Kaiser Foundation Hospitals}, where the alleged tortious conduct of the defendant was directed to the bystander as well as to the immediate victim, both are direct victims.\textsuperscript{143}

In 1961, before Louisiana allowed any recovery for bystander NIED, the First Circuit found such a direct duty in \textit{Holland v. St. Paul Mercury Insurance Co.}\textsuperscript{144} The court found that the defendant exterminator owed plaintiff parents a duty, both contractual and delictual, to know the ingredients of its poisons that were ingested by the plaintiff's minor son so that timely, effective treatment would be possible.\textsuperscript{145} "Defendant's duty in this regard, as well as plaintiffs' correlative rights, are neither secondary, derivative nor dependent upon injury to

\textsuperscript{141} Id. at 1306.
\textsuperscript{142} Id. at 1310.
\textsuperscript{143} 616 P.2d 813, 816-17 (Cal. 1980). The court allowed plaintiff husband to recover for NIED where the defendant doctor negligently told the patient wife that she had contracted syphilis and directed her to inform her husband.
\textsuperscript{144} 135 So. 2d 145 (La. App. 1st Cir. 1961). For other cases pre-dating \textit{Lejeune} wherein courts found independent duties owed to distress victims whose anguish was caused by injury to a third party, see \textit{Bishop v. Callais}, 533 So. 2d 121 (La. App. 4th Cir. 1988), \textit{writ denied}, 536 So. 2d 1214 (1989); \textit{Skorlich v. East Jefferson Gen. Hosp.}, 478 So. 2d 916 (La. App. 5th Cir. 1985); \textit{Champagne v. Hearty}, 76 So. 2d 453 (La. App. Orl. 1954); \textit{Jordan v. Fidelity & Cas. Co.}, 90 So. 2d 531 (La. App. 2d Cir. 1956); and \textit{Valence v. Louisiana Power & Light Co.}, 50 So. 2d 847 (La. App. Orl. 1951).
\textsuperscript{145} 135 So. 2d 145, 158 (La. App. 1st Cir. 1961).
a third party but on the contrary, are direct, primary and independent of an alleged tort in relation to plaintiffs' son." 146 The court went on to state:

We believe the foregoing views neither disturb nor deviate from the rule obtaining in this state (to which this Court continues to adhere) to the effect a plaintiff may not recover for mental pain and anguish occasioned by injury to another. Excepted from said rule, however, are those instances wherein a plaintiff suing for mental pain and anguish occasioned by physical injury to another does so on the basis of a breach of a primary legal duty and obligation owed by the defendant directly to the plaintiff seeking such damages. 147

If such a result obtained at a time when there was no recovery for bystander NIED claims, a fortiori Article 2315.6, which prescribes the parameters of bystander NIED recovery, does not, absent an express provision to the contrary, preclude recovery by similarly situated plaintiffs—those who suffer distress as a result of another person's injury but where the tortfeasor breached a duty owed directly and independently to the plaintiff to protect against the anguish.

Guidelines are required, however, to distinguish these direct and independent duties so as to avoid merely following the standard foreseeability-based duty-risk analysis. Any scenario satisfying Moresi would involve a duty owed to the plaintiff else no action would lie. The result would be that Moresi might indicate a duty and thus preempt the application of Article 2315.6 in every case. Clearly this is an outcome that neither the court nor the Legislature intended. 148 But to ensure that both Moresi and Article 2315.6 remain in their proper position, one or the other should clearly spell out those circumstances in which the defendant owes the plaintiff an independent, direct duty of care of a nature such that Article 2315.6 is rendered inapplicable though the distress is otherwise suffered by a bystander.

C. The Future of Moresi and Article 2315.6

Lejeune's avowed purpose was twofold: first, to declare that NIED claims arising out of injury to third persons were valid under Article 2315 and duty-risk principles; and, second, to modify and restrict these bystander claims so as to limit tortfeasor exposure and ensure the mental anguish is genuine and severe. 149 Recall that Moresi was crafted to do the same thing with respect to NIED causes of action generally. 150 In allowing recovery in accordance with Article 2315 so long as there are sufficient assurances that the claim is not

146. Id.
147. Id. at 158-59.
149. Id. at 569.
spurious, and that it is based upon facts guaranteeing a genuine claim of serious mental distress, Moresi's general rule is virtually indistinguishable in its purpose from Lejeune's.

The Lejeune court itself recognized that its rule imposed "somewhat arbitrary" restrictions on bystander NIED claims. Moreover, the court drew the line so as to "ensure that there is no open-ended exposure of tortfeasors, and ensure as well that a policy of limited exposure to serious mental pain and anguish damages sustained by a limited class of claimants will be permitted." Thus, Lejeune was designed to achieve the same ends as was Moresi, but yields more arbitrary and harsh results along the way.

It should not be surprising that when a bystander case yields a particularly harsh and "arbitrary" result under Article 2315.6, the courts may feel compelled to reach a more equitable and just result by resorting to Moresi whenever possible. Perhaps this is result-oriented decision-making by the courts; however, considering Justice Dennis' explanation of the Lejeune opinion, the courts are seemingly justified so long as there existed a direct, independent duty in favor of the plaintiff.

The larger problem is that such result-oriented decisions seem inconsistent not only with Lejeune as a jurisprudential rule, but also with Article 2315.6—a positive law restriction on bystander NIED claims which, by its very language, affords no exception. Thus, the question is not whether the two (Article 2315.6 and Moresi) are in conflict, they are, but how should the conflict be resolved.

The answer largely depends upon whether Article 2315.6 is rightly regarded as the mere codification of Lejeune as explained by Justice Dennis, or whether Article 2315.6 is complete in itself such that courts may not fairly look beyond its language in effecting its interpretation. Obviously, if Article 2315.6 is nothing more than a legislative enactment of Lejeune which preserves the court's intent, then courts are perfectly justified in resorting to Moresi where there exists an independent duty owed directly to the plaintiff by the defendant, despite the fact that Article 2315.6 is otherwise controlling.

Under Louisiana Civil Code article 9, "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." Thus, a court's justification for not limiting bystander NIED claims to the provisions of Article 2315.6 when the article is squarely on point may turn on the absurdity of the result. Particularly, as stated earlier, where application of Article 2315.6 yields a harsh and "arbitrary" result that is readily corrected by resort to Moresi, courts may be justified in doing so. However, given that the legislature had full benefit of the California experience which had revealed that bystander NIED claims were especially prone to being

151. Lejeune, 556 So. 2d at 569.
152. Id.
153. See supra text accompanying note 135.
spurious and to result in unlimited liability for damages only remotely foreseeable, a harsh result obtained under Article 2315.6 seems to more fairly represent a considered possibility and not an absurdity. In simple terms, such results are costs to society in terms of fairness that, in the collective mind of the legislature, are outweighed by the benefits of limited liability within carefully defined parameters serving to prevent many spurious claims and to promote judicial efficiency.

In at least one case, Daigrepont v. Louisiana State Racing Commission, the fourth circuit refused to allow recovery to a step-mother who witnessed an injury-causing accident in which her step-son was a trauma victim. Finding that Article 2315.6 applied and that “mother” included only biological or adoptive mothers, the court affirmed the trial court’s dismissal of her claim. Though it did not specifically address the issue, the court likely did not find such result to be absurd. In fact, the court employed Article 9 to conclude that, as used in Article 2315.6, “mother” is clear and unambiguous such that it cannot be read to include a step-mother. Indeed, this case may be one of those arbitrary and harsh results. Given that the plaintiff was the trauma victim’s only mother figure since he was three years old, a distinct possibility exists that a detailed, fact specific inquiry would reveal a guarantee that the claim was not spurious, and that the mental distress was both genuine and severe. In short, though the plaintiff failed to state a claim under Article 2315.6, the opposite result would likely obtain under Moresi. If so, the ultimate question is whether the cost in fairness and equity denied to the plaintiff were truly compensated for by any real benefit to society as a whole.

V. Conclusion

A. Recapitulation of the Current Status of NIED as a Cause of Action

Currently, Louisiana recognizes an independent cause of action for NIED as articulated in Moresi. The only exception to this jurisprudential rule is Article 2315.6 that governs bystander recovery through its enhanced safeguards against spurious claims and unlimited recovery—concerns that are substantially more warranted in the bystander context. However, where the tortfeasor owes an independent, direct duty to the bystander NIED victim, a reasonable argument can be made that the claim is evaluated under Moresi and not under Article 2315.6.

154. See supra text accompanying note 86.
156. Id. at 841.
157. Id.
158. See id.
B. Resolving the Hypothetical

The hypothetical posed in the introduction was a hybrid of Lejeune and Daigrepont. In Lejeune, Chief Justice Calogero did not specify the relational proximity required between the plaintiff and the trauma victim, saying only that whatever standard is to be adopted, “Mrs. Lejeune, the wife of the directly injured victim, qualifies.” Furthermore, the court refused to indicate whether that standard might include only close relatives by blood and marriage or all claimants having a close relationship with the victim. Since the issue was clearly resolved by the Legislature in the language of Article 2315.6(A), this would be a moot point before any court that would follow Daigrepont in steadfastly applying the article, despite its seemingly harsh and arbitrary results. Under this approach, the victim would not state a valid NIED cause of action. Though Moresi would likely be satisfied, the governing rule of law would be Article 2315.6 that denies recovery to step-mothers.

However, if a court considering the hypothetical determined either that this language yielded an absurd result, or, more likely, that the defendant hospital owed the step-mother an independent, direct duty to protect her against such mental anguish, then it should employ the Moresi standard instead. For example, if the facts were such that the step-mother had taken the step-son to the hospital initially and had contracted for his medical care, the hospital would owe her a direct, independent duty and Article 2315.6 would be rendered inapplicable.

In Daigrepont, the plaintiff did not argue that there was such a duty, and as a result, the court did not comment on how it would resolve the issue. But, as made clear in Clomon, Guillory, and Norred, were the plaintiff to plead and subsequently prove such a duty, the court might well apply Moresi.

C. Recommendations

Prosser and Keeton suggest that the bystander proximity doctrine and an independent NIED cause of action may be incompatible: “How far the rule of [the bystander proximity doctrine] may ultimately spread, and whether it may even one day be swallowed up in the newly emerging ‘independent’ cause of action for emotional distress, remain for now unanswered questions in this tumultuous area of the law.” Indeed this insight seems correct given that the two will almost certainly conflict, and that with the built in limitations of the

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159. See supra note 12.
161. Id. at 570-71.
162. See supra note 59.
164. See supra text accompanying notes 55, 58, and 129.
general cause of action, a more restrictive bystander approach seems not only unnecessary, but is certain to yield harsh and arbitrary results incongruous with those that would otherwise obtain under the general rule. The only valid reason to have both rules is to prevent a flood of unjustified litigation that would otherwise occur if only the general rule were in place. However, where the general rule contains adequate restrictions to safeguard against such excesses, there simply is such minimal utility in having a bystander proximity rule that its costs to fairness may overwhelm any small contribution it provides.

If one were to contrast the likely divergent results to be obtained in applying Article 2315.6 and Moresi to the hypothetical fact pattern solely in the context of whether fairness will permit the loss to be sustained by the innocent mental anguish victim, the Moresi test yields the better result. Moresi is only preferable to Article 2315.6, however, if the litigation floodgates are not opened too widely for bystander NIED claims. Thus, the matter turns on the nature of the safeguards contained within Moresi. They seem adequate to the task and, in fact, only slightly more relaxed than those in Article 2315.6. Whether the Legislature should repeal Article 2315.6 is fairly debatable. What seems clear, however, is that either the court or the Legislature should inform the law as to what constitutes direct and independent duties of care such that plaintiffs otherwise denied recovery by Article 2315.6 can instead invoke the Moresi general NIED test. Currently courts are left to an "I will know it when I see it" approach that defeats consistency and fails to put society on adequate notice of the rules governing NIED.

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