OPINION OF ACOBA, J.,
CONCURRING IN PART AND DISSENTING IN PART

I agree that summary judgment must be vacated. However, I disagree with the reasoning employed by the majority and the basis of the rule it adopts as to who may recover under the circumstances set forth in this case. In my view, (1) in the context of this case, the human remains of the decedent are not property as that term is used in Hawai‘i Revised Statutes (HRS) § 663-8.9(a) (1993), (2) negligent infliction of mental distress is an independent tort for which recovery is allowed in this case under the standards established in Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970), (3) Rodrigues is precedent and controls the disposition in this case rather than the minority rule, and (4) recovery for mental distress resulting from the negligent mishandling of human remains should be allowed for the parents, siblings, spouse, and children of the decedent or, in the absence of any such persons, those who in fact occupy an equivalent status, as dictated under the principles in Rodrigues.

I.

A.

Law is, if anything, contextual. What in law may be acceptable in one setting may be considered anathema in another. HRS § 663-8.9(a), which abolishes a cause of action for negligent infliction of serious emotional distress if the

distress arises solely out of damage to property or material objects (emphasis added), presents such a dilemma[1].

Property is, in a broad sense, an aggregate of rights which are guaranteed and protected by the government. Black s Law Dictionary1216 (6th ed. 1990) (citing Fulton Light, Heat & Power Co. v. State, 65 Misc.Rep. 263, 121 N.Y.S. 536 (N.Y.Ct.Cl. 1909)). Among these rights are the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use, it, and to exclude every one else from interfering with it. Id. The term also denotes

> everything that has an exchangeable value or which goes to make up wealth or estate[:] . . . extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments, and . . . every invasion of one s property rights by actionable wrong.

Id. (citing Labberton v. General Cas. Co. of Am., 332 P.2d 250, 252, 254 (Wash. 1958)).

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[1] HRS § 663-8.9(b) states that [t]his section shall not apply if the serious emotional distress or disturbance results in physical injury to or mental illness of the person who experiences the emotional distress or disturbance. Ironically, if read literally, HRS § 663-8.9(b) imposes no limits on liability if the serious emotional distress . . . results in physical injury . . . or mental illness [to] the person[.] Therefore, as long as such injury or illness can be established, a cause of action with an underlying property claim will not be precluded by the literal language of the statute. Serious mental distress is not defined in the statute. Insofar as section (b) incorporates the serious mental distress standard announced in Rodrigues, supra, it is inherently inconsistent with that case s rejection of physical injury or mental illness as a prerequisite to suit.

The term material object is not a legal concept but stems from the concurring and dissenting opinion in Rodrigues, which discouraged recognition of attachment to material possessions as a basis for recovery in a court of law. 52 Haw. at 175 n.8, 472 P.2d at 521 n.8. In that sense, the term embodies a value determination that materialistic attachment, i.e., a preoccupation with or stress upon material . . . things, Merriam Webster s Collegiate Dictionary717 (10th ed. 1993), is not actionable. Thus under that view, while all material objects are property, not all property would fall within the category of material object[s].

The facts in this case do not present a preoccupation with material rather than intellectual or spiritual things and so we are not concerned with the material object aspect of HRS § 663-8.9(a). But conceivably, the remains of a person may be regarded as property, for example, as where they are purchased for anatomical study, or parts used for organ transplantation, or tissues recovered for genetic research, or in any other number of transactions or endeavors.

B.

It is not unexpected, then, that [s]ome courts have recognized a quasi-property right in dead bodies for the limited purpose of [having a] body . . . [appropriately] interred or

disposed of. Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 880 (Colo. 1994) (citing 22A Am. Jur. 2d Dead Bodies § 3 (1988); Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 441 (W.Va. 1985)) (parenthetical explanation omitted). It is said that [t]he quasi-property rights of the survivors include the right to custody of the body; [the right] to receive it in the condition in which it was left . . . ; [the right] to have the body treated with decent respect . . . ; and [the right] to bury or . . . dispose of the body without interference. Whitehair, 327 S.E.2d at 441 (citations omitted) (cited in Culpepper, 877 P.2d at 880). Insofar, however, as the purported property right in human remains serves as a mere peg upon which to hang damages for . . . mental distress, Restatement (Second) of Torts § 868 comment a (1979), it is a legal fiction, a proxy for the physical injury, that some courts require as a guarantee of the genuineness of an emotional distress claim. See Rodrigues, 52 Haw. at 170-71, 472 P.2d at 519 (citations omitted).

I believe that, in the context in which this case arises, the human remains over which Plaintiffs grieve are not property as that term is employed in HRS § 663-8.9. In the context of Plaintiffs cause of action, the decedent s body is not the object of sale or transfer or of some use, see Restatement (Second) of Torts § 868 comment a, supra, stemming from its intrinsic nature and, thus, is not property in the

commonly understood sense. The mental distress of family members or those in equivalent positions stems from the symbolic character the remains hold for such persons. In that framework, the cause of action is exclusively one for mental distress, id., and does not arise solely out of damage to property[.] HRS § 663-8.9(a). That being the case, HRS § 663-8.9(a) is not applicable, and the case law in our jurisdiction controls.

II.

The fallacy of an approach that focuses on the object that purportedly gives rise to psychic injury, rather than on an objective measure of the injury itself, is evident in this case. In a claim for psychic injury, it is not the property or the material object that tort recovery and liability are truly concerned with, but with the reaction to the thing. Therefore, it is the reasonableness of a plaintiff s response, rather than the object involved, that should define the ambit of a plaintiff s recovery and delimit the extent to which a defendant must render compensation. That was the focus in Rodrigues, in which this court held that serious mental distress may be found where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case. 52 Haw. at 173, 472 P.2d at 520.

In applying that standard, claims were to be considered by the jury and the court in the light of the circumstances presented in each case. See id. But after Rodrigues, this court ruled that recovery for negligent infliction of emotional distress [(NIED)] by one not physically injured generally requires some physical injury to property or a person resulting from the defendant s conduct. Chedester v. Stecker, 64 Haw. 464, 468, 643 P.2d 532, 535, reconsideration denied, 64 Haw. 464, 643 P.2d 532 (1982) (cited in Ross v. Stouffer Hotel Co. Ltd., 76 Hawai i 454, 465-66, 879 P.2d 1037, 1048-49 (1994)). See also Jenkins v. Liberty Newspaper Ltd., 89 Hawai i 254, 269, 971 P.2d 1089, 1104 (1999); Tseu ex rel. Hobbs v. Jeyte, 88 Hawai i 85, 92-93, 962 P.2d 344, 351-52, reconsideration denied, 91 Hawai i 124, 980 P.2d 998 (1998); Tabieros v. Clark Equip. Co., 85 Hawai i 336, 361, 944 P.2d 1279, 1304 (1997). In mandating that physical injury to a plaintiff result from a defendant s conduct, the law in this jurisdiction regressed to mandating the physical injury or impact requirement previously eschewed in Rodrigues. See 52 Haw. at 171, 472 P.2d at 519. Thus, in the absence of physical injury, plaintiffs who, as in this case, suffered no physical injury cannot generally sue for recovery.[2] And because HRS § 663-8.9 abolished recovery for emotional distress arising

[2] Arguably in some cases emotional distress may manifest itself in some physiological change.

from damage to property, the physical injury to property ground for suit is likewise unavailable.

However, in John & Jane Roes v. FHP, Inc., 91 Hawai i 470, 985 P.2d 661 (1999), where there was no physical injury to either property or a person, the physical injury rule was

> criticized as [an] inadequate method[] of distinguishing between worthy and unworthy claims.

Id. at 473, 985 P.2d at 664 (quoting Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 40, 837 P.2d 1273, 1293 (1992)). In FHP, employees of an airline were exposed to human immunodeficiency virus (HIV) contaminated blood. See id. at 472, 985 P.2d at 663. The employees subsequently tested negative for HIV. See id. Distinguishing between two seemingly conflicting lines of cases in this jurisdiction with respect to physical injury or impact requirements,[3] this court held that

> a claim . . . may be granted . . . where the negligent behavior of a defendant subjects an individual to an actual, direct, imminent, and potentially life-endangering threat to his or her physical safety by virtue of exposure to HIV.

Id. at

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[3] FHP distinguishes two lines of cases with respect to physical injury or impact requirements. In Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974), this court held that when it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances, the trial court should conclude that defendant s conduct is the [legal] . . . cause of plaintiff s injury and impose liability on the defendant for any damages arising from the consequences of his [or her] negligent act. Id. at 410, 520 P.2d at 765. On the other hand, this court has subscribed to the principle that recovery for negligent infliction of emotional distress by one not physically injured is generally permitted only when there is some physical injury to property or a[nother] person resulting from the defendant s conduct. Ross, 76 Hawai i at 465-66, 879 P.2d at 1048-49 (quoting Chedester, 64 Haw. at 468, 643 P.2d at 535) (footnote omitted).

475, 985 P.2d at 666. Relying on Rodrigues, it was said that a reasonable person would foreseeably be unable to cope with the mental stress engendered by an actual, direct, imminent, and potentially life-endangering threat to his or her physical safety. Id. (citation omitted). However, rather than applying the general standard rationale upon which Rodrigues rested, FHP recognized the HIV related claim as an exception to the general rule that recovery was permitted only when there was some predicate injury to a person.

III.

In this case, the majority again carves out an exception to the general rule, adopting the minority view that physical injury or illness is not a prerequisite to suit in a claim for negligent mishandling of a body.[4] The majority thus employs a categorical approach in determining whether a person is eligible to bring a claim of mental distress. That very course, however, was rejected in Rodrigues on the premise that there is a general duty to refrain from negligent infliction of serious mental distress:

> It can no longer be said that the advantages gained by the courts in administering claims of mental distress by reference to narrow categories outweigh the burden thereby imposed on the plaintiff. We recognize that the interest in

[4] That view essentially reflects the approach in Restatement (Second) of Torts § 868, supra, that discards the requirement of physical injury for family members seeking recovery against [o]ne who . . . negligently . . . mutilates . . . [a] body of a dead person[.]

> freedom from negligent infliction of serious mental distress is entitled to independent legal protection. We hold, therefore, that there is a duty to refrain from the negligent infliction of serious mental distress.

52 Haw. at 174, 472 P.2d at 520. The categorical approach lacks a cohesive rationale and can produce unjust results. See id. at 174, 472 P.2d at 520-21 (citations omitted). Thus, the better view would be to treat exceptions to the general rule as examples of trustworthy claims because they involve circumstances that guarantee the genuineness and seriousness of the claim. Id. at 171, 472 P.2d at 519.

Ostensibly the categorical approach is employed to avoid the dangers of vexatious suits and fictitious claims, majority opinion at 12, and a jury without restraint that might otherwise result from the application of a general standard. But

> the jury is no less without restraint under the reasonable [person] standard . . . than in innumerable other negligence cases where a reasonable [person] standard and general tort principles are applied and where the preliminary issue of whether the case presents questions on which reasonable [persons] would disagree is for the court.

Rodrigues, 52 Haw. at 175 n.8, 472 P.2d at 521 n.8. Moreover, as Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981) pointed out eleven years following this court s holding in Rodrigues, there has been no plethora of similar cases. Id. at 565, 632 P.2d at 1071 (internal quotation marks omitted). The fears of unlimited liability have not proved true. Id.

It was determined more than three decades ago that the advantages gained by the courts in administering claims of mental

distress by reference to narrow categories was outweighed by the burden thereby imposed on the plaintiff and that the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection. Rodrigues, 52 Haw. at 173-74, 472 P.2d at 520. Hence, psychic tort law in this jurisdiction progressed beyond the categorical approach in deciding the viability of a mental distress claim.

IV.

In my view, the physical injury requirement and the categorical approach to claims of psychic tort sounding in negligence were renounced in Rodrigues. [T]he preferable approach is to adopt [a] general standard[] to test the genuineness and seriousness of mental distress in any particular case. Id. at 171, 472 P.2d at 519. Consequently, there is little to be gained from relying on the minority view in deciding this appeal. Indeed, Hawai‘i became the first jurisdiction to allow recovery for NIED without a showing of physically manifested harm to the plaintiff. FHP, 91 Hawai‘i at 473, 985 P.2d at 664 (quoting Campbell, 63 Haw. at 560, 632 P.2d at 1068) (brackets omitted). As FHP suggests, where no physical injury exists, resort is to the Rodrigues standard.

Hence, the appropriate measure for determining whether plaintiffs have alleged an actionable claim in this jurisdiction

is that set forth in Rodrigues -- that is, whether a reasonable person, normally constituted, would suffer severe mental distress under the circumstances of the case. See 52 Haw. at 170, 472 P.2d at 519 (stating that in determining the duty imposed on the defendant, if any, we must weigh the considerations of policy which favor the plaintiff s recovery against those which favor limiting the defendant s liability). [W]hether the case presents questions [of liability] on which reasonable [persons] would disagree is for the court. Id. at 175 n.8, 472 P.2d at 521 n.8. After due regard to the standard we have adopted . . . , the question of whether the defendant is liable to the plaintiff in any particular case will be solved most justly by the application of general tort principles. Id. at 174, 472 P.2d at 520 (citations omitted).

Applying that standard returns reason and symmetry to the law and easily resolves the issue presented to us in this case. For there is near universal agreement that a reasonable person, normally constituted, may be unable to adequately cope with the mental stress engendered by the desecration of a deceased family member s remains. Recognition of negligently inflicted psychic injury as an independent tort, like the life experiences that compel it, see FHP, 91 Hawai i at 476-77, 985 P.2d at 667-68, cannot be confined in a doctrinal straitjacket.

V.

Rodrigues, rather than Christiansen v. Superior Court, 820 P.2d 181 (Cal. 1991), is precedent in our jurisdiction and controls on the question of who is entitled to claim mental distress resulting from the mishandling of human remains. Rodrigues instructs that a limitation on the right of recovery, as in all negligence cases, is that the defendant s obligation to refrain from particular conduct is owed only to those [plaintiffs] who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. 52 Haw. at 174, 472 P.2d at 521 (citations omitted). Under Rodrigues, then, the nature of the risk defines the scope of liability. As a result, in devising a rule as to who should recover in this case, there is justification for affording the right to sue to those most likely to suffer mental distress because of the desecration of a body, for they are those foreseeably [affected] by the [wrongful] conduct. Id.

Those most likely affected are those who are also most likely to suffer the greatest grief over the death of the decedent -- the parents, siblings, spouse, and children of the deceased and, in the absence of any such persons, those who in fact occupy an equivalent status. Cf. HRS § 663-3(b) (Supp. 2000) (stating that damages may be recovered for a wrongful death

of a person by the surviving spouse, reciprocal beneficiary, children, father, mother, and by any person wholly or partly dependent upon the deceased person)[5]. The majority has adopted the foregoing formulation of family members and incorporated it as part of the majority opinion.[6] However, the foregoing formulation rests on the precepts in Rodrigues.

The Christiansen rationale is to the contrary and bears no relationship to an appropriate family members description. In Christiansen, the California Supreme Court rejected a court of appeals decision that close family members may recover damages for the emotional distress they suffer if remains are negligently . . . mishandled, 820 P.2d at 183, and held that the duty is owed only to close family members who were aware that funeral and/or crematory services were being performed, and on whose behalf or for whose benefit the services were rendered. Id. (emphasis added).

Under the Christiansen formulation, a rational relationship between the interest sought to be protected -- freedom from negligent infliction of emotional distress -- and those affected -- the immediate family members who are aware of

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[5] The actual amount of damages any plaintiff would actually recover would, as in similar assessments of tort damages, depend on the circumstances of each case and proof of the nature of the relationship between the particular plaintiff and the deceased person.

[6] The term reciprocal beneficiary is tied to the provisions of HRS chapter 572C and is thus less satisfactory for common law application. Those described as reciprocal beneficiaries in HRS § 572C-3 and -4 (Supp. 2000) would be included as being among those occupying an equivalent status.

the services and for whose benefit the services are being performed, majority opinion at 21 -- is difficult to discern. The Christiansen limiting qualification of immediate family members adopted by the majority, is likely to spur collateral litigation. Awareness of the funeral services as opposed to the desecration seems an irrelevant factor and the further condition that a putative plaintiff must benefit from the services performed appears contractual in nature. Both qualifications are remote from the true interest sought to be protected and potentially disqualify persons who should otherwise be entitled to recover. The appropriate class of plaintiffs, then, should be that defined by the principles established in Rodrigues.