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NOTE

WHEN FACETIME BRINGS DARK TIMES: A SUPERIOR APPROACH TO BYSTANDER NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

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ABSTRACT

Most United States jurisdictions do not allow a plaintiff to recover for negligent infliction of emotional distress as a bystander unless they witness the event firsthand and the plaintiff has a close familial relationship with the victim. However, a bystander will not always witness their loved one get injured directly. As technology use continues to rise and audio-video applications become more advanced, there is a greater chance someone could watch and hear another participant die or face great bodily injury in real-time. Proximity to the injured party should not preclude recovery. Although they are not physically present at the scene of the incident, they are experiencing all of the events that occur in real-time and experiencing all of the same feelings. Nevertheless, under current Pennsylvania law, a plaintiff would have no avenue of recovery simply because the perception of the event was virtual. Conversely, a case addressing this issue has recently been decided in California in which a virtual real-time perception of the event

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witnessed over a smartphone application satisfied the elements of the claim for bystander negligent infliction of emotional distress.

This Note argues that Pennsylvania should follow California's approach to bystander recovery and allow plaintiffs to recover for negligent infliction of emotional distress even when their perception of the incident occurred virtually. Pennsylvania should make this change because it has adopted California precedent for this tort in the past, and this change would account for technological advancements in society. Also, this Note reasons that since Pennsylvania would be adopting California's standard on the method through which a plaintiff perceives an event, it should also modify its approach to the close relationship requirement. By ensuring proximate causation between the incident causing the emotional distress and factually measuring the relationship between the victim and plaintiff, it will shift the potential plaintiff pool to account for significant changes in family dynamics and social norms.

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INTRODUCTION

Technology usage and the role it plays in everyday life continues to expand in the United States,[1] but the consequences of increasing technology usage are often an afterthought. In 2021, 97% of American adults owned cell phones, and 85% of those adults owned smartphones.[2] As the role of technology continues to increase in the United States, more adults are choosing to use videoconferencing to communicate with their family and friends, with FaceTime being the most popular platform as of March 2020.[3] While this increased technology usage is beneficial, it also highlights the need for the law to adapt and provide injured parties with a manner by which to seek damages where technology traditionally prohibits legal recovery.[4]

For example, on October 14, 2021, Marie Joseph, a seventy-four-year-old woman, began "choking on a mucus clogged

1. *See Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/#who-owns-cellphones-and-smartphone [https://perma.cc/6RHV-MFWE].

2. *Id.*

3. *Most Popular Videoconferencing Services Used by Adults in The United States to Chat with Family and Friends During the Coronavirus Pandemic as of March 2020*, STATISTA (July 7, 2022), https://www.statista.com/statistics/1119981/videoconferencing-services-us-coronavirus-pandemic/ [https://perma.cc/BSX3-FKPY].

4. Debra Cassens Weiss, *Suit Seeks Damages for Traumatic Event Witnessed over FaceTime; Bystander Definition at Issue*, AM. BAR. ASSOC. (July 7, 2022, 1:21 PM), https://www.abajournal.com/news/article/suit-seeks-damages-for-traumatic-event-witnessed-over-facetime-bystander-definition-at-issue [https://perma.cc/E8G8-XCJD].

tracheostomy tube and lost her consciousness."[5] Garden Spring Center, a nursing facility located in Willow Grove, Pennsylvania, was responsible for performing regular cleanings of Joseph's tracheostomy tube, but the facility failed to perform its duties effectively.[6] Joseph often experienced "difficulty breathing, and regularly exhibited thick mucus and low oxygen levels."[7] While choking on October 14, Joseph attempted to reach the staff at the Garden Spring Center by ringing her call bell but was unsuccessful because the bell was defective.[8] Shortly after a failed attempt to reach the staff, Joseph FaceTimed her daughter, Norma Clotaire, who witnessed the choking, and contacted emergency services to assist her mother.[9] Emergency services contacted Garden Spring Center, which prompted a staff member to aid Joseph and have her transferred to a hospital.[10] Unfortunately, the clogged tube and delayed response led to Joseph's death two days later.[11] Therefore, Norma Clotaire filed suit against Garden Spring Center in the Montgomery County Court of Common Pleas seeking damages for perceiving this traumatic event.[12]

Clotaire v. Garden Spring Center presents an important issue that will continue to arise as technology usage expands: whether bystanders need to be physically present in order to raise a claim for negligent infliction of emotional distress.[13] When someone witnesses a family member experience a great bodily injury or pass away in real-time with audio and visual

5. Max Mitchell, *Should Plaintiffs Get Emotional Distress Damages for Something Witnessed over FaceTime? New Suit Pursues Novel Claim*, THE LEGAL INTELLIGENCER (July 6, 2022, 5:21 PM), https://www.law.com/thelegalintelligencer/2022/07/06/should-plaintiffs-get-emotional-distress-damages-for-something-witnessed-over-facetime-new-suit-pursues-novel-claim/?slreturn=20240010141513 [https://perma.cc/J5H6-4AZV].

6. *See id.*; Cassens Weiss, *supra* note 4.

7. Mitchell, *supra* note 5; *see* Complaint at 16–17, Clotaire v. Garden Spring Ctr. SNF, LLC, No. 2022-10849 (Pa. Ct. Com. Pl. June 29, 2022).

8. Mitchell, *supra* note 5.

9. *Id.*

10. *Id.*

11. *Id.*; Complaint, *supra* note 7, at 20.

12. Mitchell, *supra* note 5.

13. Cassens Weiss, *supra* note 4.

coverage, like a FaceTime call, there should exist an avenue of recovery through the tort of bystander negligent infliction of emotional distress.[14] While states like California have recognized that these types of technology are necessary to create a safer world where people can be contemporaneously present with their loved ones virtually by avoiding travel and disease transmission by allowing plaintiffs to recover in a similar situation that,[15] the same cannot be said for Pennsylvania. In Pennsylvania, there has been no progress made toward allowing recovery under tort law where the bystander experiences distress via FaceTime.[16] Because FaceTime is widely used in ways similar to that in *Clotaire v. Garden Spring Center*, the antiquated requirement of physical presence and close proximity for bystander negligent infliction of emotional distress claims needs to be updated.[17] While this case would be one of first impression in Pennsylvania,[18] California has already addressed this issue,[19] and Pennsylvania has followed California's lead for this avenue of recovery in the past.[20]

Accordingly, this Note proposes that Pennsylvania adopt and codify a standard similar to California's precedent allowing for virtual presence to satisfy the contemporaneous perception requirement for bystander negligent infliction of emotional distress claims in order to reflect technological advancements and changes in society. Moreover, since Pennsylvania would be updating the perception requirement, the jurisdiction should also adjust the close relationship requirement to account for new societal and familial norms. Although the current standard for the close relationship requirement would be satisfied in *Clotaire*,

14. *See* Mitchell, *supra* note 5.

15. *See* Ko v. Maxim Healthcare Servs., Inc., 272 Cal. Rptr. 3d 906, 908 (Cal. Ct. App. 2020).

16. *See* Mitchell, *supra* note 5.

17. *See Suing for Emotional Distress in Pennsylvania*, DUGAN & ASSOCS. (Feb. 22, 2022), https://www.dugan-associates.com/suing-for-emotional-distress-in-pennsylvania/ [https://perma.cc/578A-LTV9]; Covello v. Weis Mkts., Inc., 610 A.2d 50, 53 (Pa. Super. Ct. 1992); *infra* Section I.C.3.

18. *See* Mitchell, *supra* note 5.

19. *See Ko*, 272 Cal. Rptr. 3d at 917–19.

20. *See* Sinn v. Burd, 404 A.2d 672, 684–85 (Pa. 1979); *infra* Section I.C.3.

there are many imaginable scenarios where people virtually witness best friends or even coworkers die or get horribly injured in real time. Therefore, it would be advantageous for Pennsylvania to adjust both the perception and close relationship requirements to shift the tort's availability to different plaintiffs who have experienced harm.

Part I of this Note discusses technological advancements and the changes made to the standards used for bystander negligent infliction of emotional distress claims in Pennsylvania. Part II discusses how other jurisdictions have ruled on the contemporaneous perception element of negligent infliction of emotional distress. Part III examines how other jurisdictions have applied the close relationship requirement in bystander negligent infliction of emotional distress claims. Part IV proposes that Pennsylvania adopt and codify a standard similar to California's for cases involving virtual perception and suggests Pennsylvania take a broader approach to the close relationship requirement while considering the future implications of both changes.

I. BACKGROUND

The use of technology continues to become more prevalent in the everyday lives of almost all Americans.[21] Because technology continues to advance, other aspects of society are forced to adapt, and the law is no exception.[22] Although the law has changed significantly in the past for bystander negligent infliction of emotional distress claims, there has not been any progress in Pennsylvania to consider technology in this tort's application.[23] This Part discusses: (1) how the law has trouble keeping up with developments in technology, (2) the distinction between claims for negligent infliction of emotional

21. *See Mobile Fact Sheet*, *supra* note 1; Andrew Perrin & Sara Atske, *About Three-in-Ten U.S. Adults Say They Are 'Almost Constantly' Online*, PEW RSCH. CTR. (Mar. 26, 2021), https://www.pewresearch.org/short-reads/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/ [https://perma.cc/3F7Q-UT9Y].

22. *See* Julia Griffith, *A Losing Game: The Law Is Struggling to Keep Up with Technology*, J. OF HIGH TECH. L. (Apr. 12, 2019), https://sites.suffolk.edu/jhtl/2019/04/12/a-losing-game-the-law-is-struggling-to-keep-up-with-technology/ [https://perma.cc/F9XX-FW8P].

23. *See Suing for Emotional Distress in Pennsylvania*, *supra* note 17; Mitchell, *supra* note 5.

distress and intentional infliction of emotional distress, and why this Note only discusses negligent infliction of emotional distress, and (3) the history of Pennsylvania's standards for negligent infliction of emotional distress and what those standards are currently.

A. *Technology and the Law: An Endless Game of Tag*

Much like a children's game of tag, the law never seems to be able to catch advancements in technology.[24] Almost all American adults own some kind of cellular phone, and a large majority of Americans own a smartphone as of 2021.[25] Additionally, a majority of American adults own another device with access to the internet.[26] As of 2021, 77% of American adults owned a laptop or desktop and 53% owned a tablet computer.[27] Further, about 33% of Americans use video conferencing platforms on said devices to communicate for business, and American businesses account for around eleven million video conferences a day.[28] While this staggeringly large number only accounts for business users in the United States, some platforms have overlap between their business users and personal users.[29] Zoom averages over 300 million daily users worldwide, with 89% of users using the platform for business and 63% of users using the platform to talk to friends and family.[30] Now, with a lack of a physical barrier, even activities like school and doctor's visits can be done from the comfort of one's own home.[31] Thus, it is

24. *See* Griffith, *supra* note 22.

25. *Mobile Fact Sheet*, *supra* note 1.

26. *See id.*

27. *Id.*

28. Ivan Blagojević, *Video Conferencing Statistics*, 99 FIRMS, https://99firms.com/blog/video-conferencing-statistics/#gref [https://perma.cc/3ARH-2HHH].

29. Matthew Woodward, *Zoom User Statistics: How Many People Use Zoom in 2024?*, SEARCH LOGISTICS, https://www.searchlogistics.com/grow/statistics/zoom-user-statistics/ [https://perma.cc/4U4G-5XY2] (Dec. 21, 2023).

30. *Id.*

31. Gilles Bertaux, *How Video Is Reshaping Society in the Wake of the Pandemic – and What to Expect for 2022*, FORBES (Nov. 29, 2021, 7:00 AM), https://www.forbes.com/sites/forbestechcouncil/2021/11/29/how-video-is-reshaping-society-in-the-wake-of-the-pandemic--and-what-to-expect-for-2022/?sh=58acc5487508 [https://perma.cc/75FH-HWTR].

obvious that people on a global scale are changing the way they communicate with one another and opting for a convenient, easier, and safer means of communication.

As technology evolves globally, it will have major implications for several different industries in the United States.[32] Technology has largely impacted the practice of law, highlighting the difficulties associated with adapting the law to reflect the ever-evolving technological landscape.[33] Like most other new trends in society, the law has continuously faced issues in predicting new technologies.[34] However, keeping up with technology is continuously an issue compared to other social influences. As a result, the law is not adjusted until well after the technology has been introduced and caused an issue. For example, the law continues to lag behind in protecting privacy due to the fact that information can be collected with or without knowledge from any technology user.[35] Therefore, technological advancements and its greater usage will continue to cause issues in the United States, and the correct changes need to be made to the law to ensure that injured parties have an appropriate avenue of recovery.[36]

B. *Distinguishing the Two Types of Emotional Distress Claims from Each Other*

"Emotional distress refers to mental suffering as an emotional response to an experience that arises from the effect or memory of a particular event, occurrence, pattern of events or

32. *See* Darrell M. West, *Technological Progress and Potential Future Risks*, BBVA OPENMIND, https://www.bbvaopenmind.com/en/articles/technological-progress-and-potential-future-risks/ [https://perma.cc/76B9-TFCC].

33. *See* Griffith, *supra* note 22.

34. *Id.*

35. *See* Brooke Auxier & Lee Rainie, *Key Takeaways on Americans' Views About Privacy, Surveillance and Data-Sharing*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/short-reads/2019/11/15/key-takeaways-on-americans-views-about-privacy-surveillance-and-data-sharing/ [https://perma.cc/QR52-Y7T9]; Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology*, MIT TECH. R. (Apr. 15, 2014), https://www.technologyreview.com/2014/04/15/172377/laws-and-ethics-cant-keep-pace-with-technology/ [https://perma.cc/2YM6-J8AB].

36. *See* Griffith, *supra* note 22.

condition."[37] Under United States tort law, there are two different types of claims which involve the infliction of emotional distress: intentional infliction of emotional distress and negligent infliction of emotional distress.[38] Moreover, in Pennsylvania and other jurisdictions, the types of plaintiffs who can bring both of these types of claims have significantly changed over the course of the last century.[39] To bring an intentional infliction of emotional distress claim in most jurisdictions, there must be an act that "intentionally or recklessly causes another to suffer severe emotional distress."[40] This Note does not further discuss claims for intentional infliction of emotional distress, but it is necessary to ensure that a distinction is drawn between it and negligent infliction of emotional distress as each has a different burden of proof and elements necessary to sustain a claim.

On the other hand, claims for negligent infliction of emotional distress differ greatly in what is required to be proven by a plaintiff. In a claim for negligent infliction of emotional distress, the plaintiff must have had a contractual relationship with the defendant, experienced physical contact, been in the "zone of danger," or have a close relation to the person injured.[41] These

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37. *Emotional Distress*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/emotional_distress [https://perma.cc/9ZXF-M4FN].

38. *Id.* Bystander negligent infliction of emotional distress is a subset that falls under negligent infliction of emotional distress rather than intentional infliction of emotional distress. *See NIED*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nied [https://perma.cc/HM5V-3THV].

39. *See* Niederman v. Brodsky, 261 A.2d 84, 84–85 (Pa. 1970); Sinn v. Burd, 404 A.2d 672, 675–78 (Pa. 1979); Toney v. Chester Cnty. Hosp., 961 A.2d 192, 198–200 (Pa. Super. Ct. 2008); *Suing for Emotional Distress in Pennsylvania*, *supra* note 17.

40. *Intentional Infliction of Emotional Distress*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intentional_infliction_of_emotional_distress [https://perma.cc/47F9-7ZCV]. To establish a *prima facie* case for intentional infliction of emotional distress, the plaintiff must show the defendant acted outrageously, the act "purposely or recklessly, caus[ed] the victim of emotional distress so severe that it could be expected to adversely affect mental health," and the act caused emotional distress to the plaintiff. *Id.* Since these elements are not absolute, modifications are permitted in some jurisdictions, like allowing the defense of consent, permitting transferred intent to apply, or in some cases, getting rid of the tort altogether. *Id.*

41. *Suing for Emotional Distress in Pennsylvania*, *supra* note 17. For one to be in the "zone of danger," one must have been close enough to the incident that they feared injury. *See Zone of Danger Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/zone_of_danger_rule [https://perma.cc/8PM4-6VV7]. One of the major criticisms of the tort of negligent infliction of emotional distress is that it could lead to infinite recovery for bystanders. *See* David Crump,

four scenarios can be used to claim negligent infliction of emotional distress in Pennsylvania currently, but they were not always available to potential plaintiffs in the Commonwealth.[42]

C. Pennsylvania's Changes to Negligent Infliction of Emotional Distress Requirements

Over the course of the twentieth and twenty-first centuries, Pennsylvania has changed its standards on negligent infliction of emotional distress. At first, the impact rule was used as the standard for claims of negligent infliction of emotional distress, focusing on whether the plaintiff themselves experienced some sort of physical harm.[43] Then, Pennsylvania adopted the "zone of danger" standard, focusing on the plaintiff's risk of physical harm and ability to recover damages without the physical manifestation of an injury.[44] After the "zone of danger," standard, the rule was then altered again, leading to the four avenues of recovery for this type of claim available today in Pennsylvania.[45]

Negligent Infliction of Emotional Distress: An Unlimited Claim, but Does It Really Exist?, 49 TEX. TECH L. REV. 685, 700–01 (2017). If anyone was able to claim bystander negligent infliction of emotional distress, there could potentially be no limit on liability for a tortfeasor to the general public. *Id.* at 701. Most who criticize the tort for infinite liability argue that only claims for intentional infliction of emotional distress should be available because it will limit liability and can be altered to include a remedy for bystanders to allow those who witness the death or great bodily injury of a loved one to recover. *Id.* at 700. In effect, this would limit liability to defendants who have some form of intent to injure, limiting those who would have bystander negligent infliction of emotional distress claims and prevent claims based on everyday conduct. *Id.* However, states continuously recognize standalone claims for negligent infliction of emotional distress, especially for bystanders. *See, e.g.*, *Suing for Emotional Distress in Pennsylvania*, *supra* note 17.

42. *See* Sinn, 404 A.2d at 675–78; Knaub v. Gotwalt, 220 A.2d 646, 647–48 (Pa. 1966); Covello v. Weis Mkts., Inc., 610 A.2d 50, 52 (Pa. Super. Ct. 1992); *Suing for Emotional Distress in Pennsylvania*, *supra* note 17.

43. *Suing for Emotional Distress in Pennsylvania*, *supra* note 17; Cucinotti v. Ortmann, 159 A.2d 216, 218–19 (Pa. 1960); Bosley v. Andrews, 142 A.2d 263, 264–65 (Pa. 1958).

44. Sinn, 404 A.2d at 676; Niederman v. Brodsky, 261 A.2d 84, 84–85 90 (Pa. 1970).

45. Weiley v. Albert Einstein Med. Ctr., 51 A.3d 202, 217 (Pa. Super. Ct. 2012) (quoting Toney v. Chester Cnty. Hosp., 961 A.2d 192, 197–98 (Pa. Super. Ct. 2008)).

1. *Physical harm only: the impact rule*

Until 1970, Pennsylvania evaluated bystander negligent infliction of emotion distress on the basis of the impact rule.[46] Under the impact rule, the plaintiff had to show that the defendant caused some form of physical injury to the plaintiff.[47] The physical injury caused by the defendant would be enough to demonstrate that the defendant should be responsible for the emotional distress experienced by the plaintiff; the plaintiff did not need to provide any medical evidence to recover.[48] This rule ensured that the physical injury caused by the defendant was the actual cause of the plaintiff's "fright or nervous shock or mental or emotional disturbances or distress."[49] For example, in *Knaub v. Gotwalt*, the plaintiffs were the "mother, father, and sister of a young boy who was struck and killed by [an] automobile."[50] The vehicle struck the boy when he and his sister were crossing a highway, while their parents were about twenty-five feet away from the incident in their car.[51] Since the mother, father, and sister were untouched by the vehicle, the court found that they could not recover damages for their emotional distress.[52] The court reasoned that there could not be recovery for "fright or nervous shock or mental or emotional disturbances or distress, unless they are accompanied by physical injury or physical impact."[53]

However, the Pennsylvania courts abandoned this rule in 1970 for a more lenient standard, since emotional distress could arise even if the plaintiff was not physically touched.[54] In

46. *See Suing for Emotional Distress in Pennsylvania*, *supra* note 17; *Niederman*, 261 A.2d at 84–85.

47. 48 Pa. L. Encyc. Torts § 95 (2023); Knaub, 220 A.2d at 647–48 (Pa. 1966); Hough v. Meyer, 55 Pa. D. & C.4th 473, 480 (Fayette Cnty Ct. Com. Pl. 2002); Flicker v. James Sacks Inc., 31 Pa. D. & C.4th 385, 390 (Montgomery Cnty. Ct. Com. Pl. 1996).

48. *See Knaub*, 220 A.2d at 647.

49. Cucinotti v. Ortmann, 159 A.2d 216, 218 (Pa. 1960).

50. *Knaub*, 220 A.2d at 646.

51. *Id.*

52. *Id.* at 647–48.

53. *Id.* at 647.

54. Niederman v. Brodsky, 261 A.2d 84, 90 (Pa. 1970); *see* Covello v. Weis Mkts., Inc., 610 A.2d 50, 52 (Pa. Super. Ct. 1992).

Niederman v. Brodsky, the Supreme Court of Pennsylvania opted to move to a new standard where a plaintiff could recover for their emotional distress without experiencing any physical injury or impact themselves as long as the plaintiff was in the zone of danger.[55]

2. *When fear alone became enough: the zone of danger*

Throughout the majority of the 1970s, Pennsylvania applied the zone of danger rule to claims for bystander negligent infliction of emotional distress.[56] The zone of danger rule allows a plaintiff to recover for experiencing emotional distress when the plaintiff was in "reasonable fear of injury" from the incident.[57] For example, in *Niederman*, the plaintiff was a father who was walking on a sidewalk with his son.[58] The son was struck by a vehicle that mounted the sidewalk.[59] The father, who was unharmed, was just feet away when it occurred.[60] Here, the Supreme Court of Pennsylvania overruled the impact rule and held that the plaintiff was able to recover because when a "plaintiff was in personal danger of physical impact because of the direction of a negligent force against him and where [the] plaintiff actually did fear the physical impact," the plaintiff does not need to show a physical injury to oneself for recovery.[61]

In most jurisdictions, the zone of danger rule requires the plaintiff to be "(1) 'placed in immediate risk of physical harm' by the defendant's negligence and (2) frightened by the risk of harm."[62] In some states, the requirements are even stricter and

55. *Niederman*, 261 A.2d at 90; *see Covello*, 610 A.2d at 52.

56. *Negligent Infliction of Emotional Distress: What Must You Prove?*, GISMONDI & ASSOC., https://www.gislaw.com/firm-articles/negligent-infliction-of-emotional-distress-what-must-you-prove/ [https://perma.cc/CM9C-HF4P].

57. *Covello*, 610 A.2d at 52; *see also Niederman*, 261 A.2d at 89–90.

58. *Niederman*, 261 A.2d at 84.

59. *Id.*

60. *See id.* at 84–85.

61. *Id.* at 90.

62. *Zone of Danger Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/zone_of_danger_rule [https://perma.cc/8PM4-6VV7] (citing Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 548 (1994)).

require that the plaintiff prove other elements to recover.[63] However, the Supreme Court of Pennsylvania did not feel this was an adequate way to address negligent infliction of emotional distress moving forward in *Sinn v. Burd*.[64] Therefore, the Supreme Court of Pennsylvania determined that the zone of danger requirement was no longer needed and expanded the realm of recovery for this type of claim to four scenarios where a plaintiff can claim negligent infliction of emotional distress.[65]

3. *Pennsylvania's current standard*

Currently, in Pennsylvania, there are four distinct scenarios in which a plaintiff can claim negligent infliction of emotional distress: (1) when a defendant and a plaintiff had a contractual or fiduciary relationship; (2) when a plaintiff experienced physical impact or injury; (3) when a plaintiff was in the zone of danger of the incident and feared physical injury; and (4) when a plaintiff watched a tortious injury occur to a close relative.[66] When Pennsylvania implemented this standard, which derived from the California Supreme Court's decision in *Dillon v. Legg*,[67] the Pennsylvania Supreme Court emphasized three factors for bystander cases: (1) proximity to the accident; (2) "emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident"; and (3) close relationship to the victim.[68] The plaintiff must also prove causation, showing that the defendant's conduct was the direct cause of the plaintiff's emotional distress and that the emotional distress was not preexisting or caused by a different source.[69] Importantly, there is a requirement that the plaintiff's emotional distress be paired with a "physical manifestation of the harm."[70] Physical

63. *See id.*
64. *See* Sinn v. Burd, 404 A.2d 672, 675–78 (Pa. 1979).
65. *Id.* at 686.
66. Weiley v. Albert Einstein Med. Ctr., 51 A.3d 202, 217–18 (Pa. Super. Ct. 2012).
67. Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968).
68. *Sinn*, 404 A.2d at 685.
69. *Suing for Emotional Distress in Pennsylvania*, *supra* note 17; s*ee Sinn*, 404 A.2d at 678–79.
70. *Suing for Emotional Distress in Pennsylvania*, *supra* note 17.

manifestations of harm can be found in "mental health disorders such as depression, anxiety, panic attacks, or post-traumatic stress disorder" and even "ulcers, headaches, and insomnia."[71] A plaintiff can prove physical manifestations of harm by presenting evidence of the emotional distress from a medical professional or witness.[72]

Pennsylvania applies the aforementioned three factors, introduced by the *Dillon* court, in claims for negligent infliction of emotional distress.[73] The bystander must actually witness the negligent act itself, having "a sensory and contemporaneous observance of the injury."[74] However, the requirement of "sensory and contemporaneous observance" of the event is not the only factor; the plaintiff also needs to be in close proximity to the scene of the event and have a close relationship with the victim.[75] All three factors need to be met before a plaintiff can bring a claim of emotional distress, and to recover, the plaintiff also must demonstrate that this emotional distress has led to physical manifestations of harm.[76] Thus, the California Supreme Court has been the lead influence for Pennsylvania in its approach to bystander negligent infliction of emotional distress. Pennsylvania has almost followed California's approach verbatim since Pennsylvania implemented the standard in *Sinn*, even stressing that reasonable foreseeability of harm caused to the plaintiff by the defendant should be a controlling factor in the court's determination.[77]

Much like the prior controlling authority in California, Pennsylvania courts have even emphasized that presence at the scene of the incident is essential to this type of claim because the plaintiff "has no time in which to prepare . . . for the immediate

71. *Id.*; *see* Toney v. Chester Cnty. Hosp., 961 A.2d 192, 200 (Pa. Super. Ct. 2008).

72. *Suing for Emotional Distress in Pennsylvania*, *supra* note 17.

73. *See Sinn*, 404 A.2d at 685–86.

74. Love v. Cramer, 606 A.2d 1175, 1177 (Pa. Super. Ct. 1992).

75. Schmidt v. Boardman Co., 11 A.3d 924, 949 (Pa. 2011).

76. *Id.* at 949, 955.

77. *Sinn*, 404 A.2d at 684–85; Dillon v. Legg, 441 P.2d 912, 920–21 (Cal. 1968).

emotional impact of such conduct."[78] Also, requiring the presence of the plaintiff provides a means of notice to a defendant committing tortious conduct because the defendant is more aware of the likely emotional impact caused to the plaintiff.[79] With the plaintiff present, the defendant should be aware that their conduct is "substantially certain, or at least highly probable, [to] cause severe emotional distress to the plaintiff."[80] Further, the Supreme Court of Pennsylvania saw this as a way of limiting the number of plaintiffs with this type of claim for relief and sets the parameters for when a plaintiff actually has a cause of action.[81] The Pennsylvania Supreme Court reasoned that the emotional impact of an incident that occurs lessens when a plaintiff finds out about it long afterward and without perceiving it with their own eyes.[82]

This standard applied in California has influenced Pennsylvania courts to follow its application strictly.[83] Specifically, the Supreme Court of Pennsylvania has applied the proximity requirement narrowly and has not allowed a plaintiff to recover because of the personal observance requirement on several occasions.[84] For example, the plaintiff in *Yandrich v. Radic* did not recover because the he only saw his son at the hospital after the accident instead of at the scene of the accident.[85] Similarly, in *Mazzagatti v. Everingham*, the plaintiff did not recover because she arrived at the scene of the accident after receiving

78. Taylor v. Albert Einstein Med. Ctr., 754 A.2d 650, 653 (Pa. 2000); *see also Dillon*, 441 P.2d at 920 (contrasting contemporaneous observation with post-hoc observation).

79. *Taylor*, 754 A.2d at 653.

80. *Id.*

81. *Id.*; *see also* Crump, *supra* note 41, at 700–01 (explaining that without limitations and line drawing considerations, the tort of negligent infliction of emotional distress would result in "indefinite liability").

82. *Taylor*, 754 A.2d at 653.

83. *See Negligent Infliction of Emotional Distress: What Must You Prove?*, *supra* note 56.

84. *Id.*

85. Yandrich v. Radic, 433 A.2d 459, 461–63 (Pa. 1981) (per curiam) (denying recovery to the plaintiff whose son was struck by an automobile and did not see his son until arriving at the hospital later that day).

notification of its occurrence.[86] These two cases demonstrate that Pennsylvania is reluctant to expand the pool of potential plaintiffs and has an affinity toward requiring the plaintiff to be located close to the incident when it occurs.

By requiring plaintiffs to be near the scene of the incident when it occurs, Pennsylvania denies recovery to those who may have witnessed the incident virtually—solely because of their perceptual proximity.[87] This is especially harmful to those who may have virtually witnessed the event occurring in real-time. Although the plaintiff may not be physically present, distress experienced as a result of the incident would likely not be diminished, and the plaintiff could experience even more significant emotional distress.[88] Luckily, some courts have been more expansive and inclusive than Pennsylvania in allowing plaintiffs to recover for this type of claim.[89]

II. CONTEMPORANEOUS PERCEPTION: WHICH JURISDICTION DOES IT BEST?

Jurisdictions move cautiously in determining whether to allow this cause of action to be extended to more parties. However, since new videoconferencing technology has become prominent, new issues continue to arise where a bystander has perceived the event through these types of technology. This presents courts with two options: leave the traditional standard intact or broaden the standard to account for the change in society. California has been very expansive for these types of claims and shows its willingness to allow those who witness an event where a loved one is injured or killed to recover whether

86. Mazzagatti v. Everingham, 516 A.2d 672, 673–74, 678–79 (Pa. 1986) (denying recovery to the plaintiff whose daughter was struck by an automobile and saw her daughter upon arriving at the scene of the accident after it had already occurred).

87. *See* Jack Karp, *Virtual Bystander Claims May Make Courts Redefine 'Present'*, LAW360 PULSE (Aug. 5, 2022, 4:22 PM), https://www.law360.com/pulse/articles/1518299 [https://perma.cc/JAH6-9D88].

88. *Id.* (quoting Clotaire's attorney arguing "the distress experience is actually worse").

89. *See, e.g.*, *id.* (discussing the standards adopted by California and Connecticut courts).

the plaintiff perceived it virtually or in person.[90] Other states like Indiana have stayed close to California's approach, but New York has not been a state to adhere to this latitude.

A. *Two Opposite Sides of the Spectrum: Indiana and New York*

Indiana is one state that closely adheres to California's approach for bystander negligent infliction of emotional distress claims. Indiana has shown leniency in the past by allowing plaintiffs to recover when they arrive at an incident shortly after it occurred rather than witnessing it occur.[91] Although Indiana has shown flexibility in the application of the standard, it had not delt with virtual bystanders when it decided *Clifton v. McCammack* in 2015.[92]

In *Clifton*, a father witnessed a car crash on television and drove to the scene of the accident because he suspected that his son was involved.[93] Upon arrival, the father discovered that his son was killed in the accident, but the body had been moved and covered prior to the father's arrival.[94] The court did not determine whether the virtual perception of the event could satisfy the standard because the court did not even consider that witnessing the incident on television could have been grounds to bring a claim.[95] In the end, the court ruled that the father did not have a claim because his arrival at the scene of the accident failed to satisfy the elements of bystander negligent infliction of emotional distress.[96] In doing so, the court missed its chance to set its own future-looking precedent years before the *Ko* decision, where the court allowed plaintiffs to recover despite only having virtual perception. That being said, if the *Clifton* court decided the case today, Indiana may have been more willing to

90. *See, e.g.*, Ko v. Maxim Healthcare Servs., Inc., 272 Cal. Rptr. 3d 906, 919 (Cal. Ct. App. 2020).

91. Groves v. Taylor, 729 N.E.2d 569, 573 (Ind. 2000).

92. *See id.*; Clifton v. McCammack, 43 N.E.3d 213 (Ind. 2015).

93. *Clifton*, 43 N.E.3d at 215.

94. *Id.*

95. *See id.* at 215–16.

96. *Id.* at 222–23.

follow California's lead with the precedent set in *Ko* and allow recovery, because prior decisions do not explicate a requirement that the plaintiff witness the incident in real-time. On the other hand, some jurisdictions approach the contemporaneous perception issue differently and are not as flexible as Indiana.

A brief discussion of the New York standard demonstrates that at least one state has not been willing to show any leniency with contemporaneous perception and continues with antiquated methods.[97] In New York, courts require plaintiffs show they feared physical injury before awarding damages.[98] Accordingly, New York still requires a traditional rule that the plaintiff is located in the "zone of danger" when the incident occurs.[99] New York courts have approached this issue with firmness, and since the New York Court of Appeals introduced the zone of danger rule in 1984, it has desired to minimize the number of these claims.[100] Some critics argue New York's application of the zone of danger rule "bears little or no relationship to the interest the tort protects, or to the harm that people suffer."[101] The zone of danger requirement shows how obsolete New York's standard has grown, and attempting to limit liability actually "undermines the legitimacy of the courts," diminishes judicial efficiency, and fails to redress worthy tort victims—the ultimate policy goal of tort law.[102] Therefore, since bystanders still cannot recover unless they are in the zone of danger, New York differs greatly from California's more expansive approach because New York remains inflexible in its willingness to allow

97. *Id.*; *see, e.g.*, JR v. DC, 820 N.Y.S.2d 843, 843 (N.Y. Sup. Ct. 2006); Weiss v. Vacca, 196 N.Y.S.3d 479, 483 (N.Y. App. Div. 2023).

98. *See, e.g.*, *JR*, 820 N.Y.S.2d at 843 (explaining that to recover on a claim for NIED, a plaintiff must be in physical danger or fear for their physical safety); *Weiss*, 196 N.Y.S.3d at 483 (denying a claim for NIED because the plaintiff was not in the zone of danger at the time of the incident).

99. *See, e.g.*, *Weiss*, 196 N.Y.S.3d at 483.

100. *See* Kevin G. Faley & Andrea M. Alonso, *Understanding New York's 'Zone of Danger' Rule in Non-Automobile Situations*, N.Y.L.J. (Aug. 11, 2021, 11:45 AM), https://www.law.com/newyorklawjournal/2021/08/11/understanding-new-yorks-zone-of-danger-rule-in-non-automobile-situations/ [https://perma.cc/2LM6-3H9U] (citing Bovsun v. Sanperi, 461 N.E.2d 843, 847–48 (N.Y. 1984)).

101. Thomas T. Uhl, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties that Bind*, 61 BROOK. L. REV. 1399, 1471 (1995).

102. *Id.*

plaintiffs outside the distinct zone of danger to bring a claim for negligent infliction of emotional distress.

B. *The Gold Standard: California*

As a haven for technology in the United States, it is understandable why California is willing to show latitude to plaintiffs who have perceived the death or great bodily injury of a loved one virtually.[103] In California, to succeed on a claim of negligent infliction of emotional distress, a plaintiff does not need to show a physical injury to themselves.[104] Rather, the plaintiff only needs to show that the defendant owed a duty of care to the plaintiff, defendant breached such duty, and such breach caused plaintiff's injury.[105] "Whether a defendant owes a duty of care is a question of law," and must be decided by the court; while, whether a defendant breached a duty of care is a question left for the trier of fact to deliberate.[106] Nonetheless, if both questions are answered in the affirmative, the trier of fact need only to find that a reasonable person in the same situation would not be able to cope with the mental distress caused by the incident.[107] The landmark case *Ko v. Maxim Healthcare Services, Inc.* provides an illustrative example of when the Supreme Court of California found in favor of the plaintiff on a claim of negligent infliction of emotional distress.

In *Ko*, the parents of a disabled child hired the defendant "to provide in-home caretaking services for [their son] for when they were at work or otherwise unavailable."[108] While one of the caregivers provided services for the parents, the mother

103. *See* Nick Routley, *The Biggest Tech Talent Hubs in the U.S. and Canada*, VISUAL CAPITALIST (Sept. 21, 2022), https://www.visualcapitalist.com/biggest-tech-talent-hubs-in-us-and-canada/ [https://perma.cc/DK5D-WJAN].

104. *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 917 (Cal. 1968).

105. *Id.* at 916; Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 770 P.2d 278, 281 (Cal. 1989) ("The traditional [negligence] elements of duty, breach of duty, causation, and damages apply.").

106. *Marlene F.*, 770 P.2d at 281; *see* Hernandez v. Jensen, 276 Cal. Rptr. 3d 281, 288 (Cal. Ct. App. 2021) ("The element[] of breach of duty . . . [is] ordinarily [a] question of fact for the jury's determination.").

107. *See* Molien v. Kaiser Found. Hosps., 616 P.2d 813, 819–20 (Cal. 1980).

108. Ko v. Maxim Healthcare Servs., Inc., 272 Cal. Rptr. 3d 906, 909 (Cal. Ct. App. 2020).

checked an application on her phone where she could watch and hear what was happening in the family home through a nanny cam.[109] The nanny cam showed the caregiver was physically assaulting the child, which prompted the parents to call 911.[110] Because of the caregiver's physical assault, the plaintiffs' son required surgical removal of an eye, among other physical injuries, and eventually succumbed to his injuries while the case was pending.[111] The California Court of Appeals ruled that the parents who watched the caregiver abuse their child through the nanny cam with real-time audio and visual satisfied the contemporaneous perception requirement of bystander negligent infliction of emotional distress.[112] Therefore, this ruling effectively introduced the idea that "'virtual presence' in light of the technological advances that have occurred," will suffice for a plaintiff to recover for negligent infliction of emotional distress.[113] Accordingly, the court in *Ko* significantly altered bystander precedent and gave future plaintiffs significant latitude for virtual, real-time proximity.

As expected in a unique case of first impression, the defendant reasoned that physical presence should be absolutely required, as was generally required.[114] The defendant argued if physical presence was not required, there could potentially be recovery for any televised traumatic event where a loved one was involved, like the explosion of the space shuttle, Challenger.[115] While creative, the argument failed.[116] Despite the similarity in circumstances, the court stated that it could not have anticipated how advanced we would become with technology to the point where one could have real-time conversations with

109. *Id.* at 909.

110. *Id.* After the police arrived, the caregiver was arrested and reassigned to a different child. *Id.*

111. *Id.*

112. *Id.* at 916–19.

113. *Id.*

114. *See id.* at 915–16, 916 n.9.

115. *Id.* at 917.

116. *Id.* at 919.

others through a device.[117] Thus, the court could not have implemented this standard in any prior case.[118]

In deciding *Ko*, the court considered its allowance of virtual perception to satisfy the "sensory and contemporaneous observance" element by analyzing the reasoning of the Supreme Court of California in *Krouse v. Graham* and *Ochoa v. Superior Court*.[119] In *Krouse*, the court explicitly recognized that there does not need to be a direct, visual perception to satisfy the observance requirement.[120] Even though the plaintiff "did not see" his wife die, the court allowed the plaintiff to recover because he "fully perceived the fact that she had been so struck, for he knew her position an instant before the impact, observed defendant's vehicle approach her at a high speed on a collision course, and realized that defendant's car must have struck her."[121] Similarly in *Ochoa*, the court found there did not need to be an observation of a sudden occurrence and allowed a mother to recover after watching her son suffer pain from the inadequate treatment of pneumonia in a juvenile detention facility.[122] The court in *Ko* used these cases to assert that there only needs to be a perception of an event that is "contemporaneously understood as causing injury to a close relative."[123]

The decision of the court in *Ko* seems to be yet another instance displaying the jurisdictions flexibility in analyzing the contemporaneous perception element. California courts have been progressive with their view on the perception element of negligent infliction of emotional distress claims in years past and will likely continue evolving to allow plaintiffs' recovery

117. *Id.* at 917.

118. *See id.* at 908, 917–18.

119. *Id.* at 912–13. *See generally* Krouse v. Graham, 562 P.2d 1022 (Cal. 1977); Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985).

120. *Krouse*, 562 P.2d at 1031.

121. *Id.*

122. *Ochoa*, 703 P.2d at 3, 12–13 (describing that during a visit the mother saw her son "exhibiting alarming symptoms, including a soaring temperature, dehydration, vomiting, hallucinations, the beginnings of convulsions and severe pain on his left side . . . [and] vomiting blood").

123. *Ko*, 272 Cal. Rptr. 3d at 913–15.

where it deems fit.[124] Accordingly in *Bird v. Saenz*, the court stated that senses other than sight could be sufficient to satisfy the requirement of contemporaneous perception for a plaintiff to recover.[125] For example, in *Wilks v. Hom*, a mother heard, saw, and felt a bedroom explode from a gas leak where she knew her child was located.[126] The court determined that although the mother did not see her child when the explosion occurred, her perception of the event was sufficient to bring a claim for negligent infliction of emotional distress.[127] As evidenced by the different cases from this jurisdiction over several decades, California will likely continue its flexibility in allowing recovery for plaintiffs who have witnessed a tragic event happen to someone with whom they have a close relationship. However, not all California jurisdictions have shown the same level of latitude to plaintiffs when it comes to the close relationship requirement.[128]

III. THE CLOSE RELATIONSHIP REQUIREMENT AND ITS INCONSISTENT APPLICATIONS

Many states have adopted limitations on negligent infliction of emotional distress claims that are the same or a slight variation from the standard set forth in the Third Restatement of Torts. The Restatement allows recovery by close family members who perceive incidents, even if they are not within the zone of danger.[129] The states that closely follow the Restatement typically require the plaintiff and the injured party in the incident have one of the following relationships: marital, intimate, spousal, child, parental, grandparental, grandchild, or sibling.[130] Oregon, Texas, California, Maine, Mississippi, New

124. *See id.*

125. Bird v. Saenz, 51 P.3d 324, 328 (Cal. 2002) (explaining that as "long as the event is contemporaneously understood as causing injury to a close relative" other senses could qualify).

126. Wilks v. Hom, 3 Cal. Rptr. 2d 803, 807–08 (Cal. Ct. App. 1992).

127. *Id.* at 808.

128. *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 586 (Cal. 1988) (holding "that an unmarried cohabitant may not recover damages for emotional distress").

129. RESTATEMENT (THIRD) OF TORTS § 48 (AM. L. INST. 2005); Greene v. Esplanade Venture P'ship, 168 N.E.3d 827, 842 (N.Y. 2021) (Rivera, J., concurring).

130. *Greene*, 168 N.E.3d. at 842–43.

Jersey, Indiana, Pennsylvania, and New Hampshire are some of the states requiring similar relationships.[131] The main rationale for strictly applying the close relationship standard was to serve as a safeguard to defendants and limit liability.[132] Courts reason that broadening the scope of liability for defendants would permit claims for anyone and everyone in the general public who witnesses the incident.[133] Many jurisdictions believe that allowing an unrelated third party to recover would result in an abundance of liability exposure to any tortfeasor and would cause an influx of negligent infliction of emotional distress claims.[134] Though many states follow the strict standard described, there is still great variation from the rule in other jurisdictions.[135] Accordingly, throughout time, courts have applied these standards differently to cases, which has resulted in the production of many unreliable and unpredictable outcomes.

A. *States With Narrow Approaches to the Close Relationship Requirement*

Pennsylvania, California, New York, and New Jersey all follow narrow approaches to the close relationship requirement, being weary of over-inclusion rather than the impracticality of under-inclusion. This rigid standard has led to several examples of inconsistent rulings and unjust inequalities. For example, in *Blaynar v. Pagnotti Enterprises, Inc.*, the Pennsylvania Supreme Court determined a cousin relationship does not satisfy the close relationship requirement even when the boys were good friends who spent a significant amount of time with one another.[136] This inflexibility demonstrates that Pennsylvania courts have a strong interest in keeping potential plaintiffs to a

131. *See id.* at 842–43 (discussing how various courts define "closely related").

132. Colin E. Flora, *Special Relationship Bystander Test: A Rational Alternative to the Closely Related Requirement of Negligent Infliction of Emotional Distress for Bystanders*, 39 RUTGERS L. REC. 28, 31 (2012) [hereinafter Flora, *A Rational Alternative*].

133. *Id.*

134. *See id.*

135. *See id.* at 31–32.

136. 679 A.2d 790, 794 (Pa. Super. Ct. 1996).

limited number.[137] Pennsylvania is not the only jurisdiction with this interest, as many states make it essential for there to be a close relationship between the bystander and victim.[138]

While it may seem California would be lenient in its application of the close familial relationship requirement, surprisingly, California courts have applied the standards strictly.[139] For example, the court in *Elden v. Sheldon* held that the need to control tortfeasors' damages and the intrusion required by an inquiry into the private life of the partners to determine each relationship's closeness persuaded the court to not extend damages to unmarried cohabitating partners.[140] Similarly, in *Coon v. Joseph*, the court held that same-sex partners would not meet the requirement because at the time they could not be married in the state.[141]

Similar to their strict approach regarding contemporaneous perception, New York courts have remained mostly inflexible on the issue of immediate familial relationships and have even refused to recognize some close familial relationships as qualifying to bring a claim for negligent infliction of emotional distress.[142] However, as recently as 2021, New York courts decided to allow grandmothers to qualify as immediate family and have done so, in part, due to "shifting societal norms."[143] Nevertheless, New York courts have referred to the state as a place where there is a "narrow avenue to bystander recovery."[144]

Like New York courts, New Jersey courts require there to be "a marital or intimate, familial relationship between plaintiff and the injured person."[145] New Jersey courts impose this strict

137. *See id.* at 794 (citing Brooks v. Decker, 516 A.2d 1380, 1382–83 (Pa. 1986)); Armstrong v. Paoli Memorial Hosp., 633 A.2d 605, 615 (Pa. Super. Ct. 1993) ("Were we to allow [Plaintiff] to collect, we would risk opening the floodgates of [negligent infliction of emotional distress] litigation in Pennsylvania, something we decline to do.").

138. Flora, *A Rational Alternative*, *supra* note 20.

139. *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988).

140. *Id.* at 589–90.

141. Coon v. Joseph, 237 Cal. Rptr. 873, 877 (Cal. Ct. App. 1987).

142. Faley & Alonso, *supra* note 115.

143. Greene v. Esplanade Venture P'ship, 168 N.E.3d 827, 828 (N.Y. 2021).

144. *Id.* at 835 (quoting Trombetta v. Conkling, 626 N.E.2d 653, 654 (N.Y. 1993)).

145. Portee v. Jaffee, 417 A.2d 521, 528 (N.J. 1980).

close relationship standard because it is the most crucial element of an emotional distress claim and the suffering that occurs from harm to a loved one is the most "serious and compelling."[146] The court's analysis in New Jersey is very fact-dependent, and these courts want to keep the relationship requirement as close as possible to those with blood relations or marriage.[147] Further, even a relationship between parent and child or husband and wife is a question for the jury and can be challenged by a defendant in any circumstance without an automatic assumption that the standard is met.[148] The *Dunphy v. Gregor* court established factors to consider when determining the existence of a close relationship:

> [1] the duration of the relationship, [2] the degree of mutual dependence, [3] the extent of common contributions to a life together, [4] the extent and quality of shared experience, and . . . [5] "whether the plaintiff and the [decedent or seriously] 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."[149]

Under the framework, the New Jersey Superior Court, Appellate Division sought to ensure that the emotional bonds are strong and that the relationship between the plaintiff and the injured party is strong enough to, without a doubt, cause some form of emotional distress before allowing recovery.[150]

As evidenced by these states, there is a major interest in keeping this avenue of recovery limited. However, as states begin to account for evolving social norms in other aspects of bystander

146. *Id.* at 526–27.

147. *See* Moreland v. Parks, 191 A.3d 729, 736–37 (N.J. Super. Ct. App. Div. 2018).

148. *Id.* at 737–38 (citing Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994)).

149. *Dunphy*, 642 A.2d at 378.

150. *See Moreland*, 191 A.3d at 738.

negligent infliction of emotional distress,[151] it is imperative to also shift the standard for the close relationship requirement to account for major societal changes. While California has already demonstrated how to change the contemporaneous perception element to account for new social norms,[152] there are other states that have shown how to shift the close relationship requirement to account for evolving social norms.[153] Thus, it is important to look at the disparity among jurisdictions and distinguish the narrow states from the more lenient ones to grasp how this tort differs greatly among jurisdictions.

B. *States That Have Shown Leniency in Their Close Relationship Standard*

Though many states tend to be strict in applying the close relationship requirement,[154] there are some instances in which states loosen their standards.[155] For example, Hawaii has been lenient in its application of this element.[156] The Supreme Court of Hawaii held that a step-grandmother's death would satisfy the close relationship standard for this type of claim in *Leong v. Takasaki*.[157] The court reasoned since Hawaiian and Asian families have strong family ties with extended family, and it is customary for extended family to take care of another person's child, the relationship is strong enough to satisfy the requirement.[158] The Supreme Court of New Hampshire also showed

151. *See, e.g.*, Greene v. Esplanade Venture P'ship, 168 N.E.3d 827, 828 (N.Y. 2021) (allowing a grandchild and grandparent to be considered immediate family for the purpose of a NIED claim in accordance with changing social norms).

152. *See* discussion *supra* Section II.B.

153. *See, e.g.*, Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974) (holding that the social concept of "ohana," or family, demonstrates the uniquely strong extended family ties in Hawaii for the purposes of an NIED claim).

154. *See* discussion *supra* Section III.A.

155. *See, e.g.*, *Leong*, 520 P.2d at 766 (holding a close relationship does not require a "blood relationship").

156. *See id.*

157. *Id.* at 760, 766.

158. *Id.* at 766. However, since the ruling in *Leong*, the court has shown instances where it has not been willing to loosen its standards for these types of claims and has gone in the complete opposite direction. *See* Milberger v. KBHL, LLC, 486 F. Supp. 2d 1156, 1167 (D. Haw. 2007). Applying Hawaii state law, the Hawaii District Court in *Milberger* held that an unmarried

leniency when it held that an unmarried couple could satisfy the close relationship requirement.[159] In *Graves v. Estabrook*, the Supreme Court of New Hampshire reasoned that the close relationship requirement was satisfied by a "relationship that is stable, enduring, substantial, and mutually supportive . . . cemented by strong emotional bonds and providing a deep and pervasive emotional security."[160] The court also takes into account: (1) the relationship's "duration," (2) the relationship's "degree of mutual dependence," (3) the relationship's "extent of common contributions," (4) the relationship's "extent and quality of shared experience," (5) whether the two were "members of the same household," (6) whether the two had an "emotional reliance on each other," (7) other "particulars of their day to day relationship," and (8) whether "they related to each other in attending life's mundane requirements."[161] These states' willingness to show flexibility in its application of this requirement demonstrates that some jurisdictions are already progressing and taking into consideration how a close relationship can differ depending on specific circumstances, cultures, and familial histories.[162]

Though the states vary in their application of the relationship required to bring a claim for negligent infliction of emotional distress, it is important to identify that some jurisdictions have been willing to recognize change and modify their standards accordingly.[163] Since Pennsylvania should adjust the standard for contemporaneous perception in bystander negligent infliction of emotional distress claims, it should take the opportunity

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partner cannot bring a claim for negligent infliction of emotional distress. *Id.* The court reasoned that if there is not some point where recovery is precluded, then it would be difficult to make decisions on the basis of cohabitants and when their relationship is strong enough to bring a claim. *Id.* Also, the court distinguished the *Leong* case because this relationship is not rooted in tradition and, since this would be an extension of a right of marriage, it would force the court to go beyond their Constitutionally granted powers by determining what marital rights are extended to unmarried couples. *See id.* at 1166.

159. Graves v. Estabrook, 818 A.2d 1255, 1262 (N.H. 2003).

160. *Id.* (alteration in original) (quoting Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994)).

161. *Id.* (quoting Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994)).

162. *See id.*

163. *See, e.g.*, *Leong*, 520 P.2d at 766.

to account for new social norms in other elements of the claim as well. Therefore, moving forward, Pennsylvania courts should be willing to put a halt to the rigid applications of these standards. Courts should show leniency for plaintiffs with compelling claims for bystander negligent infliction of emotional distress by implementing a new standard; one that accounts for changing societal norms and relationship dynamics.

IV. MOVING FORWARD: WHY PENNSYLVANIA SHOULD ALLOW NORMA CLOTAIRE TO RECOVER AND TAKE A BROADER APPROACH

Today, Pennsylvania only recognizes bystander negligent infliction of emotional distress claims upon the satisfaction of the three elements mentioned throughout this Note. While the standard may have served its purpose when codified in the 1980s, it is unquestionably outdated. With the advent of technology and videoconferencing platforms, individuals are more connected than ever.[164] Injuries and deaths that once occurred without the knowledge of a loved one are now happening before their very eyes.[165] By failing to recognize virtual contemporaneous perception as a valid avenue for recovery, courts are depriving plaintiffs of the opportunity to be made whole again after experiencing traumatic mental injuries. As such, the standard which governs recovery for the individuals who witness such traumatic events in Pennsylvania should be altered to remain consistent with society's dependence on technology.

A. *Pennsylvania Should Codify California's Precedent and Apply Ko to Clotaire*

Though the cases have subtle distinctions in terms of the types of injury and how plaintiffs perceived the incidents,[166] the

164. *See Mobile Fact Sheet*, *supra* note 1.

165. *See, e.g.*, Ko v. Maxim Healthcare Servs., 272 Cal. Rptr. 3d at 909, 917–18 (allowing parents who witnessed child abuse over smartphone "nanny-cam" to proceed with NIED claim).

166. Compare *Ko*, 272 Cal. Rptr. 3d. at 909, *with* Complaint at 19, Clotaire v. Garden Spring Ctr. SNF, LLC, No. 2022-10849 (C.P. Montgomery Cnty. June 6, 2022).

circumstances and events that occurred in both *Clotaire* and *Ko* are substantially similar; therefore, Pennsylvania should adopt and apply a standard similar to California's precedent. Pennsylvania should follow California and allow Norma Clotaire, and other similarly situated future plaintiffs, to pursue a claim of bystander negligent infliction of emotional distress for the injury. Pennsylvania has followed California's lead on this type of claim in the past to keep up with a changing society.[167] Similarly, it would be best to codify California's progressive ruling in this case and adopt a standard similar to the one produced by the court in *Ko*.[168]

In previous cases, Pennsylvania has not required the plaintiff to see the impact to satisfy the requirement of contemporaneous perception.[169] All that has been required is that there is a "full, direct, and immediate awareness of the nature and import of the negligent conduct."[170] Although in *Neff v. Lasso*, the Pennsylvania Superior Court stated that the conduct cannot be buffered "temporally or geographically," it showed its willingness to alter the standard and not require actual presence.[171] The court did not require "visual sensory perception" and allowed for an "aural perception" to satisfy the requirement.[172] In *Neff*, while the plaintiff did not see her husband get struck by a vehicle, hearing the impact inside the house was enough to satisfy the contemporaneous perception requirement.[173] Just three years after *Neff*, the court again expanded the requirement of physical presence in *Love v. Cramer*.[174] Here, the plaintiff witnessed her mother pass away from cardiac arrest, and the

167. *See* Sinn vs. Burd, 404 A.2d 672, 685–86 (Pa. 1979) (citing Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968)).

168. *See Ko*, 272 Cal. Rptr. 3d at 919.

169. *See, e.g.*, Neff v. Lasso, 555 A.2d 1304, 1313–14 (Pa. Super. Ct. 1989) (holding a plaintiff who heard a car crash and saw the injuries it produced immediately after hearing the sound—despite not seeing the crash itself—was sufficient "contemporaneous perception").

170. *Id.* at 1314.

171. *See id.* at 1313–14.

172. *See id.*

173. *Id.* at 1313 ("It is the immediate sensory awareness and not the source (*i.e.* visual, tactile, aural, gustatory or olfactory), of the awareness which must control.").

174. *See* Love v. Cramer, 606 A.2d 1175, 1177–78 (Pa. Super. Ct. 1992).

plaintiff sued the mother's physician for negligence occurring during her mother's doctor's visits, as well as for her cardiac arrest.[175] By allowing the plaintiff to recover despite not being present for all of the doctor's visits, the court effectively altered the rule; accordingly, a bystander is no longer required to be present at the time of the injury or death of the family member.[176] This demonstrates Pennsylvania's willingness to relax its standards to allow for the contemporaneous perception requirement to be satisfied without an actual visual perception in the past.

Therefore, in *Clotaire*, Pennsylvania should continue its willingness to relax historical standards and allow Norma Clotaire to recover damages because she witnessed her mother choking and going unconscious over a FaceTime call two days prior to her death.[177] Because of the trauma associated with witnessing said events, Norma experienced "depression, anxiety, loss of sleep, nightmares, and PTSD."[178] Norma brought a claim against the Garden Spring Center for bystander negligent infliction of emotional distress and looks to recover for her injuries caused by their alleged negligence of Garden Spring Center.[179] Norma also alleged that her mother's call button did not work and that Norma voiced her concerns to the administrator of Garden Spring Center, but those concerns went unaddressed.[180]

Further, in both *Clotaire* and *Ko*, there was some form of duty of care breached by the defendants, which led to each plaintiff witnessing a serious bodily injury occur to a family member in a virtual format. Although the applications used to view the incidents in both cases were different and the family dynamic between mother and daughter compared to parents and child are different, these differences do not alter the fact that they both contemporaneously perceived the event with the audiovisual

175. *Id.* at 1176.
176. *See id.* at 1178–79.
177. *See* Mitchell, *supra* note 5.
178. *Id.*
179. *Id.*
180. *Id.*

transmission in real-time.[181] Clotaire's cause of action would meet the requirements of the *Ko* court, as one could reasonably decide that Clotaire "personally and contemporaneously perceive[d] the injury-producing event and its traumatic consequences."[182]

Further, there is a need for the law that governs bystander negligent infliction of emotional distress to adapt to the changing societal norms and family dynamics of the twenty-first century and its technological advances.[183] No longer do people visit their loved ones in person as frequently as they once did.[184] Since 2020, many people experience difficulties seeing those with whom they have close relationships and have a fear of getting their loved ones sick.[185] Therefore, platforms like Zoom, Facebook, and WhatsApp have provided a way for people to connect with their families and relatives virtually without the need to travel or worry about getting them sick.[186]

The growth and more frequent use of social platforms increases the chances of people viewing tragic events that occur to their loved ones in real-time, without being physically near the incident.[187] Some may think that this virtual perception will open up liability for potential tortfeasors and effectively have

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181. Mitchell, *supra* note 5; Ko v. Maxim Healthcare Servs., Inc., 272 Cal. Rptr. 3d 906, 908 (Cal. Ct. App. 2020).

182. *Ko*, 272 Cal. Rptr. 3d at 915 (quoting Thing v. La Chusa, 771 P.2d 814, 828 (Cal. 1989)).

183. *See* Press Release, U.S. Census Bureau, Computer and Internet Use in the United States: 2018 (Apr. 21, 2021), https://www.census.gov/newsroom/press-releases/2021/computer-internet-use.html [https://perma.cc/TFM8-JUSE] (illustrating the increased usage of technology).

184. *See, e.g.*, *In Their Own Words, Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-covid-19-pandemic/ [https://perma.cc/43Q9-2RQB].

185. *See Visiting Friends and Relatives Will Be a Driving Force Behind Travel's Recovery*, GLOBALDATA (Aug. 12, 2021), https://www.globaldata.com/visiting-friends-relatives-will-driving-force-behind-travels-recovery/ [https://perma.cc/XEX7-LFLA]; *New Poll: COVID-19 Impacting Mental Well-Being: Americans Feeling Anxious, Especially for Loved Ones; Older Adults Are Less Anxious*, AM. PSYCHIATRIC ASS'N (Mar. 25, 2020), https://www.psychiatry.org/newsroom/news-releases/new-poll-covid-19-impacting-mental-well-being-amer [https://perma.cc/DVV7-RRFS] (noting that more Americans feared getting their loved ones sick during the COVID-19 pandemic then they feared getting sick themselves).

186. *Visiting Friends and Relatives Will Be a Driving Force Behind Travel's Recovery*, *supra* note 183.

187. *See id.*; *see also* Press Release, U.S. Census Bureau, *supra* note 181.

unlimited liability applied to anyone in the world.[188] However, this is not the case because, just as the *Ko* court reasoned, claims will be limited to those who have "personally and contemporaneously perceive[d]" the event and have an intimate relationship with the victim.[189]

Most criticism surrounding recovery for bystander negligent infliction of emotional distress is rooted in fraud, infinite liability, and the arbitrary nature of rules.[190] However, most of this criticism lacks validity.[191] First, fraudulent and frivolous claims "are matters of evidence, procedure, ethics, and attorney supervision."[192] Thus, it is not something to be concerned about because if attorneys and judges exercise diligence, especially at the pleading stage, there should be no concern regarding fraud and frivolity as there are many of these types of claims across all different areas of the law each day.[193] Though these claims may exist beyond the pleading stage, they are difficult to prove and will likely not be successful.[194]

Concerns of infinite liability for defendants are probably the most troublesome policy issue.[195] There has been a suggestion that the duty a defendant owes a bystander plaintiff should be based solely on foreseeability.[196] Foreseeability in this context is simply an inquiry as to whether the person should have been able to predict that someone else would have been impacted from their negligent acts.[197] This argument has been made several times in an attempt to limit liability because the jury may

188. *See, e.g.*, Ko v. Maxim Healthcare Servs., Inc., 272 Cal.d Rptr. 3d 906, 912 (Cal. Ct. App. 2020) (explaining that prior courts declined to recognize bystander NIED claims believing they would induce frivolous claims and burden courts with the impossible job of defining the full extent of the tortfeasor's liability).

189. *Id.* at 919 (quoting Thing v. La Chusa, 771 P.2d 814, 828 (Cal. 1989)).

190. *See, e.g.*, Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. STATE L.J. 805, 836 (2004).

191. *Id.*

192. *Id.*

193. *See id.* at 831–34.

194. *Id.* at 834.

195. *Id.* at 836.

196. *See id.* at 840.

197. *Id.* at 839–40.

not find that the defendant could foresee that another person would be impacted by their acts.[198] However, courts have rejected this because of the difference between mental and physical injuries.[199] Mental injuries "transcend natural limitations and cross the vast expanses of the human mind and heart," therefore, foreseeability should not be the sole determination of duty and could potentially prevent those with serious mental injury from recovering.[200]

Another factor that will help defeat infinite liability concerns is where and in what court a tortfeasor may be sued.[201] One could imagine a likely scenario where a plaintiff in one state witnesses the victim in another state suffer death or great bodily injury over a real-time audiovisual platform. So, in turn, implications of jurisdiction will also help defeat concerns of infinite liability, which will limit those plaintiffs who file virtual bystander negligent infliction of emotional distress claims because the plaintiff must sue in a court that meets the venue,[202] personal jurisdiction,[203] and, if the case is brought in federal court, subject matter jurisdiction[204] requirements.[205] This presents another

198. *See id.* at 839–42.

199. *Id.* at 841.

200. *See id.* at 811, 813–14, 841.

201. *See id.* at 821–23.

202. Proper venue for a case to be heard is determined by first looking to where the defendant resides, then the district where a substantial part of the events took place that gave rise to the claim, or if neither of the prior two are satisfied, then in any district where the defendant is subject to personal jurisdiction. 28 U.S.C. § 1391(b).

203. Personal jurisdiction is the concept that a court will not have jurisdiction over a party unless that party has minimum contacts with the state in which the court sits, or in other words, the defendant has significant connections with the forum state. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

204. Subject matter jurisdiction is the concept that a court must have the power to hear a claim. *Subject Matter Jurisdiction*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/subject_matter_jurisdiction [https://perma.cc/3Z7M-3SYV]. State courts have general jurisdiction meaning that they can hear almost any claim under federal or state law, but federal courts have limited jurisdiction meaning that they can only hear cases under particular circumstances. *Id.* Two common types of cases federal courts have subject matter jurisdiction over are: (1) federal question cases, meaning cases with claims that arise under federal law; and (2) diversity cases, meaning cases where the amount in controversy is over $75,000 and no plaintiff and defendant are residents of the same state. 28 U.S.C. §§ 1331–32.

205. *Jurisdiction and Venue for Lawsuits*, JUSTIA, https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/jurisdiction-and-venue [https://perma.cc/9CX2-FQ4F]. First, assuming that a plaintiff and defendant are not from the same state, venue would only likely be

issue on top of the already expensive cost of filing a lawsuit. Plaintiffs may have to travel in some cases to pursue a lawsuit in another state, adding to the overall costs of litigation.[206] Thus, plaintiffs may decide that it is not worth it to pursue a claim for the fear of additional costs and time away from their homes.[207]

Lastly, there is criticism that the rules governing claims of negligent infliction of emotional distress are arbitrary in nature because the tort is focused on mental injuries rather than physical injuries.[208] The concern that the rules are arbitrary in nature is due to the tort's requirements seeming to be vague or ambiguous and without the support of any positive public policy.[209] However, these concerns are without merit.[210] Since this tort is a common law rule, it is based on policy considerations at its foundation, aiming to provide an avenue of recovery for those who have suffered true mental harm.[211] This tort is neither vague nor ambiguous because, like most other common law rules, it has strict requirements to meet for recovery.[212] The concern around the tort being under-inclusive or over-inclusive

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proper in either the defendant's home jurisdiction or where a substantial portion of the events took place, which would be where the defendant committed the negligent act to the victim. 28 U.S.C. § 1391(b). Next, personal jurisdiction would likely only be met in the defendant's home state due to the minimum contacts test or in the state in which the plaintiff resides. *See Int'l Shoe Co.*, 326 U.S. at 316. Lastly, subject matter jurisdiction would likely be satisfied in both state and federal court. *See Jurisdiction and Venue for Lawsuits*, *supra.* Federal courts would not have federal question jurisdiction; however, federal courts would have diversity jurisdiction assuming that the plaintiff and tortfeasor are not citizens of the same state and the amount in controversy exceeds $75,000. 28 U.S.C. §§ 1331–32. Therefore, the plaintiff would likely have to bring suit in the defendant's home state or where the defendant committed the original negligent act to ensure that venue, personal jurisdiction, and subject matter jurisdiction are met. *See id.* §§ 1391(b), 1332; *Int'l Shoe Co.*, 326 U.S. at 316.

206. *See* Richard Gama, *Why Are Lawsuits So Expensive?!?*, GAMA L. FIRM (Feb. 23, 2024), https://gamalawfirm.com/blog/why-are-lawsuits-so-expensive/ [https://perma.cc/VWV6-KNAG].

207. *See* Stanley L. Brodsky, Carroll M. Brodsky & Sarah H. Wolking, *Why People Don't Sue: A Conceptual and Applied Exploration of Decisions Not to Pursue Litigation*, 32 J. PSYCH. & L. 273, 277 (2004).

208. *See, e.g.*, Rhee, *supra* note 188, at 845–47.

209. *See id.* at 845–46.

210. *See id.*

211. *See id.* at 815.

212. *See id.* at 845.

does, however, have validity because courts need a way to limit liability by only allowing meritorious claims.[213]

Pennsylvania will be able to ensure that frivolous claims are defeated at the pleading stage and only offer recovery to those who can satisfy the elements outlined in *Ko*.[214] Thus, it is crucial that Pennsylvania courts adapt the laws as California's has, and they allow injured plaintiffs to recover for their emotional distress—regardless of physical presence. Taking into account the changing landscape of communication in the world, allowing plaintiffs to recover without a physical presence protects injured plaintiffs from defeat on a technological technicality. In this digital age, plaintiffs can be "present" without being in the same room as their loved ones. Watching your mom die is watching your mom die, whether it's in person or on a computer screen. Courts should recognize that. Therefore, Pennsylvania should adopt a standard similar to *Ko*, apply it to *Clotaire* to allow Norma Clotaire to recover for witnessing her mother suffer over FaceTime, and apply the new contemporaneous perception requirement to similarly situated plaintiffs in the future.

B. *Taking a Broader Approach to the Close Relationship Requirement: A New Test Is Necessary*

Although the plaintiff in *Clotaire* meets the current close relationship requirement as the plaintiff and victim are mother and daughter, Pennsylvania should also revamp the close relationship requirement to further account for societal changes. Although most jurisdictions have been extremely inconsistent in their application of the close relationship factor,[215] Pennsylvania should adopt a new standard to ensure those who have suffered serious emotional distress due to a tortfeasor's actions can recover. The current standard uses old societal norms to limit

213. *Id.*

214. *See* Ko v. Maxim Healthcare Servs., Inc., 272 Cal. Rptr. 3d 906, 914, 919 (Cal. Ct. App. 2020).

215. *See* Flora, *A Rational Alternative*, *supra* note 131, at 31.

liability.[216] Expanding this standard benefits society more broadly by using a different standard to validate claims rather than relying on antiquated relationships.[217] This new standard would allow for a more inclusive approach for those who suffered emotional distress as a result of the incident.[218] It would include a two-level test to ensure the validity and sanctity of the relationship before allowing for recovery. The new test would first be based on a factual determination of whether there is actual emotional distress resulting from the incident, and whether the incident is the proximate cause of the emotional distress.[219] Though this would be a question for the jury, the plaintiff would be able to bolster the causation argument by providing evidence from a psychotherapist or a medical professional stating that the incident has caused the emotional distress.[220] Next, the test would require there to be a factual determination regarding the relationship between the victim and the plaintiff, but with deference given to marital and immediate familial relationships.[221] The court would inform the jury to analyze factors of the relationship like length, frequency of time spent together, mutuality, communication frequency, and if applicable, intimacy levels.[222] This may allow plaintiffs to bring claims for close friends, coworkers, non-blood relatives, fiancées, partners, or a mentor.[223]

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216. *See, e.g.*, Blanyar v. Pagnotti Enters., 679 A.2d 790, 793–94 (Pa. Super. Ct. 1996) (declining to expand the "closely related" standard to be more inclusive).

217. *See* Flora, *A Rational Alternative*, *supra* note 131, at 46.

218. *See id.*

219. *See Suing for Emotional Distress in Pennsylvania*, *supra* note 17; *see also* Toney v. Chester Cnty. Hosp., 961 A.2d 192, 199–200 (Pa. Super. Ct. 2008). "The proximate cause of an event is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred." Fuller v. Palazzolo, 197 A. 225, 232 (Pa. 1938) (quoting Frankel v. Norris, 97 A. 104, 106 (Pa. 1916)).

220. *See* Kazatsky v. King David Mem'l Park, Inc., 527 A.2d 988, 992–93, 995 (Pa. 1987).

221. *See Suing for Emotional Distress in Pennsylvania*, *supra* note 17; *see also Toney*, 961 A.2d at 198 (explaining that one of the four factual scenarios for a claim of negligent infliction of emotional distress is "the plaintiff observed a tortious injury to a close relative").

222. *See, e.g.*, Graves v. Estabrook, 818 A.2d 1255, 1262 (N.H. 2003) (explaining that courts look at several factors, including the length of the relationship, the degree of interconnectedness of the individuals, and emotional dependence on one another, to determine the substantial nature of the relationship).

223. *See id.*

This two-prong test would provide a multi-level safeguard to prevent frivolous claims before allowing a plaintiff to satisfy the relationship requirement for a claim of bystander negligent infliction of emotional distress.[224] While it may raise concerns of superfluous claims, most frivolous claims or claims without standing will be dismissed in the pleading stage.[225] However, this test would allow plaintiffs to recover for those with whom they have a close relationship without a blood or marital connection, without expanding the potential plaintiff pool too far.[226] It will prevent those trying to bring a claim for a family member with whom they have a blood connection but have no substantial relationship.[227] There are many scenarios in which a plaintiff may seem to have a claim solely because they have a blood or marital relationship but will be barred from recovery due to the remaining elements not being met.[228]

In most cases, there will likely still be an easy causal determination of the emotional distress as the jury will be able to connect the emotional distress and the negligent act of the third party.[229] In cases where causation is found but a definitive familial relationship is not, the court will likely have to go beyond the pleading stage to find out more about the relationship, considering the factors mentioned above.[230] Another element that will help prevent an abundance of plaintiffs from pursuing this cause of action is that to show causation, the plaintiffs will likely have to hire an expert, such as a psychologist or psychotherapist, to show that the incident was the proximate cause of the emotional distress.[231] This would deter plaintiffs from bringing

224. *See* Rhee, *supra* note 188, at 835–36.

225. *See id.* at 836.

226. *See* Turner v. Med. Ctr., Beaver, PA, Inc., 686 A.2d 830, 833–34 (Pa. Super. Ct. 1996).

227. *Cf.* Dunphy v. Gregor, 642 A.2d 372, 377–78 (N.J. 1994).

228. *Id.* at 378.

229. *See* Ko v. Maxim Healthcare Servs., Inc., 272 Cal. Rptr. 3d 906, 914, 919 (Cal. Ct. App. 2020).

230. *See supra* note 220 and accompanying text.

231. *See* Kazatsky v. King David Mem'l Park, Inc., 527 A.2d 988, 992–93, 995 (Pa. 1987).

a suit without a true need for recovery, as experts are often costly.[232]

By implementing this new test, Pennsylvania will then be a jurisdiction, like California, that is socially modernized and accounts for the evolution of technology. While the new test still respects the principles currently underlying the tort, it explicitly states what is required to recover now and will make cases easier to decipher for Pennsylvania courts. Therefore, Pennsylvania should loosen its standards on the close relationship requirement and allow plaintiffs to bring claims when they can show causation and a relationship that meets the factors mentioned above.

CONCLUSION

Pennsylvania should follow the precedent set in *Ko* and allow Clotaire to pursue a claim of bystander negligent infliction of emotional distress for the injury that occurred to her mother. It would be reasonable for Pennsylvania to follow California's lead given that it has in the past when it adopted the tort requirements explained in *Dillon*. By adopting a standard similar to the one in *Ko* and allowing for the virtual perception of an incident to qualify as a contemporaneous perception, it would keep Pennsylvania current with California's standards. Pennsylvania has already been willing to get rid of the old analysis of the perception standard by its allowance for plaintiffs to recover when there has not been a visual perception of an incident. Also, this tort being altered will not broaden the potential plaintiff pool too greatly as *Clotaire* is a case of first impression in Pennsylvania and audiovisual applications have been in use for decades.

Further, Pennsylvania should be willing to adapt and modify tort standards to consider new societal norms, where technology plays a larger role more than ever. As time continues to pass and technology evolves further, Pennsylvania needs to legally recognize how loved ones and friends communicate with

232. *See* Gama, *supra* note 204.

one another through virtual platforms with real-time audio and visual components. People will continue to use alternative forms of communication for convenience and to avoid face-to-face contact to prevent the risk of getting their friends or family sick. This new allowance of virtual perception is better for Pennsylvania because it still follows the jurisdiction's foundational rules that lay out the tort's current elements, while acknowledging that technology use will just continue to grow and advance.

While adopting this new rule that would allow virtual perception to satisfy the elements of bystander negligent infliction of emotional distress, the court should take the opportunity to broaden the close relationship requirement by implementing the new test, even though Norma Clotaire and Marie Joseph would satisfy the jurisdiction's current standard. This new two-level test would first test the proximate cause of the injury and ensure that the incident actually was the cause of the plaintiff's emotional distress. Second, the test would be a factual analysis of the relationship by taking into account the relationship's length, frequency of time spent together, mutuality, communication frequency, and if applicable, intimacy levels before allowing for the close relationship prong to be satisfied. A lot of these factors are already analyzed in many courts in different jurisdictions to determine the validity of an intimate relationship. Therefore, using these factors would not be a significant change in the way Pennsylvania analyzes these claims. Rather, the courts will give more deference to those who claim to have an intimate relationship and look for the plaintiff to prove the existence of the relationship through the factors and not rely solely on a blood or marital relationship. This test is an overall better standard for the close relationship requirement because it is easier to administer, gives deference to a plaintiff who can show the elements of negligent infliction of emotional distress, and does not allow a lack of marital or blood relationship to preclude recovery for a plaintiff.

Therefore, when *Clotaire* moves past discovery and ultimately makes it to trial, Pennsylvania should take the opportunity through this case of first impression to make drastic changes to

the tort to help account for changes in social norms by using *Ko* as precedent moving forward and adopting a new test for the close relationship requirement. Moving forward, Pennsylvania should apply the new contemporaneous perception and close relationship requirements to all bystander negligent infliction of emotional distress claims to allow for plaintiffs who are similarly situated to *Clotaire* to recover and not bar recovery for others due to a lack of blood or marital relationship.