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HOW MUCH ANGUISH IS ENOUGH? BABY SWITCHING AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

*Marc D. Ginsberg**

I. HYPOTHETICAL

Two mothers, A and B, deliver children, X and Y, at the same hospital on the same day. Both children are taken to the newborn nursery. Due to misidentification, the babies are switched. X is given to B, Y is given to A, and the mothers nurse each other's babies in the hospital. The mistake is corrected in the hospital after a few days (or, alternatively, after the mothers take the wrong babies home). X is returned to A, Y is returned to B. The mothers, however, are not comforted and request blood and DNA testing for health and maternity confirmation. Within a couple of weeks, it is confirmed that the mothers have the correct babies and that the babies are healthy. One of the mothers suffers depression and anxiety. She remains concerned about the safety of her child and continually recalls the traumatic hospital experience.

Does the mother have a potential negligent infliction of emotional distress claim against hospital?

II. INTRODUCTION

The misidentification of newborns in a hospital is regrettable and well-known to the medical literature.¹ It has been estimated that 20,000 accidental baby switches occur each year due to various errors in identification.² There is a known pregnancy anxiety related to potential baby switch-

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1. See, e.g., James E. Gray et al., *Pediatric Misidentification in the Neonatal Intensive Care Unit: Quantification of Risk*, 117 PEDIATRICS e43 (2006); Gautham Suresh et al., *Voluntary Anonymous Reporting of Medical Errors For Neonatal Intensive Care*, 113 PEDIATRICS 1609, 1612-14 (2004); Robert R. Rusting, *Baby Switching: An Underreported Problem That Needs to Be Recognized*, 17 J. HEALTHCARE PROT. MGMT. 89, 89, 97, 99 (2001).

2. Rusting, *supra* note 1, at 99 (noting that the errors largely relate to the failure to check the baby's I.D. band with the mother's and that babies are temporarily taken from their bassinets and returned to the wrong ones). It defies logic, however, to suggest that most of these switches are anything other than very brief in

ing.³ It is also urged, however, that misidentification occurs despite the best efforts of the hospital:

[W]hen the wrong mother is identified today, it is almost always despite diligent efforts to make a correct identification. The hospital takes a footprint of the baby, places a wristband on the mother and the baby, provides twenty-four hour video monitoring of the nursery, and utilizes other steps to assure that each woman is uniquely identified to only her own child.⁴

Misidentification of newborns is a well-reported occurrence in neonatal intensive care units.⁵

Another more fundamental consequence of newborn misidentification in a hospital is baby switching, giving a newborn to the wrong mother, perhaps being nursed by the wrong mother in the hospital and taken home by the wrong family.⁶ The family law complications of baby switching are numerous and are the subject of scholarly discussion.⁷

Tort claims may arise from baby switching in a hospital. The likely claim is one for infliction of emotional distress⁸ brought by the mother of the switched baby against the hospital. This commentary explores (1) the emotional distress claim as it implicates duties owed by a hospital to its patients and parents of patients, and (2) how much distress must be suffered in order to support the claim.

nature.

3. Joan DiPasquale Davis et al., *Pregnancy Anxieties and Natural Recognition in Baby-Switching*, 10 Brit. J. Nursing 718 (2001).

4. Ronald K. Henry, *The Innocent Third Party: Victims Of Paternity Fraud*, 40 Fam. L. Q. 51, 74 (2006).

5. See Gray et al., *supra* note 1; Suresh et al., *supra* note 1, at 1612-14; C. Snijders, et al., *Incidents and Errors in Neonatal Intensive Care: A Review Of The Literature*, 92 ARCHIVES OF DISEASE IN CHILDHOOD, FETAL & NEONATAL EDITION 391 (2007).

6. See, e.g., *Filson v. Seton Corp.*, 2009 WL 196048, at *1, *8 (Tenn. Ct. App. Jan. 27, 2009) (baby nursed by wrong mother); *Larson v. Banner Health System*, 81 P.3d 196, 198-99 (Wyo. 2003) (baby taken home by the wrong family).

7. See Cynthia R. Mabry, *The Tragic and Chaotic Aftermath of A Baby Switch: Should Policy And Common Law, Blood Ties, Or Psychological Bonds Prevail?*, 6 WM. & MARY J. WOMEN & L. 1 (1999); Kathryn Katz, *Ghost Mothers: Human Eff Donation And The Legacy Of The Past*, 57 ALB. L. REV. 733 (1994); Tara R. Crane, *Mistaken Baby Switches, Analysis of Hospital Liability and Resulting Custody Issues*, 21 J. LEGAL MED. 109, 109-111, 116, 118 (2000); Jana Micek, *The Child's Right of Access to the Courts*, 11 J. CONTEMP. LEGAL ISSUES 656, 658-60 (2000); Alice M. Noble-Allgire, *Switched At The Fertility Clinic: Determining Maternal Rights When A Child Is Born From Stolen Or Misdelivered Genetic Material*, 64 MO. L. REV. 517, 519-521, 553-559, 594 (1999); Henry, *supra* note 3, at 58-60; Christi Gill Baunach, *The Role Of Equitable Adoption In A Mistaken Baby Switch*, 31 U. LOUISVILLE J. FAM. L. 501, 501-13 (1992); Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 WAYNE L. REV. 1227, 1230-33 (1994); Joy McMillen, *Begging The Wisdom of Solomon: Hiding Behind The Issue of Standing In Custody Disputes To Treat Children As Chattel Without Regard For Their Best Interests*, 39 ST. LOUIS U. L.J. 699, 699, 701-706 (1995); Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: Arts, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 2-7, 20-24 (2003).

8. See generally DAN B. DOBBS, *THE LAW OF TORTS*, HORNBOOK SERIES, 821-22 (West Group 2000).

III. WHAT DUTY IS OWED BY A HOSPITAL TO ITS PATIENT?

A hospital is an owner/occupier of land which owes tort duties to those on its premises, including patients. A hospital patient may hold the status of a business invitee.⁹ The general duty of care to the invitee has been defined as “a duty of care to make conditions on the land reasonably safe and to conduct its active operations with reasonable care for the invitee whose presence is known or reasonably foreseeable.”¹⁰ More specifically related to the hospital/patient setting, “the duty a hospital owes its patients is to exercise reasonable or ordinary care to maintain, in a reasonably safe condition, that part of the hospital designed for the patients’ use.”¹¹ More recently, it has been urged that the hospital/patient relationship implicates a hospital’s fiduciary responsibilities.¹²

A hospital’s duty to its patients may be cast more in terms of a professional negligence duty. A hospital owes a “general duty of care toward a patient”¹³ and a “duty to exercise reasonable care in rendering hospital services.”¹⁴ Similarly, a hospital is liable to its patients for failing to have in place procedures to protect patients¹⁵ and owes a professional duty to provide a safe environment for patient diagnosis, treatment, and recovery.¹⁶

Whichever approach is preferred, the hospital should be required to safe keep newborns on its premises. Whether a hospital owes a duty to parents of newborns is somewhat more difficult (and interesting) to analyze. Of course, a predicate duty to parents of newborns is necessary to a negligent infliction of emotional distress claim based on baby switching.

IV. WHAT DUTY IS OWED BY A HOSPITAL TO THE PARENTS OF A NEWBORN?

Can baby switching provide the ammunition for a negligent infliction of emotional distress (NIED) claim in favor of a parent? All negligence claims require a breach of duty.¹⁷ If a hospital owes a tort duty to a parent,

9. See, e.g., *Riverview Reg. Med. Ctr. v. Williams*, 667 So. 2d 46, 48 (Ala. 1995); *Bodin v. Vagshenian*, 462 F.3d 481, 489 (5th Cir. 2006).

10. DOBBS, *supra* note 8, at 602.

11. *Thornton v. F.J. Cherry Hospital*, 644 S.E.2d 369 (2007), *aff’d*, 655 S.E.2d 350 (2008).

12. Barry R. Furrow, *Patient Safety and the Fiduciary Hospital: Sharepening Judicial Remedies*, 1 *Drexel L. Rev.* 439, 482-84 (2009).

13. *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 882 N.E.2d 244, 249-53 (Ind. Ct. App. 2008).

14. *Id.*

15. Barry R. Furrow, et. al., *Health Law*, Hornbook Series 381 (West Publishing Co. 2d ed. 2000).

16. *Id.* at 382.

17. DOBBS, *supra* note 8, at 269.

upon what is that duty based? The parent, in a traditional sense, is not the patient against whom the negligence is visited. The baby is the direct victim.¹⁸

NIED claims historically come in two varieties, dependent upon the victim: direct victim claims and bystander claims.¹⁹ The parent, as plaintiff in a baby switching-based NIED claim, is arguably not the “direct” victim of the tortfeasor.²⁰ The parent has not suffered direct physical harm or physical impact. Although the parent’s NIED claim may not fit perfectly with the stand-alone or bystander claim category, it is likely that the bystander category of claim potentially applies.²¹

The “fit” of the label (direct vs. bystander) to the baby-switching NIED claim is worthy of mention because the traditional analysis can be a bit uncomfortable. Here, the parent (plaintiff) clearly does not suffer a physical impact or bodily injury and would be disqualified from a direct victim claim.²² However, the parent of a switched baby does not classically observe a tort visited on the baby, does not come to an accident scene to witness an injured child and, depending on when the switch is corrected, cannot know if the baby was harmed in any respect. This could be significant in determining if a parent has a cognizable NIED claim.

Back to the tort “duty” inquiry: bystander NIED analysis requires attention to “foreseeability” of emotional harm as the basis of a duty owed to the bystander NIED claimant. Courts have struggled with foreseeability as the sole determinant of duty in the NIED context and have relied upon policy considerations to define the claim.²³ The reason for this has been ex-

18. See *Johnson v. Jamaica Hosp.*, 467 N.E. 2d 502, 503, 524-25, 527-29, 531-32 (N.Y. 1984) (court recognized that direct injury was inflicted upon plaintiff’s daughter, who was abducted from the hospital due to the hospital’s breach of its duty of care owed to the daughter).

19. See Dan B. Dobbs, *Undertaking and Special Relationships In Claims For Negligent Infliction Of Emotional Distress*, 50 ARIZ. L. REV. 49, 51 (2008) (“[C]ourts firmly accept recovery for negligently inflicted emotional distress as damages parasitic to physical harm, that is, as a form of pain and suffering. However, negligently inflicted stand-alone emotional distress is a different matter. Stand-alone claims for emotional distress do not assert that the distress resulted from physical harm or bodily impact”).

20. *Johnson*, 467 N.E. 2d at 503.

21. Of course, the mother of a switched baby may physically bond with the wrong baby. The mother may hold and nurse the wrong baby, which clearly involves a physical touching.

22. See *Johnson*, 467 N.E. 2d at 530-32. Here, the Court of Appeals of New York held that the parents of a newborn infant abducted from the defendant hospital’s nursery could not recover damages from the hospital for the parents’ emotional distress secondary to hospital negligence in the case of the child or in the management of its nursery. *Id.* The Court found no direct duty owed by the hospital to the parents. *Id.* The Court rejected an “in loco parentis” based duty owed to the parents. *Id.* at 528-29. The Court, in analyzing the pleadings, noted that the parents did not allege “that they were within the zone of danger and that their injuries resulted from contemporaneous observation or serious physical injury or death caused by defendant’s negligence.” *Id.* at 526. It seems as if the Court in *Johnson* considered two separate bases for the potential claim – direct tort duty owed to parents and a “zone of danger” formula – and rejected them both. *Id.*

23. See, e.g., *Thing v. LaChusa*, 771 P.2d 814, 818-19 (Cal. 1989).

plained eloquently by the Supreme Court of California in Thing v. LaChusa.²⁴ That Court concluded that the use of foreseeability alone to define duty creates a limitless class of potential claimants. It noted that “foreseeability, like light, travels indefinitely in a vacuum”²⁵ and “that foreseeability of injury alone is not a useful ‘guideline’ or a meaningful restriction on the scope of the NIED action.”²⁶ As a result, courts are apt to look to policy factors to limit the scope of bystander NIED claims, such as:

- Was the direct victim severely injured or killed?²⁷
- Is the NIED bystander claimant closely related to the direct victim?²⁸
- Did the NIED bystander claimant observe the tortious act or observe the scene or aftermath shortly after the tort occurred?²⁹
- Did the NIED bystander claimant suffer the appropriate type and amount of distress?³⁰

With this background, the introductory hypothetical can be re-examined and case law explored to determine how courts tend to confront NIED baby switching cases and the evidence of emotional harm.

V. CASE LAW

There is a modest but interesting body of law in baby switching cases involving emotional distress claims.³¹ The facts of the cases vary widely. These cases will be examined for factual content and to determine if there is any common thread to the courts’ legal analysis in resolving the emotional distress claims.

24. *Id.*

25. *Id.* at 824.

26. *Id.*

27. *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W. 2d 432, 439, 444-446 (Wis. 1994).

28. *Thing*, 771 P.2d at 815; *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000).

29. *Bowen*, 517 N.W.2d at 444-445.

30. *See id.* at 445-46.

31. *Filson*, 2009 WL 196048, at *4; *Larson*, 81 P.3d at 199; *Lopez v. Corp. Insular De Seguro*, 931 F.2d 116, 124 (1st Cir. 1991); *Twigg v. Hosp. Dist. of Hardee County*, 731 F. Supp. 469, 472 (M.D. Fla. 1990); *Mays v. Twigg*, 543 So. 2d 241, 242-43 (Fla. Dist. Ct. App. 1989); *Wishard Mem’l Hosp. v. Logwood*, 512 N.E.2d 1126, 1126-28 (Ind. Ct. App. 1987); *Ryan v. U.S.*, 2007 WL 557193, at *1 (D. ND. 2007), *aff’d*, 534 F.3d 828 (8th Cir. 2008); *Espinosa v. Beverly Hosp.*, 249 P.2d 843 (Cal Dist. Ct. App. 1952).

A. *Filson v. Seton Corp.*³²

On August 15, 2003, the Filsons' and Hobbs' babies were born at Baptist Hospital in Memphis, Tennessee. Two days later, the Hobbs' baby was mistakenly delivered to Ms. Filson to be nursed. The baby did not nurse well and Ms. Filson then realized that the baby did not look like hers. Ms. Filson compared her armband number with the baby's armband number to find that the numbers did not match. Ms. Filson knew that the baby was not hers.

Ms. Filson and her husband went to the nursery, saw that her baby's bassinet was empty and waited for the nurses to check the other bassinets. The Filsons' baby was found in a bassinet labeled "Hobbs." The baby's ankle I.D. bracelet was missing but she was wearing a wrist I.D. bracelet and security bracelet. After further investigation, Ms. Filson and the hospital nurses knew that Ms. Filson breast fed the wrong baby.

After the baby switching incident, blood and DNA testing ensued. The DNA testing confirmed that Ms. Filson departed the hospital with her biological child.

The Filsons sued Baptist Hospital alleging hospital negligence resulting in the baby switch and Ms. Filson nursing the wrong baby. They claimed pain, suffering and emotional distress. The Filsons did not seek professional assistance for their alleged injuries. Neither a physician nor psychologist stated that the Filsons suffered "serious" mental injury due to the events.

Procedurally, the defendant hospital filed a motion for summary judgment to which the Filsons responded. The motion for summary judgment raised the issues of the absence of expert testimony and the insufficiency of the claimed emotional injuries to support the emotional distress claim.

Interestingly, the Filsons filed an affidavit of a psychiatrist who did not render any care to Ms. Filson prior to filing suit. In fact, he evaluated her for an hour and a half, only two days before his affidavit was filed. The psychiatrist opined that Ms. Filson "suffers or suffered from the serious emotional/psychiatric condition of dysthymia."³³ He defined "'dysthymia' as a 'chronic low-grade depressive syndrome.'"³⁴ Ms. Filson's affidavit described her "immediate reaction to the incident and the ten days await-

32. *Filson*, 2009 WL 196048, at *1-11; *Hobbs v. Seton Corp.*, 2009 WL 196040, at *1-5 (Tenn. Ct. App. Jan. 27, 2009). In *Hobbs*, however, summary judgment was granted as the mother's emotional distress claim. *Id.* That claim was not the subject of the appeal to the Court of Appeals of Tennessee.

33. *Filson*, 2009 WL 196048, at *2.

34. *Id.*

ing the DNA test, e.g., sleep deprivation, depression, excessive crying.”³⁵ In addition, she described a loss of trust in professionals.³⁶

In ruling on the hospital’s motion for summary judgment, the “court found that there was a genuine issue of material fact as to the seriousness of Ms. Filson’s emotional injury”³⁷ and refused to dispose of her entire claim on the hospital’s motion. Essentially, the trial court allowed the emotional distress claim limited to the ten day time period between the baby switching incident and the results of the DNA testing.

The Court of Appeals’ opinion focused on the Tennessee law of negligent infliction of emotional distress. The seminal Tennessee Supreme Court case, *Camper v. Minor*,³⁸ made clear that the Supreme Court was:

fundamentally concerned with striking a balance between two opposing objectives: first, promoting the underlying purpose of negligence law – that of compensating persons who have sustained emotional injuries attributable to the wrongful conduct of others; and second, avoiding the trivial or fraudulent claims that have been thought to be inevitable due to the subjective nature of these injuries.³⁹

The Court of Appeals, therefore, “telegraphed” a policy concern for courts of Tennessee – a flood of non-meritorious cases,⁴⁰ particularly in “stand-alone”⁴¹ negligent infliction of emotional distress claims. Interestingly, it did not identify baby switching cases as *sui generis* – the type of claim so uncommon that it would not likely flood Tennessee courts. It identified the Tennessee Supreme Court opinion in *Camper v. Minor*⁴² as the hallmark of Tennessee jurisprudence regarding claims for emotional distress.

The *Camper*⁴³ rules require a serious or severe claimed emotional injury⁴⁴ and support of the claimed injury by expert proof.⁴⁵ The *Filson* Court, citing *Camper*, noted that “a serious or severe emotional injury occurs where a reasonable person, normally constituted, would be unable to

35. *Id.*

36. *Id.*

37. *Id.* at *3.

38. *Camper v. Minor*, 915 S.W. 2d 437 (Tenn. 1996).

39. *Id.* at 440.

40. *Filson*, 2009 WL 196048, at * 5.

41. *Id.*

42. *Id.* (quoting *Camper*, 915 S.W. 2d at 437).

43. *Camper*, 915 S.W. 2d at 446.

44. *Id.*

45. *Id.*

adequately cope with the mental stress engendered by the circumstances of the case.”⁴⁶ The Tennessee Supreme Court, in *Ramsey v. Beavers*,⁴⁷ further pronounced that only a disabling emotional injury would be serious or severe enough for recovery.

With this background and legal analysis, the *Filson* Court held that in a stand-alone claim of NIED “the plaintiff must prove by medical expert or scientific proof that the emotional injury is so onerous as to render a reasonable person, normally constituted, unable to cope with the mental stress caused by the negligence,”⁴⁸ essentially a disabling emotional injury. This analysis would potentially marginalize the trauma of baby switching and look to the depth of emotional distress as part of the prima facie case, not simply to the measure of damages.⁴⁹

Ms. Filson’s claim could not withstand scrutiny. A psychiatric evaluation of Ms. Filson did not occur until after the litigation was in progress and not until after the hospital moved for summary judgment. Ms. Filson’s psychiatric evaluation occurred in one day. Apparently, she was not otherwise under the care of a mental health professional. The affidavit of the psychiatrist concluded that Ms. Filson suffered from “a chronic low-grade depressive syndrome.”⁵⁰

Although Ms. Filson had reported to the psychiatrist her sadness, lack of trust, decreased sleep, decreased enjoyment and decreased energy,⁵¹ as well as stating in her affidavit “the fear and uncertainty she experienced while in the hospital during the ten days until the DNA reports confirmed her child’s identity,”⁵² the *Filson* Court held that there was an absence of expert proof of a “debilitating emotional injury.” Ms. Filson’s “mild depression”⁵³ was insufficient to support the NIED claim.

The *Filson* Court again paid homage to the Tennessee Supreme Court and its quest to conquer potentially frivolous claims. Referring to the Supreme Court’s opinion in *Doe v. Roman Catholic Diocese of Nashville*,⁵⁴ the *Filson* Court identified the *Doe* “directive”⁵⁵ from the Supreme Court: “We express confidence in the court system to winnow out false and frivolous claims through the pretrial and trial processes and through conscien-

46. *Filson*, 2009 WL 196048, at * 5 (quoting *Camper*, 915 S.W. 2d at 446).

47. *Ramsey v. Beavers*, 931 S.W. 2d 527, 532 (Tenn. 1996).

48. *Filson*, 2009 WL 196048 at *6 (quoting *Flax v. Daimler Corp.*, 2008 WL 2831225, at *4).

49. DOBBS, *supra* note 8, at 1047-48.

50. *Filson*, 2009 WL 196048, at * 8.

51. *Id.* at *7-8.

52. *Id.* at *8.

53. *Id.*

54. *Doe v. Roman Catholic Diocese of Nashville*, 154 S.W. 3d 22 (Tenn. 2005).

55. *Filson*, 2009 WL 196048, at * 8.

tious application of the elements necessary to establish causes of action for purely emotional harm.”⁵⁶

The *Filson* Court’s concern with frivolous NIED claims is unmistakable. The *Filson* Court also identified a rather high hurdle that Ms. Filson could not clear – the need for expert proof of an emotional disability. The circumstances of the baby switch did not carry the day. The court looked to the depth and quality of Ms. Filson’s emotional distress as a necessary element of the claim and subjectively determined its insufficiency.

Of course, the *Filson* Court’s concern may be exaggerated. Although baby switching can occur, it is unlikely to occur in vast numbers due to hospital security. The likely “universe” of NIED claims due to baby switching is small. Is there another way for a court to approach an NIED claim based on baby switching that recognizes the unique circumstances of parents who experience it?

Perhaps the *Filson* Court could have considered the parents’ experiences and “trauma” associated with baby switching. Since courts have not routinely considered baby switching, perhaps these cases are entitled to a different legal analysis than one that primarily focuses on the flood of non-meritorious claims. Why not evaluate the depth of claimed distress as a damage element, similar to the analysis of damages in other personal injury based tort claims?

Consider the rare event featured in *Witt v. Yale-New Haven Hospital*.⁵⁷ Ms. Witt was a breast cancer patient who required chemotherapy. Chemotherapy carries a likely risk of infertility; therefore, Ms. Witt allowed the hospital to remove and cryogenically store her ovarian tissue with the hope of a future pregnancy. There, the defendant hospital allegedly “discarded Ms. Witt’s ovarian tissue, which had been cryogenically frozen and stored for the purposing [sic] of using the tissue to allow the Witts to conceive a child in the future.”⁵⁸ Among the claims were NIED claims on behalf of both wife and husband. After learning that the tissue had been discarded, Ms. Witt “suffered sleep disturbances, nightmares, headaches, inability to concentrate, depression, post-traumatic stress disorder, severe and extreme emotional distress, [and] a diminished capacity or loss to engage in and enjoy many of life’s activities.”⁵⁹ Ms. Witt’s husband “suffered severe and extreme emotional distress.”⁶⁰

56. *Doe*, 154 S.W.3d.

57. *Witt v. Yale-New Haven Hosp.*, 977 A.2d 779 (Conn. 2008).

58. *Id.* at 781-82.

59. *Id.* at 782.

60. *Id.*

The *Witt* Court framed the issue as: “whether the anxiety or fear attendant upon the loss of an opportunity to use anticipated future technology to potentially conceive a child is sufficiently foreseeable to support a claim of negligent infliction of emotional distress.”⁶¹

Using the foreseeability test and referring to other decisions concerning “the deprivation of the opportunity of experiencing pregnancy, prenatal bonding, and the birth of a child,”⁶² the *Witt* court found “persuasive support for the proposition that the anxiety created by the foreclosure of an opportunity to potentially conceive a child is foreseeable.”⁶³

The *Witt* Court recognized the parents’ “clear emotional investment in the procedures recommended to them by the defendant, which would be reasonably apparent to any ART [alternative reproductive technology] provider”⁶⁴ and that ART providers are aware of “heightened emotional distress that commonly attends these procedure and the special attachment that parents typically maintain for this type of unique genetic material.”⁶⁵ Therefore, it was reasonable for defendants to foresee “overwhelming anxiety sufficient to cause illness or bodily harm”⁶⁶ as a result of discarding the ovarian tissue.

The *Witt* Court also referred to the wife and husband’s shared reliance on the ART practitioner.⁶⁷ Both parents would “be equally distressed to learn that their only hope for having a child together was discarded by their medical provider.”⁶⁸

The *Witt* Court was concerned with limiting bystander NIED claims but was confident that “the pool of potential litigants is inherently limited.”⁶⁹ The ART related NIED claim “[did] not involve a secondary victim.”⁷⁰ “[T]here is a limited universe of potential claimants.”⁷¹

The *Filson* Court, although perhaps constrained by Tennessee jurisprudence,⁷² could have applied a foreseeability test and considered the par-

61. *Id.* at 785.

62. *Id.* (quoting *Perry-Rogers v. Obasaju*, 723 N.Y.S. 2d 28, 29 (2001)).

63. *Id.* at 786. This finding is particularly interesting in light of the fact that as recently as 2006, The Practice Committee of the American Society for Reproduction medicine considered ovarian tissue cryopreservation and transplantation as experimental. A detailed committee report is provided in *Ovarian Tissue and Oocyte Cryopreservation*, 86 (Suppl. 4) *Fertil. Steril.* S142 (Nov. 2006).

64. *Id.* at 787.

65. *Id.*

66. *Id.* at 788.

67. *Id.* at 789-90.

68. *Id.* at 790.

69. *Id.* at 792.

70. *Id.*

71. *Id.*

72. See *Camper*, 915 S.W. 2d at 440-43; *Doe*, 154 S.W. 3d at 22; *Ramsey*, 931 S.W. 2d at 529-32.

ents' reliance upon a hospital to safe keep their newborn child. The realization of a missing child, if only for a relatively brief time, must be emotionally painful. How much less foreseeable is the attendant distress from a *Filson*-like baby switch than that arising from the *Witt* scenario?⁷³ Court dockets are not filled with baby switching NIED claims. Perhaps the court in *Filson* was too harsh and too dismissive of the claim, equating "frivolity" with less than an emotionally disabling injury. If the *Filson* court would have focused on foreseeable emotional harm instead of the need for proof of emotional disability, Ms. *Filson* might have been able to prosecute her NIED claim, despite proof of modest damages.

B. *Larsen v. Banner Health System*⁷⁴

In *Larsen*, the Supreme Court of Wyoming considered the following certified question from the United States District Court for the District of Wyoming: "Whether a mother and daughter, who were separated for forty-three years because a hospital switched two newborn babies at birth, can maintain a negligence action in which the only alleged damages are great emotional pain, humiliation, anxiety, grief, and expenses for psychological counseling?"⁷⁵

The baby switch occurred in 1958 – two babies went home with the wrong mothers. DNA testing performed in 2001 revealed that neither James nor Jean Morgan was Shirley Morgan's parent. James had "openly and frequently asserted that Shirley was not his child."⁷⁶ Shirley had a darker complexion than her "siblings." She "was ostracized and terribly mistreated by James Morgan and the Morgan siblings."⁷⁷

Shirley searched for her biological mother and learned that one other baby was born at the hospital. She contacted the other "switched baby," Debra, and Debra called her "mother," Shirley's biological mother, Polly, and broke the news.

Shirley and Polly sued Banner Health Systems, which staffed and operated Campbell County Memorial Hospital, for negligence in switching the babies at birth. The claim was for emotional damages only. The hospital moved to dismiss the complaint, urging that Wyoming did not recognize a cause of action for negligence resulting only in emotional injury.

73. It can be argued that *Witt* was wrongly decided. Though the anguish was foreseeable, the plaintiffs must have known that the ART technique was experimental and fraught with risk. Here, the anguish arose from the loss of chance of unproven, experimental therapy.

74. *Larsen*, 81 P.3d at 196.

75. *Id.* at 198.

76. *Id.*

77. *Id.*

The Wyoming Supreme Court recognized its jurisprudence in emotional distress claims. "Wyoming has clearly restricted the instances in which recovery for emotional injury without accompanying physical injury will be allowed."⁷⁸

The Court recognized that the baby switching completely severed the parent-child relationship and that the Court had never addressed a similar case. It looked to other reported cases involving baby switching⁷⁹ (which will be discussed later in this article) but found them unhelpful as applied to the *Larsen* facts.

The Wyoming Supreme Court approved the Iowa Supreme Court's approach to negligence claims for emotional damages. That approach recognizes an "exception to the general rule prohibiting recovery for strictly emotional damages"⁸⁰ "where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm."⁸¹ The Wyoming Supreme Court preferred "Iowa's application of the independent duty exception because this expression is narrowly tailored and well-reasoned,"⁸² which "exists only in circumstances involving contractual services that carry with them deeply emotional responses in the event of breach. There must be a close nexus between the negligent action at issue and extremely emotional circumstances."⁸³

The Court easily concluded that emotional distress is foreseeable when baby switching is discovered.⁸⁴ Of interest, the Court also concluded that baby switching cases "present the direct victims of a tort"⁸⁵ and that "the concerns related to the closeness of 'bystanders' are thus not present."⁸⁶ It is not at all clear whether the Court considers the switched babies, the parents, or both as direct victims of the hospital negligence.

The Court identified a genuine injury⁸⁷ and moral blame attaching to the hospital's conduct.⁸⁸ After applying the "balancing of factors test,"⁸⁹ the Court stated:

78. *Id.* at 199.

79. *Id.* at 202.

80. *Id.* at 202-03.

81. *Id.* at 202-03. (quoting *Lawrence v. Grinde*, 534 N.W. 2d 414, 421 (Iowa 1995)).

82. *Id.* at 203.

83. *Id.*

84. *Id.* at 204.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 205.

89. *Id.* at 206.

it is difficult for the court, on the basis of natural justice, to reach the conclusion that this type of action will not lie. Human tendencies and sympathies suggest otherwise [citations omitted]. Accordingly, we hold that in Wyoming, in the limited circumstances where a contractual relationship exists for services that carry with them deeply emotional responses in the event of a breach, there arises a duty to exercise ordinary care to avoid causing emotional harm. However, as can be seen by our discussion, this exception is extremely limited. We persist in seeking to assure that our already burdened court system will not be additionally burdened by an overly broad liability for emotional damages.⁹⁰

Certainly, the time frame involved in *Larsen* was extreme and may have influenced the Court's decision. Here, the parent-child relationship was destroyed. Nevertheless, the Court did focus on the unique nature of the baby switching NIED claim and did not believe that the recognition of the claim would tax the court system.

C. Wishard Memorial Hospital v. Logwood⁹¹

*Wishard*⁹² involved baby switching of children born to hospital roommates, but only for a period of hours. An emotional distress claim was filed and the trial court denied the hospital's motion to dismiss. An interlocutory appeal ensued and the Court of Appeals framed the issue as: "Whether the negligent placing of a newborn infant in the hands of one not its mother, for a period of hours, constitutes an impact to the infant and to the parents necessary to support their action for emotional distress."⁹³

After discussing the Indiana law pertaining to emotional distress claims, the Court held that since there was no "contemporaneous physical injury accompanying the emotional anguish,"⁹⁴ there was simply no claim. With no evidence of hospital willful or intentional conduct, the claims did not fall within the Indiana exception to the contemporaneous physical injury rule.⁹⁵ Therefore, the Court reversed the trial court with directions to enter summary judgment for the hospital.

90. *Id.* at 206-07. The Supreme Court of Wyoming recently confirmed the limited exception to recovery for emotional damages "accompanied by physical injury, exposure to physical harm or willful, wanton or malicious conduct" in *Hendricks v. Hurley*, 184 P.3d 680, 687 (Wyo. 2008).

91. *Wishard Memorial Hosp. v. Logwood*, 512 N.E.2d 1126 (Ind. 1987).

92. *Id.*

93. *Id.* at 1127.

94. *Id.*

95. *Id.* at 1128.

D. *Twigg v. Hospital Dist. of Hardee County*⁹⁶

In *Twigg*, the Court considered a complaint filed in 1989 regarding an alleged baby switch occurring at the defendant hospital in 1978.⁹⁷ The complaint alleged negligent infliction of emotional distress but no physical injury. The court ruled that the hospital's "motion to dismiss will be granted only insofar as Plaintiffs may be attempting to file a separate cause of action for psychic trauma alone . . ."⁹⁸ There was no discussion of the nature of baby switching claims.

E. *Espinosa v. Beverly Hospital*⁹⁹

Espinosa is an early case of baby switching with a claim of emotional distress and no physical injury. Here, the plaintiffs took a switched baby home and cared for the baby until the error was discovered. Plaintiffs advised the hospital and were given another child, presumably plaintiffs' own child. Plaintiffs' claim was tried before a jury, which returned a verdict for the hospital.

The *Espinosa* court explained that under California law at that time, "the human body can through negligence of others suffer injury in only two ways: (1) by physical impact, and (2) by shock, through the senses, to the nervous system."¹⁰⁰ The court cautioned, however, that "it does not necessarily follow that every mental disturbance is caused by a shock to the nervous system."¹⁰¹ The jury, under its instructions, had been authorized to award damages and "supplement them with damages for mental suffering, anxiety and loss of sleep,"¹⁰² if "the delivery of the wrong baby produced such an impact upon the nervous system of either appellant as to cause physical injuries."¹⁰³ Insofar as there was no such physical injury, there was no recovery for "mental suffering."¹⁰⁴

F. *DeLeon Lopez v. Corporacion Insular de Seguros*¹⁰⁵

The court characterized this case as a "topsy-turvy tale of the traded

96. *Twigg*, 731 F. Supp. at 469; See *Mays*, 543 So. 2d at 241 regarding paternity issue.

97. *Twigg*, 731 F. Supp. at 470.

98. *Id.* at 472.

99. *Espinosa*, 249 P.2d at 843.

100. *Id.* at 844.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 845.

105. *Lopez*, 931 F.2d at 116.

twins.”¹⁰⁶ Identical twin daughters were born in 1985 in Puerto Rico. The next day, fraternal twin daughters were born in the same facility. Babies from each set of twins were switched. Ultimately, after approximately two years, in 1987, the families, previously aware of the problem, returned the twins – essentially an exchange to cause realignment.

An emotional distress claim was filed by the grandfather of one of the switched babies against the hospital’s malpractice insurer.¹⁰⁷ The case went to trial. The district court “ruled as a matter of law that the baby-switching, if negligently occasioned, fell within the Hospital’s medical malpractice coverage.”¹⁰⁸ The district court granted plaintiff’s motion for directed verdict on negligence, on a *res ipsa loquitur*¹⁰⁹ theory. The jury returned an \$800,000 verdict for compensatory damages. This award was subsequently the subject of a remittitur¹¹⁰ and judgment was entered on the reduced damage award.

The Court of Appeals examined the application of *res ipsa loquitur* to the claim. It held that the elements of *res ipsa loquitur* were met because:

1. “Common sense dictates that babies will not be switched unless due care is by the boards,”¹¹¹ and “a swap could not have eventuated in the absence of negligence.”¹¹²

2. Exclusivity of control was present as “the Hospital was solely in charge of safekeeping and tending the infants in its care. It dominated the environment, exercising pervasive control over what transpired in the wards, in the nursery, and elsewhere on the premises.”¹¹³ Neither mother had access to the other’s newborns.

3. Plaintiff¹¹⁴ was free of responsibility for the negligent act.

The Court of Appeals made an interesting observation as to the evidence at trial. Plaintiff “suffered emotional trauma related both to his own loss and to watching his son and daughter-in-law undergo so wrenching an experience.”¹¹⁵ “[N]o medical or other expert testimony was presented in

106. *Id.* at 119.

107. *Id.* A direct action was appropriate pursuant to Puerto Rico law. P.R. Laws Ann. Tit. 26, §§ 2002-2004 (1976).

108. *Id.* at 120.

109. DOBBS, *supra* note 8, at 370.

110. JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 595-96 (Thomson West 4th ed. 2005).

111. *Lopez*, 931 F.2d at 124.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 125.

connection with the damage claim.”¹¹⁶ Plaintiff “contracted no lasting physical or mental impairment.”¹¹⁷ Yet the Court of Appeals affirmed the district court’s judgment on the verdict, despite evidence that could never withstand a *Filson*¹¹⁸ analysis due to the absence of expert testimony of emotional disability, not to mention that plaintiff was not the parent of a switched baby.

G. *Ryan v. United States*¹¹⁹

Ryan concerned a claim of baby switching occurring at a hospital in Fort Yates, North Dakota in 1946. The claim against the U.S. was not filed until 2002. Damages were sought for emotional distress. The court detailed the chronology of events from before 1973 to 2004, including DNA testing, which confirmed the switch.

Not surprisingly, the U.S. moved to dismiss the claim on limitations grounds. The motion was granted¹²⁰ and the Court of Appeals affirmed.¹²¹ Neither the district court nor the Court of Appeals opinion discussed the merits of the emotional distress claim.

VI. ADDITIONAL DISCUSSION

Filson,¹²² in a baby switching context, is an example of how a court may become trapped in the unfortunate jurisprudence of a state. Baby-switching must be a traumatic event for the parents, even if the hospital error is discovered and corrected in a relatively short period of time. It is hard to imagine that baby switching would not implicate a breach of a hospital’s duty to care for the newborn, with some resultant emotional harm suffered by the parents. Neither the traditional nor more modern approaches to NIED claims provide comfort to parents if they cannot overcome a physical impact, zone of danger or emotional disability analysis. Why not adopt an approach which looks to the quality and depth of emotional distress as a measure of damages? The *Filson* analysis simply trivi-

116. *Id.*

117. *Id.* at 116. *See also Lopez*, 931 F.2d at 47 (noting that “the plaintiff presented no evidence of any economic loss, neither past, present, nor future, due to the switching of the twins. There was no expert testimony presented concerning plaintiff’s past, present or future psychological damages. There was no evidence of any temporary or permanent physical or mental impairment. The plaintiff did not give to the jury any evidence of a loss of earnings or services. He presented no evidence of an inability to perform and function and live his life in the future as he always had”).

118. *Id.*

119. *Ryan*, 2007 WL at 557193.

120. *Ryan*, 2007 WL at *1.

121. *Ryan v. U.S.*, 534 F.3d 828, 829 (8th Cir. 2008).

122. *Filson*, 2009 WL at 196048.

alizes baby switching NIED claims by using a proof requirement - emotional disability - which may dismantle the claim.

Another quite recent example of this “trapped by jurisprudence” problem arises in *Hedgepath v. Whitman Walker Clinic*,¹²³ an HIV misdiagnosis and NIED case. The issue here was “whether a patient may recover damages for acute emotional distress resulting from a negligent misdiagnosis of Human Immunodeficiency Virus (“HIV”), where the misdiagnosis did not directly place the patient in physical danger.”¹²⁴

In *Hedgepath*, following the diagnosis, there was true, medically documented emotional distress. As the court noted, for a five year period, plaintiff believed he was HIV positive, was depressed, had suicidal thoughts, was twice committed to hospital psychiatric wards, and was prescribed medications for depression. The misdiagnosis led to the use of illegal drugs, an eating disorder, family isolation and other complications. NIED claims in the District of Columbia require a zone of danger presence applicable to the plaintiff, including bystander plaintiffs. Since *Hedgepath* was never exposed to HIV and was HIV negative, he was never in the zone of danger and could not recover as a matter of law.¹²⁵

Hedgepath’s problem was not the same as Ms. *Filson*’s. *Hedgepath* suffered an abundance of documented emotional distress but did not meet the “zone of danger” test. Ms. *Filson* was unencumbered by the zone of danger requirement but simply did not prove the existence of “emotional disability” – frankly, a convenient conclusion drawn by a court with an overriding concern for frivolous NIED lawsuits.

VII. CONCLUSION

Despite the estimate of yearly accidental baby-switches to which the introduction to this article referred,¹²⁶ it appears as if very few of the incidents have seeped into the NIED jurisprudence. Baby switching NIED claims are interesting and challenging, as the parents as plaintiffs do not neatly fit into the NIED victim categories of direct and bystander. However, the anguish of parents is undeniable in situations similar to *Filson*¹²⁷ or when leaving a hospital with another’s child, as is the breach of the hospital’s duty of care that allowed the switch to occur. There does not

123. *Hedgepath v. Whitman Walker Clinic*, No. 07-CV-158 (D. Dec. Oct. 1, 2009), available at http://www.dcappeals.gov/dccourts/appeals/pdf/07-CV-158_MTD.PDF.

124. *Id.* at 1-2.

125. *Id.* at 2.

126. Rusting, *supra* note 1, at 89.

127. *Filson*, 2009 WL at 196048.

seem to be a flood of spurious, non-meritorious baby switching NIED claims. The potential universe of claims is likely limited. The jurisprudence of any jurisdiction should be able to recognize the *sui generis* nature of the NIED baby switching claim and provide realistic court access and opportunity for proof.¹²⁸

128. For example, the Supreme Court of Illinois recently held “that expert testimony, while it may assist the jury, is not required to support a claim for negligent infliction of emotional distress.” *Thornton v. Garcini*, 2009 WL 3471065, *4 (Ill. 2009). The admissibility of lay testimony would likely assist greatly in overcoming the burden of the *Filson* analysis. If a trial court cannot dismiss a NIED claim for want of expert testimony, it would be hard pressed to determine as a matter of law that a plaintiff has not suffered sufficient emotional distress.