

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 2669
Emotional Distress Bill

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House Judiciary Committee

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Main Capitol Building
Room 60, East Wing
Harrisburg, Pennsylvania

Tuesday, November 12, 1996 - 9:30 a.m.

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BEFORE:

Honorable Thomas Gannon, Majority Chairman
Honorable Jerry Birmelin
Honorable Lita Cohen
Honorable Brett Feese
Honorable Al Masland
Honorable Jere Schuler
Honorable Thomas Caltagirone, Minority Chairman
Honorable Michael Horsey
Honorable James Harold
Honorable Kathy Manderino

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ALSO PRESENT:

Brian Preski, Esquire
Chief Counsel for Committee

Heather Ruth
Majority Research Analyst

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16	Professor of Law	
17	Dickinson School of Law	
18		
19	(Written testimony submitted and attached	
20	hereto on behalf of Abram M. Hostetter, M.D.,	
21	Pennsylvania Psychiatric Society)	
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1 CHAIRMAN GANNON: The meeting of the
2 House Judiciary Committee concerning hearings on
3 House Bill 2669 is called to order. I would like
4 the members present to perhaps identify
5 themselves and the districts that they are
6 representing, starting with Representative Cohen.

7 REPRESENTATIVE COHEN: Lita Cohen,
8 Montgomery County, 148th District, just starting
9 my third term.

10 REPRESENTATIVE JAMES: Harold James,
11 186th Legislative District out of Philadelphia,
12 south Philadelphia, and starting my fifth term.

13 CHAIRMAN GANNON: And beginning on
14 my right.

15 REPRESENTATIVE MASLAND: Al Masland
16 from the 199th District.

17 REPRESENTATIVE HORSEY: Mike Horsey,
18 Philadelphia, 190th District.

19 CHAIRMAN GANNON: My name is Tom
20 Gannon, 161st District, Delaware County.

21 Our first witness is the Honorable
22 Lawrence Roberts, a member of the House of
23 Representatives from the 51st Legislative
24 District of Fayette County.

25 Welcome, Representative Roberts.

1 REPRESENTATIVE ROBERTS: Thank you,
2 Mr. Chairman. It's a pleasure to be here today,
3 and I am extremely pleased that you have decided
4 to hold public hearings on House Bill 2669.

5 Mr. Chairman, members of the
6 committee, the crash two years ago of Flight 427
7 in Pittsburgh devastated our Commonwealth. We
8 lost many friends and neighbors in that crash.
9 Some in this room have even lost family.

10 Well, time is said to heal all
11 wounds. And while this may be true for many
12 survivors, the family of Bill Menarcheck
13 continues to suffer. Bill was a victim of the
14 US Air crash. Bill's family came to me early
15 this year with a story illustrating how cruel and
16 hurtful people can act toward one another.

17 CHAIRMAN GANNON: Representative
18 Roberts, if I could interrupt you just a second.
19 I see Ms. Pamela Neill is also listed with you?

20 REPRESENTATIVE ROBERTS: Yes, Mr.
21 Chairman. In fact, I have the Menarcheck --

22 CHAIRMAN GANNON: If she would care
23 sit up and join you --

24 REPRESENTATIVE ROBERTS: The
25 Menarcheck family is here with me.

1 Do you want to come up?

2 CHAIRMAN GANNON: Sorry for the
3 interruption.

4 REPRESENTATIVE ROBERTS: That's all
5 right. Thank you, Mr. Chairman.

6 CHAIRMAN GANNON: Okay. You can
7 proceed.

8 REPRESENTATIVE ROBERTS: Bill's
9 family came to me early this year with a story
10 illustrating how cruel and hurtful people can act
11 toward one another.

12 After Bill was killed in the plane
13 crash, his estranged wife set out to hurt his
14 family even more by keeping them from important
15 details of Bill's death, his burial, and the
16 memorial. We have since come to learn that
17 estranged wife is very difficult to define
18 legally.

19 Prior to the crash of Flight 427,
20 Bill had been living with his parents. He and
21 his wife had completed their divorce proceedings,
22 and they were separated. In fact, their divorce
23 would have been final just two weeks after his
24 death.

25 The Menarchecks kept the

1 heartbreaking situation in the family for as long
2 as they could before turning to the courts and
3 the legislature for help.

4 In response to the Menarchecks'
5 story and subsequent failure in court, I have
6 drafted this legislation, House Bill 2669, to
7 hold people liable when they purposely cause
8 others severe emotional distress.

9 The Court of Common Pleas in Fayette
10 County just this March dismissed the Menarchecks'
11 lawsuit against their son's wife, who was the
12 perpetrator of the unkindly deeds.

13 The presiding judge sympathizes with
14 the family, even stating in his decision, but
15 saying, and I quote, that extreme and outrageous
16 behavior, unquote, again, extreme and outrageous
17 behavior is at times protected.

18 The judge states that the wife's
19 actions, and I quote again, appear to be morally
20 repugnant and even heartless. I have to repeat
21 that. Her actions appear to be morally repugnant
22 and even heartless, unquote. But the law allows
23 her to exercise her legal rights.

24 He says further that she may have a
25 moral duty to cooperate with the Menarchecks but

1 not a legal one.

2 Ladies and gentlemen, if it is the
3 legal that gives someone license to perpetrate
4 what amounts to psychological torture, then I
5 think we should change the law.

6 If passed into law, my bill would
7 hold a person liable for damages when that person
8 uses extreme and outrageous conduct to
9 intentionally or recklessly cause another severe
10 emotional distress. The aggressor also could not
11 use as a defense the fact that he or she is doing
12 no more than insisting upon his or her legal
13 rights.

14 I have heard arguments against my
15 measure, but they hold little merit against the
16 trauma that this family has suffered. I don't
17 think it is unfair to say that Bill Menarcheck's
18 mother died not so long ago of a broken heart.
19 After her son's death, she stood at the kitchen
20 window many, many times watching for Bill to come
21 home. For her, there was no closure.

22 Without closure, the Menarcheck
23 family will continue to suffer unduly, as will
24 others if we don't correct this infraction in the
25 law or this discrepancy in the law.

1 How can we turn away from this
2 family and the many others who may face similar
3 situations without protection from our laws?

4 It is a difficult issue but one that
5 must be addressed. You have gone so far as to
6 give my bill a public hearing; and for that, I am
7 greatly appreciative. I ask you now to move it
8 out of committee as quickly as possible and allow
9 it to be considered by the full House and Senate.

10 Members of the Menarcheck family are
11 sitting here with me who will be testifying, and
12 I am sure that you will hear about some of the
13 atrocities with which they have had to deal. And
14 as you listen to their testimony, please give
15 some thought to how you would feel personally if
16 you were in their place.

17 In closing, I would like to ask that
18 you move this bill forward without delay and
19 thank you for this opportunity.

20 CHAIRMAN GANNON: Thank you,
21 Representative Roberts.

22 REPRESENTATIVE ROBERTS: I have on
23 my left Pam Neill and her sister Theresa on my
24 right. Pam will be the next to testify. Mr.
25 Menarcheck, Bill's father, is on my extreme

1 right. And Pam's husband, Len, is on my left.

2 MS. NEILL: Thank you very much, Mr.
3 Roberts and all of you. I present myself this
4 morning before this body to urge your support in
5 the passage of House Bill 2669, Bills' Law, as we
6 have fondly referred to it.

7 Bill Menarcheck, my brother, lost
8 his life in the crash of US Air Flight 427 in its
9 approach to the Greater Pittsburgh International
10 Airport on September 8, 1994. Bill died side by
11 side with 131 other passengers and flight crew
12 members in that fatal crash.

13 Bill was a young man with an
14 incredible zest for living. Bill was dedicated
15 to the future and had just begun to taste the
16 fruits of a successful career at Sensus
17 Technologies in Uniontown. He was the director
18 of operations. The father of two young children,
19 the most exciting part of his life was yet before
20 him.

21 My brother had an infectious smile
22 and love and respect for all people. Bill's
23 death was indeed tragic. I am not here today
24 merely to paint Bill as an ideal person. My
25 purpose is to protect the immediate members of my

1 family: my mother, my father, my brother, my
2 sister, my husband.

3 Also I am concerned about the
4 possibility that this intentional horrendous
5 ordeal suffered by my family might be avoided in
6 similar circumstances in the future.

7 CHAIRMAN GANNON: Mrs. Neill, can I
8 just interrupt?

9 MS. NEILL: Yes.

10 CHAIRMAN GANNON: For the record, we
11 have been joined by the Democratic Chairman of
12 the Judiciary Committee, Representative
13 Caltagirone; Representative Brett Feese; and
14 Representative Kathy Manderino.

15 I am sorry. You may proceed.

16 MS. NEILL: May I please clarify the
17 issue? As I indicated earlier, Bill chose to
18 live with our parents since December 28, 1991.
19 He had taken the necessary steps leading to the
20 divorce of his wife. Ironically, his divorce
21 would have been finalized the day we were
22 informed that his remains were identified.

23 Although separated for three years,
24 according to Pennsylvania law, Bill was still
25 legally married when he died. My family,

1 therefore, had no legal rights to any information
2 regarding the circumstances of his death, the
3 assurance that he was indeed dead, the absolute
4 assurance that his remains which could be
5 identified, and whatever personal effects placed
6 Bill at the sight of the crash.

7 Bill's estranged wife prevented his
8 family from knowing any of the circumstances
9 surrounding his death and specifically the
10 assurance that Bill did indeed die in the crash
11 of Flight 427.

12 May I take a few minutes here to
13 relate similar circumstances which occurred
14 following Bill's death, circumstances which have
15 also made us victims of Flight 427.

16 May I please observe that Bill's
17 estranged wife instructed US Air to communicate
18 with her only; instructed US Air to avoid total
19 contact with Bill's immediate family; instructed
20 US Air not to notify Bill's family about any
21 memorial services.

22 Prevented Bill's family from
23 obtaining an original copy of the videotape of a
24 memorial service; instructed US Air not to inform
25 Bill's immediate family about the process used to

1 identify his remains.

2 Informed US Air that Bill was
3 residing with his wife at the time of the crash,
4 although he was indeed residing with his parents,
5 my parents, since 1991. She had the death
6 certificate altered to misrepresent this fact.

7 Instructed the funeral director not
8 to inform Bill's family of funeral arrangements
9 and other information regarding memorial masses;
10 remained totally indifferent to Bill's immediate
11 family with reference to funeral arrangements,
12 the burial site, etc.; habitually removes flowers
13 or any artifacts that we place on Bill's grave
14 site unless she personally approves them.

15 These legal rights of a wife go
16 beyond the rational, the humane, the
17 compassionate. Perhaps a more appropriate term
18 might be legal psychological terrorism. But we
19 are not here today to judge why Bill's legal wife
20 acted as she did.

21 We are here today to seek your
22 support in the passage of House Bill 2669 so that
23 the immediate families struck with similar
24 catastrophes do not become victims themselves at
25 the hands of those whose motives would indeed

1 mystify the understanding of the most brilliant
2 and respected psychiatrists.

3 Please prevent these circumstances
4 recounted from ever happening again. Your
5 support in the passage of House Bill 2669 can
6 indeed prevent all families in the future from
7 suffering a similar fate.

8 May I be more specific? May I
9 please indulge your patience? Certainly what my
10 family has been forced to endure the past two
11 years might be legal. But is it right?

12 Certainly those who really loved
13 Bill had the right to be fully informed of the
14 circumstances of his death, the right to be
15 informed of the details of his identification,
16 the right to participate in funeral ceremonies.

17 No one, especially an estranged
18 wife, should have the legal authority to deny
19 these rights to the victim's immediate family.
20 Should any person wield the power to deny the
21 mother of the victim permission to hold, even for
22 a minute, her dead son's wallet, a wallet in
23 which she often placed a few extra bucks so that
24 her son might have a good meal on his many
25 business trips.

1 What Bill's estranged wife has been
2 able to do with perhaps some type of vengeful
3 legality certainly has no place where right
4 morality must always reign.

5 Although, we can do nothing to bring
6 back the victims of plane crashes, we can do much
7 to alleviate the continued pain and suffering of
8 the living victims, as I have tried to relate
9 them.

10 After 26 months, Bill's grave has no
11 headstone, no tombstone. The only difference is
12 that Bill no longer lies alone. On October 8,
13 1996, my mother became the 133rd victim of the
14 crash of Flight 427.

15 My mother died not knowing with
16 absolute certainty that her son did indeed die in
17 that fatal crash. Never did she receive any
18 tangible evidence, maybe a credit card or a part
19 of a wallet or a belt, perhaps even a lock of his
20 hair which she might use to identify her dead
21 son.

22 For more than two years, she waited
23 patiently and eagerly in anticipation of her
24 son's return home. And she continued to wait for
25 Bill's return until the day she herself died.

1 And why shouldn't she? Mothers have a right
2 given by God to be able to verify the death of
3 their children. And no one, I emphasize no one,
4 should be able to deny them that right.

5 Mom died not really knowing what
6 happened to her son. She never learned how his
7 body was identified. She never received any
8 assurance that he was even on Flight 427. She
9 continued to await his return home from his
10 business trip.

11 She could wait no longer for her
12 son. She united with him in death. She lies in
13 the grave behind him, and there is a picture at
14 the very end that shows them lying together.
15 Although we buried mom a day or so after her
16 death on October 8, in reality she too died with
17 Bill on the crash of Flight 427. Her last words
18 were, "You know what you have to do."

19 Today before this most honorable
20 body, I am doing what I have to do. I am here to
21 urge your support in the passage of House Bill
22 2669, Bills' Law. What has already happened to
23 Bill's immediate family should never again happen
24 to another family.

25 Throughout my testimony you may

1 think that I have made a typographical error over
2 and over again. I have referred to House Bill
3 2669 in the plural possessive, B-i-l-l-s-',
4 Bills' Law. This was intentional. In the midst
5 of this horror and madness, there has been an
6 unknown hero, another Bill.

7 This Bill, Bill's father, our
8 father, hid his grief over the loss of his son
9 and he remains strong for his family. He did not
10 realize that we saw him tremble each time a plane
11 passed overhead, or we pretended not to notice
12 him hiding out behind the garage crying for the
13 son he had lost. Instead, he became the
14 caretaker, the nurturer of his grieving wife and
15 children.

16 The past two years his life has been
17 one long sad day. He prayed for the wife whose
18 tears never seemed to end. He prayed for the
19 closure she needed to come to terms with the loss
20 of their son. He prayed for the strength to
21 continue on when it would have been so much
22 easier just to give up.

23 Now he must deal with two losses at
24 once, the loss of his oldest first-born son, who
25 had lived with him, and the loss of his wife of

1 48 years on October 24. Doesn't he deserve some
2 respect and dignity? Isn't he entitled to some
3 closure in this horrendous affair?

4 My dad challenges himself every day.
5 He tries to find his place for he is lost. My
6 brother Bill, when going to his car every
7 morning, never followed the path of a sidewalk
8 but would cut directly through the grass
9 diagonally to his car. My dad often wondered why
10 he cut through that grass but never asked Bill.
11 I asked Bill. He told me he walked through the
12 grass in the mornings to clean his shoes.

13 After Bill's death, you could often
14 find my mother sitting on the back porch steps
15 visualizing Bill walking through the grass. Upon
16 my mother's death, my dad challenged himself to
17 walk the path that Bill took each morning. This
18 may sound like nothing to you, but this took
19 incredible courage for him to stand up and follow
20 in his son's footsteps.

21 If this broken, beaten man can
22 attempt to face the unknown future, can't you
23 please help him and give a positive meaning to
24 this tragic loss? Can't you please help others
25 who are certain to follow in our footsteps?

1 It has taken all of our courage to
2 get this close. It has taken all of our courage
3 to come before you today. We have truly done
4 everything we could to bring this message to you.
5 The completion of our journey is now in your
6 hands. Can't you please see that Bills' Law
7 reaches its proper destination, safe passage?

8 A very smart young lady once wrote,
9 "No one ever dies unless they are forgotten."
10 Bill and my mother will never be forgotten. We
11 will remember. We will always remember. Bill
12 made us believe in angels; and being here today
13 with all of you, makes us believe in miracles.

14 Thank you again from the bottom of
15 our hearts. May God bless all of you and yours.
16 We know that you will do the right thing. Thank
17 you very much.

18 I would like to introduce my sister,
19 Theresa Wadsworth.

20 CHAIRMAN GANNON: You may proceed,
21 Theresa.

22 MS. WADSWORTH: On September 8,
23 1994, my brother Bill died. He was a passenger
24 on US Air Flight 427, which crashed in Pittsburgh
25 PA.

1 Since that date, Bill has continued
2 to be a victim. And his family, his mother,
3 father, brother, sisters, nieces, nephews, and
4 children have all become victims of another
5 disaster, the destruction of a family. Little
6 did we dream that our entire family would also
7 die that day, not physically as Bill had, but in
8 every other way. Life as we knew it had ended.

9 It is easy to lose sight of the
10 people behind the words "victims of a plane
11 crash." These words insulate us and keep us safe
12 from facing the horrors of these victims.
13 Victims are really people, like you, like me,
14 like everyone here today.

15 When Bill died, our family was
16 denied the most basic of these rights. From the
17 very beginning, we were deprived of even the
18 knowledge of exactly how Bill died. How could
19 this happen? How could a family be denied
20 permission to participate and help plan the
21 funeral?

22 This could happen because the
23 estranged wife was only exercising her legal
24 rights. I believe there is also a moral law, a
25 law which would protect families from extreme and

1 outrageous emotional distress.

2 Society dictates the normal ways we
3 grieve, a funeral, a burial plot, a headstone.
4 None of these were available to us. When someone
5 dies, even in the most normal of circumstances,
6 if the loss of someone you love can ever be
7 normal, it is the right of those who love them to
8 be able to understand the circumstances of their
9 death, to be able to say good-bye in a way that
10 will help to ease the pain of the loss and to be
11 able to remember the loved one in concrete
12 actions.

13 I imagine everyone in this room has
14 lost a loved one at sometime. You might have
15 been at the bedside when they died. You
16 probably, if the deceased was a mother, father,
17 brother, or sister, helped make the funeral
18 arrangements. You probably attended a memorial
19 service for them. You visited their grave and
20 read their tombstone. You probably still visit
21 the grave; and on special days, you place
22 flowers.

23 Now, imagine, if you can, being told
24 that you cannot do any of these things. You
25 can't be a part of any of what society dictates

1 is the accepted way of respecting and grieving
2 the death of a loved one. Unthinkable,
3 unimaginable? What do you mean I can't
4 participate in my mother's, my father's, my
5 brother's, or my sister's funeral?

6 What do you mean I can't put a
7 headstone on the grave? Why can't I put flowers
8 on the grave? These are all questions you
9 probably would angrily ask, questions my family
10 asked and continue to ask, questions that my
11 mother died asking.

12 In our state, the state that you
13 have been chosen to lead and protect, the points
14 that I have tried to emphasize are legal. You
15 were chosen to serve on this most prestigious
16 committee because you have the wisdom and
17 compassion to recognize injustice such as this.

18 You realize that no one should be
19 permitted by law to torment victims' families in
20 a way which causes emotional scars that may never
21 heal. You are compassionate enough to know that
22 no one should prevent families from experiencing
23 closure to the death of a loved one, a necessary
24 step in the recovery process.

25 No one should be legally permitted

1 to cause intentional, severe, emotional distress.
2 At a time when there are more questions than
3 answers, when nothing makes sense, information is
4 our only link to resolution.

5 I thank you; and I would like to
6 introduce to you my brother-in-law, Leonard
7 Neill.

8 CHAIRMAN GANNON: Thank you,
9 Theresa. You may proceed, Mr. Neill.

10 MR. NEILL: Thank you, sir.

11 Many years ago, Bill Menarcheck,
12 Sr., and Millie Menarcheck stood for me and
13 became my godparents. Throughout 20 years of
14 marriage, they have stood by my wife, their
15 daughter, and my sides. As I sit before this
16 honorable committee today, I must stand for them.

17 The Menarchecks raised their
18 children, teaching them right from wrong;
19 teaching them respect; teaching them that as a
20 family, any obstacle can be overcome; teaching
21 them that determination and hard work will always
22 win.

23 Pap worked the coal mines of
24 southwestern Pennsylvania for over 30 years and
25 provided all four of his children with a college

1 education. You have been briefed on the type of
2 man that Bill, Jr., was. My wife, Pam, is a
3 teacher of visually impaired children and often
4 works with visually impaired adults. My
5 sister-in-law Theresa teaches special education.
6 My brother-in-law Jerome works to provide housing
7 for our senior citizens. Could any parents have
8 done a better job?

9 Pap was inducted into the County
10 League Big 10 Hall of Fame for his achievements
11 in county league baseball. He has told me that
12 he never possessed great speed but this was
13 overcome by his determination. This
14 determination has been passed on to his children.
15 This determination is what has brought us before
16 this honorable panel on this day.

17 I will forever have memories of
18 holidays when everyone gathered at home, Pap and
19 Millie's home. These days are gone forever. We
20 that are left will still come together, but it
21 will never be the same.

22 If there is a law that permits one
23 person to cause so much pain to this many, if
24 there is a law that states it is legal to deprive
25 a mother and father of their God-given right to

1 know the details of their son's death, if there
2 is a law that causes a wave of depression to
3 envelop so many innocent families, then this law
4 must be changed.

5 I sat with my family, the only true
6 family that I have known for over 20 years, and
7 watched Pap grieve as his wife of almost half a
8 century died. Bill Menarcheck, Sr., deserves
9 answers. Bill Menarcheck, Sr., deserves the
10 truth. Bill Menarcheck, Sr., deserves justice.
11 I ask you to do what is right, pass House Bill
12 2669, pass Bills' Law.

13 I would now like to introduce the
14 patriarch of the family, William Menarcheck, Sr.

15 CHAIRMAN GANNON: Thank you, Mr.
16 Neill. You may proceed, Mr. Menarcheck.

17 MR. MENARCHECK: Thank you.

18 It is both an honor and privilege to
19 speak to this committee. I served our country in
20 the United States Navy in World War II. My life
21 was in danger a number of times. I worked at the
22 Robena coal mine and had several near misses on
23 my life. Going through these close calls was
24 nothing compared to the past two years. I will
25 try to explain why.

1 I returned home from the Navy and
2 happened to take my uniform to a local dry
3 cleaner. When I went to the counter, I met the
4 most beautiful woman I have ever seen. It was
5 love at first sight. I made every excuse I could
6 think of to return to that cleaners as often as I
7 could.

8 Her name was Mildred Cabot, and we
9 were married 48 years. We have four children and
10 eight grandchildren. They remain the most
11 important parts of our lives. Bill, Jr., was our
12 first born, my namesake.

13 When we heard that my son Bill was
14 on Flight 427, that crash in Pittsburgh, we could
15 not accept it. We never saw anything, we never
16 held anything that could make us believe that he
17 was gone.

18 My wife would pray the rosary every
19 time Bill would travel until he would safely
20 return. She would wait in the kitchen and look
21 out the window when she knew he was due to
22 arrive.

23 Since that fateful September
24 afternoon, a typical day for my wife would begin
25 at 3 a.m. when she would get up and look out

1 kitchen window with hopes that Bill would somehow
2 return home. You see, Bill had lived with us for
3 three years before he died. After an hour or so,
4 she would return to bed and sleep restlessly
5 until 8 a.m.

6 She would have coffee in our living
7 room where we have a wall with all of the family
8 pictures and just stare with tear filled eyes at
9 Bill's picture. She would spend most of the days
10 sitting and staring out the window waiting for
11 our son to come home.

12 Mil would go back to bed at midnight
13 and tell me that she thought she would hear the
14 doorbell ring and that it might be Bill. No one
15 was ever there. This repeated itself exactly 750
16 times until we lost her on October 8 of this
17 year. 750 times until we -- I'm sorry. 750
18 times he never came down the walk. 750 times he
19 was never at the door. 750 times she cried every
20 day. I feel that she could not wait no longer,
21 that she could cry no more.

22 Please don't permit any other
23 fathers, mothers, brothers, or sisters to suffer
24 as we have. You have the power to prevent this
25 from ever happening to anyone again. There will

1 be other plane crashes, and others will mourn as
2 we have. You must permit them to have the
3 closure so that they can resurrect there lives.
4 You must support Bill 2669.

5 Thank you.

6 CHAIRMAN GANNON: Thank you, Mr.
7 Menarcheck.

8 I want to thank the Menarcheck
9 family for being here today. I know how
10 difficult it was to come before the committee and
11 testify. On behalf of the committee, I
12 appreciate it very much.

13 MR. MENARCHECK: Thank you.

14 REPRESENTATIVE ROBERTS: Mr.
15 Chairman.

16 CHAIRMAN GANNON: Yes,
17 Representative Roberts.

18 REPRESENTATIVE ROBERTS: Again, I
19 would like to thank you and the committee for
20 holding this public hearing today and for
21 moving -- considering House Bill 2669. I would
22 hope that you would urge its passage to the
23 committee and onto the House floor. I expect you
24 are going to do that.

25 And if we can could do that, I would

1 ask the committee to also help us get some action
2 in the Senate if we can get it through the House.

3 Thank you very, very much for
4 allowing us to testify before you today.

5 CHAIRMAN GANNON: Thank you,
6 Representative Roberts.

7 Oh, I'm sorry. We have a question.

8 REPRESENTATIVE MASLAND: Just one
9 quick question, is this amendment yours? Have
10 you seen the amendment?

11 REPRESENTATIVE ROBERTS: I haven't
12 seen the amendment. I don't know where the
13 amendment came from.

14 REPRESENTATIVE MASLAND: I just
15 wanted to know if this was something that you
16 wrote. Thank you.

17 CHAIRMAN GANNON: Do any of the
18 other members have questions or comments?

19 (No response.)

20 CHAIRMAN GANNON: Thank you,
21 Representative Roberts.

22 Our next witness is Michael Mogill,
23 Esquire, Professor of Law, Dickinson School of
24 Law

25 Welcome, Professor Mogill. You may

1 proceed.

2 MR. MOGILL: Mr. Chairman, members
3 of the committee, I want to start by addressing
4 my sincerest condolences to the Menarcheck
5 family. And having said that, I do have a
6 statement which I wish to read. However, I want
7 to do something a little bit differently; and I
8 ask for your indulgence on this.

9 Having read the initial bill that
10 was introduced, as well as the amendment, my
11 statement does address that. While I can see
12 some differences between the two bills, I think
13 these two bills can coexist and in coexisting can
14 actually offer fuller relief than either one of
15 the bills by themselves might offer.

16 Now, having said that, I would like
17 to read my prepared statement, and then where it
18 is necessary to address the coexistence of these
19 two, be able to do something like that. And I
20 would welcome the opportunity, if the committee
21 sees fit, to submit to you a supplemental
22 memorandum, which I can discuss how those two can
23 coexist.

24 I say that because having heard
25 Representative Roberts' statement in which he

1 recounted what happened before the Court of
2 Common Pleas where the court said that there is a
3 moral duty, but not a legal duty, this committee
4 does have it within its authority to make
5 whatever is looked at as a moral duty into a
6 legal obligation. At that, if I might go ahead
7 and proceed with my statement.

8 REPRESENTATIVE MASLAND: Mr.
9 Chairman, if I might briefly. I have another
10 meeting to go to. I do want to apologize to
11 Professor Mogill if I have to leave during the
12 middle of your testimony. I will try to get back
13 for questions and answers. I do look forward to
14 seeing your supplemental memo.

15 MR. MOGILL: I appreciate that.

16 May I proceed?

17 CHAIRMAN GANNON: Yes, you may
18 proceed.

19 MR. MOGILL: Thank you for the
20 opportunity to come before you this morning to
21 share my comments concerning the above-referenced
22 legislation. I presently serve as a faculty
23 member of the Dickinson School of Law and have
24 practice experience of nearly 12 years in
25 representing both plaintiffs and defendants in

1 private and public litigation.

2 My initial comments will be directed
3 towards the proposed legislation establishing a
4 an independent cause of action based on the
5 outrageous conduct of another resulting in severe
6 emotional distress, with my subsequent comments
7 directed towards the proposed amendment
8 concerning the disposition of the remains of a
9 deceased party to a divorce action.

10 First, House Bill 2669. The
11 language of this proposed statute states that one
12 will be liable for damages if his conduct is (1)
13 extreme and outrageous, (2) either intentional or
14 reckless, and (3) causes severe emotional
15 distress to another.

16 Subparts A and B are identical in
17 scope and nearly identical in language to that
18 contained in the Restatement (Second) of Torts
19 Section 46. The Restatement has been quite
20 influential in the development of tort law, as
21 its purpose is to summarize and rearticulate
22 general principles of the common law representing
23 a consensus view of the courts.

24 As such, the rules set forth in the
25 Restatement are meant to keep pace with common

1 law developments in light of changes in society
2 and public policy. By contrast, Subsections C
3 and D go beyond the explicit language in
4 Restatement Section 46. Each of these subparts
5 will be discussed below.

6 The law of torts is often viewed as
7 a battleground of social theory. Its primary
8 purpose is the fair adjustment of the conflicting
9 claims of parties concerning civil wrongs, other
10 than breach of contract, for which damages are
11 provided.

12 Tort law perceives society's
13 interest as trying to fairly and promptly resolve
14 disputes between individuals, as well as
15 articulating rules which achieve desirable social
16 results both for the present and in the future.

17 In stating these rules, courts and
18 legislatures identify the interests to be
19 protected by the law. Once interests have been
20 identified, society obligates individuals to
21 comply with the socially desired standard. When
22 individuals violate those obligations, tort law
23 will provide compensation for the harm to that
24 legally recognized interest in order to adjust
25 losses caused by such activity.

1 The purpose of the law creating a
2 separate cause of action for one's intentional or
3 reckless infliction of severe emotional distress
4 upon another is to protect one's piece of mind as
5 an independently recognized right.

6 While the law was initially slow to
7 recognize this independent interest in freedom
8 from emotional distress standing alone, it has
9 been fully recognized in recent years. This is a
10 result of the increasing recognition placed by
11 society on the individual's interest in privacy
12 and emotional well-being, as well as a heightened
13 sensitivity to protect emotional health, not just
14 physical health.

15 In such instances, the defendant's
16 conduct is viewed as lacking social utility; and
17 it is, therefore, in society's best interest to
18 nip this undesirable conduct in the bud.
19 Moreover, this claim is viewed as being common
20 sensical in providing for civilized conduct in
21 today's world so that individuals will meet the
22 community's moral code.

23 The claim for damages based on the
24 intentional infliction of emotional distress
25 clearly has limitations. Most particularly,

1 liability is only appropriate when the
2 defendant's conduct has been, quote, extreme and
3 outrageous, end quote.

4 As Comment D to the Restatement
5 states: It has not been enough that the
6 defendant has acted with the intent which is
7 tortious or even criminal or that he has intended
8 to inflict emotional distress or even that his
9 conduct has been characterized by malice or a
10 degree of aggravation which would entitle
11 plaintiff to punitive damages for another tort.

12 Liability has been found only where
13 the conduct has been so outrageous in character
14 and so extreme in degree as to go beyond all
15 possible bounds of decency and to be regarded as
16 atrocious and utterly intolerable in a civilized
17 community.

18 Generally, the case is one in which
19 the recitation of the facts to an average member
20 of the community would arouse his sentiment
21 against the actor and lead him to exclaim,
22 "Outrageous."

23 Thus, it is usually not one instance
24 of conduct alone but a prolonged course of such
25 conduct which will support this claim.

1 Case law examples include situations
2 where a defendant spread false rumors that the
3 plaintiff's son had hung himself; where the
4 defendant was responsible for bringing a mob to
5 the plaintiff's door at night with continual
6 threats to lynch him unless he left town; where a
7 defendant continued solicitations for illicit
8 intercourse accompanied with indecent pictures
9 and exposure of himself to a married woman; and
10 where defendant rubbish collectors threatened to
11 beat up the plaintiff and put him out of business
12 unless he paid protection money to them.

13 Moreover, the extreme and outrageous
14 character of the defendant's conduct can be found
15 by the defendant's abuse of a position relative
16 to the plaintiff which gives the defendant some
17 actual or apparent authority over the plaintiff,
18 or where the defendant has acted knowingly to
19 take advantage of a person's particular
20 susceptibility to emotional distress.

21 Restatement, Comments E and F.

22 The law further limits a defendant's
23 liability by protecting one's freedom to express
24 unflattering opinions of another however wounded
25 the recipient may be by those expressions.

1 Again, Comment D to the Restatement
2 notes: The liability clearly does not extend to
3 mere insults, indignities, threats, annoyances,
4 petty oppressions, or other trivialities. The
5 rough edges of our society are still in need of a
6 good deal of filing down; and in the meantime,
7 plaintiffs must necessarily be expected and
8 required to be hardened to a certain amount of
9 rough language and to occasional acts that are
10 definitely inconsiderate and unkind.

11 There is no occasion for the law to
12 intervene in every case where someone's feelings
13 are hurt. There must still be freedom to express
14 an unflattering opinion, and some safety valve
15 must be left through which irascible tempers may
16 blow off relatively harmless steam.

17 Thus, while the law has been moving
18 in the direction of recovery for this action, the
19 limitation that the conduct be extreme and
20 outrageous limits recovery to the most egregious
21 instances of conduct.

22 A second limitation is that the
23 defendant's actions must be either intentional or
24 reckless. Thus, a claim will not prove effective
25 unless one desires to inflict severe emotional

1 distress upon another or knows that such distress
2 is certain or substantially certain to result or
3 where one acts recklessly in deliberate disregard
4 of the high probability that severe emotional
5 distress will result from his conduct.

6 While such a state of mind, at
7 times, is not easily determined, it may be
8 inferred from one's conduct itself.

9 Specifically, if the conduct is indeed
10 outrageous, it is generally thought to have been
11 intended to cause severe emotional distress.

12 The third a restriction is that the
13 defendant's conduct must result in severe
14 emotional distress. While emotional distress
15 includes such highly unpleasant mental reactions
16 as freight, horror, grief, shame, humiliation,
17 embarrassment and the like, liability will only
18 be found where such results are extreme.

19 Again, Restatement, Comment J:

20 Complete emotional tranquility is seldom
21 attainable in this world, and some degree of
22 transient and trivial emotional distress is a
23 part of the price of living among people.

24 The law intervenes only where the
25 distress inflicted is so severe that no

1 reasonable man could be expected to endure it.
2 The intensity and duration of the distress are
3 factors to be considered in determining its
4 severity.

5 Moreover, a victim will generally
6 not be able to recover for exaggerated and
7 unreasonable emotional distress, unless the
8 defendant has knowingly acted upon a plaintiff's
9 particular susceptibility to such distress.
10 Therefore, extreme emotional distress is measured
11 against how a reasonable person would react to
12 such conduct, thereby further limiting a
13 defendant's potential liability.

14 A final instance in which recovery
15 is limited under the proposed legislation occurs
16 when the defendant's outrageous conduct is
17 directed at a third person. For instance, a
18 parent may wish to sue a defendant who has
19 intentionally inflicted severe emotional distress
20 upon his child.

21 Section D(1) limits this claim to a
22 member of the aggrieved third party's immediate
23 family who was present at the time of the injury
24 to that third party or to a nonfamily member
25 present at the time of the conduct if, in

1 addition, they suffer bodily harm.

2 These limitations can be justified
3 by the practical necessity of drawing the line
4 for potential liability at a reasonable point.
5 Thus, by limiting recovery to persons present
6 when a defendant's conduct is directed at a third
7 person, the law need not fear that those not
8 present may act outraged if they learn of the
9 defendant's act afterwards.

10 Moreover, the plaintiff's presence
11 during the course of this outrageous conduct
12 provides assurance that whatever harm is suffered
13 will likely be extreme emotional distress.

14 Thus, on the one hand, the proposed
15 legislation recognizes that the defendant is
16 highly culpable to those present when the
17 defendant directs activity at a third person
18 which is deemed outrageous, while, on the other
19 hand, limiting one's potential liability to that
20 select group of individuals

21 Subpart C of the legislation limits
22 the impact of *Kazatsky v. King David Memorial*
23 Park, where the Pennsylvania Supreme Court held
24 that it was, quote, unwise and unnecessary to
25 permit recovery based on the defendant's

1 outrageousness without expert medical
2 confirmation that the plaintiff actually suffered
3 the claimed distress, end quote.

4 Subpart C eliminates the requirement
5 of expert medical confirmation and is thereby
6 consistent with Restatement Section 46, which
7 does not obligate the plaintiff to produce such
8 evidence.

9 The lack of any so-called expert
10 medical evidence may not be detrimental, because
11 juries know emotional distress exists from their
12 own experiences of how disagreeable emotions can
13 result from one's conduct. In essence, the
14 existence of severe emotional distress will be
15 judged from the nature of the outrageous conduct,
16 as determined by the jury.

17 Medical testimony, in general, only
18 becomes necessary when such testimony is so
19 distinctly related to some science, skill, or
20 occupation beyond the knowledge or experience of
21 average lay people. In the instance of severe
22 emotional trauma, such results are within the
23 realm of common understanding which jurors bring
24 with them to the courtroom.

25 Moreover, nothing within Restatement

1 Section 46 prohibits the plaintiff from
2 introducing medical evidence supporting his
3 claim, nor prohibits the defendant from
4 introducing medical evidence to undercut the
5 plaintiff's claim, thereby leaving it up to the
6 parties to determine the evidence that best
7 supports their contentions.

8 Finally, Subpart D prohibits two
9 defenses. Specifically, this subpart prohibits a
10 defendant from responding to a claim by stating
11 that he is only insisting upon his legal rights
12 permissibly or that his conduct was in
13 self-defense based upon extreme provocation.

14 In essence, the prohibition of these
15 defenses serves to limit privileges which the
16 defendant would otherwise be able to assert. As
17 such, these limitations are directly contrary to
18 Comment G of Restatement Section 46, which allows
19 a defendant to avoid liability for intentional
20 infliction of emotional distress where the
21 defendant has either insisted upon his legal
22 rights permissibly or acted in such a manner in
23 self-defense against another's conduct.

24 For example, under Restatement
25 Section 46, a landlord may call on a tenant whose

1 rent is not paid and threaten to evict her, full
2 knowing that the tenant and her family and her
3 children are destitute and ill.

4 While the conduct might be
5 characterized as heartless, the landlord has only
6 availed himself of his legal remedies and,
7 therefore, has exercised his legal privilege so
8 as not to be responsible for any emotional
9 distress suffered by the tenant. The proposed
10 Subpart D would eliminate this privilege.

11 The Pennsylvania Supreme Court has
12 not yet formally recognized the claim for
13 intentional infliction of emotional distress.
14 While it has acknowledged that Restatement 46
15 exists, it decided in Kazatsky that, quote,
16 because the evidence educed in this matter does
17 not establish a right of recovery under the terms
18 of the provisions as set forth in the
19 Restatement, we again leave to another day the
20 question of the viability of Section 46 in this
21 Commonwealth.

22 As a result, Pennsylvania remains an
23 anomaly, given that the vast majority of states
24 have adopted Section 46 in its entirety. In
25 addition, the Kazatsky decision, while admittedly

1 from the Commonwealth's highest court, is in
2 sharp contrast to the plethora of both federal
3 and lower Pennsylvania appellate court decisions
4 which have adopted and applied Section 46 as a
5 potentially valid cause of action.

6 Thus, one recent lower appellate
7 court decision noted that the, quote, status of
8 this cause of action is unclear in Pennsylvania,
9 as some appellate courts have adopted Restatement
10 Section 46, but our Supreme Court has not, end
11 quote.

12 Moreover, the Pennsylvania courts
13 are replete with, quote, confusion and conflict
14 of law, end quote, in determining whether to
15 adopt Section 46 of the Restatement.

16 For example, in a recent decision,
17 the Superior Court held that Section 46 of the
18 Restatement created a valid claim for an
19 18-year-old plaintiff who, in her first job, was
20 a victim of numerous incidents of sexual
21 harassment, intimidation, physical abuse, and
22 retaliatory termination from her job leading to
23 severe emotional distress, with her allegations
24 having been supported by two fellow employees.

25 The court went on to state that

1 Section 46 did not require the introduction of
2 any expert medical testimony to sustain her
3 allegations, the Hackney case. However, the
4 Pennsylvania Supreme Court, in a per curiam
5 order, summarily reversed this decision, merely
6 citing to the Kazatsky case.

7 Therefore, it is unclear whether the
8 decision was reversed because the Supreme Court
9 determined that the lower appellate court
10 improperly adopted Section 46 or improperly
11 upheld a claim without expert medical testimony.
12 Thus, the pending legislation will provide
13 clarity and understanding to this area.

14 It is understandable that there are
15 concerns regarding this proposed legislation.
16 Among these are that the passage of this
17 legislation will open up the floodgates of
18 litigation; that courts should not take up
19 valuable time in dealing with such matters; that
20 false claims may be filed; that the standard of
21 extreme and outrageous is too vague to govern
22 one's conduct; that this claim impinges upon
23 freedom of speech; and that it will be difficult
24 to measure damages.

25 However, as noted earlier, the

1 purpose of tort law is to provide for the fair
2 adjustment of the conflicting claims of parties
3 with public policy necessarily supplying
4 limitations to acceptable human behavior. Nor is
5 it surprising to hear a concern regarding
6 possible floodgates of potential cases, as this
7 is typically raised concerning new causes of
8 action.

9 This notion, as well as the fear
10 regarding possible false claims, can be
11 controlled via the discovery process,
12 cross-examination, impeachment of witnesses,
13 proper jury instructions regarding the
14 credibility of witnesses and weight of evidence.
15 various sanctions for perjury, and the overall
16 careful scrutiny of the evidence supporting the
17 claim, with the use of common sense
18 distinguishing serious and valid claims from
19 trifling nonclaims.

20 Moreover, it remains within the
21 court's power to determine which cases are
22 appropriate for the jury, with the court deciding
23 whether sufficient evidence has been introduced
24 to allow the jury to determine that an
25 individual's conduct has been extreme and

1 outrageous. Again, the Restatement, Comment H.

2 Furthermore, the existence of a
3 multitude of claims only shows society's pressing
4 need for the legal redress of these particular
5 grievances.

6 In addition, courts have been able
7 to determine damages concerning claims which
8 affect other intangible interests, including loss
9 of consortium, pain and suffering, loss of
10 enjoyment of life, and the negligent infliction
11 of emotional distress, with jury instructions
12 helping to provide guidance.

13 Finally, the standard that the
14 conduct be extreme and outrageous clearly limits
15 the application of this new cause of action,
16 thereby allowing the judicial system to handle
17 wrongdoing that other claims would not satisfy,
18 as well as recognizing the importance of one's
19 mental health.

20 Of course, concerns may still exist
21 regarding the judiciary's interpretation of this
22 new cause of action, should it be formally
23 adopted. Clearly firmer boundaries for this
24 claim will have to await judicial construction
25 via individual decision.

1 However, it is instructive to note
2 that Pennsylvania cases finding the plaintiff
3 entitled to recovery under the standard
4 articulated in Restatement Section 46 have been
5 quite rare.

6 Examples of cases providing recovery
7 are *Banyas*, where the facts showed that
8 physicians deliberately falsified the cause of
9 death in a decedent's death certificate to
10 attribute that death to the plaintiff in an
11 attempt to cover up the physicians' own
12 negligence, and the *Chuy* case, where a team
13 doctor falsely told the plaintiff football player
14 that he had a fatal disease with full knowledge
15 that the player did not have that disease.

16 In contrast, a significantly higher
17 number of cases have determined that the adoption
18 of this cause of action would still not allow a
19 plaintiff to recover.

20 Examples include *Fewell*, where no
21 claim was established by a defendant doctor's
22 disclosure of confidential information from his
23 patient that she intentionally harmed her child.

24 *Snyder*, where no claim was
25 established when a supervisor screamed at a

1 plaintiff employee, subsequently remanded him,
2 and demoted him to an entry level position when
3 the plaintiff was late for work because he had
4 administered emergency medical treatment to an
5 accident victim.

6 Parano, no claim where the defendant
7 allegedly defamed the plaintiff hospital
8 administrator's conduct in his news article by
9 stating the plaintiff was less than helpful,
10 uncooperative, and adversarial.

11 And Britt, no claim established
12 against a teacher and college for having
13 sabotaged the plaintiff's reputation and academic
14 career by providing low grades in retaliation for
15 plaintiff's class comments and by revoking
16 certain pre-approved class credits so plaintiff
17 did not graduate on time. These are indicative
18 of the many cases which have denied the
19 plaintiff's claim for intentional infliction of
20 emotional distress.

21 A clear gap exists in Pennsylvania
22 tort law. By failing to address the question of
23 whether Restatement Section 46 is the law of
24 Pennsylvania, the state Supreme Court has
25 implicitly appeared to defer to the legislature.

1 Indeed the legislature may be better able to
2 investigate and study issues of tort liability,
3 free of the constraints faced by litigants in a
4 specific judicial proceeding and away from the
5 judicial spotlight.

6 Moreover, the legislature is better
7 able to address this issue in a non-piecemeal
8 manner resulting in a consistent, comprehensive
9 statute addressed at protecting all recognized
10 interests, rather than being limited by the
11 narrow facts presented in a particular case.

12 At this point, I want to go ahead
13 and go away from my statement based on the
14 comments I have heard from the Menarcheck family
15 and working these two bills together. So
16 proceeding from the bottom of page 11, if I
17 might, please.

18 I say that it is, therefore, my
19 opinion that the Commonwealth would be best
20 served through the adoption of proposed House
21 Bill 2669, Subparts A, B, and C. It is my
22 suggestion, however, that Subpart D does go
23 beyond the tenor of Restatement Section 46 and is
24 not recommended for adoption.

25 In its place -- and this goes away

1 from my statement. In its place, I would suggest
2 that language be brought from this amendment
3 instead and be made part of Subpart D.

4 And while I was listening to the
5 statements of the Menarcheck family, the language
6 that I penned down was the following: Defense
7 prohibited. The surviving spouse of a party to
8 an action for divorce who becomes deceased prior
9 to the final entry of an order for divorce shall
10 not be permitted to use as a defense the manner
11 in which that surviving spouse disposed of the
12 remains of the decedent.

13 And I say that because it
14 specifically addresses the concern of the family
15 here, as well as addressing the larger concern
16 for the state itself. And if I may continue with
17 my statement.

18 The adoption of the proposed bill
19 will clearly put Pennsylvania in the mainstream
20 of tort law in this area. In essence, the
21 adoption of the bill recognizes that a perfect
22 formula is not attainable in an imperfect world.
23 If we rely on achieving perfection at some point
24 in time, we will do an injustice in the interim.

25 Admittedly, the law exists to

1 separate valid from invalid claims. However,
2 there is no mistaking that clear answers of black
3 and white quickly fade into gray. Therefore, the
4 courts are positioned and trusted to determine
5 the full reach of legislation being obliged to
6 follow statutory mandates and to answer
7 unanswered questions in interpreting the law.

8 This flexible approach will allow
9 the Pennsylvania courts to add to that body of
10 case law which has already addressed Restatement
11 Section 46 and applied it in a clearly cautious
12 manner.

13 If I may continue with my comments
14 on the proposed amendment separately.

15 This proposed amendment allows
16 certain persons related by blood to be allowed to
17 proceed in court to determine the disposition of
18 the body of their deceased relative should that
19 relative become deceased prior to the entry of an
20 order for divorce.

21 The gist of the proposed legislation
22 appears to have its origins in the Restatement
23 (Second) of Torts Section 868, which states that,
24 quote, One who intentionally, reckless, or
25 negligently removes, withholds, mutilates, or

1 operates upon the body of a dead person or
2 prevents its proper interment or cremation is
3 subject to liability to a member of the family of
4 the deceased who is entitled to the disposition
5 of the body.

6 This section of the Restatement is
7 seen as a special case validating the mental
8 health of the family members of the decedent.
9 Comment A to that Restatement section. However,
10 the proposed amendment is different from the
11 Restatement in at least two respects.

12 In most states, the right of the
13 disposition of a decedent's body remains in the
14 surviving spouse. Restatement Section 868,
15 Comment B. The proposed amendment specifically
16 limits the right to question the disposition and
17 interment of the body of the decedent to those in
18 kinship or blood relationship. By implication,
19 this would not include the decedent's spouse.

20 Moreover, the proposed statute does
21 not subject a defendant to liability, as does
22 Restatement Section 868, but merely states that,
23 quote, A single action relating to the
24 disposition and interment of the body of the
25 deceased party, end quote, may be brought by the

1 decedent's bloodline.

2 Three concerns exist regarding the
3 proposed legislation. The first is that there is
4 not enough guidance given to determine how to
5 dispose or inter the body, nor does the proposal
6 explicitly state that one not blood related is
7 excluded from pursuing this claim.

8 Second, the proposed legislation
9 fails to distinguish between lineal
10 consanguinity, those in direct ascending or
11 descending line from the decedent, such as a son,
12 father, grandfather, etc., and collateral
13 consanguinity, those persons who have the same
14 ancestors but who do not ascend or descend from
15 one another such as aunts and nephews.

16 The committee may want to consider
17 addressing these areas in order to provide more
18 guidance in the legislation.

19 Finally, if the legislation intends
20 that there be monetary relief provided in such
21 disputes, the committee may wish to make clear
22 that the proposed legislation does not provide
23 for any liability, meaning that the relief is
24 limited to the disposition of the decedent's body
25 rather than to any type of financial

1 compensation.

2 Once again, I do appreciate the
3 invitation to be before you today in order to
4 offer the above comments. I hope that you will
5 not hesitate to contact me if I can be of further
6 assistance to you concerning this legislation or
7 other future matters. Thank you.

8 CHAIRMAN GANNON: Thank you,
9 Professor Mogill.

10 Representative Caltagirone, any
11 questions?

12 REPRESENTATIVE CALTAGIRONE: No.

13 CHAIRMAN GANNON: Representative
14 Feese?

15 REPRESENTATIVE FEESE: No.

16 CHAIRMAN GANNON: Representative
17 Manderino?

18 REPRESENTATIVE MANDERINO: Thank
19 you.

20 I did not get, Professor, the exact
21 language that you were recommending. I
22 understood that your recommendation is, if I can
23 put it in a nutshell, adopt Restatement Section
24 46, don't use the defenses listed in D in the
25 original bill, and a proposed alternative to D

1 was a modification of the language in the
2 Amendment 6895.

3 MR. MOGILL: Yes, ma'am.

4 REPRESENTATIVE MANDERINO: And maybe
5 you can just share, after the fact, what your
6 proposed language is.

7 But then my question is, In your
8 opinion, then when you talked about the proposed
9 amendment and focused us to Restatement of Torts
10 868, which I don't really know was necessarily in
11 mind when the amendment was drafted, do you have
12 an opinion as to which way is the better way to
13 go both seeming to accomplish the same goal?

14 MR. MOGILL: Well, my feeling is
15 that these two bills can coexist. The originally
16 introduced 2669 addresses liability in terms of
17 financial compensation for emotional distress.
18 The amendment addresses how do we go ahead and
19 dispose of the remains. So one deals with the
20 remains. One deals with the emotional distress
21 which is caused by the estranged spouse in having
22 disposed of the remains in such a manner as the
23 Menarcheck family brought between us.

24 That's why I see these two as very
25 well fitting together. What I was struck by is

1 not only the grieving of the family itself and
2 them not wanting any other family to ever have to
3 go through what they have suffered, but I was
4 also struck by Representative Roberts' referral
5 to what happened in the Court of Common Pleas
6 where it mentions that the judge sympathized with
7 the family and said that, you know, this is
8 something that is only a moral duty, but it's not
9 a legal duty.

10 What House Bill 2669 would do is
11 what tort law generally has historically done, it
12 takes a look at morally what is the right thing
13 to do and makes it the legal obligation.

14 2669 in its original form will bring
15 the Commonwealth into line with the vast majority
16 of the states which allow this cause of action.
17 The specific prohibition of this defense and the
18 language that I am recommending would address the
19 Menarcheck family's concerns and the concerns of
20 other families who have gone through such
21 horrifying instances.

22 And I would be glad to again send
23 along a supplemental letter with this specific
24 language or repeat it right now or do both.

25 REPRESENTATIVE MANDERINO: I think

1 if you sent it along to our committee staff, it
2 would be fine. Thank you.

3 MR. MOGILL: I appreciate that
4 opportunity.

5 REPRESENTATIVE MANDERINO: That's
6 all.

7 CHAIRMAN GANNON: Mr. Preski?

8 MR. PRESKI: One question,
9 Professor. Do you advocate the adoption of 2669
10 in its original form?

11 MR. MOGILL: Not totally, with the
12 caveat that I mentioned.

13 MR. PRESKI: Well, with the proviso
14 that D be dropped.

15 However, it's clear that you say
16 that you want to do this to bring the
17 Commonwealth in line with other existing
18 jurisdictions. There, however, is a body of case
19 law from the Superior Court and Supreme Court
20 that specifically rejects this type of cause of
21 action. Is that not true?

22 MR. MOGILL: The Supreme Court has
23 said that we haven't cross that bridge yet. At
24 some point, we will cross that bridge.

25 Interesting to note the Kazatsky

1 case was decided, I believe, seven years ago; and
2 they still haven't crossed that bridge. So in
3 the meantime, people are not being afforded the
4 right to pursue this cause of action.

5 Lower courts are still going ahead
6 and, as I mentioned, and I cited to some cases,
7 expressing their confusion over what is the law
8 and what's not the law. Please go ahead and give
9 us some type of guidance.

10 MR. PRESKI: That is where my
11 question is going. As a professor of law, is it
12 not true, though, that traditionally new causes
13 of actions are generated by the courts themselves
14 rather than by the legislature, especially in the
15 area of tort law?

16 Well, the courts will specifically
17 move further and further to establishment of a
18 cause of action until ultimately the court, in
19 the decision, will recognize a cause of action
20 which will then be codified by the legislature.

21 MR. MOGILL: I can't deny that in
22 general that's true; however, the legislature
23 certainly has power and the courts go ahead and
24 follow the direction of the legislature itself.

25 I will be more direct with you,

1 though. In the vast majority of instances in
2 which states have gone ahead and adopted this
3 cause of action, it has come through the courts.
4 It hasn't come through the legislatures.
5 However, there are legislatures that have adopted
6 this legislation and the courts have gone ahead
7 and interpreted it as a result.

8 There are times where the courts --
9 and these are when the legislature has acted --
10 courts just have sat back for too long. And they
11 have said that we are not going to cross this
12 bridge. And the question is, How long do we wait
13 before we get to that bridge?

14 MR. PRESKI: Where my questions
15 ultimately lead, then, is that the adoption of
16 2669 in this circumstance would not have helped
17 the Menarcheck family at all, would it have?

18 MR. MOGILL: Specifically how?

19 MR. PRESKI: Specifically in that we
20 have a decision by the lower court that said this
21 is a moral duty and not a legal duty. Had 2669
22 existed at the time of this tragic incident, with
23 the Defense D inside of it, without that portion
24 being removed, would not then the defendant in
25 this cause of action had the argument, I did

1 everything that I could have within the law and
2 although other groups or other people have been
3 hurt by this, it still does not stop me from
4 doing what I am legally able to do?

5 MR. MOGILL: Within the language of
6 Restatement Section 46, the language itself now,
7 not the comments which are provided for purposes
8 of interpretation, the language itself does not
9 say whether or not someone has a proper defense
10 because they legally acted within the law.

11 The comments to the Restatement,
12 which essentially are the, if you will,
13 legislative history to the Restatement and
14 provide some type of guidance would have afforded
15 the defendant that shelter. That's correct.

16 MR. PRESKI: Thank you.

17 MR. MOGILL: That is the reason that
18 I was suggesting that the additional language
19 coming from the amendment into the original
20 proposal would keep somebody from having that
21 type of shelter to say that they were allowed to
22 get away with that type of conduct.

23 MR. PRESKI: This takes it one step
24 further then.

25 MR. MOGILL: Sure.

1 MR. PRESKI: Also part of 46 and
2 part of the bill is the removal of what has come
3 to be known as the impact rule, the showing of a
4 medical -- some kind of manifestation medically
5 of the injury.

6 Do you think, then, with the
7 adoption of 2669, which is in essence Restatement
8 46, and the deletion of the impact rule, that we
9 open up ourselves to just another form of
10 pleading in the alternative in every civil case
11 where all you need now do is put a person on the
12 stand who says, I have been injured, it's been
13 emotionally draining, it's been emotionally
14 distressful, and without the requirement of the
15 impact rule or the medical manifestation, that
16 these claims will be won meritorious, meritorious
17 to the point that people will collect on them out
18 of routine?

19 MR. MOGILL: The idea is that
20 possibly some type of physical manifestation
21 might support or might go ahead and give some
22 supporting strength to the idea of emotional
23 distress. However, when you talk about emotional
24 distress, when someone is depressed, it doesn't
25 always have physical manifestations. And when

1 someone goes through severe emotional distress,
2 it doesn't always have those manifestations
3 either.

4 What we are talking about is a
5 system in which the plaintiff has the burden to
6 go ahead and show that there is some type of
7 severe emotional distress. Clearly it would be
8 to a plaintiff's advantage to have some medical
9 information to back that up. Clearly it would be
10 to a plaintiff's advantage to have a lot of
11 supporting testimony from friends and neighbors
12 and the like to go ahead and back that up.

13 But realistically speaking in
14 today's age where we believe that protecting
15 emotional health is as important as protecting
16 physical health, we need to address the idea that
17 there is a limitation in expecting that any type
18 of severe emotional distress is going to be
19 accompanied by some type of physical
20 manifestation.

21 I think that that is asking for
22 something that is not realistic in every
23 instance.

24 MR. PRESKI: Thank you, Professor.

25 CHAIRMAN GANNON: Any other

1 questions?

2 Representative Manderino.

3 REPRESENTATIVE MANDERINO: Just one
4 other follow-up. Assuming that -- because it's a
5 policy decision really whether we want to cross
6 that bridge, as you put it, in terms of
7 legislatively adopting Restatement 46 as compared
8 to letting it evolve through the courts, assuming
9 that -- let's assume that from a policy point of
10 view for reasons that extend to the greater body
11 of tort law, not necessarily the instance brought
12 before us by the family here, that we don't want
13 to cross that bridge legislatively, does the
14 amendment as proposed in 6895 accomplish a remedy
15 or at least an avenue for redress in the courts
16 for a family facing a similar instance as what we
17 have heard about today?

18 MR. MOGILL: As I read the proposed
19 amendment, it allows those related by blood to go
20 ahead and bring a case regarding how the
21 decedent's remains are to be disposed. It
22 doesn't say in what priority people who are blood
23 relatives would have that claim. It does not
24 explicitly delete nonblood relatives. That was
25 one concern that I had. And so the legislature

1 probably wants to explicitly put that in there so
2 that someone can't say, well, the legislature
3 left it open.

4 The second thing is --

5 REPRESENTATIVE MANDERINO: Because
6 somebody was raised by an aunt or something.

7 MR. MOGILL: Exactly.

8 And secondly, there is nothing
9 clearly in there that suggests that there is any
10 type of monetary relief provided in such disputes
11 for the severe emotional distress which could
12 exist as a result.

13 And specifically taking a look at
14 what was done in the common pleas court in this
15 instance where the common pleas judge said, "It's
16 a moral duty, it's not a legal duty, we are not
17 going to go ahead and provide any type of relief
18 in terms of monetary relief," there is a gap left
19 here, because if it exists with this language
20 without suggesting there is any type of monetary
21 relief, the courts are going to continue to go
22 ahead and say apparently that it's a moral duty,
23 it's not a legal duty.

24 So the amendment addresses the
25 disposition of the body but not monetary relief.

1 REPRESENTATIVE MANDERINO: But the
2 concerns raised by the family, notification, an
3 ability to participate, an ability to, I mean, do
4 the simple human and decent things to do like if
5 the estranged spouse is not going to provide a
6 headstone, the family, then, has a legal --
7 wouldn't this create the legal right for them to
8 provide the headstone should a court determine
9 that they have -- I mean don't the legal rights
10 give them all those things.

11 MR. MOGILL: It appears to, so long
12 as we put in there that the estranged spouse
13 doesn't have an implicit right to go ahead and
14 join in such litigation.

15 REPRESENTATIVE MANDERINO: Thank
16 you. Thank you, Mr. Chairman.

17 MR. PRESKI: One final question,
18 Professor.

19 Let's speak about the amendment now.
20 The amendment is not directed towards any
21 monetary recovery on the part of the family. All
22 that it intends to do is to grant the family in
23 these situations the standing to go to the court
24 and to say, We don't like the way that our
25 relative, our brother or our uncle has been

1 interned.

2 Existing law now grants the power to
3 who over the interment of the body in a case
4 similar to this?

5 MR. MOGILL: Generally, it's the
6 spouse.

7 MR. PRESKI: The spouse. Or would
8 it be to the executor of a will? Would the
9 executor have any powers if so delineated in the
10 will?

11 MR. MOGILL: If it is delineated in
12 the will, yes. In other words, those wishes have
13 to be followed because the decedent has spoken
14 prior.

15 MR. PRESKI: This law -- or this
16 amendment would not change that, would it?

17 MR. MOGILL: No.

18 MR. PRESKI: All that this would do
19 is it would grant additional parties the ability
20 to go into court and say in essence, We don't
21 like this, we would like something else.

22 MR. MOGILL: Two things, if the
23 decedent in the will said, My spouse is to
24 dispose of the body, then the court is going to
25 have to take a look at that, because that is

1 something that was the decedent's wish.

2 No. 2, there still is a door open
3 for a spouse to come in here, even the estranged
4 spouse, and say, Well, this did give the standing
5 to those in consanguinity, in blood relationship
6 to come in there, but it doesn't say I can't come
7 in here.

8 MR. PRESKI: I understand. Well, I
9 would think wouldn't it be in addition to
10 existing law that already would say the spouse
11 would have --

12 MR. MOGILL: Yes. It does not
13 eliminate existing law. It is in addition to it.

14 MR. PRESKI: Okay. Thank you,
15 Professor.

16 CHAIRMAN GANNON: Do you know
17 whether or not the deceased here had a will?

18 MR. MOGILL: I do not. I came to
19 know this information from Ms. Ruth who provided
20 the background information to me. And I have
21 since come to know a bit more obviously in
22 listening to the tragic statements this morning.

23 CHAIRMAN GANNON: Thank you very
24 much, Professor Mogill. I appreciate your coming
25 here today and presenting us with the testimony

1 and the information.

2 MR. MOGILL: Thank you, Mr.
3 Chairman, members of the committee.

4 CHAIRMAN GANNON: I have here a
5 memorandum from the Pennsylvania Psychiatric
6 Society. They could not have a representative
7 here to testify today, but they asked that this
8 memorandum be made part of the record. And I
9 would like to have it attached to the
10 transcription as a committee exhibit.

11 Any other questions from any of the
12 committee members?

13 (No response.)

14 CHAIRMAN GANNON: Any comments?

15 (No response)

16 CHAIRMAN GANNON: This public
17 hearing of the House Judiciary Committee on House
18 Bill 2669 is adjourned.

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20 (Hearing adjourned at 11:00 a.m.)

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CERTIFICATE

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me during the hearing of the foregoing cause and that this is a correct transcript of the same.


Denise L. Travis, Reporter

Notary Public in and for the
Commonwealth of Pennsylvania

My commission expires
April 20, 1998