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TORT LAW — NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS — D.C. COURT OF APPEALS ALLOWS RECOVERY FOR EMOTIONAL HARM OUTSIDE ZONE OF DANGER. — *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789 (D.C. 2011) (en banc).

Courts have traditionally been reluctant to compensate victims of “pure” emotional harms accompanied by neither predicate nor consequent physical injury. Beginning in the late nineteenth century, however, many jurisdictions gradually expanded tort liability for negligent infliction of emotional distress (NIED), first through the “impact” rule, which allowed recovery when even trivial physical contact was made,<sup>1</sup> and later through the “zone-of-danger” rule, which allowed recovery absent contact when the plaintiff suffered a near miss.<sup>2</sup> Recently, in *Hedgepeth v. Whitman Walker Clinic*,<sup>3</sup> the D.C. Court of Appeals further relaxed restrictions on NIED recovery, allowing a claim by a patient who suffered severe distress, but no physical injury, as a result of being misdiagnosed as HIV positive. With *Hedgepeth*, D.C. joined a growing number of jurisdictions that have extended NIED beyond the traditional zone-of-danger rule.<sup>4</sup> But in so extending, the court created a new rule when it could simply have eliminated an old one. The result is added complexity in an area of law already marked by administrability concerns and doctrinal fractures.

On December 13, 2000, after learning that his girlfriend was infected with HIV, Terry Hedgepeth visited the Whitman Walker Clinic to get tested.<sup>5</sup> The clinic took a blood sample and sent it to an off-site testing facility, which returned the result “non-reactive.”<sup>6</sup> Although this meant Hedgepeth was *not* HIV positive, a staff member misinterpreted the result and prepared a form indicating that Hedgepeth in

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<sup>1</sup> Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 815–16 (2004).

<sup>2</sup> *Id.* at 817.

<sup>3</sup> 22 A.3d 789 (D.C. 2011) (en banc).

<sup>4</sup> See, e.g., *Larsen v. Banner Health Sys.*, 81 P.3d 196 (Wyo. 2003); *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996); *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85 (N.C. 1990); *Oswald v. LeGrand*, 453 N.W.2d 634 (Iowa 1990); *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369 (Ala. 1981); *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). None of these courts reached precisely the same holding under precisely the same reasoning, so when one adds the numerous jurisdictions that retain the traditional rules, see, e.g., *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846 (Fla. 2007) (per curiam) (impact rule); *Catron v. Lewis*, 712 N.W.2d 245 (Neb. 2006) (zone-of-danger rule), and those that categorically exclude all NIED claims, see, e.g., *FMC Corp. v. Helton*, 202 S.W.3d 490 (Ark. 2005), the modern landscape of NIED law becomes one of the most conflicted in modern private law, eluding tidy synopsis.

<sup>5</sup> *Hedgepeth v. Whitman Walker Clinic*, 980 A.2d 1229, 1230 (D.C. 2009).

<sup>6</sup> *Id.*

fact had HIV.<sup>7</sup> Dr. Mary Fanning subsequently reported this erroneous result to Hedgepeth.<sup>8</sup>

For the next five years, Hedgepeth believed he was HIV positive.<sup>9</sup> He developed depression and suicidal thoughts, which culminated in multiple admissions to psychiatric wards and prescriptions for antidepressants.<sup>10</sup> He lost his job, began using illegal drugs “heav[ily],” developed an eating disorder, and started having sex with a woman he knew was HIV positive.<sup>11</sup> He became alienated from relatives, including his twelve-year-old daughter.<sup>12</sup> In June 2005, however, Hedgepeth visited the Abundant Life Clinic to undergo another HIV test. This test came back negative, as did a follow-up test at another clinic several weeks later.<sup>13</sup>

Hedgepeth sued the clinic and Dr. Fanning for NIED in D.C. Superior Court.<sup>14</sup> The trial judge granted summary judgment for the defendants, relying on *Williams v. Baker*,<sup>15</sup> and a panel of the D.C. Court of Appeals affirmed.<sup>16</sup> *Williams* had adopted the zone-of-danger rule, under which a plaintiff may recover for NIED only if his physical safety has actually been threatened.<sup>17</sup> Since Hedgepeth was outside the zone of danger — he did not have HIV and so his physical safety was never actually threatened — he could not recover for the emotional harms he suffered.<sup>18</sup> However, one member of the three-judge panel wrote a concurrence urging an en banc rehearing to revisit *Williams*.<sup>19</sup> Hedgepeth’s petition for rehearing was granted,<sup>20</sup> and the question of whether *Williams*’s zone-of-danger rule should preclude Hedgepeth’s recovery for NIED absent imminent physical danger went before the full Court of Appeals.<sup>21</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1230–31.

<sup>11</sup> *Id.* at 1231.

<sup>12</sup> *Id.*

<sup>13</sup> *Hedgepeth*, 22 A.3d at 819.

<sup>14</sup> *Hedgepeth*, 980 A.2d at 1230.

<sup>15</sup> 572 A.2d 1062 (D.C. 1990) (en banc).

<sup>16</sup> *Hedgepeth*, 980 A.2d at 1233.

<sup>17</sup> A common example is a car’s narrowly missing a pedestrian. See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 131 (2010).

<sup>18</sup> Other courts have allowed similar claims on an impact-rule theory that the plaintiff’s safety was threatened by unnecessary and dangerous medical treatment resulting from the misdiagnosis. See, e.g., *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 364 (Fla. 1995) (allowing plaintiff to amend his complaint to show such treatment). Hedgepeth, however, never took any HIV medications during the time he believed he was infected. *Hedgepeth*, 980 A.2d at 1230.

<sup>19</sup> *Hedgepeth*, 980 A.2d at 1233–34 (Ruiz, J., concurring). Judge Ruiz would later write the opinion for the en banc decision in *Hedgepeth*.

<sup>20</sup> *Hedgepeth v. Whitman Walker Clinic*, 990 A.2d 455 (D.C. 2010) (per curiam).

<sup>21</sup> See *Hedgepeth*, 22 A.3d at 792.

The D.C. Court of Appeals, sitting en banc, reversed.<sup>22</sup> Writing for the court, Judge Ruiz first emphasized that the court was not overruling *Williams* completely: the zone-of-danger rule “continues to be generally applicable” to NIED claims.<sup>23</sup> However, the court created a “supplement[al]”<sup>24</sup> rule establishing a new category of liability. Under the court’s holding, the lack of imminent physical harm no longer bars recovery when the defendant has entered into a special relationship with the plaintiff or begun an “undertaking” that necessarily implicates the plaintiff’s emotional well-being.<sup>25</sup>

Because the decision marked a major shift in D.C.’s negligence law, Judge Ruiz began her discussion with some background on general principles of negligence.<sup>26</sup> She then provided a brief synopsis of the jurisdiction’s prior NIED law. Historically, courts had been hesitant to allow broad recovery in such cases due to three concerns: (1) fear of “fictitious or trivial claims,” (2) evidentiary difficulties of proving the existence and extent of harm, and (3) the need to restrict what might otherwise become unlimited liability.<sup>27</sup> By the time of *Williams*, the court explained, the first two concerns had largely dissipated, with only unlimited liability remaining as a reason for circumscribing NIED recovery.<sup>28</sup> Thus, *Williams* had instituted the zone-of-danger rule allowing an emotionally injured plaintiff to recover if the defendant’s negligence had placed him in imminent danger of physical injury — even if no physical injury actually occurred.<sup>29</sup>

The court then explained the new category of liability created by its holding: plaintiffs outside the zone of danger could now recover for NIED when (1) the defendant had a special relationship with or had undertaken an obligation to the plaintiff that implicated the plaintiff’s emotional well-being, (2) the undertaking or relationship made it “especially likely”<sup>30</sup> that the defendant’s negligence would cause

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 793–95.

<sup>27</sup> *Id.* at 795.

<sup>28</sup> *Id.* at 797–98.

<sup>29</sup> *Id.* at 798; *see also* *Williams v. Baker*, 572 A.2d 1062, 1067 (D.C. 1990) (en banc). Similar reasoning, *Hedgepeth* suggested, led the U.S. Supreme Court to adopt the zone-of-danger rule several years later in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). *See Hedgepeth*, 22 A.3d at 797 n.8 (citing *Gottshall*, 512 U.S. at 552).

<sup>30</sup> *Hedgepeth*, 22 A.3d at 800. This standard is a higher bar than the typical requirement of foreseeability. *See id.* at 800, 802 (twice emphasizing that the risk be “not only foreseeable, but especially likely,” *id.* at 800). The court provided an illustrative but not exhaustive list of relationships and undertakings that might qualify: psychiatry, some types of medical care, funeral services, and guardianship of or counsel to “especially vulnerable” groups like children, the elderly, or the disabled. *Id.* at 813–14. Undertakings with purely “financial, commercial or legal objective[s],” by contrast, do not sufficiently implicate emotional well-being. *Id.* at 815.

serious emotional harm,<sup>31</sup> and (3) the defendant's negligence had in fact caused serious harm.<sup>32</sup> The question of whether the defendant's undertaking or relationship was sufficient to create a duty, the court continued, is to be evaluated as a matter of law by the court.<sup>33</sup> As support for the new rule, the court cited the draft of the Restatement (Third) of Torts, which supplemented the zone-of-danger rule by allowing NIED recovery based on "specified categories of activities, undertakings, or relationships."<sup>34</sup>

The court offered a brief tour of prior NIED cases to demonstrate the doctrinal appeal of the undertaking rule: In cases where recovery had been permitted under inventive applications of the zone-of-danger rule, the new rule would provide doctrinal coherence by better explaining the results.<sup>35</sup> And in cases where claims had previously been denied, the new rule could lead to more just results by allowing recovery.<sup>36</sup> Crucially for the court, though, the new rule — like the zone-of-danger rule it supplemented — would serve as a check on the infinite liability contemplated by the D.C. Court of Appeals in *Williams* and by the U.S. Supreme Court in *Consolidated Rail Corp. v. Gottshall*.<sup>37</sup> By way of example, the court borrowed a hypothetical from the draft Restatement (Third) of a movie star or professional athlete who, like Hedgepeth, had been negligently misdiagnosed with a serious disease.<sup>38</sup> The new "undertaking rule" would limit the doctor's liability to the celebrity and would not extend liability to the potentially limit-

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<sup>31</sup> The court emphasized that the gravity of the harm must be great indeed. *Id.* at 813 ("[I]t must be especially likely that *serious* emotional distress will result from negligent performance . . .").

<sup>32</sup> *Id.* at 810–11.

<sup>33</sup> *Id.* at 811.

<sup>34</sup> *Id.* at 801 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46(b) (Tentative Draft No. 5, 2007) [hereinafter DRAFT RESTATEMENT (THIRD)]). The court did not read the phrase "specified categories" as requiring a priori delineation by either a court or a legislature; the language rather referred to any categories that might be deemed proper as courts develop the law in this area. *See id.* at 812 n.38.

<sup>35</sup> *Id.* at 804–08 (citing *Morgan v. Psychiatric Inst. of Wash.*, 692 A.2d 417 (D.C. 1997) (therapist initiated sexual relationship with patient); *Sowell v. Hyatt Corp.*, 623 A.2d 1221 (D.C. 1993) (plaintiff discovered worm in spoonful of rice); *Jones v. Howard Univ., Inc.*, 589 A.2d 419 (D.C. 1991) (X-rays and surgery threatened plaintiff's unborn children)).

<sup>36</sup> *See id.* at 805, 808 (citing *Minch v. District of Columbia*, 952 A.2d 929 (D.C. 2008) (alleged mistreatment during police interrogation and investigation); *Jane W. v. President and Dirs. of Georgetown Coll.*, 863 A.2d 821 (D.C. 2004) (hospital's informing patients that their medicine may have been replaced with saline solution); *Washington v. John T. Rhines Co.*, 646 A.2d 345 (D.C. 1994) (mishandling of husband's corpse); *Drejza v. Vaccaro*, 650 A.2d 1308 (D.C. 1994) (police interview of rape victim)).

<sup>37</sup> 512 U.S. 532 (1994).

<sup>38</sup> *Hedgepeth*, 22 A.3d at 813 n.40 (citing DRAFT RESTATEMENT (THIRD), *supra* note 34, § 46 cmt. f).

less class of avid fans who may have suffered severe emotional distress as a result of the negligence.<sup>39</sup>

Applying the new rule to the facts at hand, the court found that summary judgment below was improper because “it was especially likely that a doctor’s breach of duty in misdiagnosing a patient with HIV-infection would result in serious emotional harm.”<sup>40</sup> Thus, the doctor’s duty fell within the new category of liability. The court remanded the case for further proceedings.<sup>41</sup>

Thanks in part to the sympathetic facts before it, the *Hedgepeth* court had little difficulty justifying the decision to expand NIED liability beyond the traditional zone-of-danger rule. But whenever a court creates a new rule (as opposed to eliminating an old one), the question arises whether this new mechanism is so necessary as to justify its accompanying costs on the judicial system and its risk of misapplication. The answer, with respect to *Hedgepeth*’s undertaking rule, is probably no. The court justified its holding predominantly on the practical grounds that opening recovery to all direct claims would realize courts’ longstanding fears of limitless liability for emotional harms.<sup>42</sup> But in addressing this concern, the court failed to account fully for the distinction between direct and bystander liability for NIED — a distinction that in all likelihood does all that is necessary to prevent limitless liability for emotional harms.

D.C., like many jurisdictions, differentiates between cases of “direct”<sup>43</sup> and “bystander”<sup>44</sup> NIED, and under *Williams* all bystander recovery for NIED is precluded as a matter of law.<sup>45</sup> The *Hedgepeth*

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<sup>39</sup> See *id.* (citing DRAFT RESTATEMENT (THIRD), *supra* note 34, § 46 cmt. f).

<sup>40</sup> *Id.* at 820.

<sup>41</sup> *Id.*

<sup>42</sup> The other traditional pragmatic concerns — danger of frivolous claims and evidentiary difficulties — “no longer present[] compelling reasons” to limit liability in this area. *Id.* at 797. *Williams* credited the decline of these concerns to “advances in medical research and improved diagnostic techniques.” 572 A.2d 1062, 1067 (D.C. 1990) (en banc). Sexism likely also played a role in jurists’ hostility to emotional distress claims, as such injuries were regarded as feminine in nature and thus “of little concern to the law.” John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1669 (2002).

<sup>43</sup> One commentator has defined cases of direct NIED as those “where the primacy of the wrongful conduct was directed at the victim affecting her safety or well-being.” Rhee, *supra* note 1, at 811–12.

<sup>44</sup> Bystander cases are those “where the injury arises from the knowledge of harm to another.” *Id.* at 812. Most states allow bystander recovery under certain circumstances. See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 559 (9th ed. 2008) (tallying twenty-nine states as following some variant of California’s rule of bystander recovery, see *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), and three states surpassing it).

<sup>45</sup> In fact, it is this rule — not the zone-of-danger rule — that *Williams* justifies on unlimited liability grounds. See 572 A.2d at 1072. Simply put, then, the *Hedgepeth* court focused on the wrong prong of *Williams*’s holding; limitless liability was not an original justification for the zone-of-danger rule.

court clearly sought to broaden recovery for emotional harms, and in pursuit of this goal, it could have chosen simply to expand recovery right up to the direct/bystander line. Instead of eliminating the zone-of-danger rule, however, the court grafted a new rule onto its side.

As the court explained, the undertaking rule serves to exclude claims that could otherwise prevail under full direct-harm recovery. These claims, however, would not pose anything close to the floodgates threat contemplated by the court, since NIED is already subject to an array of rules constraining liability. As in typical negligence claims, the injury suffered must have been foreseeable. But most jurisdictions impose the additional requirement that the harm suffered be severe.<sup>46</sup> And unlike in cases of physical injury, where the eggshell skull rule dictates that a defendant takes her victim as she finds him,<sup>47</sup> there is generally no recovery for mental harms suffered due to a plaintiff's unusually sensitive temperament.<sup>48</sup>

At the margin, then, the class of claims that the undertaking rule serves to exclude appears to be narrow: a plaintiff would have to allege a negligent act that foreseeably and directly caused severe distress in a person of reasonable fortitude but occurred absent any relationship or undertaking on the defendant's part.<sup>49</sup> Such acts may exist, but it is unlikely that they are common enough to justify fears of infinite liability.<sup>50</sup> And so, while there may be good reasons to exclude such claims, those reasons must be based in principle and not in pragmatism.<sup>51</sup>

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<sup>46</sup> See Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or *Refinements Thereof*, 96 A.L.R.5th 107, § 5(a)-(b), at 157-60 (2002) (listing cases in which plaintiff's injury has and has not met the severity requirement). *Hedgepeth* itself required that the distress be "serious." 22 A.3d at 811.

<sup>47</sup> See GOLDBERG & ZIPURSKY, *supra* note 17, at 347.

<sup>48</sup> See *id.* at 349-50.

<sup>49</sup> Rather than offer an example of such a claim, the court instead relied on the movie star hypothetical. See *Hedgepeth*, 22 A.3d at 813 n.40 (citing DRAFT RESTATEMENT (THIRD), *supra* note 34, § 46 cmt. f). However, in that scenario the misdiagnosis affected the fans only to the extent that it left them emotionally disturbed; it was the star who suffered direct emotional harm, so the fans would be bystanders and would therefore be precluded from recovering. Likewise, the court's citation to the Supreme Court's *Gottshall* opinion, see *id.* at 797 n.8 (citing *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 552 (1994)), was not directly on point, as *Gottshall* presented a case of bystander liability.

<sup>50</sup> Perhaps a more accurate explanation of the court's pragmatic concerns is that sympathetic juries cannot be fully trusted to apply these other rules and that the discretion of a judge is necessary to prevent plaintiffs from recovering for emotional injuries that are not truly foreseeable or severe.

<sup>51</sup> Some commentators have persuasively articulated principled reasons for thus limiting duty in NIED claims. See, e.g., Goldberg & Zipursky, *supra* note 42, at 1678-85 (discussing the "agency concern" that sets mental harm apart from physical harm as a normative matter, *id.* at 1678). A fruitful analogy might also be found in the duty to rescue: the act/omission distinction, like the physical/emotional distinction, is superficially apparent but fails on many levels to withstand rigorous scrutiny. Cf. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE

With little discussion of such a principled justification offered by *Hedgepeth*,<sup>52</sup> the rule appears underinclusive.

Less obvious, though perhaps more significant, are problems of overinclusiveness. *Hedgepeth*'s attention to the new undertaking rule at the expense of the older bystander rule opens the door for plaintiffs to win ad hoc exceptions to the rule against bystander recovery. There are situations in which the injured plaintiff was not herself the express subject of the defendant's undertaking. But such plaintiffs may still recover, the court suggested, because an undertaking implicating emotions "is implied, and fairly so, based on the understanding of who is intended to benefit from the obligation."<sup>53</sup> It is not clear what the limits of this "implicit undertaking" are, and borderline cases are sure to arise as D.C.'s lower courts apply *Hedgepeth*. Is a mother's emotional well-being implicitly implicated when a doctor treats her newborn? Her toddler? Her teenager? Outside the family context, what if a patient witnesses an act of negligence by his therapist that leads to traumatic harm to a third party? It is not difficult to push the boundaries of the rule, and so the court has, without admitting as much, obscured the contours of what was formerly a bright-line rule against bystander recovery.<sup>54</sup>

Besides the above concerns, *Hedgepeth*'s reasoning is problematic in that it provides scant guidance to other courts. First, lower D.C. courts will be adrift when applying the holding. No rule is, on its face, clear and complete enough for easy application to the limitless variety of future cases,<sup>55</sup> and knowledge of the rule's purpose aids interpretation. But when the primary guidance from the higher court is that "this doctrine is designed to keep claims out," courts may err on the side of exclusion and bar claims that should have prevailed under a more principled justification. Second, NIED, more than most other

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L.J. 997, 1062 (1985) (describing, in the contracts context, the act/omission distinction as "infinitely manipulable"). Still, courts acknowledge the intuitive difference between acts and omissions by declining to assign liability for a failure to rescue — at least, until the defendant has *undertaken* to begin a rescue. See RESTATEMENT (SECOND) OF TORTS § 323 (1965).

<sup>52</sup> The opinion is not wholly lacking in discussion of principles. See *Hedgepeth*, 22 A.3d at 807 (describing how "society's expectations" help define what duties persons should properly owe to one another). But the bulk of the court's attention is bestowed upon pragmatic concerns.

<sup>53</sup> *Id.* at 814.

<sup>54</sup> This concern is especially salient given courts' apparent readiness to perform acts of doctrinal contortionism in order to reach results deemed equitable in individual NIED cases. See, e.g., *Conder v. Wood*, 716 N.E.2d 432, 435 (Ind. 1999) (impact rule satisfied when plaintiff pounded her hands against the side of a truck that was about to run over her friend); *Jarka v. Yellow Cab Co.*, 637 N.E.2d 1096, 1102 (Ill. App. Ct. 1994) (zone-of-danger rule satisfied when plaintiff, standing outside a taxi cab, witnessed a verbal altercation between his wife and the cab driver).

<sup>55</sup> The classic "no vehicles in the park" scenario is the most famous example. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

areas of tort law, has been characterized by steady change and significant variation among jurisdictions.<sup>56</sup> And while D.C. is not the first jurisdiction to expand liability as *Hedgepeth* has,<sup>57</sup> it is not likely to be the last. As other state courts reform their own NIED rules, they would be aided by opinions whose principled foundations facilitate interjurisdictional consensus and coherent integration into the existing body of tort law. Decisions that lack robust, principled support serve as less useful referents and encourage further doctrinal fracturing.<sup>58</sup>

Given the above concerns, there is an alternate approach that the court would have done well to consider: eliminating the zone-of-danger rule altogether and opening the courthouse doors to all cases of direct emotional injury. This approach would circumscribe liability enough to assuage courts' floodgates concerns while serving as a clearer check against creeping bystander recovery. It would also be more administrable: while the clarity of the direct/bystander distinction should not itself be overstated,<sup>59</sup> that determination is already required under current doctrine, and one test must be easier to apply than three concurrent ones.<sup>60</sup>

D.C.'s bar on bystander recovery may itself be open to criticism, but until it is overruled courts should fully acknowledge and respect it. With *Hedgepeth*, the court has failed to do so. Instead of muddying the doctrinal waters with an additional test, the court should have opened the doors to recovery in all cases of direct NIED while clearly delineating the class of bystander cases that would continue to be off limits.

<sup>56</sup> See *supra* note 4 and accompanying text.

<sup>57</sup> See, e.g., *Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 738 A.2d 839, 848 (Me. 1999) (finding liability where a "unique relationship of the parties has been established").

<sup>58</sup> *Hedgepeth* is not alone in this regard. In *Baker v. Dorfman*, for example, the Second Circuit predictively applied New York law to permit recovery for a false-positive HIV test. 239 F.3d 415 (2d Cir. 2000). But the court based this holding on a "special circumstances" rule justified by concerns over fraudulent or spurious claims. See *id.* at 421. As *Hedgepeth* explains, these concerns are no longer material. See *supra* note 42.

<sup>59</sup> California, for instance, has struggled to reach equilibrium on the issue. Compare *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980), with *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977). See generally Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 601-04 (1982) ("If the *Molien* logic is pursued, nothing is left of *Justus*." *Id.* at 604.). The state finally defined a "direct" harm as one involving a duty arising from a preexisting relationship, thus foreshadowing the *Hedgepeth* holding. See *Burgess v. Superior Court*, 831 P.2d 1197, 1201 (Cal. 1992). But the categories lend themselves to tidier definition when divorced from the question of preexisting duty. See *supra* notes 43-44.

<sup>60</sup> That is, the current troika of direct/bystander, zone-of-danger, and undertaking rules.