Louisiana Law Review

Volume 53 | Number 2
November 1992

Negligent Infliction of Emotional Distress: The Effect of Article 2315.6

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INTRODUCTION

Should one be able to recover for the *negligent* infliction of emotional distress? Suppose a motorist is driving down the road in a careful fashion and suddenly an oncoming vehicle swerves into his lane. Veering to the right to avoid the oncoming vehicle, the motorist hits a pedestrian walking on the side of the road. The pedestrian is thrown through the motorist's windshield at which time the pedestrian's head is severed and lands in the motorist's lap. The motorist suffers no physical injuries, but because of his involvement in the traumatic event, he suffers severe psychological problems, hampering his ability to work and care for his family and requiring extensive psychiatric treatment. Can he recover from the oncoming motorist who swerved into his lane?

Before answering, consider this: instead of the motorist hitting a pedestrian and suffering severe psychological harm, he hits a telephone pole and is paralyzed from the neck down. Can he recover from the oncoming motorist who swerved into his lane?

Is there any reason why the motorist in the second hypothetical should recover for his *physical* injuries while the motorist in the first hypothetical should not recover for his *mental* injuries?

In 1991, the Louisiana Legislature passed Civil Code article 2315.6. The article provides a cause of action for mental anguish or emotional distress for injury to another, while limiting who may recover and under what circumstances. The purpose of this comment is to determine the scope of Article 2315.6 and its impact on Louisiana's law regarding the negligent infliction of emotional distress. The author concludes that Article 2315.6 applies to "bystander recovery" only and *not* to "traditional" recovery for emotional distress—which includes the above hypo.

The comment is divided into several sections and subsections. Section I provides an overview of Article 2315.6 and the problems presented in determining its impact on the most pertinent cases involving negligent infliction of emotional distress. Section II presents Louisiana's jurisprudential history of negligent infliction of emotional distress. Section III analyzes the issues created by the article and suggests possible solutions to the problems recognized in Section I. Subsection A of Section III discusses the scope of Article 2315.6. Subsection B examines the legislative history and the language of Article 2315.6. Subsection C discusses policy considerations in allowing recovery for negligent infliction of emotional distress. Subsection D sets forth a continuum of recovery under Article

2315.6, and Subsection E summarizes its application. Section IV discusses the effects of the solutions proposed. Subsection A addresses each of the article's requirements for bystander recovery and Subsection B considers the directions the court may take in interpreting Article 2315.6 in relation to the hypothetical situation presented. Finally, Section V concludes with some observations and a summation of the problems, with the current state of the law.

I. OVERVIEW

The rule in Louisiana has always been that a plaintiff could recover for negligent infliction of emotional distress if the defendant owed a direct duty to the plaintiff, there was a breach of that duty, and the mental anguish was genuine.[1] However, prior to 1990, beginning with *Black v. Carrollton Railroad Co.*,[2] one generally could not recover for her own mental anguish for injury to another. Then, in 1990, the Louisiana Supreme Court overruled 135 years of jurisprudence and allowed one to recover for her own mental anguish caused by injury to another, in the landmark case of *Lejeune v. Rayne Branch Hospital*.[3] However, the court imposed restrictions on this "bystander recovery." These restrictions were 1) the claimant must view the accident which caused injury to the other or come upon the scene soon thereafter; 2) the mental anguish must be reasonable; 3) the mental anguish must be serious and foreseeable; and 4) the claimant must have a close relationship with the person injured—i.e., the direct victim.[4] The court did not specifically list the close relationship required, but rather, left open "for another day" exactly which close relationships met the requirement.[5]

Following *Lejeune*, the Louisiana Supreme Court decided *Clomon v. Monroe City School Board*.[6] In *Clomon*, the driver of an automobile

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1. *See infra* text accompanying notes 14-66.
2. 10 La. Ann. 33 (1855).
3. 556 So. 2d 559 (La. 1990).
4. In their entirety, the *Lejeune* requirements read:

> 1) A claimant . . . must . . . either view the accident or injury-causing event or come upon the accident scene soon thereafter and before substantial change has occurred in the victim's condition.
>
> 2) The direct victim of the traumatic injury must suffer such harm that it can reasonably be expected that one in the plaintiff's position would suffer serious mental anguish from the experience.
>
> 3) The emotional distress sustained must be both serious [severe and debilitating] and reasonably foreseeable to allow recovery.
>
> 4) The fourth restriction concerns the relationship of the claimant and the direct victim [the court declined to determine what relationship was necessary, stating that a husband-wife relationship is clearly sufficient].

Id. at 570.

5. *Id.*
6. 572 So. 2d 571 (La. 1990).

was allowed to recover for the mental anguish she suffered from hitting a boy (to whom she was not related) with her car due to the defendant's negligence. The court stated that *Lejeune* did not apply because it "does not govern every class of claim for emotional damage due to third party injury," but rather "only the most typical class, a suit by a plaintiff . . . on a breach of the [defendant's] general duty of due care."[7] The *Clomon* court then based its decision allowing recovery on the breach of a direct, special statutory duty the defendant owed the plaintiff.[8]

Justice Hall's concurrence further reiterates the distinction between *Lejeune* and *Clomon*. In *Clomon* the plaintiff was a *participant*, whereas in *Lejeune* the plaintiff was a *bystander*. In relation to this, Justice Hall sees a further distinction: while a *bystander* suffers emotional distress from witnessing an injury to another person, a *participant* in an accident suffers emotional distress from being *involved* in a traumatic ordeal, and the emotional distress arising from that ordeal should be compensable.[9]

After *Clomon*, the Louisiana Third Circuit Court of Appeal decided *Guillory v. Arceneaux*.[10] *Guillory* involved an accident in which someone was killed as a result, in part, of a third party's negligence.[11] The plaintiff was involved in the accident and sought to recover for her own emotional distress. The court stated that *Lejeune* did not apply because the plaintiff was not a bystander but a participant and that *Clomon* did not apply because there was no breach of a direct, special statutory duty. Nevertheless, the court cited Justice Hall's concurrence in *Clomon*, in its entirety, and held that the plaintiff did have a cause of action, based upon the defendant's breach of his general duty of care.[12]

Then, on July 19, 1991, the Louisiana Legislature passed Louisiana Civil Code article 2315.6,[13] which reads:

> A. The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury:
>
> (1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.

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7. *Id.* at 575.
8. *Id.* at 578.
9. *Id.* at 579.
10. 580 So. 2d 990 (La. App. 3d Cir. 1991).
11. *Id.* at 991. The plaintiff's petition is assumed to be true for purposes of the exception of no cause of action.
12. *Id.* at 995.
13. 1991 La. Acts No. 782, § 1.

(2) The father and mother of the injured person, or either of them.

(3) The brothers and sisters of the injured person or any of them.

(4) The grandfather and grandmother of the injured person, or either of them.

B. To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable. Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article.

While Article 2315.6 answers the question *Lejeune* left "for another day," it raises many uncertainties. How does Article 2315.6 affect recovery for negligent infliction of emotional distress in bystander cases and traditional cases? Was it meant to have any affect on traditional theories of recovery? Is it merely legislative approval of *Lejeune*? Does it overrule *Clomon* and *Guillory* by restricting recovery for negligent infliction of emotional distress in all circumstances only to close relatives, or should traditional theories of recovery be applied to these cases? Does it leave room for *Clomon's* direct, special statutory duty analysis? If *Clomon* is legislatively overruled, does Justice Hall's concurrence, adopted in *Guillory*, present an alternative theory under which recovery may be granted?

At first glance it may seem that Article 2315.6 overrules *Clomon* and *Guillory*. However, upon closer examination, one may conclude that it does not. There are basically two categories of cases allowing recovery for emotional distress: 1) traditional cases where defendant's negligence is aimed directly at the plaintiff, and 2) bystander recovery cases where the defendant's negligence is aimed at a third person and the plaintiff suffers emotional distress from having viewed the injury, as in *Lejeune*. Article 2315.6 deals solely with bystander recovery and does not interfere with traditional theories of negligent infliction of emotional distress. The *Clomon/Guillory* situation is, in reality, a traditional type of emotional distress case and not a bystander recovery situation. Therefore, that type of case should be analyzed according to traditional theories. Thus, Article 2315.6 does not overrule *Clomon* or *Guillory* and our motorist in the above hypo would have a cause of action. Alternatively, Justice Hall's theory—that the claimant's injury is not from "injury to another" but from his participation in the accident—may be adopted and, if so, Article 2315.6 is again inapplicable.

II. The Louisiana Jurisprudence

The seminal case in Louisiana in the area of negligent infliction of emotional distress and, more specifically, recovery for mental anguish as

a result of injury to a third person is *Black v. Carrollton Railroad Co.*[14] *Black* involved a train wreck caused by the Carrollton Railroad Company's negligence. A fourteen-year-old boy who was a passenger on the train suffered two broken legs. His father, not a passenger, attempted to recover for his own damages.[15]

The jury awarded damages for "the shock to the parental feelings, and the solicitude and anxiety of the parents."[16] The Louisiana Supreme Court overruled the trial court, holding that vindictive damages[17] are limited to the direct victim, and thus a third party may not recover.[18] The court stated, "[W]e do not understand the object of the law to be, the punishment of an offending party for having been the cause of unpleasant emotions in the family and acquaintances of the party offended."[19]

The *Black* rule was considered again and followed by the Louisiana Supreme Court in three cases early in this century.[20] *Black* remained the law for 135 years until 1990 when it was overruled by the Louisiana Supreme Court in *Lejeune v. Rayne Branch Hospital.*[21] During this 135-year span, however, there were several cases in which recovery for negligent infliction of emotional distress was allowed—some involving injury to third persons[22] and some not.[23] These "traditional" cases of negligent infliction of emotional distress fall within several "categories"[24] such as telegraph cases,[25] dead body

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14. 10 La. Ann. 33 (1855).

15. *Id.* at 37.

16. *Id.* at 38.

17. Vindictive damages are "in the nature of a penalty and of an example—partaking of the character of public justice, while redressing a private wrong." *Id.* The court considered mental anguish damages to be in the nature of vindictive damages.

18. *Id.*

19. *Id.*

20. Kaufman v. Clark, 141 La. 316, 75 So. 65 (1917); Brinkman v. St. Landry Cotton Oil Co., 118 La. 835, 43 So. 458 (1907); Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906).

21. 556 So. 2d 559, 569 (La. 1990).

22. The third circuit referred to these cases as "maverick cases" in Lejeune v. Rayne Branch Hosp., 539 So. 2d 849, 852-53 (La. App. 3d Cir. 1989). They are Vidrine v. Gov't Employees Ins. Co., 528 So. 2d 765 (La. App. 3d Cir.), *writ denied*, 532 So. 2d 156 (1988); Skorlich v. East Jefferson Gen. Hosp., 478 So. 2d 916 (La. App. 5th Cir. 1985); Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961); Jordan v. Fidelity & Casualty Co. of N.Y., 90 So. 2d 531 (La. App. 2d Cir. 1956); Champagne v. Hearty, 76 So. 2d 453 (La. App. Orl. 1954); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. Orl. 1951).

23. Cases allowing recovery for negligent infliction of emotional distress not involving injury to a third person include missent telegraph messages and damage to property. *See* McGee v. Yazoo & M.V.R., 206 La. 121, 19 So. 2d 21 (1944), and Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903) respectively.

24. Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1096 (La. 1990).

25. *Graham*, 109 La. 1069, 34 So. 91.

cases,[26] property damage cases,[27] breach of contract cases,[28] and fear for personal safety cases.[29]

Graham v. Western Union Telegraph Co.[30] involved a woman attempting to recover damages for mental anguish occasioned by her inability to contact her ill son prior to his death. She could not reach her son before he died because the telegraph company failed to promptly deliver a telegraph informing her of her son's condition. The Louisiana Supreme Court allowed recovery, but did so on a breach of contract theory under Louisiana Civil Code article 1934,[31] as opposed to a tort theory under Article 2315.

The "dead body" cases generally involved some sort of mishandling[32] or mutilation[33] of a corpse. Recovery for mental anguish arising under such circumstances is generally allowed to close relatives such as the parents,[34] the children,[35] the grandchildren,[36] the surviving spouse,[37] and the brothers and sisters.[38] However, these cases do not base recovery on mental anguish as a result of injury to another. Rather the close relatives are allowed to recover for mental anguish because they are considered to have a quasi-property interest in the corpse which has been violated.[39]

One may also recover for mental anguish arising from damage to his property.[40] However, recovery is normally permitted in only four instances:

> 1) property [is] damaged by an intentional or illegal act;
> 2) property [is] damaged by acts for which the tortfeasor will be strictly or absolutely liable;

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26. Fortuna v. St. Bernard Memorial Gardens, Inc., 529 So. 2d 883 (La. App. 4th Cir. 1988); French v. Ochsner Clinic, 200 So. 2d 371 (La. App. 4th Cir. 1967); Blanchard v. Brawley, 75 So. 2d 891 (La. App. 1st Cir. 1954).

27. *McGee*, 206 La. 121, 19 So. 2d 21.

28. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961).

29. Klein v. Medical Bldg. Realty Co., 147 So. 2d 122 (La. App. Orl. 1933).

30. 109 La. 1069, 34 So. 91 (1903).

31. Article 1934 (now La. Civ. Code art. 1998) allowed for nonpecuniary damages for breach of a contract which had for its object the gratification of some intellectual enjoyment. *Id.* at 1073, 34 So. at 93.

32. Fortuna v. St. Bernard Memorial Gardens, Inc., 529 So. 2d 883 (La. App. 4th Cir. 1988).

33. Blanchard v. Brawley, 75 So. 2d 891 (La. App. 1st Cir. 1954).

34. *Id.*

35. Humphreys v. Bennett Oil Corp., 195 La. 531, 197 So. 222 (1940) (defendant disturbed the grave of plaintiff's father).

36. Kok v. Harris, 563 So. 2d 374 (La. App. 1st Cir. 1990) (son of the deceased refused to delay the funeral one hour to allow the grandchildren to arrive).

37. Burton v. City of New Orleans, 464 So. 2d 943 (La. App. 4th Cir. 1985).

38. Blanchard v. Brawley, 75 So. 2d 891 (La. App. 1st Cir. 1954).

39. *Id.* at 893-94.

40. McGee v. Yazoo & M.V.R., 206 La. 121, 130-31, 19 So. 2d 21, 24 (1944).

> 3) property [is] damaged by acts constituting a continuous nuisance; and,
> 4) property [is] damaged at a time when the owner thereof is present or situated nearby and the *owner experiences trauma as a result.*[41]

Recovery is not allowed for minimal and normal worry suffered by the property owner where mere negligence caused the damage.[42]

Damages for mental anguish suffered as a result of undergoing a traumatic ordeal are also recoverable.[43] These cases are referred to as "fear for one's self" cases. In *Chappetta v. Bowman Transportation, Inc.*,[44] the plaintiff, a young female driver, was stopped at an intersection. A tractor-trailer truck was making a left hand turn onto the road where the plaintiff was stopped. The truck's rear tires rolled over the hood and roof of the plaintiff's car. The plaintiff was not physically injured at all, but she became hysterical and was treated for post-traumatic stress disorder. The trial court allowed her to recover $1,000 for her fear and worry. The appellate court upheld the plaintiff's recovery and stated, "[W]hen emotional injuries are proven by a preponderance of the evidence to exist and to have been caused by a negligent act, damages should be awarded for those injuries."[45] The court recognized the fear of frivolous claims but held that, like physical injuries, the problem is one of proof to be decided by the trier of fact.[46] The court went on to state that "duty/risk analysis and proximate cause concepts serve to limit liability to those emotional injuries that were foreseeable or that could have been reasonably anticipated to result from the negligent act."[47]

In none of these cases was recovery based on injury to a third person. However, there were several so called "maverick" cases[48] which allowed recovery for mental anguish as a result of injury to a third person. The first of these cases was *Valence v. Louisiana Power & Light Co.*[49] The

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41. Louisiana Farm Bureau Mut. Ins. Co. v. Dunn, 484 So. 2d 853, 856 (La. App. 1st Cir. 1986). *See* Fontenot v. Magnolia Petroleum Co., 227 La. 866, 80 So. 2d 845 (1955) (absolute liability); *McGee*, 206 La. 121, 19 So. 2d 21 (nuisance); Meshell v. Insurance Co. of N. Am., 416 So. 2d 1383 (La. App. 3d Cir. 1982) (illegal act); Speight v. Southern Farm Bureau Ins. Co., 254 So. 2d 485 (La. App. 3d Cir. 1971) (owner of property being nearby).

42. Farr v. Johnson, 308 So. 2d 884 (La. App. 2d Cir. 1975).

43. Carroll v. State Farm Ins. Co., 427 So. 2d 24 (La. App. 3d Cir. 1983).

44. 415 So. 2d 1019 (La. App. 4th Cir. 1982).

45. *Id.* at 1022.

46. *Id.* at 1022-23.

47. *Id.* at 1023.

48. *See supra* note 22.

49. 50 So. 2d 847 (La. App. Orl. 1951); *see also* Jordan v. Fidelity & Casualty Co., 90 So. 2d 531 (La. App. 2d Cir. 1956) (husband awarded damages for his mental anguish resulting from physical injury sustained by his pregnant wife in a car accident).

Orleans Appellate Court in *Valence* allowed recovery of damages for mental anguish suffered by the husband due to his worry about the unborn fetus of his wife following injury to the wife.[50] This case, however, "stands alone contrary to the weight of the firmly established jurisprudence of this state"[51]—or at least it did for several years.

The next "maverick" case was *Holland v. St. Paul Mercury Insurance Co.*[52] In *Holland*, a couple contracted with Terminix, a pest control company, to place rat poison in the couple's house. The couple's son ate the rat poison, and when the couple called Terminix to find out what type of poison was used, Terminix did not know. The first circuit court of appeal allowed the parents to recover for their mental anguish.[53] After recognizing the *Black* rule and quoting American Law Reports,[54] the court held that Terminix had a duty to know the substance of its rat poison. This duty "arises *ex contractu* as well as *ex delicto*."[55] The court recognized the ongoing viability of the *Black* rule[56] and held: "[E]xcepted from said rule, however, are those instances wherein a plaintiff suing for mental pain and anguish occasioned by physical injury to another does so on the basis of a breach of a primary legal duty and obligation owed by the defendant directly to the plaintiff seeking such damages."[57]

Over the next twenty-nine years, the appellate courts of Louisiana struggled with the issue of negligent infliction of emotional distress where injury to a third person was involved. Cases arose involving rape,[58] battery,[59]

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50. *Valence*, 50 So. 2d at 854.

51. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145, 154 (La. App. 1st Cir. 1961).

52. *Id.*

53. *Id.*

54. The court relied on J.E. Macy, Annotation, Damages, 18 A.L.R. 2d, § 7, 239-40 (1951), and quoted the entire Section 7 Editorial Comment, the most pertinent part being: "Before a defendant can be held liable to a plaintiff for the probable consequences of an act, *it must appear that the act was a breach of duty to the plaintiff, not merely to someone else.*" *Holland*, 135 So. 2d at 152 (court's emphasis).

55. *Holland*, 135 So. 2d at 158.

56. 88 *See supra* text accompanying note 19.

57. *Holland*, 135 So. 2d at 158-59.

58. In Brauninger v. Ducote, 381 So. 2d 1246 (La. App. 4th Cir. 1979), the court denied a mother's claim for mental anguish suffered as a result of the defendant's 17-year-old son raping her minor daughter. The court questioned the logic of Louisiana jurisprudence but adhered to it; *see also* then Judge Lemmon's concurrence. However, in Bishop v. Callais, 533 So. 2d 121 (La. App. 4th Cir. 1988), the court stated that the plaintiffs, who suffered mental anguish when their son was raped by an employee of the psychiatric hospital he was in, may have a cause of action if they could show the hospital breached a duty owed directly to them.

59. In Fisher v. Louisiana Dep't of Pub. Safety, 555 So. 2d 626 (La. App. 4th Cir. 1989), recovery was denied to a brother and brother-in-law who witnessed the direct victim's beating. In Hardin v. Munchies Food Store, 521 So. 2d 1200 (La. App. 2d Cir. 1988), the court awarded a girl damages for her mental anguish due to fear for her own safety but denied any recovery for mental anguish caused by watching her boyfriend get beaten.

trespass,[60] kidnapping,[61] medical malpractice,[62] fear for one's own safety or trauma of an ordeal,[63] and instances where the plaintiff was not present at the scene of the accident.[64]

These cases clearly indicate that Louisiana law allows one to recover for mental anguish without accompanying physical injury.[65] However, when a person was neither physically injured nor physically involved in the accident, the trend of these cases reveals that one who merely witnessed injury to another or suffered grief because of injury to a loved one could not recover due to the vitality of the *Black* rule. On the other hand, when a duty was owed *directly* to the plaintiff claiming mental anguish, the courts allowed recovery when there was a breach of that duty causing genuine mental anguish.

This was the state of the law when *Lejeune v. Rayne Branch Hospital*[66] reached the Louisiana Supreme Court. In *Lejeune*, the court plainly granted recovery for mental anguish arising from injury to another. The plaintiff was the wife of a comatose patient being treated at the defendant hospital. Her husband was bitten on the face several times by rats. The wife came upon the scene shortly thereafter (but after the wounds had been cleaned) and claimed she "suffered mental anguish, due to her seeing her husband having been eaten alive by a rodent."[67]

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60. Ard v. Samedan Oil Corp., 475 So. 2d 384 (La. App. 1st Cir. 1985).

61. In Spencer v. Terebelo, 373 So. 2d 200 (La. App. 4th Cir. 1979), the court allowed recovery for mental anguish to a father as a result of the mother kidnapping their children. The court based its holding on a breach of a legal duty owed to the custodial parent by the non-custodial parent.

62. In Blackwell v. Oser, 436 So. 2d 1293 (La. App. 4th Cir. 1983), the court denied recovery for mental anguish to the father of a child born deformed as a result of the defendant-doctor's negligence. The mother was allowed to recover, however, because, according to the court, the doctor owed a duty to the mother (who was the patient) but not to her husband. The court criticized Louisiana jurisprudence but abided by it. In Skorlich v. East Jefferson Gen. Hosp., 478 So. 2d 916 (La. App. 5th Cir. 1985), an almost identical set of facts occurred. This court disregarded *Blackwell*, finding a duty was owed to the husband by his wife's physician and thus allowing recovery for his mental anguish.

63. Mayo v. Borden, Inc., 784 F.2d 671 (5th Cir. 1986); Courmier v. Travelers Ins. Co., 486 So. 2d 243 (La. App. 3d Cir. 1986); Carroll v. State Farm Ins. Co., 427 So. 2d 24 (La. App. 3d Cir. 1983); Chappetta v. Bowman Transp., Inc., 415 So. 2d 1019 (La. App. 4th Cir. 1982); Butler v. Pardue, 415 So. 2d 249 (La App. 2d Cir. 1982); Hoffman v. All Star Ins. Corp., 288 So. 2d 388 (La. App. 4th Cir. 1974); Klein v. Medical Bldg. Realty Co., 147 So. 122 (La. App. Orl. 1933); Laird v. Natchitoches Oil Mill, Inc., 120 So. 692 (La. App. 2d Cir. 1929).

64. Gibbons v. Orleans Parish Sch. Bd., 391 So. 2d 976 (La. App. 4th Cir. 1980); Lanham v. Woodward, Wight & Co., Ltd., 386 So. 2d 131 (La. App. 3d Cir. 1980); Bourque v. American Mut. Liab. Ins. Co., 345 So. 2d 237 (La. App. 3d Cir. 1977); Hickman v. Parish of E. Baton Rouge, 314 So. 2d 486 (La. App. 1st Cir. 1975).

65. Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081 (La. 1990); Stewart v. Arkansas S. R.R., 112 La. 764, 36 So. 676 (1904).

66. 556 So. 2d 559 (La. 1990).

67. *Id.* at 561.

The court went through a long discussion of *Black* and many cases following it. The court dismissed the impact rule[68] and the zone of danger test.[69] After a discussion of other jurisdictions' treatment of bystander recovery,[70] the court performed a duty-risk analysis. The court stated that *if* the hospital was negligent in allowing the rats to bite Mr. Lejeune,[71] then this was the cause-in-fact of Mrs. Lejeune's injuries. The court then said that *if* the hospital had a duty not to cause Mrs. Lejeune emotional distress, it breached that duty.[72] The supreme court then stated that there was no reason to bar recovery of damages for all claims of mental anguish and overruled *Black*, holding that "[a] duty does exist to protect a plaintiff from mental anguish damages occasioned by the negligent infliction of injury to a third person."[73] The court did, however, impose restrictions on bystander recovery.[74]

Following the overruling of 135 years of jurisprudence in *Lejeune*, the next case in this saga was *Clomon v. Monroe City School Board*.[75] There, the supreme court granted recovery but on a different basis than in *Lejeune*. In *Clomon*, a school bus carrying handicapped children stopped to drop off a four year old passenger. The attendant on the bus did not escort the child across the street as was her job, but instead merely escorted the child to the center line next to the bus. In addition, the bus driver turned his warning lights off and started to accelerate while the child was at the center line. The plaintiff, Sonya Clomon, turned onto the street, approaching the bus from the opposite direction at a lawful speed, and did not see the boy. As she passed the front of the bus, the boy darted out from the center line and was struck by Sonya Clomon's car. The boy later died. Sonya Clomon was arrested, booked, and charged with negligent homicide, though the charges were later reduced to negligent operation of a motor vehicle.[76]

The court discussed the bystander recovery rule as handed down in *Lejeune* but came to the conclusion that it did not apply to this situation.

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68. *Id.* at 564. The impact rule limits recovery for mental anguish for harm to another to those who were physically impacted.

69. *Id.* The zone of danger test limits recovery for mental anguish to those who were sufficiently close to the danger.

70. The court discussed Dillon v. Legg, 441 P.2d 912 (Cal. 1968), the seminal case in this country allowing recovery for mental anguish of a bystander who was neither physically impacted nor within the zone of danger, as well as several subsequent cases. *Id.*

71. Because the case was before the court under an exception of no cause of action, the court accepted as true Mrs. Lejeune's allegations that the hospital was negligent. *Id.* at 566 (citing La. Code of Civ. P. art. 931).

72. *Id.* at 567.

73. *Id.* at 569.

74. *See supra* note 4.

75. 572 So. 2d 571 (La. 1990).

76. *Id.* at 572-73.

The court explained that "the *Lejeune* court did not intend to modify or interrupt the development of rules or decisions permitting recovery for emotional distress from a tortfeasor who owed the plaintiff a special, direct duty created by law, contract or special relationship."[77] The court found that the bus driver's failure to adhere to Louisiana Revised Statutes 32:80,[78] which requires a bus driver to activate the warning signals when receiving or discharging pupils, was a breach of a delictual duty owed specially and directly to Sonya as a motorist. The court stated: "Consequently we conclude that in the narrow class of cases involving the direct, special statutory duty owed to the motorist, there is no justification for the creation of juristic limitations upon the principle of reparation underlying Civil Code Article 2315."[79] In addition, the court held that any contributory negligence on the part of Sonya Clomon did not bar her recovery but merely reduced it by the percentage of her fault.[80]

The final case in this line of jurisprudence is *Guillory v. Arceneaux*,[81] an appellate court case. This case was an appeal from an exception of no cause of action. Ms. Guillory, a motorist, entered a bypass which was icy and unlit. Prior to Ms. Guillory's arrival on the bypass, Ms. Arceneaux's car had struck a guardrail, and Ms. Arceneaux had left her car and had been struck by an eighteen-wheeler. She was lying injured in the road when Ms. Guillory drove around the curve of the bypass. Ms. Guillory attempted to stop but could not, and she struck Arceneaux who was killed.[82] Ms. Guillory brought an action to recover for her own mental anguish suffered as a result of this incident.[83]

The court removed this situation from the realm of the bystander recovery rule of *Lejeune* because Ms. Guillory was a participant in the accident and not a bystander.[84] The court also distinguished this case from *Clomon*, saying there was no special, direct statutory duty that Ms.

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77. *Id.* at 575.

78. La. R.S. 32:80 (1963 & Supp. 1992).

79. *Clomon*, 572 So. 2d at 578.

80. *Id.* at 578-79; La. Civ. Code art. 2323.

81. 580 So. 2d 990 (La. App. 3d Cir. 1991); compare with Devereux v. Allstate Ins. Co., 557 So. 2d 1091 (La. App. 2d Cir. 1990) (a similar case decided differently, but before *Clomon* was handed down by the Supreme Court).

82. This was an appeal from an overruling of an exception of no cause of action, thus the court accepted the plaintiff's allegations as true. The plaintiff's allegations imply that Arceneaux may have died as a result of being struck by Guillory's vehicle. *Guillory*, 580 So. 2d at 991-92.

83. *Id.* at 992. The parties to this suit were Arceneaux's liability insurer (her estate was not a defendant), the owner and the driver of the eighteen-wheeler and their liability insurer, Louisiana Ins. Guar. Ass'n (LIGA), and the Louisiana Department of Transportation and Development.

84. *Id.*

Arceneaux owed to Ms. Guillory as a motorist.[85] The court affirmed the trial court's overruling of the exception of no cause of action, reasoning that Ms. Guillory was physically involved in the accident and suffered emotional injury as a result, which has long been compensable even with no accompanying physical injury.[86]

This was the state of the Louisiana jurisprudence when Louisiana Civil Code article 2315.6 was enacted.[87] Article 2315.6 is nearly identical to the restrictions listed in *Lejeune*, except it lists the close relationships needed to recover, whereas *Lejeune* left open "for another day" exactly who met the restriction.[88] The question then becomes whether Article 2315.6 is 1) a legislative approval of *Lejeune* and an overruling of *Clomon* and *Guillory* or 2) merely a legislative approval of *Lejeune* that fills *Lejeune*'s "close relationship" gap and leaves *Clomon* and *Guillory* intact. In addition, the question arises as to what affect an acceptance of Justice Hall's analysis in *Clomon*[89] would have on the application of Article 2315.6. The next section of this comment will attempt to answer these questions.

III. ANALYSIS

A. Comparison of Bystander Recovery and Traditional Recovery

As stated earlier, there seem to be two categories of cases dealing with negligent infliction of emotional distress: 1) the traditional case where the defendant's negligence is aimed directly at the plaintiff and 2) the bystander recovery case where the defendant's negligence is aimed at a third person and the plaintiff suffers emotional distress from having *viewed* the injury, as in *Lejeune*. Do *Clomon* and *Guillory* (and the introductory hypo) fall within the former or the latter category and is Article 2315.6 applicable to these situations?

The *Clomon* and *Guillory* scenario should be analyzed under the same rules that were developing for "traditional" negligent infliction of emotional distress as these cases are, in reality, traditional cases and not bystander situations. The court in *Clomon* recognized this when it stated, "[T]he *Lejeune* court did not intend to modify or interrupt the development of rules or decisions permitting recovery for emotional distress

85. *Id.* at 998. However, this case was granted supervisory writs to the court of appeal before *Clomon* and then was decided after *Clomon*. Plaintiff cited two statutes which may form a special, direct, statutory duty, but the court felt there was a duty owed regardless.

86. *Id.* at 993-98.

87. For the text of Article 2315.6, *see supra* text accompanying note 13.

88. Lejeune v. Rayne Branch Hosp., 556 So. 2d, 559, 570 (La. 1990); *see supra* note 4 for the *Lejeune* restrictions.

89. Clomon v. Monroe City Sch. Bd., 572 So. 2d 571, 579 (La. 1990) (Hall, J., concurring). *See supra* text accompanying note 9.

from a tortfeasor who owed the plaintiff a *special, direct duty* created by law, contract or special relationship."[90] The court discussed several cases that recognized such an "independent duty owed to an aggrieved non-traumatically injured plaintiff."[91] In fact, the *Black* decision itself says, "We carefully note the distinction between the immediate sufferer from a railroad accident, and a relative of the sufferer."[92] The *Black* court went on to state: "[W]e deem it advisable not to extend the right to recover . . . [mental anguish] damages, to others than those who, in their own proper persons, are victims of the misconduct,"[93] thus implicitly indicating that "those who, in their own proper persons, are victims of misconduct" may recover.

In *Clomon*, the defendant conceded that the plaintiff met three of the *Lejeune* requirements, but the fourth, requiring a close relationship, was not met. If the *Lejeune* requirements were meant to apply to this situation, then it would bar recovery since the close relationship requirement was not met. However, it would also have to apply to *any* situation where injury to another occurred, including *Bishop*, *Skorlich*, *Holland*, *Valence*, and so on.[94] These cases found independent duties owed by the defendant to the plaintiff that were breached. However, all four requirements of *Lejeune* would not have been met in any of these cases. If those past cases were to arise today, a court would not be justified in applying the *Lejeune* requirements because the *Lejeune* court itself approved of those earlier cases as having been based on a different rationale than bystander recovery.[95]

To further support this distinction, there appears to be no real difference between the situation in *Chappetta*[96] and the situation in *Clomon*[97]

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90. *Id.* at 575 (emphasis added).

91. *Id.* (quoting *Lejeune*, 556 So. 2d 559, 567). The court briefly discussed Bishop v. Callais, 533 So. 2d 121 (La. App. 4th Cir. 1988); Skorlich v. East Jefferson Gen. Hosp., 478 So. 2d 916 (La. App. 5th Cir. 1985); Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961); Jordan v. Fidelity & Casualty Co., 90 So. 2d 531 (La. App. 2d Cir. 1956); Champagne v. Hearty, 76 So. 2d 453 (La. App. Orl. 1955); and Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. Orl. 1951). *Id.* at 575-76.

92. Black v. Carrollton R.R., 10 La. Ann. 33, 38 (1855).

93. *Id.*

94. *See supra* notes 22 and 58.

95. Clomon v. Monroe City Sch. Bd., 572 So. 2d 571, 584 (La. 1990) (Dennis, J., assigning additional reasons in support of the majority opinion) (citing *Lejeune*, 556 So. 2d 559). Justice Dennis' additional reasons provide an excellent discussion of the difference between bystander recovery and other types of recovery for negligent infliction of emotional distress such as in *Clomon*. He explains why *Lejeune* does not apply to a *Clomon* type situation.

96. Chappetta v. Bowman Transp., Inc., 415 So. 2d 1019 (La. App. 4th Cir. 1982); *see supra* text accompanying notes 44-47.

97. *Clomon*, 572 So. 2d 571; *see supra* text accompanying notes 75-80.

or *Guillory*.[98] In *Chappetta*, the defendant's tractor-trailer wheels rolled over the plaintiff's car causing the plaintiff emotional distress. Is there any difference between the defendant negligently rolling his tires over the plaintiff's car in *Chappetta* and the defendant's negligently hitting the plaintiff's car with a child in *Clomon*? Essentially, in *Clomon*, the defendant's negligence caused Sonya Clomon's car to be hit with a person, causing mental anguish to the plaintiff, and, in *Chappetta*, the defendant's negligence caused the plaintiff's car to be hit with tires causing mental anguish to the plaintiff. This is in no way meant to imply that the plaintiff in *Clomon* suffered a worse injury than the little boy, but rather to illustrate the method by which the defendant's negligence caused the plaintiff's harm. Similarly, as the defendant in *Chappetta* negligently rolled his tires over the plaintiff's car, the defendant in *Guillory* negligently caused a person to be rolled underneath the plaintiff's car causing the plaintiff severe emotional distress.

It should not be debated that a person owes a duty not to hit someone negligently with a thing. This duty should apply whether the defendant hits the plaintiff with a thing such as a car or with the body of a person. This is different and distinct from bystander recovery and should be treated differently and distinctly. In a bystander recovery situation, the defendant hits a person causing severe injury or death, but that person is not the plaintiff; the plaintiff is a bystander nearby. There is no independent duty owed by the defendant to the bystander, but rather that duty must be "borrowed" from the breach of the defendant's duty owed to the direct victim.

In further support of this distinction between bystander recovery and recovery in a *Clomon* and *Guillory* situation, an analysis of Justice Watson's and Justice Hall's concurrences in *Clomon* is in order. Justice Watson acknowledged in his *Clomon* concurrence that he had dissented in *Lejeune*, but stated: "Here the plaintiff [Sonya Clomon] was not a bystander; she was physically involved in the accident. For this reason, I would hold that she is entitled to recover for her emotional damages."[99] Justice Hall's concurrence not only recognizes this distinction but also recognizes a distinction in the actual cause of the emotional distress:

> Here, plaintiff [Sonya Clomon] was not a bystander. As a result of the defendant's breach of duty owed to her, she became a participant in the accident. *Plaintiff does not seek to recover as a result of witnessing an injury to another; she seeks to recover because she was involved in a traumatic accident as a result of the defendant's negligence.* Her emotional distress suffered during

98. Guillory v. Arceneaux, 580 So. 2d 990 (La. App. 3d Cir. 1991); *see supra* text accompanying notes 81-86.

99. *Clomon*, 572 So. 2d at 579 (Watson, J., concurring).

> an accident in which she was involved and which was caused by defendant's negligence is compensable. *Since she was a participant in the accident she is entitled to recover because of her concern for her own well-being, not merely because of her concern for a third party as a witness to the accident. While she probably suffered no fear for her physical well-being, she likely suffered great fear of the consequences of having hit a child and severe guilt and remorse.* This emotional distress, conceded by all to be serious and disabling, was caused by the negligence of the defendant, and therefore plaintiff is entitled to recover for it.[100]

Civil Code article 2315.6 states, "Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article." According to Justice Hall, though, Sonya Clomon did not suffer mental anguish because of injury to another but because she was "involved in a traumatic accident as a result of the defendant's negligence."[101] Justice Hall's concurrence was cited in its entirety in *Guillory* with approval.[102]

Based on language used by the court in *Lejeune* and *Clomon* and on a comparison of the situations, it seems that bystander recovery is separate and distinct from a *Clomon* or *Guillory* type of situation. The *Clomon* and *Guillory* type of situation should (as should the introductory hypo) be analyzed under traditional theories that were developing before *Lejeune*. Alternatively, under Justice Hall's analysis, since the mental anguish is not for "injury to another," Article 2315.6 would be inapplicable for this reason alone.

B. Wording of Article 2315.6

The Louisiana Legislature in enacting Article 2315.6 seems to have adopted the *Lejeune* requirements virtually verbatim and simply added a concrete list of the close relationships required to recover.[103] The article allows recovery by certain persons "who view an event . . . or who come upon the scene of the event soon thereafter." That language is virtually identical to the first requirement of *Lejeune*,[104] and seems to be the very essence of bystander recovery. Thus, *if* you are a bystander (i.e., you view the event or come upon the scene soon thereafter), you must then meet all the requirements set forth in Article 2315.6 in order to recover. While it is true that one who is a participant in an accident, such as

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100. *Id.* (emphasis added) (Hall, J., concurring).
101. *Id.* (Hall, J., concurring).
102. *Guillory*, 580 So. 2d at 994-95.
103. *See supra* text accompanying note 13 and *supra* note 4.
104. *See supra* note 4.

our motorist in the hypo, generally views the accident, it seems the legislature used words, as stated above, normally associated with bystander recovery. For *Clomon* to be brought under Article 2315.6, without also including the rest of the jurisprudence relating to recovery for emotional distress, words such as "or is physically involved in the event causing injury to another person" should have been added to the first sentence.

The last sentence of Article 2315.6 states, "Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article." This sentence does not, however, bring all claims for emotional distress within the purview of this article. This sentence does, since the article deals with bystander recovery, bring *all bystander recovery* within the scope of the article. The reason for this sentence is because of certain language in *Clomon*. In *Clomon*, there was a violation of Louisiana Revised Statutes 32:80, which basically requires a school bus driver to turn on his warning lights when letting children off the bus.[105] The court found that the purpose of the statute included the protection of motorists from emotional distress which they may suffer should they hit a child because of the bus driver's violation of the statute.[106] From this language, one could logically infer that the court could find in other statutes a direct duty to protect *bystanders* from emotional distress arising from witnessing injury to another. To prevent this, the last sentence of Article 2315.6 was added.[107] Thus, bystander recovery is completely and inextricably self-contained within Article 2315.6, and the courts may not wander to other statutes to find a direct duty to allow recovery to bystanders who do not fit the requirements of Article 2315.6. This does not change the fact, however, that Article 2315.6 applies to bystander recovery only and not to recovery for emotional distress brought about in other ways.

C. *Policy Considerations*

The policy concerns behind the limitations set forth in *Lejeune* and Article 2315.6 do not exist in situations like those in *Clomon* and *Guillory*. There are several reasons why the courts and the legislature may want to limit the class of claimants who may recover for negligent infliction of emotional distress. First, allowing recovery may subject the defendant

105. *Clomon*, 572 So. 2d at 577.

106. *Id.* at 578.

107. *See* Louisiana State Senate Committee on Judiciary, Section A, Minutes of Meeting of May 21, 1991. Senator Bankston explains that this last sentence is the only significant change from SB 344 which was proposed in the 1990 regular session and this current bill, SB 547, which was adopted as Article 2315.6. Thus it appears that the legislature was fearful of the statutory interpretation used in *Clomon* and fearful that it might be used to alter the intent of Article 2315.6; therefore the legislature added the last sentence.

to a myriad of claims.[108] Second, allowing recovery in certain situations may open the "floodgates of litigation."[109] Finally, allowing recovery may result in many fraudulent and trivial claims being presented to the courts.[110]

A defendant who negligently caused some event to occur would be subject to a myriad of claims if anyone disturbed by the event could recover from him; that would surely be unreasonable.[111] Thus, the bystander recovery rule embodied in Article 2315.6 limits the bystanders who may recover to *close family members* who *view the accident* or *come upon the accident scene soon thereafter.*[112] However, preventing the defendant from being subjected to a myriad of claims is no reason to prevent a *Clomon* or *Guillory* type of plaintiff from recovering. In these situations, the defendant is subject to claims by only those people who are directly involved in the accident and to whom he breached a direct duty, just as if the claimants had been physically injured. There is no fear of the defendant being subjected to dozens of claims simply because there were many witnesses—a common concern in a bystander situation. The class of claimants is limited to the number of people directly involved in the injury causing event to whom the defendant breached a direct duty. Thus, the policy consideration of limiting the claims against a defendant is not a legitimate concern in a *Clomon* or *Guillory* situation.

The fear of opening the courts to a flood of litigation is another argument against allowing recovery for mental anguish for injury to another. It is somewhat a combination of the other two fears—a myriad of claims, and fraudulent and trivial claims. However, the job of the courts is to resolve disputes between parties. When parties have genuine claims that should be redressed, they should not be denied access to the courts merely because there may be many others with similar claims. In reality, would there be that many new lawsuits filed, or would there simply be a new issue to litigate in the lawsuits where previously only the physical injuries and its associated mental anguish had to be litigated? The fear of opening a "Pandora's Box of litigation" is a "cry [that] has been raised against every innovation in tort litigation. . . . To refuse to entertain valid claims because others might be fraudulently brought is an argument of expediency rather than of justice."[113] Expediency also

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108. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145, 155 (La. App. 1st Cir. 1961) (citing J.E. Macy, Annotation, Damages, 18 A.L.R. 2d, § 7, 239-40 (1951)); *see also* W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 54, at 361 (5th ed. 1984).

109. *Holland*, 135 So. 2d at 155. *See also* Keeton et al., *supra* note 108, § 12, at 56.

110. Brauninger v. Ducote, 381 So. 2d 1246, 1249 (La. App. 4th Cir. 1979) (Lemmon, J., concurring). *See also* Keeton et al., *supra* note 108, § 54, at 361.

111. Keeton et al., *supra* note 108, § 54, at 366.

112. *See supra* text accompanying note 13.

113. Ferdinand F. Stone, Tort Doctrine § 170, at 220 in 12 Louisiana Civil Law Treatise (1977).

should not be used to bar genuine claims that should be redressed simply because there may be many of them. Thus, the fear of a flood of new litigation is not a satisfactory excuse for denying claims of a whole class of plaintiffs such as our motorist.

The fear of fraudulent and trivial claims is of equal concern in both bystander recovery and traditional (*Clomon* and *Guillory* included) situations. However, this can be handled by "careful scrutiny of the evidence supporting the claim; and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law,"[114] such as with physical injury. The legislature has chosen to handle this policy concern for bystander recovery, as did the court in *Lejeune*, by requiring that the direct victim suffer such harm as to make it reasonable for the claimant to suffer serious emotional distress, and that the claimant's emotional distress be severe, debilitating, and foreseeable.[115] There is no reason why these same principles cannot be applied to ensure that a claimant directly involved in the accident and to whom the defendant breached a direct duty, such as our motorist, suffered genuine and serious emotional distress.

Since the policy goals of limiting the number of claimants and closing the floodgates of litigation, which are addressed by Article 2315.6, are not required in a *Clomon* or *Guillory* type of situation where traditional theories can be applied, the tighter restrictions of Louisiana Civil Code article 2315.6 should not apply to those situations.

D. A Continuum of Recovery

Imagine a continuum of mental anguish damages with the measuring sticks being ease of association and breach of duty. On the left of the continuum, recovery is allowed only for intentional infliction of emotional distress accompanied by physical harm which is aimed directly and only at the claimant. On the right, recovery is allowed for negligent infliction of emotional distress allowed to everyone who hears of a particular event.[116] Recovery under *Clomon* seems to have a greater ease of association and a more direct breach of duty than *Lejeune* and, thus, belongs to the left of *Lejeune* on this continuum.

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114. Keeton et al., *supra* note 108, § 12, at 56.

115. Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 570 (La. 1990); La. Civ. Code art. 2315.6.

116. The classic hypo: Can everyone who heard of John F. Kennedy being shot recover for their emotional distress? An affirmative answer places this at the right of the continuum.

Intentional infliction of emotional distress aimed directly at claimant	*Chappetta*	*Clomon & Guillory*	*Lejeune* & 2315.6	Everyone who hears of event can recover
<				<
<				<
<	<	<	<	<
<				<
<				<
<				<

In further support of this proposition, note that Justice Watson, while dissenting in *Lejeune*,[117] concurred in the result in *Clomon*, stating that "awarding damages to a person actually involved in an accident, no matter what the nature of the damages, is a much more precise and concrete application of Civil Code article 2315 than formulating and applying the necessarily arbitrary guidelines necessitated by the allowance of 'bystander recovery.'"[118]

Therefore, if Civil Code article 2315.6 is read to overrule *Clomon* and *Guillory*, the result would be: 1) a class of claimants on the left of this continuum could recover [*Chappetta*]; 2) a class in the middle [*Clomon* and *Guillory* type claimants] could not recover; and 3) a class of claimants in the more liberal theory of bystander recovery, as in *Lejeune*, on the right of the continuum could also recover. Such a result would be unreasonable. Therefore, the logical interpretation of Article 2315.6 is that it is merely a legislative approval of *Lejeune*, and *Clomon* and *Guillory* should not be overruled.

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117. *Lejeune*, 556 So. 2d at 571 (Watson, J., dissenting).

118. Clomon v. Monroe City Sch. Bd., 572 So. 2d 571, 579 (La. 1990) (Watson, J., concurring). It is interesting to note that Judge Stoker, the author of the *Guillory* opinion, was also the author of *Lejeune* at the appellate court level. Judge Stoker, in Lejeune v. Rayne Branch Hosp., 539 So. 2d 849 (La. App. 3d Cir. 1989), *aff'd*, 556 So. 2d 559 (1990), allowed recovery to Mrs. Lejeune for her mental anguish suffered as a result of injury to her husband. He based his decision on Articles 2315 and 2315.2, limiting the class of claimants to the same categories of persons as would have a cause of action for wrongful death. Thus, while advocating a "close relative" restriction for bystander recovery, Judge Stoker endorses Mrs. Guillory's cause of action despite the fact that she was not related to Mrs. Arceneaux and that there was no direct, special statutory duty as required by *Clomon*.

E. Conclusion of Application of Article 2315.6

Louisiana Civil Code article 2315 provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Louisiana Civil Code article 2316 reads: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." These articles are the "fountainhead of responsibility"[119] in Louisiana tort law. They are the basis for recovery of any damages, including emotional distress, caused by the negligence of another.[120]

Any limitation on recovery, or limitation as to who may recover, under Article 2315 should be read strictly so as to apply such limitations in no more limiting a way than that clearly intended by the legislature. Civil Code article 2315.6 certainly seems to be a legislative limitation of Articles 2315 and 2316, so it should be read in no more of a limiting fashion than that clearly intended by the legislature. As shown earlier,[121] it appears the legislature intended this article to be a bystander recovery statute, or at least it is unclear whether it intended the article to cover any other areas. Therefore, Louisiana Civil Code article 2315.6 must be interpreted to apply only to bystander recovery and to confine bystander recovery within the parameters of Article 2315.6.

IV. Effects

A. Bystander Recovery

In a bystander recovery situation under Article 2315.6, prior jurisprudence interpreting *Lejeune* will be controlling because the law has not changed other than by specifying which relatives may recover. This comment will now analyze the four requirements of *Lejeune* and Article 2315.6 which are: 1) that the claimant view the event or come upon the scene of the event soon thereafter; 2) that the claimant have a specified close relationship with the injured person; 3) that the injured person's harm be such that the claimant could have reasonably suffered serious mental anguish; and 4) that the emotional distress be severe, debilitating, and foreseeable.[122]

1. The Claimant Must View the Event

There are no cases interpreting *Lejeune* which deny recovery based on a failure to view the event or come upon the scene soon thereafter. However, in *Bernard v. State Department of Transportation & Devel-*

119. Langlois v. Allied Chem. Corp., 258 La. 1067, 1077, 249 So. 2d 133, 137 (1971).
120. Stewart v. Arkansas S. R.R., 112 La. 764, 36 So. 676 (1904).
121. *See supra* text accompanying notes 90-107.
122. *See supra* text accompanying note 13 and *see supra* note 4.

opment,[123] the court stated in dicta that the plaintiff did not meet the first (viewing) requirement of *Lejeune*. The plaintiff was informed of his son's auto accident two hours after it occurred. He then went to the hospital, where his son's condition had substantially changed. He did not go to the scene of the accident until 7:30 the next morning.[124] The reasoning of the court in saying the viewing requirement was not met seems to be correct.

In *Matthews v. Turner*,[125] the plaintiff was awarded $50,000 for her mental anguish suffered as a result of witnessing her daughter suffer over a forty-eight hour period and then die due to a physician's misdiagnosis.[126] The court relied on *Lejeune* but did not discuss whether or how the plaintiff met the four criteria.[127] This is unfortunate. It seems debatable whether the plaintiff actually viewed the event which caused the injury (the misdiagnosis of appendicitis). It could be said that the mother came upon the scene of the event soon thereafter, as she cared for her daughter immediately thereafter and over the next forty-eight hours prior to her death, but some discussion is clearly warranted before a court grants recovery in such a case.[128] This writer believes that recovery is warranted and will generally be granted in this situation, but the application of Article 2315.6 to a medical malpractice situation certainly would make for an interesting discussion.

In *Sam v. Rogers*,[129] the plaintiff, husband of a pregnant woman involved in a car accident, was awarded damages for his mental anguish suffered as a result of his worrying about the unborn fetus. This court also relied on *Lejeune* with no discussion and allowed the husband to recover despite the fact that he did not know of the event until he was told of it upon arriving home from work that evening.[130] This decision clearly seems to be unjustified under *Lejeune* as well as under Article 2315.6.[131]

The restriction requiring that a "bystander" view the event or come

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123. 563 So. 2d 282, 286 (La. App. 4th Cir. 1990).

124. *Id.* at 286-87.

125. 566 So. 2d 133 (La. App. 5th Cir. 1990).

126. *Id.* at 134.

127. *Id.* at 135.

128. See Price v. Louisiana Dept. of Transp. and Dev., 1992 WL 135054 (La. App. 4th Cir.) where the plaintiff came upon the scene soon after the injury causing event. After brief discussion on this issue, the court allowed recovery.

129. 559 So. 2d 1001 (La. App. 3d Cir. 1990).

130. *Id.* at 1004.

131. However, the court further justifies its decision based on Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. Orl. 1951), stating that not only the mother but also the father should be awarded damages for mental anguish over worry for an unborn fetus.

upon the scene soon thereafter precludes one who merely learns of the event from recovering for mental anguish.[132] Thus, the court in *Sam v. Rogers* erroneously applied *Lejeune*, while the court in *Bernard* correctly interpreted *Lejeune*'s "viewing" requirement.

2. *Close Relationship Requirement*

As to the close relationship requirement, there have been no cases under *Lejeune* which have ventured outside the class of claimants listed in Article 2315.6. Louisiana courts have held that grandchildren do fulfill the close relationship requirement,[133] while close friends, no matter how close, do not.[134] Thus it appears that the appellate courts have answered the question left "for another day"[135] in a fashion similar to the one chosen by the legislature.

3. *Claimant's Mental Anguish Must be Reasonable*

There have been two cases following *Lejeune* that deal with the requirement that the injured person suffer such a degree of harm that it is reasonable that the claimant suffer mental anguish. In *Frisard v. Eastover Bank for Savings*,[136] the court disallowed plaintiff's claim for emotional distress suffered as a result of the emotional distress suffered by his tenants. The court differentiated *Lejeune*, stating that *Lejeune* dealt with physical injuries of the third person and not emotional injuries.[137] However, this is not a valid distinction under *Lejeune*, nor would it now be a valid distinction under Article 2315.6. Clearly, the severity of the injury to the direct victim must be such that a bystander could reasonably be expected to suffer mental anguish for having viewed it. Therefore, it is the severity and not the type of harm that is controlling. Nevertheless, recovery will undoubtedly be denied in most cases where a bystander claims emotional distress based on emotional distress suffered by the direct victim.

Similarly, the fact that a close relative [father] suffered the *possibility* of injury does not give the son a cause of action to recover damages for his own mental anguish. In *Lotz v. Ochsner Foundation Hospital*,[138] an elderly patient wandered out of the hospital and into a busy thor-

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132. Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 570 n.11 (La. 1990).

133. Thomas v. Schwegmann Giant Supermarket, 561 So. 2d 992 (La. App. 4th Cir. 1990).

135. Keen v. Louisiana Farm Bureau Ins. Co., 583 So. 2d 835 (La. App. 1st Cir. 1991).

135. *Lejeune*, 556 So. 2d at 570.

136. 572 So. 2d 343 (La. App. 5th Cir. 1990).

137. *Id.* at 346.

138. 570 So. 2d 232 (La. App. 5th Cir. 1990).

oughfare. His son, who had just arrived at the hospital, saw his father in the thoroughfare. His father, though obviously in a perilous situation, was not injured whatsoever. The court, while recognizing that the plaintiff met three of the *Lejeune* requirements, specifically denied recovery because before recovery is allowed by the bystander, serious harm must come to the direct victim.[139]

These two cases seem to be in accord with Article 2315.6. Where the line will be drawn as to the degree of severity of the direct victim's injury is uncertain, but one thing is certain: the level of severity must be greater than that in *Frisard* and *Lotz*.

4. Severe, Debilitating, and Foreseeable Mental Anguish

The fourth *Lejeune* requirement is concerned with the severity of the plaintiff's emotional distress rather than the direct victim's injury. One case interpreting *Lejeune* that denied recovery because the emotional distress of the claimant was not serious enough is *Thomas v. Schweggmann Giant Supermarket, Inc.*.[140] There, the court denied recovery to small children who witnessed their grandmother being falsely detained for shoplifting. Three of the *Lejeune* requirements were met, but the children sought no medical attention whatsoever for their alleged emotional distress. Indeed, the only evidence of any distress on the children's part was that after the event, they began going into their parents' bedroom to sleep at night.[141] The court held that the emotional distress of the claimant children was not serious enough and denied recovery.

The court in *Lejeune* gave a *nonexhaustive* list of examples of severe and debilitating emotional distress: neuroses, psychoses, chronic depression, phobia, and shock.[142] It would seem any one of these or similar categories of emotional distress would qualify under Article 2315.6.[143]

B. Traditional Recovery

When a person, such as our motorist, suffers mental anguish in a *Clomon* or *Guillory* type of situation, there are three possible directions the courts may take. The courts may find that:

1) Article 2315.6 completely bars recovery to all except the enu-

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139. *Id.* at 233.

140. 561 So. 2d 992 (La. App. 4th Cir. 1990). *See also* Blair v. Tynes, 1992 WL 358374 (La. App. 1st Cir.). Other cases generally accept as true that plaintiff suffered serious emotional harm in determining whether plaintiff had a cause of action.

141. *Id.* at 997.

142. Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 570 (La. 1990).

143. See Price v. Louisiana Dept. of Trans. and Dev., 1992 WL 135054 (La. App. 4th Cir.) for a discussion of this requirement where the court allowed recovery.

merated close relatives;
2) Article 2315.6 is inapplicable because participant recovery is simply a traditional type of negligent infliction of emotional distress which Article 2315.6 was not meant to address; or
3) Article 2315.6 is inapplicable if one accepts Justice Hall's theory.[144]

If the first direction is taken, then this comment is moot, other than to show that such a direction is illogical. If the second direction is taken, traditional theories of recovery will apply. Thus, an independent, direct duty must have been owed by the defendant to the plaintiff, that duty must have been breached, and the mental anguish suffered must be genuine, reasonable, and foreseeable.

The second and third directions lead to essentially the same result. However, Justice Hall goes one step further than saying that a *Clomon* and *Guillory* type of situation is just a traditional case. He states that the mental anguish is not suffered "for injury to another" but rather is suffered due to the claimant having undergone a traumatic ordeal. While the reasoning may be slightly different, the effect is the same. Article 2315.6 would not apply; rather, the traditional theories of recovery for emotional distress would apply.

V. CONCLUSION

Mental anguish without accompanying physical harm has always been compensable, particularly when one undergoes a traumatic ordeal. Thus, the basis for our motorist, and anyone else in a similar situation, to recover has always existed in Louisiana jurisprudence. To read Article 2315.6 as allowing bystander recovery but overruling *Clomon* and *Guillory* would be an erroneous interpretation of the article. Article 2315.6 is basically a legislative approval of *Lejeune* and applies only to bystander recovery. It sets forth specific relationships between the direct victim and the bystander that are required before bystander recovery is allowed. In addition, the article requires that the bystander view the event or come upon the scene soon thereafter, that the direct victim suffer such harm that it is reasonable for the bystander to suffer serious mental anguish, and that the bystander's mental anguish be severe, debilitating, and foreseeable. Recent jurisprudence interpreting *Lejeune* should still be completely valid.

However, in a *Clomon* or *Guillory* type of situation where the defendant's negligence causes the plaintiff to be involved in the injuring of

144. Justice Hall's theory is that the claimant does not suffer mental anguish for injury to another but rather for being subjected to a traumatic ordeal. Clomon v. Monroe City Sch. Bd., 572 So. 2d 571, 579 (La. 1990) (Hall, J., concurring).

a third person and the plaintiff suffers mental anguish as a result, Article 2315.6 is inapplicable as it applies only to bystander recovery. These are not bystander situations, and thus traditional rules apply. A plaintiff must prove that the defendant owed him an independent, direct duty, that the defendant breached that duty, and that the plaintiff's mental anguish is genuine. The plaintiffs in *Clomon* and *Guillory* had a cause of action for the negligent infliction of emotional distress caused by the defendants' breach of duty. This breach of duty resulted in their involvement in an accident which injured a third person. Plaintiffs in similar situations today, such as our motorist, continue to have such a cause of action, and that cause of action has not been affected by the enactment of Louisiana Civil Code article 2315.6.

Cullen J. Dupuy