

**5.10F NEGLIGENCE — EMOTIONAL DISTRESS FROM  
WITNESSING SERIOUS INJURY TO AN INTIMATE  
FAMILY MEMBER (Approved 5/84)**

In this case, plaintiff seeks to recover against the defendant on his/her own behalf, contending that defendant's negligence caused the plaintiff severe emotional and mental distress as a result of observing the injury to [victim's name] for which injury plaintiff contends the defendant's negligence was responsible.

***NOTE TO JUDGE***

If the court has already instructed the jury on the issue of liability vis-a-vis the victim and the defendant, use the following instruction.

You should understand that if you have found in accordance with my previous instructions that the injury to (victim's name) was not a result of defendant's negligence, then the plaintiff who witnessed the injury cannot recover damages from the defendant for emotional distress.

***NOTE TO JUDGE***

If the court has not previously instructed the jury on liability vis-a-vis the victim and the defendant, use the following instruction.

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You the jury, must determine, whether the injury to (victim's name) was caused by the negligence of the defendant. If you find that the injury was not a result of defendant's negligence, then the plaintiff who witnessed the injury cannot recover damages from the defendant for emotional distress. These are the criteria by which you are to determine whether the defendant was negligent for causing injury to (victim's name):

***NOTE TO JUDGE***

Here give instructions regarding the traditional elements of the cause of actions vis-a-vis the victim and the defendant.

If you have determined that [*victim's name*]'s injury was caused by the negligence of the defendant, then you must consider whether the plaintiff has proven the following elements by a fair preponderance of the evidence.<sup>1</sup>

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<sup>1</sup>The Committee on Model Jury Charges, Civil, recognizes that the existence of a "marital or intimate familial relationship" is an essential element of the cause of action for negligent infliction of emotional distress. *Portee v. Jaffee*, 84 N.J. 88, 98-99 (1980). However, the Committee believes that the court should decide this element as a matter of law since it goes to the heart of the existence or non-existence of defendant's duty. While the issue was not specifically addressed in *Portee*, it was held to be an issue for the court in *Dillon v. Leqq*, 441 P.2d 912 (Cal. Sup. Ct. 1968) and the subsequent case of *Mobaldi v. Board of Regents*, 127 Cal. Retr. 720 (Cal. App. Ct. 1976). The New Jersey Supreme Court in *Portee* relied heavily on the *Dillon* decision.

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1. That the defendant's negligence (fault) caused serious bodily injury (or death) to (victim's name).
2. That plaintiff in fact witnessed the accident or event which caused serious bodily-injury (or death) to (victim's name).
3. That plaintiff experienced severe emotional distress as a result of the observation of the accident or event.

If plaintiff has proven each of these elements by a fair preponderance of the evidence then the defendant is liable to the plaintiff for money damages resulting from the infliction of emotional distress. You must then set an amount of money damages which will compensate plaintiff for the mental and emotional anguish, distress and harm suffered by plaintiff.

***NOTE TO JUDGE***

Here insert standard charge for special damages, disability and pain and suffering where appropriate under the evidence.

***NOTE TO JUDGE***

The court should instruct the jury that the plaintiff's verdict will be reduced by the percentage of the victim's negligence, if any, as well as the percentage of plaintiff's negligence, if appropriate under the evidence. *See Portee v. Jaffee*, 84 N.J. 88, 101-102 (1980).