**3.15B Negligent Infliction of Emotional Distress: Bystander**

[Plaintiff] claims that [s/he] suffered severe emotional distress as a result of observing [an injury to/the death of] [victim]. In order to find in favor of [plaintiff] on this claim, you must find that it is more likely true than not true that:

1. [Defendant] negligently caused the accident/injury to [victim];

2. Following closely on the heels of the accident/injury and during an uninterrupted flow of events, [plaintiff] experienced shock as the result of the sudden sensory observation of [victim]’s serious injuries; and

3. As a result, [plaintiff] suffered severe emotional distress.

You must find all three of these elements present to compensate [plaintiff] for negligent infliction of emotional distress.

Severe emotional distress is distress that is so substantial or enduring that no reasonable person should be expected to endure it. Severe emotional distress exists when a reasonable person would be unable to adequately cope with the mental stress caused by the circumstances. Examples include neuroses, [psychoses](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ic6c75a10475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), chronic depression, phobia, post-traumatic stress disorder, and shock. But temporary fright, disappointment, or regret do not qualify as severe emotional distress.

**Use Note**

Use this instruction in a negligence case where the only damages sought are for emotional distress. A claim for negligent infliction of emotional distress allows a plaintiff to recover for severe emotional distress even in the absence of physical injury. The Alaska Supreme Court has recognized two subtypes of this cause of action: bystander and preexisting duty. This instruction is for use in bystander cases. Where the NIED claim is based upon breach of a preexisting duty that defendant owes to plaintiff, instruction 3.15A (Negligent Infliction of Emotional Distress: Preexisting Duty) should be given. Appropriate negligence instructions also should be given; these will include 3.03A/B (Negligence Defined) and 3.07 (Substantial Factor), as well as others that may be relevant based on the particulars of the case.

**Comment**

Alaska law does not require that a plaintiff be in the “zone of danger” to recover for NIED. *Tommy’s Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1040-43 (Alaska 1996), holds that it is sufficient that the plaintiff foreseeably witness the immediate aftermath of the accident or other tortious act and suffer severe emotional distress as a result of the victim’s injury or death. *Id.* at 1041-43. “The touchstone . . . is not a rigid requirement of sensory and contemporaneous observance of the accident, but rather is the reasonable foreseeability that the plaintiff-witness would suffer emotional harm.” *Id. at 1043; see also Kallstrom v. United States*, 43 P.3d 162, 165 (Alaska 2002). In *Beck v. State, Dep’t of Transp. & Pub. Facilities*, 837 P.2d 105, 110–11 (Alaska 1992), the Court explained that a NIED cause of action will lie where the plaintiff “is thrust, either voluntarily or involuntarily, into such dramatic events and who makes a sudden sensory observation of the traumatic injuries of a close relative in the immediate aftermath of the event which produced them,” but not where plaintiff “learns of the injury or death of a loved one, or who observes the pain and suffering or the injuries only after a considerable period of time has elapsed since the accident” and has time to “steel herself” against the emotional impact. The plaintiff has an NIED claim when they “experience[] shock as the result of a sudden sensory observation of a loved one's serious injuries during an uninterrupted flow of events following closely on the heels of the accident.” *Doan v. Banner Health, Inc.*, 442 P.3d 706, 713 (Alaska 2019) (internal quotes omitted) (quoting *Beck*, 837 P.2d at 110). A plaintiff need not “contemporaneously comprehend that the loved one’s injuries were negligently caused” in order to state a claim for NIED. *Doan*, 442 P.3d at 713.

Alaska law also requires the existence of a “close relationship” between the plaintiff and the accident victim in a bystander NIED claim. Published Alaska NIED cases have included only close family blood relationships like parent/child, although the Alaska Supreme Court has left open the possibility that some non-blood relationships could suffice. *See Kallstrom v. United States*, 43 P.3d 162, 165 & n.13 (Alaska 2002). In *Kallstrom*, the court made the determination of whether a sufficiently close relationship existed as a matter of law, and in most cases this determination similarly will be a legal question for the court. If a factual dispute requires that the jury make this determination, it can be added as an element in this instruction.

*Schack v. Schack*, 414 P.3d 639, 641-44 (Alaska 2018) holds that there is no cause of action for NIED under Alaska law when the injured relative is also the negligent tortfeasor.

Whether a plaintiff’s injury rises to the level of “severe emotional distress” is a question for the jury. *Chizmar v. Mackie*, 896 P.3d 196, 204-05 (Alaska 1995). The language defining “severe emotional distress” is taken from *Sowinski v. Walker*, 198 P.3d 1134, 1166 (Alaska 2008), in which the Alaska Supreme Court affirmed a very similar instruction.

Although Comment j to Restatement (Third) of Torts § 46 suggests that there may be a difference between “serious emotional distress” and “severe emotional distress,” the Alaska Supreme Court uses the terms interchangeably. *Fyffe v. Wright*, 93 P.3d 444, 456 n.34 (Alaska 2004), *partially disavowed on other grounds by Burton v. Fountainhead Dev., Inc.*, 393 P.3d 387, 392-93 & n.20 (Alaska 2017).