The Influence of Reasonableness in Determining Delictual or Tort Liability for Emotional Distress or Mental Harm in American and French Law

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Abstract

American and French law, like South African law, recognises claims for emotional or mental harm. Emotional, mental or psychological harm was recognised by the courts only in the nineteenth century and even though the mind and body in a sense are considered as a unit, these types of claims are not on a par with claims for physical bodily injury. Finding delictual or tort liability for emotional, mental or psychological harm has been problematic not only in South Africa but also in the United States of America and France. Even though there are fundamental differences in the law between these jurisdictions, the broader questions the courts face is whether a claimant is entitled to claim, the amount of damages that should be awarded and how to limit liability with this type of claim. Limiting liability for emotional or mental harm is generally the main concern but the courts have found ways of using the elements of a delict or tort, or concepts such as reasonable foreseeability of harm to limit the claims. American, French and South African law recognise claims for emotional, mental or psychological harm sustained by primary and secondary victims. Thus emotional, mental or psychological harm caused directly or indirectly is compensable. In American and French law the concept of reasonableness plays an important role, whether it be implicit or explicit, in determining delictual or tort liability for the emotional or mental harm sustained. In a sense, reasonableness also plays an overarching role in determining liability. The influence of reasonableness in determining delictual or tort liability for psychiatric or psychological harm in English and South African law will be discussed in a forthcoming contribution. In this contribution the focus is on the influence of reasonableness in determining delictual or tort liability for emotional or mental harm in American and French law.

Keywords

American law; delict; emotional distress or harm; French law; intentionally inflicted emotional distress; mental harm; negligently inflicted emotional distress; reasonableness; tort.

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1 Introduction

Emotional or mental harm was recognised by the courts only in the nineteenth century[1] and claims for this type of harm are generally not on a par with claims for physical bodily injury.[2] Delictual or tort liability for emotional, mental or psychological harm has been fraught with difficulty not only in South Africa but also in the United States of America and France.[3] It should be noted that South African and French law follow a generalising approach in determining a delict (in that generally a delict is present once all the requirements for a delict are present) instead of the approach followed in American law, where there are a number of specific torts such as the tort of negligence and numerous other torts which include the intentional torts, each with its own requirements. Furthermore, the French law of delict is regulated by the *French Civil Code* and does not follow the precedent system like South Africa and the United States of America.[4] Even though there are fundamental differences in the law between these jurisdictions, the broad common questions they face is whether a claimant is entitled to claim, the amount of damages that should be awarded and how to limit liability with this type of claim.[5] The concept of reasonableness plays an important role here, not only with particular elements of tort or delictual liability, whether implicit or explicit, but it has in a sense an overarching role in determining the liability. In a forthcoming contribution the influence of reasonableness in determining delictual or tort liability for psychological or psychiatric harm in South African and English law will be discussed.[6] Due to a lack of authority on how to deal with claims for psychological or psychiatric harm, South African law followed English law, where the emphasis was placed on the reasonable foreseeability of harm and a

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1 See for example, the English case of *Victorian Railway Commissioners v Coultas* 1888 13 App Cas 222; and the American case of *Mitchell v Rochester Railway Co* 45 NE 354 (NY 1896).

2 Deakin and Adams *Markesinis and Deakin's Tort Law* 107-108.

3 The word "delict" is used In South African and French law, and the word "tort" is used in American law. These two terms are used synonymously in this contribution.

4 See an explanation by Ahmed 2019 *PELJ* 5-6.

5 In this contribution the method or quantification of damages for psychological, emotional or mental harm will not be discussed.

6 Ahmed 2023 *PELJ* (under review).

distinction was made between the primary and secondary victims of psychological or psychiatric harm.[7] Following on in this contribution, the influence of reasonableness in determining delictual or tort liability for emotional distress or mental harm in American and French law will be explored.[8]

In American law, the broad term "emotional distress" covers intangible harms such as emotional harm, distress, anxiety, diminished enjoyment, loss of autonomy, pain and other similar intangible harms.[9] Emotional harm and similar terms are not defined in any French statutes or case law.[10] Emotional harm and similar intangible harms would generally fall under the broad category of "moral damage" (*dommage moral*) and the French courts, in principle, would allow compensation for this type of damage.[11] In this contribution "emotional distress or harm", "mental harm" and "psychological harm" will be used interchangeably as they refer to the same type of harm but are really just the different phrases used in the different jurisdictions.[12]

The influence of reasonableness in determining tort liability for emotional distress or harm in American law will be discussed in this contribution to begin with. This will be followed by a discussion of the influence of reasonableness on claims for mental harm in French law. The influence of reasonableness is prevalent, whether implicit or explicit, on the elements of tort or delictual liability. Furthermore, it is used as an overarching judicial tool in determining delictual or tort liability. The conclusion to this contribution will then briefly highlight the differences and similarities found between these jurisdictions and South African law in respect of the role of reasonableness in determining delictual or tort liability where psychological, emotional distress or mental harm has been sustained.

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7 Due to the limits set on the length of the contribution, the general elements of delictual or tort liability will not be discussed in detail in this contribution but will be referred to in a peripheral manner in explaining tort or delictual liability for emotional or mental harm sustained.

8 These jurisdictions were chosen because they represent two major legal systems of the world, the common and civil law tradition. Even though American law is based on English common law, it developed a unique style. For example, in American law interests and rights are protected by a constitution, and American juries, which represent a section of society, are used in adjudicating cases. The unique style of American law will not be elaborated on in this contribution due to length constraints. French law, on the other hand, represents the civil law tradition (see Ahmed 2019 *PELJ* 3).

9 Dobbs, Hayden and Bublick *Hornbook on Torts* 699.

10 Sage 1996 *VUWLR* 10.

11 Sage 1996 *VUWLR* 4.

12 In American, French, and South African law respectively.

2 American law: emotional distress

Recovering damages for emotional distress in American law is not problematic when it is claimed with other damages under a tort such as assault, battery or physical injury from negligent conduct. So-called parasitic damages are awarded in these instances.[13] Stand-alone emotional distress as a separate tort itself, whether the emotional harm was caused negligently or intentionally, is subject to specific limitations, however.[14] The reasons for being cautious in awarding damages for a stand-alone emotional distress[15] action include: the anticipated flood of litigation; the difficulty of proving and quantifying damages for such harm, which impacts negatively on consistency in awards and the dispensing of justice; the subjectivity of how much emotional distress a person sustains;[16] and the fact that an award for emotional harm may not result in a person no longer suffering such harm.[17] It is possible, however, to claim damages for emotional distress under one tort such as battery as well as stand-alone emotional distress as a separate tort.[18]

2.1 Intentionally inflicted emotional distress

The *Restatement (Third) of Torts*[19] recognises liability for severe emotional distress caused intentionally[20] or recklessly.[21] The requirements for liability are: the defendant must have acted either intentionally or recklessly;[22] the conduct must have been outrageous or extreme; and the conduct must have been the cause of the claimant's severe emotional distress. Further

13 Dobbs, Hayden and Bublick *Hornbook on Torts* 699-700.

14 Dobbs, Hayden and Bublick *Hornbook on Torts* 700.

15 See American Law Institute *Restatement (Third) of Torts* ch 8 scope note 2 (Tentative Draft No 5 2007); Geistfeld 2011 *Yale L J* 155.

16 See Dobbs, Hayden and Bublick *Hornbook on Torts* 701-702.

17 See *Thing v La Chusa* 771 P 2d 814 (Cal 1989) 828-829; Dobbs, Hayden and Bublick *Hornbook on Torts* 700-703 and in particular the authority cited in fns 7-10.

18 See for example, *KM v Ala Dep't of Youth Servs* 360 F Supp 2d 1253 (MD Ala 2005); Dobbs, Hayden and Bublick *Hornbook on Torts* 705.

19 American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 46 (2012). The *Restatement of Torts* is a successive body of volumes of work produced by the American Law Institute. It combines black letter law which, although not binding, is applied throughout the different states in the United States of America. They are useful in that they summarise case law, restate existing common law, and provide a direction on what the rule of law should be to the legal community.

20 That is, acting with a purpose. See Prosser 1939 *Mich L Rev* 874; Givelber 1982 *Colum L Rev* 42, 46-49.

21 See *Russell v Salve Regina College* 649 F Supp 391 (DR 1 1986) 401.

22 Reckless conduct differs from intentional conduct (where one is acting with a purpose) in that reckless conduct involves some risk-taking (see Dobbs, Hayden and Bublick *Hornbook on Torts* 706-707).

requirements include: proof of severe emotional harm suffered (not trivial harm);[23] "extreme" or "outrageous" conduct on the part of the defendant, which has passed the limit of reasonable bounds of decency and is "intolerable" in a civilised community;[24] intention to cause such harm,[25] where proof that the harm is certain to occur is sufficient,[26] or "recklessness", or a "wilful attitude".[27] In reference to extreme or outrageous conduct, courts seem to refer to conduct which is clearly beyond human decency and social norms.[28] The notion of "outrageousness" requires the adjudicator to evaluate the complaints, evidence and conduct, and estimate whether the community would consider such conduct as outrageous.[29] For example, conduct which results in the defendant's abusing his position or power;[30] taking advantage of or emotionally harming a plaintiff who is

23 In *Braski v Ah-Ne-Pee Dimensional Hardwood Inc* 630 F Supp 862 (WD Wis 1986) 866 the court denied recovery for emotional distress to a plaintiff who had not visited a medical practitioner after the incident stemming from the termination of her employment, and had only seen a psychiatrist before the trial. The psychiatrist noted temporary and limited distress for seven months. The court held that the employer's conduct was not outrageous and that her claim was frivolous. Also see *Eckenrode v Life of America Insurance Co* (7th Cir 1972) 470 F 2d 1; *Fletcher v Western National Insurance Co* 1970 10 Cal App 3d 376, 89 Cal Rptr 78; Magruder 1936 *Harv L Rev* 1033, 1035.

24 See for example, *Boswell v Barnum & Bailey* 1916 135 Tenn 35, 185 SW 692, where the insult and abuse was considered outrageous; *Interstate Amusement Co v Martin* 1913 8 Ala App 481, 62 So 404, where the plaintiff was called on stage and humiliated.

25 Intention can be shown either by evidence that the harm was certain to occur or that the defendant acted with a purpose or desire to accomplish the harm (Dobbs, Hayden and Bublick *Hornbook on Torts* 707).

26 See *Chamberlain v Chandler CC* Mass 1823 3 Mason 242, 5 Fed Cas No 2, 575; Prosser 1939 *Mich L Rev* 874; Vold 1939 *Neb LB* 222; Borda 1939 *Geo LJ* 55; Seitz 1940 *Ky LJ* 411; Smith 1957 *Drake L Rev* 53.

27 An action done wilfully is one done deliberately and with intention. See *Blakely v Shortfal's Estate* 1945 236 Iowa 787, 20 NW 2d 28; American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 46 cmt h; Dobbs, Hayden and Bublick *Hornbook on Torts* 707.

28 See examples of the following authority with regard to conduct that is considered beyond human decency and social norms: *Mahnke v Moore* 1951, 197 Md 61, 77 A 2d 923; *McCulloh v Drake* 24 P 3d 1162 (Wyo 2001) 1169-1170; *White v Brommer* 747 F Supp 2d 447 (ED Pa 2010); *Valadez v Emmis Commc'ns* 229 P 3d 389 (Kan 2010); Rabin 2009 *Wake Forest L Rev* 1197; Dobbs, Hayden and Bublick *Hornbook on Torts* 707.

29 See Dobbs, Hayden and Bublick *Hornbook on Torts* 707-708.

30 See for example, *District of Columbia v Tulin* 994 A 2d 788 (DC 2010), where a police officer was a cause of an accident but instead allowed another motorist to be falsely arrested for reckless driving; *Brandon v Cnty of Richardson* 261 Neb 636, 624 NW 2d 604 (2001), where a sheriff interrogated a transsexual victim of rape in a cruel manner soon after the rape occurred; *Grager v Schudar* 770 NW 2d 692 (ND 2009), where a jailer had intercourse with a prisoner; Dobbs, Hayden and Bublick *Hornbook on Torts* 708 fn 54.

vulnerable;[31] continuing or repeating unacceptable conduct;[32] threats or acts of violence to the plaintiff, his person or his property[33] where the plaintiff has a special relationship with the person or special interest in the property;[34] and sexual harassment in the place of employment - all of these may be deemed as outrageous conduct.[35] The emotional distress endured by the plaintiff must be severe in that either a reasonable person would not be expected to tolerate it[36] or the plaintiff may show that he or she endured severe emotional distress.[37] Hurt feelings,[38] mere profanity or abuse, obscenity and threats that are considered as annoyances will not lead to compensation for mental harm.[39] Fright, shock, rage, anxiety and grief are considered as "physical" injuries.[40] This is in line with South African and English law, where the brain and nervous system are considered just as much a part of the body as a limb.[41] In general, if a reasonable person would not suffer serious emotional distress, then the plaintiff will not be successful in an action for emotional distress.[42] However, if a plaintiff has an inherent

31 See for example *Doe v Corporation of President of Church of Jesus Christ of Latter-Day Saints* 141 Wash App 407, 167 P 3d 1193 (2007), where a bishop told a teenager who had been sexually abused that if she reported the abuse she would be blamed for the break-up of her family (Dobbs, Hayden and Bublick *Hornbook on Torts* 708 fn 55).

32 See for example *Gleason v Smolinski* 88 A 3d 589 (Conn 2014), where the defendants continued hanging posters close to the plaintiff's house purely to intimidate her; *Contreras v Crown Zellerbach Corp* 88 Was 2d 735, 565 P 2d 1173 (1977) (harassment at place of employment); other cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 708 fn 56.

33 See *Plotnik v Meihaus* 208 Cal App 4th 1590, 146 Cal Rptr 3d 585 (2012), where threats were made to harm the homeowner's dog and wife; Dobbs, Hayden and Bublick *Hornbook on Torts* 709.

34 See for example, *Nims v Harrison* 768 So 2d 1198 (Fla Dist Ct App 2000), where the plaintiff was threatened with harm to her children; cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 709 fns 59-61.

35 See *Shaffer v National Can Corp* 565 F Supp 909 (ED Pa 1983) 915; Dobbs, Hayden and Bublick *Hornbook on Torts* 708-709.

36 See *McQuay v Guntharp* 331 Ark 466, 963 SW 2d 583 (1998); Dobbs, Hayden and Bublick *Hornbook on Torts* 710.

37 See *State Farm Mut Auto Ins Co v Campbell* 538 US 408, 123 S Ct 1513, 155 L Ed 2d 585 (2003); Dobbs, Hayden and Bublick *Hornbook on Torts* 710-711.

38 See *Wallace v Shoreham Hotel Corp App DC* 1946 49 A 2d 81.

39 See for example, *Taft v Taft* 1867 40 Vt 229; *Johnson v General Motors Acceptance Corp* 5th Cir 1955, 228 F 2d 104; *Slocum v Food Fair Stores of Florida Inc Fla* 1958 100 So 2d 396.

40 Goodrich 1922 *Mich L Rev* 497.

41 See *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 777, 779 with regard to South African law and *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 492.

42 See for example *Williamson v Bennett* 251 NC 498, 112 SE 2d 48 (1960), where the plaintiff went into an extremely emotional state imagining that she had struck down a child. She was not entitled to compensation for emotional harm as the reasonable person would not have suffered such emotional harm; cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 732 fn 257.

infirmity or pre-existing condition which results in the plaintiff's sustaining more harm than a normal person without a pre-existing condition, then the thin-skull rule applies, whereby the plaintiff is in principle entitled to full compensation for the emotional distress suffered.[43]

Secondary victims of intentionally inflicted emotional distress may have an action for the intentionally inflicted emotional distress sustained.[44] However, the *Restatement (Third) of Torts*[45] limits recovery for emotional distress generally to close family members (who contemporaneously perceive the defendant's harmful conduct)[46] and where the defendant acts with a purpose, or substantial certainty, or is reckless in harming the secondary victim. For example, where a child witnesses the battery of the mother, the mother (as the primary victim) and the child (as the secondary victim) may have an action for emotional distress. The defendant who inflicts harm on the mother knowing the child is present is consequently aware that both will suffer emotional distress.[47] A large group of persons such as secondary victims who witness a disturbing event will generally not be entitled to claim for emotional distress (transferred intent) as liability may be unlimited.[48] Claims by secondary victims have been limited by requiring that the emotional distress must have been reasonably foreseen or anticipated.[49]

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43 See for example, *Brackett v Peters* 11 F 3d 78 (7th Cir 1993); *Steinhauser v Hertz Corp* 421 F 2d 1169 (2nd Cir 1970); cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 732 fn 256.

44 The secondary victim is the third person, one who witnesses or hears of a disturbing event. In such cases, the defendant acts tortiously to X but actually harms Y (the third person or secondary victim). The harm to Y (emotional distress) is caused indirectly. X and Y may both have an action against the defendant for the intentional infliction of emotional distress. For example, in an instance where the defendant has a purpose to cause emotional distress to X by falsely reporting the death of a family member, the defendant will not avoid liability just because he inadvertently made the false report to X's brother (a third person) instead of X. American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 46 (2012) allows the third person to recover for the severe distress he or she sustained as a result of the defendant's conduct that was directed at X, but limitations are imposed (Dobbs, Hayden and Bublick *Hornbook on Torts* 711).

45 American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 46 cmt m (2012).

46 See, however, *Hill v Kimball* 1890 76 Tex 210, 13 SW 59; *Rogers v Williard* 1920 144 Ark 587, 223 SW 15, where the family members were not immediate family members.

47 See *Courtney v Courtney* 413 SE 2d 418 (W Va 1991) 424; *Bevan v Fix* 42 P 3d 1013 (Wyo 2002) 1022-1024; Dobbs, Hayden and Bublick *Hornbook on Torts* 712.

48 American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 46 cmt i (2012); Dobbs, Hayden and Bublick *Hornbook on Torts* 712.

49 The defendant knew or should have known that emotional distress was likely to result from his or her conduct; a reasonable jury could conclude that the emotional distress

Physical contact or injury[50] in an action for emotional distress is no longer a requirement.[51] Evidence of any serious medically recognisable harm, manifesting the emotional shock or fright sustained from a sudden event or threat of harm, is generally required.[52] The emotional distress must in general result in an illness or injury to the mind, injury to personality, or injury to the nervous system.[53]

2.2 Negligently inflicted emotional distress

The general requirements for the negligent infliction of emotional distress are: the defendant owes the plaintiff a duty; the defendant must reasonably foresee that his or her actions would cause emotional distress; the defendant breached that duty (was negligent); and the plaintiff suffered severe emotional distress as a result of the defendant's negligence.[54] In terms of negligently inflicted emotional distress or harm, claims have succeeded in various instances; for example, negligently informing a person that someone has died when in fact they had not and where it is likely to result in serious mental harm;[55] or negligently mishandling of corpses resulting in mental harm.[56] Emotional distress may result from: sudden shock or fright;[57] physical harm or the threat thereof;[58] fear of future harm from toxic exposure; receiving incorrect information, for example that a person has a severe condition;[59] or that a person who is in fact alive has

was likely to result from the conduct; see for example *Goddard v Watters* 1914 14 Ga App 722, 82 SE 304.

50 In *Mitchell v Rochester Railway Co* 45 NE 354 (NY 1896) the plaintiff had sustained a miscarriage and suffered shock when the defendant's horses came close to contact with her. There was no physical contact and the court denied compensation for shock alone. In *Battalla v State* 176 NE 2d 729 (NY 1961) the requirement of physical contact was abandoned.

51 Dobbs, Hayden and Bublick *Hornbook on Torts* 715.

52 See *Armstrong v Paoli Mem'l Hosp* 430 Pa Super 36, 633 A 2d 605 (1993), where the plaintiff lost control of his bowels and bladder after sustaining shock. This evidence was considered sufficient. Also see Dobbs, Hayden and Bublick *Hornbook on Torts* 722.

53 See for example *Paz v Brush Engineered Materials Inc* 949 So 2d 1 (Miss 2007); cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 722 fn 191.

54 See in general Dobbs, Hayden and Bublick *Hornbook on Torts* 713-732.

55 See *Russ v W Union Tel Co* 222 NC 504, 23 SE 2d 681 (1943), where the company negligently transmitted a message that a person had died; *Johnston v State of New York* 1975 37 NY 2d 378, 372 NYS 2d 638, 334 NE 2d 590, where a hospital negligently misinformed the plaintiff that her mother had died.

56 See *Chisum v Behrens* SD 1979 283 NW 2d 235; *Chelini v Nieri* 1948 32 Cal 2d 480, 196 P 2d 915 (negligent embalming); *Torres v State* 1962 34 Misc 2d 488, 288 NYS 2d 1005 dealing with unauthorised burial and autopsy.

57 *Sundquist v Madison Ry* 221 NW 2d 63 (Wisc 1960).

58 *Orlo v Connecticut Co* 21 A 2d 402 (Conn 1941).

59 See *Moolien v Kaiser Foundation Hospitals* 616 P 3d 813 (Cal 1980) 816-817, where a woman was told she had syphilis, which was infectious, and that she should inform

died;[60] and where the "defendant is under a duty of care for the plaintiff's well-being".[61] In instances where a plaintiff is exposed to something harmful such as asbestos or excessive x-rays and then develops emotional distress from the fear of future harm such as cancer, the plaintiff may be entitled to damages for the emotional distress sustained.[62] The emotional distress sustained usually forms part of other damages claimed stemming from the injury, referred to as "parasitic damages", but the courts have awarded compensation for stand-alone emotional harm where there is a fear of future harm. In terms of a negligence-based claim, it must be established whether the defendant breached a duty of care owed to the plaintiff in causing emotional distress which is not too remote. An example in which a plaintiff may recover for stand-alone emotional distress is where a medical practitioner negligently fails to detect a condition due to a negligent reading of test results, but later finds out that the plaintiff requires treatment. The delay results in the likelihood of future cancer and the plaintiff subsequently suffers emotional distress.[63] There must, however, be a reasonable fear of future harm in that an ordinary person in society would have a similar fear. The plaintiff may prove the reasonable fear by providing evidence, for example, that he was exposed to a virus (such as AIDS) or injected with a possibly contaminated needle.[64]

Negligently inflicted emotional distress may be sustained directly by the plaintiff (the "primary victim") or indirectly by a third person (the "secondary victim"). Cases involving emotional harm arising from the risk of harm to

her husband. This caused distrust between the couple leading to the breakdown of the marriage. The court allowed the husband's claim for emotional distress, stating that it was reasonably foreseeable and predictable that a wrong diagnosis would result in marital discord and emotional distress (820).

60 See *Russ v W Union Tel Co* 222 NC 504, 23 SE 2d 681 (1943); Dobbs, Hayden and Bublick *Hornbook on Torts* 726.

61 For example, where a medical practitioner's negligent conduct results in the loss of a foetus. The mother may claim for the emotional harm sustained as there is a doctor-patient relationship; see *Broadnax v Gonzalez* 2 NY 3d 148, 809 NE 2d 645, 777 NYS 2d 416 (2004); *Toney v Chester Cnty Hosp* 36 A 3d 83 (Pa 2011). Also see Dobbs, Hayden and Bublick *Hornbook on Torts* 728-731; American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 47(b) (2012). This is not a closed list.

62 See, for example, *Ferrara v Galluchio* 5 NY 2d 16, 152 NE 2d 249, 176 NYS 2d 996 (1958); *CSX Transp Inc v Hensley* 556 US 838, 129 S Ct 2139, 173 L Ed 2d 1184 (2009); *Norfolk & Western Railway Co v Ayers* 538 US 135, 123 S Ct 1210, 155 L Ed 2d 261 (2003); cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 725 fns 208-211.

63 See *Gilliam v Roche Biomedical Labs Inc* 989 F 2d 278 (8th Cir 1993).

64 See *Faya v Almaraz* 329 Md 435, 620 A 2d 327 (1993); *Madrid v Lincoln Cnty Med Ctr* 923 P 2d 1134 (NM 1996); cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 723 fns 214-220.

others are often referred to as bystander cases, where the third person is a plaintiff in his own right and the emotional harm usually results from witnessing or hearing of a disturbing event.[65] Limitations do apply to claims for primary and secondary emotional distress sustained, however. In the case of primary victims, they must have been in a position of "immediate danger of bodily harm",[66] or the harm must occur "within the confines of particular undertakings or special relationships".[67] The plaintiff must have suffered severe emotional stress, which may be proven by providing medical evidence or evidence relating to the physical manifestation of the emotional stress.[68] Generally, only serious emotional harm that a "normally constituted person would suffer" or that a reasonable person would foresee is compensable.[69] Where the defendant negligently causes emotional distress or harm which was foreseeable, the defendant will be held liable.[70] Dobbs, Hayden and Bublick,[71] however, state that it is "fair to say that these rules are not about foreseeability but about pragmatic limits on liability, which are endemic to this area".

In respect of secondary victims, usually only close family members are entitled to claim where they also "contemporaneously perceived the harm-causing event".[72] For example, a mother may fear for her son's life if she witnesses a speeding motor vehicle veering towards her son or she might suffer shock if she sees the motor vehicle strike her son or hear of or discover her son's body afterwards (aftermath or hearsay cases). Where emotional distress results from negligent harm or a threat to property,

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65 See Dobbs, Hayden and Bublick *Hornbook on Torts* 714. *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §§ 47-48 (2012).

66 American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 47 cmt a (2012).

67 Dobbs, Hayden and Bublick *Hornbook onTorts* 714. See *Hedgepeth v Whitman Walker Clinic* 22 A 3d 789 (DC 2011); American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 47 (2012).

68 See *Feller v First Interstate Bancsystem Inc* 299 P 3d 338 (Mont 2013); *Camper v Minor* 915 SW 2d 437 (Tenn 1996); other cases referred to Dobbs, Hayden and Bublick *Hornbook on Torts* 714 fn 112.

69 See *Perodeau v City of Hartford* 259 Conn 729, 754, 792 A 2d 752, 767 (2002); Dobbs, Hayden and Bublick *Hornbook on Torts* 714.

70 American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* §§ 47-48 (2012); Dobbs, Hayden and Bublick *Hornbook on Torts* 713 fn 101. Most states award compensation for stand-alone emotional harm sustained, but a small number of states do not. See *Dowty v Riggs* 385 SW 3d 117 (Ark 2010).

71 Dobbs, Hayden and Bublick *Hornbook on Torts* 714.

72 Dobbs, Hayden and Bublick *Hornbook on Torts* 714. See American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 48 (2012).

including one's pet, the courts will not award compensation.[73] Claims for negligently inflicted secondary emotional harm are more likely to succeed where the victim was a bystander who witnesses injury or threat of harm to a close relative;[74] was in the zone of danger where the victim fears for his own safety;[75] or where the emotional harm was foreseeable.[76] Emotional harm will generally be deemed foreseeable if the victim was closely related to the primary victim,[77] physically close to the scene where the primary victim was injured, or aware of the injury or threat of harm to the primary victim.[78] In respect of the reasonable foreseeability of harm, the secondary victim need not witness the initial injury of the primary victim but should see the primary victim soon after the incident, before his or her condition changes significantly.[79] A close relationship between the primary and secondary victim is required and it may be interpreted by courts restrictively to exclude non-family members such as a fiancé,[80] or family members not deemed close enough (such as a son-in-law[81] or an aunt who raised a

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73 See *McDougall v Lamm* 211 NJ 203, 48 A 3d 312 (2012); Dobbs, Hayden and Bublick *Hornbook on Torts* 714.

74 See Consolidated Rail Corp v Gottshall 512 US 532, 546-47, 114 S Ct 2396, 129 L Ed 2d 427 (1994); *Thing v La Chusa* 771 P 2d 814 (1989); cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 718 fns 151-153.

75 See *Stadler v Cross Minn* 1980 295 NW 2d 552; Corso v Merrill 119 NH 647, 650, 406 A 2d 300 (1979); Jelley v Laflame 108 NH 471, 238 A 2d 728 (1968); Cote v Litawa 96 NH 174, 71 A 2d 792 (1950); *Keck v Jackson* 122 Ariz 114, 593 P 2d 668 (1979); *Bovsun v Sanperi* 61 NY 2d 219, 461 NE 2d 843, 473 NYS 2d 357 (1984); Dobbs, Hayden and Bublick *Hornbook on Torts* 715.

76 This test was enunciated in *Dillon v Legg* 68 Cal 2d 728, 69 Cal Rptr 72, 441 P 2d 912 (1968), where a mother witnessed her child being run over and killed, even though she was safe from harm. Also see *Catron v Lewis* 271 Neb 416, 712 NW 2d 245 (2006); American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* §§ 47-48 (2012); cases cited by Dobbs, Hayden and Bublick *Hornbook on Torts* 715 fn 125.

77 Parents and siblings are most likely to be successful in their claims. See for example, *Carter v Williams* 792 A2d 1093 (Me 2002) 1099, where a five-year-old child witnessed her sister being fatally injured. Courts are reluctant to award compensation for emotional harm sustained by fiancés; see for example, *Smith v Toney* 862 NE 2d 656 (Ind 2007). However, a step-grandmother (as a secondary victim) was entitled to compensation; see *Leong v Takasaki* 520 P 2d 758 (Haw 1974) 766.

78 This is similar to the proximity rules followed in English law. See Ahmed and Steynberg 2015 *THRHR* 195ff.

79 See for example *Gabaldon v Jay-Bi Property Mgmt Inc* 925 P 2d 510 (NM 1996); other cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 716 fns 130-131. In *Cohen v McDonnell Douglas Corp* 450 NE 2D 589 (Mass 1983) 589 the mother in Massachusetts heard about the death of her son seven hours after he died in a plane crash in Chicago. Upon hearing the news the mother suffered angina attacks and died of a heart attack two days later. The court denied recovery.

80 See for example, *Zimmerman v Dane Cnty* 329 Wis 2d 270, 789 NW 2d 754 (Ct App 2010); Dobbs, Hayden and Bublick *Hornbook on Torts* 717.

81 See *Moon v Guardian Postacute Servs Inc* 95 Cal App 4th 1005, 116 Cal Rptr 2d 218, 98 ALR 5th 767 (2002); Dobbs, Hayden and Bublick *Hornbook on Torts* 717.

child).[82] On the other hand, a close enough relationship may be interpreted widely, not limiting the relationship to blood or marriage, to include a partner,[83] fiancé[84] and even distant relatives, depending on how close the relationship is.[85] In determining whether there is a close relationship between the primary and secondary victim, the following factors may be considered:

> (1) the duration of the relationship; (2) the degree of mutual dependence; (3) the extent of common contributions to a life together; (4) the extent and quality of shared experience; (5) whether the plaintiff and the injured person were members of the same household; (6) their emotional reliance upon each other; (7) the particulars of their day-to-day relationship; and (8) the manner in which they related to each other in attending to life's mundane requirements, the nature, duration, and quality of experiences shared in the relationship are considered.[86]

2.3 Summary

The influence of reasonableness on claims for emotional harm or distress in American law is predominantly explicit. Emotional harm or distress may be caused negligently or intentionally. With both intentionally and negligently inflicted emotional harm, there must be proof of the serious emotional distress suffered[87] as it would be unreasonable to hold the defendant liable for trivial harm suffered, such as threats deemed mere annoyances. In respect of intentionally inflicted emotional distress, in gauging whether the emotional distress endured by the plaintiff is severe, the standard of the reasonable person is applied in that a reasonable person should not be expected to tolerate such emotional harm or stress,[88] or alternatively proof of severe emotional harm or distress endured by the plaintiff may be provided.[89] The defendant's conduct must be "extreme" or "outrageous" in respect of intentionally inflicted emotional harm, and here the community's views are important in gauging whether the defendant's conduct is reasonable. Conduct is unreasonable if it is beyond human decency and is not acceptable by the community.[90] In respect of primary

82 *Trombetta v Conkling* 82 NY 2d 549, 626 NE 2d 653, 605 NE 2d 653, 605 NYS 2d 678 (1993); Dobbs, Hayden and Bublick *Hornbook on Torts* 717.

83 See *California Civil Code* § 1714.01; Dobbs, Hayden and Bublick *Hornbook on Torts* 717.

84 See for example *Graves v Estabrook* 818 A 2d 1255 (NH 2003); cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 717 fn 144.

85 See *Eskin v Bartee* 262 SW 3d 727 (Tenn 2008); Dobbs, Hayden and Bublick *Hornbook on Torts* 717.

86 *St Onge v MacDonald* 154 NH 768, 917 A 2d 233 (2007) 236.

87 Dobbs, Hayden and Bublick *Hornbook on Torts* 710.

88 Dobbs, Hayden and Bublick *Hornbook on Torts* 710.

89 Dobbs, Hayden and Bublick *Hornbook on Torts* 710-711.

90 Dobbs, Hayden and Bublick *Hornbook on Torts* 707.

victims, the harm must be reasonably foreseeable in that the plaintiff must have been in a position of immediate danger of harm,[91] or within the scope of an undertaking or special relationship.[92] Claims for secondary emotional harm or distress are also limited to what is reasonably foreseeable. The harm will be considered reasonably foreseeable if the secondary victim was a bystander witnessing the injury or threat of harm to a close relative,[93] or within the zone of danger, fearing for his or her own safety, or where the harm is anticipated.[94] Where a person fears future harm and sustained emotional harm or distress as a result of such fear, there must be a reasonable fear of future harm. The reasonable person must have a similar fear under similar circumstances.[95] In terms of closeness, with regard to the relationship between the primary and secondary victim, the courts are at liberty to decide on and make use of a number of factors.[96] It is apparent that the standard of the reasonable person is applied in determining both intentional and negligent inflicted emotional harm, and the reasonable foreseeability of harm is used to limit claims and liability.

3 French law: mental harm

In French law, in principle, a person may be held liable "when inflicting harm or injury, either deliberately or negligently".[97] All kinds of mental harm are in principle compensable and the mental harm need not result in some form of recognised medical psychological or psychiatric harm.[98] As a starting point, the mental harm must result in some damage in terms of articles 1240 and 1241 of the *French Civil Code* (hereinafter referred to as the "*CC*").[99] Any "negative impact on someone's feelings can amount to mental harm".[100] Even grief is in principle compensable.[101] All that is required is *faute*[102]

91 See American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 47 cmt a (2012).

92 American Law Institute *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* § 47 (2012); Dobbs, Hayden and Bublick *Hornbook on Torts* 714.

93 See cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 718 fns 151-153.

94 Dobbs, Hayden and Bublick *Hornbook on Torts* 715.

95 Dobbs, Hayden and Bublick *Hornbook on Torts* 723.

96 Dobbs, Hayden and Bublick *Hornbook on Torts* 717.

97 Steiner *French Law* 255; Knetsch *Tort Law in France* 50; arts 1240 and 1241 of the *French Civil Code*.

98 See Cass civ 2 22 February 1995 92-18731 93-12644; Chartier and CA Paris 10 November 1983, D 1984 214; Van Dam *European Tort Law* 175.

99 Delictual liability in France is generally regulated by five provisions, arts 1240-1244, previously arts 1382-1386 of the *French Civil Code* of 1804. See Knetsch *Tort Law in France* 32.

100 Van Dam *European Tort Law* 175.

101 Van Dam *European Tort Law* 183.

102 See Van Dam *European Tort Law* 52, 297.

which immediately, directly and certainly causes the mental harm.[103] The French concept of *faute* includes the elements of wrongfulness and fault from a South African perspective.[104] Knetsch[105] explains that even though there is an agreement that "*faute* reflects the breach of a duty of conduct … there is still much opacity on its exact outlines [and f]ault consists in not acting as one should (that is to say, a misconduct)". Steiner[106] explains that "a person at fault in French law is in fact someone who has breached a kind of 'general duty of good conduct', whether this conduct was dictated by legal norms or social standards." In determining negligence in particular under the French concept of *faute*, the conduct of the defendant is judged against the standard of the reasonable person and compared with how the reasonable person would have acted in the circumstances.[107] The harm is caused by either a positive act[108] or an omission.[109] There are no other specific requirements such as "reasonable foreseeability of harm".[110] The courts assess the subjective mental harm of the plaintiff in each case.[111] The "thin-skull rule" is applicable in French law, which means that a victim's compensation cannot be reduced as a result of his or her pre-existing condition.[112] The effect of the French principle of full compensation for loss also means that in instances where the plaintiff is unconscious, he or she is entitled to claim pain and suffering and the loss of amenities.[113] As mentioned above,[114] the French law of delict does not follow the precedent system like the American and South African law. French law usually follows a pro-victim stance, and the aim is to compensate the claimant as fully as possible.[115]

A look at some examples from case law will assist in illustrating how the French courts determine liability for mental harm. The first example deals with an individual who allegedly personally suffered mental harm as a result of tortious conduct and claimed compensation for the mental harm

103 Van Dam *European Tort Law* 176.
104 Galand-Carval "Fault Under French Law" 92.
105 See Knetsch *Tort Law in France* 32.
106 Steiner *French Law* 255.
107 Steiner *French Law* 256; Knetsch *Tort Law in France* 48.
108 For example, where a driver knocks over a pedestrian (see Steiner *French Law* 255).
109 Steiner *French Law* 255; Knetsch *Tort Law in France* 49.
110 Van Dam *European Tort Law* 174.
111 Van Dam *European Tort Law* 176.
112 Cass civ 2 19 May 2016. Also see Steiner *French Law* 259.
113 Cass civ 2 22 February 1995 92-18731 93-12644. Also see Steiner *French Law* 259; Knetsch *Tort Law in France* 32.
114 See introduction.
115 See Borghetti 2012 *JETL* 173; Knetsch *Tort Law in France* 32, 42.

sustained. The remainder of the examples deal with employees claiming compensation for the mental harm (anxiety) sustained.

In a particular case a certain model of pacemaker was found to be defective. The manufacturer of the pacemakers stopped selling them and recommended that anyone with that particular pacemaker should undergo regular check-ups. A patient who was aware of the possibility of the pacemaker's being defective had it surgically removed while undergoing an operation she had to undergo for a different cause. The pacemaker was in fact not defective, but the patient sued the manufacturer for compensation resulting from stress and shock after learning of the possibility that the pacemaker was defective. The *Cour de Cassation*[116] (the highest court in France to rule over civil matters) held that generally damages for non-patrimonial loss could be awarded for stress and anxiety in such instances but found that in this case the patient had to undergo surgery in any event and that the pacemaker was not defective, therefore damage had not occurred and was in fact hypothetical. It is submitted that harm in this case, stress and shock, was reasonably foreseeable (as some pacemakers were found to be defective) and preventable by removing it. The costs involved in removing the pacemaker might be considered minimal when compared to the gravity of the harm that might have ensued if at any time the pacemaker had malfunctioned. Van Dam[117] submits that the patient has to live with the constant fear that this may occur thus affecting her mental state. It would thus be reasonable to compensate the patient for the mental harm.

The *Cour de Cassation*[118] awarded compensation to employees who had suffered anxiety and fear of developing an asbestos-related disease in the future. The employees had been exposed to asbestos for a prolonged period and had not yet developed any diseases relating to the exposure. It is trite that after inhaling asbestos, symptoms or a disease may develop after twenty years. In over fifty asbestos-related cases, the *Cour de Cassation* had to deal with various ex-employees who sued their employers for "prejudice of anxiety" of developing lung cancer at a later stage as a result of being exposed to asbestos.[119] Some of the employees had initially worked on industrial sites that had been recognised as "asbestos-

116 Cass civ 1 19 December 2006, JCP 2007 II 10052, note Hocquet-Berg, RTDCiv 2007 352 observations Jourdain.

117 Van Dam *European Tort Law* 182-183.

118 Cass soc 11 May 2010 09-42241, Bull soc 2010 V 206. See Moréteau 2010 *European Tort Law Yearbook* 188-190; Van Dam *European Tort Law* 182.

119 Cass soc 11 May 2010 09-42241, Bull soc 2010 V 206. See Moréteau 2010 *European Tort Law Yearbook* 188-190; Van Dam *European Tort Law* 182.

contaminated" sites in an official list of Act 98-1194 of 23 December 1998, entitling them to early retirement. In some cases, the *Cour d'appel* (appeal court) denied compensation on the ground that anxiety alone of developing a disease could not be compensated and on the ground that the sites where the employees had been exposed to asbestos had not been recognised as "asbestos-contaminated" sites. This has been viewed as discriminatory.[120] It is submitted that policy considerations played a role in the court's reaching a decision not to compensate the victim. In some cases, damages were awarded to employees who had worked on sites which had not been officially recognised as asbestos-contaminated sites. The *Cour de Cassation* did rule, however, that damages may be claimed for "prejudice of anxiety" in respect of all mental harm connected with asbestos exposure, including the loss of "life expectancy" and the "disruption of living conditions".[121]

Generally, in terms of French law, when an employee sustains injury or illness while in the course and scope of employment, he is entitled to social security benefits, which are limited in value. However, if he is able to prove an inexcusable fault[122] on the part of the employer, that is, a deliberate breach of the safety and hygiene regulations, or gross negligence on the part of the employer, the employee is in principle entitled to compensation on all heads of damages.[123] Since the landmark decisions of the *Cour de Cassation*[124] delivered on 28 February 2002, where it was held that an employer has a strict duty to provide a safe work environment, an employer may be held liable whenever an asbestos-related illness can be linked to the working conditions of the employee. An allegation of inexcusable fault is common in claims for workers' compensation benefits in asbestos-injury related cases.[125]

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120 See authority cited by Séjean and Knetsch 2015 *European Tort Law Yearbook* 210 fn 12.

121 See Cass soc 3 March 2015 13-21832, 13-20474, 13-20486, 13-26175; Cass soc 11 May 2010 09-42241 to 09-42257; Séjean and Knetsch 2015 *European Tort Law Yearbook* 208-209.

122 There is no definition of fault in French law, let alone *faute inexcusable* (inexcusable fault), but this form of fault is prevalent in industrial accidents and is a result of an inexcusable fault committed by the employer or one of his employees. The victim may sue the employer and claim damages for that portion of his or her loss not covered by the social security scheme, such as non-pecuniary loss, which covers mental harm (Galand-Carval "Fault Under French Law" 95).

123 Séjean and Knetsch 2015 *European Tort Law Yearbook* 210.

124 Cass soc 28 February 2002 00-10051, 99-18389, 00-11793, 99-21255, 99-17201 and 00-13172.

125 Séjean and Knetsch 2015 *European Tort Law Yearbook* 210 fn 10.

In a case where an employee who had undergone several disciplinary procedures had suffered anxiety and tension from fearing dismissal, the Paris Labour Tribunal held that he was entitled to compensation for the "prejudice of anxiety" he had suffered.[126] Criticism has been raised against this decision, as the employee did not provide proof of the "prejudice of anxiety" he allegedly sustained.[127]

Both a primary (direct) victim and a secondary victim (referred to as a "*victim par ricochet*" or "rebound victim") are in principle entitled to claim for mental harm.[128] A secondary victim is usually a family relative who suffers what is commonly referred to as "affection injury" (*prejudice d'affection*). The French courts have a liberal approach to who qualifies as a secondary victim and dependants need only establish the loss of dependency (loss of support).[129] Such a victim may also claim damages for bereavement.[130] A secondary victim may *inter alia* sustain loss of income, funeral costs, emotional shock, or grief.[131] Thus, any kind of mental harm suffered by the secondary victim is compensable.[132] The courts are lenient and have, for instance, awarded compensation for mental harm as a result of losing a prized pet.[133] The secondary victim need not be a relative and what must be proven is a "material or sentimental link" or direct relationship with the primary victim.[134] In respect of unmarried couples, the relationship between them must have been stable and continuous.[135] If the secondary victim is a member of the family of or related to the primary victim, then there is a

126 Paris Labour Tribunal (*Conseil des prud'hommes Paris*), 16 January 2015 F 12/10198.

127 See CÉ 27 May 2015 371697, where the *Conseil d'État* confirmed the decision of the lower court in awarding €1 500 to a victim as a result of sustaining "moral distress" from the time he was informed of a blood-related hepatitis infection until his recovery over a year later.

128 Van Dam *European Tort Law* 176; Knetsch *Tort Law in France* 153.

129 In assessing the loss of dependency in practice, the French courts compare the total income of the household before and after the tortious conduct and award compensation of the difference to the family members less the amount that the deceased would have made for him or herself (Knetsch *Tort Law in France* 178). Also see Steiner *French Law* 266.

130 Cass crim 22 March 1877, Bull crim 1877 86; Van Dam *European Tort Law* 176.

131 See Steiner *French Law* 265; Van Dam *European Tort Law* 176.

132 Van Dam *European Tort Law* 176-177.

133 See Cass civ 1 16 January 1962 D, 1962 199 note Rodière, JCP 1962 12577 note Esmein; Moréteau "Basic Questions of Tort Law" 39; Van Dam *European Tort Law* 177; Knetsch *Tort Law in France* 159.

134 See Cass ch mixte 27 February 1970, D 1970 Jur 201 note Combaldieu, JCP 1970 II 16305; Crim 17 October 2000 99-86157, Bull crim 2000 297 874; Van Dam *European Tort Law* 176; Knetsch *Tort Law in France* 153.

135 See Cass ch mixte 27 February 1970, D 1970 Jur 201 note Combaldieu, JCP 1970 II 16305; Van Gerven, Lever and Larouche *Tort* 126.

presumption of a "link of affection" between them.[136] At the very least there must be some kind of personal relationship between the primary and secondary victim.[137] In French law, dependants are considered as the *par ricochet victims* – secondary victims.[138]

3.1 Summary

The influence of reasonableness in determining whether liability should be imposed for mental harm in French law is implicit. Some form of conduct must be present which leads to the mental harm.[139] Thus, without the presence of conduct it would be unreasonable to hold the defendant liable. What is generally considered under the element of *faute* is whether the conduct of the defendant in causing the plaintiff's mental harm is unreasonable under the circumstances. Legal norms and social standards are applied as yardsticks. Certain duties such as the employer's duty to provide a safe working environment for the employees are recognised.[140] In terms of fault in the form of negligence, the reasonable person test is applied. Policy considerations also seem to play a role,[141] and this is evident in the asbestos injury-related cases, where in some cases the courts awarded compensation, while declining it in others.[142] In the French law of delict the element of causation is used to limit claims, in that the damage must be direct and certain.[143] At times the courts may find that the damage was hypothetical and exclude liability. French law is, however, generally liberal in awarding compensation for harm which may manifest itself in grief, sorrow or some form of psychological harm.[144]

4 Conclusion

In American, French and even South African law, some form of conduct, either a positive act (such as knocking over a pedestrian or negligently informing the victim that a person close to him or her was harmed) or an omission (such as failing to detect a condition which subsequently results in

136 Van Dam *European Tort Law* 176; Van Gerven, Lever and Larouche *Tort Law* 127.
137 Van Dam *European Tort Law* 176.
138 Van Gerven, Lever and Larouche *Tort Law* 127.
139 See para 3 above.
140 Steiner *French Law* 255.
141 See Steiner *French Law* 253.
142 See para 3 above.
143 Cass civ 2 22 February 1995 92-18731 93-12644; Chartier and CA Paris 10 November 1983, D 1984 214; Van Dam *European Tort Law* 175, 183.
144 See para 3 above.

emotional or mental harm) is required.[145] Thus, conduct must be present, and without conduct it would be unreasonable to hold the wrongdoer liable for the harm sustained by the plaintiff.

In American law, evidence of medically recognised harm is required, and the emotional harm must result in an illness or injury to the mind, the personality, or the nervous system. South African law generally follows a similar approach.[146] In French law all kinds of mental harm are compensable in principle, and the conduct need not result in medically recognised psychological or emotional harm.[147] In American law there must be proof of the serious emotional distress sustained, and therefore it would be unreasonable to hold the defendant liable for trivial harm such as threats or annoyances. In French law all that is required is that the mental harm must result in some kind of damage in terms of articles 1240-1241 of the *CC*. In South African law the psychological harm must be reasonably serious and not minor or trivial.[148] In gauging whether the emotional distress endured by the plaintiff is serious in American law, the standard of the reasonable person may be used; that is, the reasonable person should not be expected to tolerate the emotional distress. French law takes a pro-victim stance and any negative impact on a plaintiff's feelings can amount to harm which is compensable, including grief. The French courts do not use an objective test but rather assess the subjective mental harm of the plaintiff.[149]

In American law the emotional distress may be caused intentionally or negligently and this is also the case in French and South African law.[150] In American law there is no concept of wrongfulness but the reasonable person in a sense embodies the views of the community. For example, outrageous conduct on the part of the defendant causing the plaintiff's emotional harm is determined by whether the community would consider such conduct as outrageous and unreasonable.[151] With regard to American law and intentionally inflicted emotional harm, the community's views are taken into account in order to determine whether the defendant's conduct is reasonable, and this is also the case in French law under the concept of

145 See paras 2.2 and 3 above regarding American and French law respectively. See Ahmed 2023 *PELJ* (under review).

146 See Ahmed 2023 *PELJ* (under review).

147 See paras 2.3 and 3 above regarding American and French law respectively. See Ahmed 2023 *PELJ* (under review).

148 See paras 2.3 and 3 above regarding American and French law respectively. See Ahmed 2023 *PELJ* (under review).

149 See paras 2.3 and 3 above regarding American and French law respectively.

150 See paras 2.3 and 3 above regarding American and French law respectively. See Ahmed 2023 *PELJ* (under review).

151 See para 2.3 above.

faute which takes into account legal norms and social standards. In South African law, in practice, the adjudicator makes a value-judgment in gauging whether the infringement of the plaintiff's right to physical-mental integrity was unreasonable.[152] Thus, in American and French law, even though there is no concept of wrongfulness from a South African perspective, in determining whether the right to physical-mental integrity was infringed in an unreasonable manner and whether the defendant's conduct was unreasonable in causing the emotional or mental harm, the tests for wrongfulness (recently, whether it is reasonable to hold the wrongdoer liable) and negligence (the standard of the reasonable person) are applied.[153] In American law the reasonable person standard is applied in determining fault in the form of negligence. The reasonable person standard is also applied in French and South African law.[154] Thus, in all these jurisdictions the influence of reasonableness is prominent in determining whether the conduct of the defendant was reasonable or not in causing the plaintiff's emotional or mental harm.

In American law, there is a distinction between primary and secondary victims of emotional distress. For primary victims, the harm must be reasonably foreseeable. The plaintiff must usually be in immediate danger. For secondary victims, the harm must also be reasonably foreseeable, and it will be foreseeable if the secondary victim was in the zone of danger, fearing harm to him/herself, or anticipating harm. The reasonable person must have anticipated the fear of harm under similar circumstances. It is usually limited to close family or where there is a close relationship between the primary and secondary victim.[155] In French law the distinction between primary and secondary victims is recognised. The courts are rather lenient, and the secondary victim is usually one who is a close relative, but this need not be so. All that must be proven is the material or sentimental link between the primary and secondary victim.[156] In South African law, there is no *numerus clausus* with regard to the type of relationships that are recognised between primary and secondary victims, and the flexible approach to legal causation may easily be applied in limiting the compensation of secondary victims.[157] What must be established is whether there is a close enough relationship between the defendant's conduct and the psychological harm

152 See paras 2.3 and 3 above regarding American and French law respectively. See Ahmed 2023 *PELJ* (under review).
153 See Ahmed 2023 *PELJ* (under review).
154 See paras 2.3 and 3 above regarding American and French law respectively. See Ahmed 2023 *PELJ* (under review).
155 See para 2.3 above.
156 See para 3 above.
157 See Ahmed 2023 *PELJ* (under review).

sustained in order for the defendant to be held liable for the psychological harm, in view of policy considerations based on reasonableness, fairness and justice.[158] Therefore, if the psychological harm is too remote, for example, if a secondary victim did not have a close relationship with the primary victim, his or her psychological harm may be regarded as too remote, and the defendant may not be held delictually liable for the secondary victim's psychological harm.[159] Thus, in all jurisdictions the defendant's conduct must be the factual cause of the emotional or mental harm. In a sense, a reasonable degree of closeness is required between the primary and secondary victim and the harm suffered must not be too remote.

In American law, as mentioned above, the policy concerns for being cautious in awarding damages for stand-alone emotional distress or harm include the danger of a flood of litigation; how much emotional harm a person sustains is subjective; an award for emotional harm may not result in a person’s no longer suffering such harm; and at times it may not be possible to see a reasonable limit to claims for emotional harm. The courts may make use of a number of elements to limit tort liability but the role of reasonable foreseeability or reasonable fear of harm plays a prominent role.[160] South African law shares similar policy concerns, and the courts may also make use of the elements to limit delictual liability, in particular wrongfulness and legal causation.[161] Due to policy concerns French law, in spite of its pro-victim stance generally, uses the elements of *faute*, damage and causation to limit claims for mental harm. For example, in the case of the pacemaker, where the claimant alleged that she had sustained mental harm for fear of the possibility of the pacemaker’s being defective, the court dismissed her claim, ultimately stating that there had been no damage, and that the damage had been hypothetical. In some of the asbestos-related disease cases liability was denied on the grounds that anxiety alone of developing a disease could not be compensated and that the sites where the employees had been exposed had not been recognised in the list of contaminated sites.[162]

The thin-skull rule applies in American, French and South African law. In American and South African law, if the emotional distress or psychological

158 *S v Mokgethi* 1990 1 SA 32 (A) 40-41.
159 See Ahmed 2023 *PELJ* (under review).
160 See para 2 above.
161 See Ahmed 2023 *PELJ* (under review).
162 See Ahmed 2023 *PELJ* (under review).

harm was reasonably foreseeable, then the defendant will be held liable for all harm despite the claimant's pre-existing condition.[163]

It may thus be concluded that the influence of reasonableness in determining liability for emotional distress or harm in American law is predominantly explicit while it is predominantly implicit in French law. Generally, in South African law the influence of reasonableness in determining liability for psychological harm is predominantly explicit.[164]

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163 See paras 2.1 and 3 above regarding American and French law respectively. See Ahmed 2023 *PELJ* (under review).

164 See paras 2 and 3 above regarding American and French law respectively. See Ahmed 2023 *PELJ* (under review).

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Legislation

France

French Civil Code

United States of America

California Civil Code

List of Abbreviations

CC	French Civil Code
Colum L Rev	Columbia Law Review
Drake L Rev	Drake Law Review
Geo LJ	Georgetown Law Journal
Harv L Rev	Harvard Law Review

JETL	Journal of Education, Teaching, and Learning
Ky LJ	Kentucky Law Journal
Mich L Rev	Michigan Law Review
Neb LB	Nebraska Law Bulletin
PELJ	Potchefstroom Electronic Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
VUWLR	Victoria University of Wellington Law Review
Wake Forest L Rev	Wake Forest Law Review
Yale LJ	Yale Law Journal