WHEN LIVING AS HUSBAND AND WIFE ISN'T ENOUGH: REEVALUATING *DILLON*'S CLOSE RELATIONSHIP TEST IN LIGHT OF *DUNPHY v. GREGOR*

David Sampedro*

I. INTRODUCTION

Historically, American courts were slow to recognize the independent legal interest an individual has in peace of mind.[1] Courts espoused various policies to justify their slow recognition of emotional distress.[2] Initially, courts recognized emotional distress[3] as an element of damages only when it accompanied another independently recognized cause of action.[4] Eventually, the judiciary reluc

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* David Sampedro received his B.S. in Political Science from Florida State University in 1992, and J.D. from Stetson University College of Law, *cum laude*, in 1995 where he was a member of the *Stetson Law Review*. He is currently an associate with the firm of Anania, Bandklayder & Blackwell in Miami.

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 54–55 (5th ed. 1984); *see also* Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 604 (1982); Marjorie A. Rasmussen, Comment, *Right of an Unmarried Cohabitant to an Action for Negligent Infliction of Emotional Distress in California*, 15 PAC. L.J. 925, 928–29 (1984). See *infra* note 3 for a definition of emotional distress. But see *infra* notes 33–36, 46–48 and accompanying text for examples of early case law recognizing emotional distress.

2. *See infra* notes 24–30 and accompanying text.

3. "Emotional distress" may be defined as:

> [M]ental anguish: When connected with a physical injury, this term includes both the resultant mental sensation of pain and also the accompanying feelings of distress, fright, and anxiety. . . . In other connections, and as . . . an element of damages, it includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc.

BLACK'S LAW DICTIONARY 985–86 (6th ed. 1990).

The Restatement defines emotional distress as "mental suffering, mental anguish, [and] mental or nervous shock." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965). However, this Article will use the phrase "emotional distress" as courts have tended to employ that term most frequently. "Fright, humiliation, indignation, or anger, standing alone, would not constitute the kind of legal damage needed to support an action" for emotional distress. F. HARPER, ET AL., THE LAW OF TORTS § 18.4, at 681–83 (2d ed. 1986).

4. *See, e.g.*, Southern Express Co. v. Byers, 240 U.S. 612, 615 (1916) (finding great

tantly extended protection to those who suffered intentional infliction of emotional distress.[5] By the end of World War II, courts had gradually extended liability to include direct victims[6] of emotional distress as well as bystander victims.[7]

The California Supreme Court took an extraordinarily important role in defining the parameters of bystander recovery for emotional distress claims in *Dillon v. Legg*.[8] *Dillon* retreated from the zone of danger rule[9] advocated in *Amaya v. Home Ice, Fuel & Supply Co.*,[10] and instead, established a three-pronged test based upon

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weight of authority precludes recovery in actions claiming mental suffering alone) (citations omitted). *See also* Lynch v. Knight, 11 Eng. Rep. 854, 863 (1861); RESTATEMENT OF TORTS § 46 (1934) (peace of mind alone not sufficient to state cause of action); Hub Harrington, Recent Decision, *Torts — Alabama Supreme Court Recognizes Intentional Infliction of Severe Emotional Distress as an Independent Cause of Action*, 12 CUMB. L. REV. 525, 530–32 nn.42–52 (1982) (giving examples of case law requiring recovery of emotional distress to be based upon an independent tort). This early dependency induced legal scholars to refer to emotional distress as a "parasitic" cause of action. KEETON ET AL., *supra* note 1, at 57.

5. See *infra* notes 24–41 and accompanying text for a discussion of intentional infliction of emotional distress.

6. The author uses the term "direct victim" throughout this Article to refer to the primary victim whose physical injury results from the defendant's culpable conduct. Depending on the circumstances, the direct victim may also seek recovery for her psychological injuries. See Julie A. Greenberg, *Negligent Infliction of Emotional Distress: A Proposal for a Consistent Theory of Tort Recovery for Bystander and Direct Victims*, 19 PEPP. L. REV. 1283, 1285–91 (1992) for a discussion of the history of the direct victim theory.

7. "Bystander" liability refers to "claims that arise after the plaintiff witnesses the harm caused to a third person by the defendant." John D. Burley, Comment, Dillon *Revisited: Toward a Better Paradigm for Bystander Cases*, 43 OHIO ST. L.J. 931, n.2 (1982).

See generally Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 2–3 (1992), for an analysis of the direct victim/bystander dichotomy; Greenberg, *supra* note 6.

8. 441 P.2d 912 (Cal. 1968). *See* KEETON ET AL., *supra* note 1, § 54, at 366. For a full discussion of Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968), *overruling* Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513 (Cal. 1963), see *infra* notes 72–86 and accompanying text. Courts, as well as legal scholars, recognize *Dillon* as the seminal case involving bystander liability. Leong v. Takasaki, 520 P.2d 758, 763 (Haw. 1974); KEETON ET AL., *supra* note 1, § 54, at 366.

The author notes that other states, particularly New York, also made great strides in accepting peace of mind as a recognized interest. *See, e.g.*, Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984); Battalla v. State, 176 N.E.2d 729 (N.Y. 1961); Ferrara v. Galluchio, 152 N.E.2d 249 (N.Y. 1958). However, this Article will, for the most part, discuss California case law as the most influential in the country.

9. *Dillon*, 441 P.2d at 915 (finding that the zone-of-danger is a fallacy and hopelessly artificial). See *infra* notes 57–69 and accompanying text for a discussion regarding the zone of danger rule.

10. 379 P.2d 513 (Cal. 1963), *overruled by* Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

foreseeability. Under the *Dillon* test, the dispositive factors are whether: 1) the plaintiff was at or near the scene of the accident; 2) the plaintiff's shock resulted from a contemporaneous and sensory observance of the accident; and 3) the plaintiff and the victim had a close relationship.[11] Courts in other jurisdictions quickly adopted *Dillon*'s foreseeability analysis to allow claims by unrelated individuals.[12] In 1988, the California Supreme Court used *Elden v. Sheldon*[13] as a catalyst to modify its landmark decision.[14] In order to prevent the extension of liability, the court held that a plaintiff who witnessed the injury of a loved one could not recover for negligent infliction of emotional distress if the two were unmarried and only cohabited.[15] The court's decision did not turn on the fact that an unmarried cohabitant's injuries were unforeseeable.[16] Instead, the court cited society's overriding interest in certainty and structure in the law as the basis for limiting a cognizable cause of action under *Dillon* to married individuals.[17]

Recently, the New Jersey Supreme Court presented the legal community with its own progressive approach to defining a "close relationship" under a *Dillon* analysis.[18] The importance and significance of *Dunphy v. Gregor II* is not limited to the state of New Jersey. In the twenty-eight years since the California Supreme Court decided *Dillon v. Legg*,[19] a majority of states have adopted some form of its foreseeability analysis.[20] Similarly, California's decision in *Elden* has surfaced as the seminal case restricting unmarried

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11. *Dillon*, 441 P.2d at 920. The *Dillon* court emphasized that courts should apply this flexible test on a case-by-case basis to determine whether it was reasonably foreseeable that the defendant owed a duty of care to the bystander plaintiff. *Id*. at 922.

12. *See infra* note 90 and accompanying text.

13. 758 P.2d 582 (Cal. 1988).

14. Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

15. *Elden*, 758 P.2d at 586–88.

16. *Id*. at 586. *See* Dean H. Lefler, Note, Elden v. Sheldon — *Should Policy Outweigh Foreseeability?*, 1989 B.Y.U. L. REV. 977, 981–83 (1989) (noting that the California Supreme Court based its decision on what it perceived to be overriding policy reasons, such as the state's interest in marriage, judicial economy, and limiting liability, rather than foreseeability).

17. Ellis Horvitz, *An Analysis of Recent Supreme Court Developments in Tort and Insurance Law: The Common-Law Tradition*, 26 LOY. L.A. L. REV. 1145, 1155 (1993).

18. Dunphy v. Gregor II, 642 A.2d 372 (N.J. 1994). For the purposes of this Article, the appellate court's decision will be referenced as Dunphy v. Gregor I and the New Jersey Supreme Court's opinion as Dunphy v. Gregor II.

19. 441 P.2d 912 (Cal. 1968).

20. *See infra* note 87 and accompanying text.

cohabitants from successful recovery under a *Dillon* analysis. *Dunphy II* is the first case which criticizes *Elden*'s reasoning and conclusion. It will provide other states with an alternative to stagnant California common-law and will more closely reflect contemporary society.[21]

This Article will first briefly explain the development and rationale of emotional distress. The discussion then explores the expansion of recovery for free standing, negligently inflicted emotional distress and the eventual creation of the bystander rule. Next, this Article will review the extent to which different states have interpreted bystander liability and their willingness to expand the law in that area, with particular emphasis on the California Supreme Court's landmark decisions in *Dillon v. Legg*[22] and *Elden v. Sheldon*.[23] The discussion will then turn to a summary of *Dunphy*'s facts and a critical analysis of the majority and dissenting opinions, which among other things will suggest that: 1) although a familial relationship by blood or marriage may be absent, individuals who have a stable, enduring, substantial, and mutually supportive relationship have a protected interest which the law should recognize; and 2) the New Jersey Supreme Court reached the proper conclusion when it rejected a bright-line distinction between married and unmarried individuals in favor of a case-by-case analysis of what constitutes a close, familial relationship. This Article also will propose an alternative approach for courts unwilling to equate the relationship between the two groups, which will preserve the ability of unmarried cohabitants to recover for negligent infliction of emotional distress. Finally, this Article will conclude that the factors set forth in *Dunphy* or those suggested by the author, which an unmarried cohabitant must meet to prevail in a bystander action, sufficiently define the parameters of the cause of action to permit a trier of fact to decide the issue.

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21. *Accord* Butcher v. Superior Court of Orange County, 139 Cal. App. 3d 58, 62–64 (1983) (finding that unmarried cohabitant may recover for loss of consortium when nonmarital relationship is characterized as stable and significant), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988). See *infra* notes 109–60 and accompanying text for a discussion of *Dunphy II*.

22. 441 P.2d 912 (Cal. 1968).

23. 758 P.2d 582 (Cal. 1988). See *infra* note 87 and accompanying text for a discussion of how a majority of courts have adopted some form of *Dillon*'s reasoning.

II. THE HISTORY OF EMOTIONAL DISTRESS

A. The First Steps to Recognition: Intentional Infliction of Emotional Distress

The judiciary's initial reluctance and, indeed, hostility toward almost any type of recovery for emotional distress[24] stemmed from several social policy reasons.[25] First, the judiciary found emotional distress cases to be too speculative as the injuries often were temporary and trivial.[26] Second, it was concerned about the sometimes tenuous causal relationship between the defendant's negligence and the victim's emotional distress.[27] Third, the judiciary feared that it would be besieged with a flood of frivolous claims.[28] Courts also cited

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24. *See supra* notes 1, 3 and accompanying text. But see *infra* notes 33–36 and accompanying text for a discussion of traditionally recognized exceptions to this early common law rule. See also *infra* notes 24–108 and accompanying text for a brief discussion of how courts gradually expanded the law.

25. *See generally* KEETON ET AL., *supra* note 1, § 54 at 360–61.

26. *Id*.; STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 16:1, at 937 (1987). *See also* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 44–45 (1982) (discussing the concerns with fraudulent emotional injuries and the difficulty in separating serious emotional injury from trite injuries); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936) (indicating courts' aversion in recognizing others' "bad manners" and everyday annoyances of living in society).

27. *See, e.g.*, Mitchell v. Rochester Ry., 45 N.E. 354, 355 (N.Y. 1896), *overruled by* Battalla v. State, 176 N.E.2d 729 (N.Y. 1961); Chittick v. Philadelphia Rapid Transit Co., 73 A. 4, 5 (Pa. 1909); Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888). As a result, even when courts found a defendant's conduct to be negligent, she would not be held liable for the ensuing emotional distress. *See Mitchell*, 45 N.E. at 354 (holding that although defendant was negligent, public policy justified precluding plaintiff from recovering for her emotional distress).

28. *Mitchell*, 45 N.E. at 354; *see*, *e.g.*, Kraus v. Consolidated Rail Corp., 723 F. Supp. 1073, 1090 (E.D. Pa. 1989); Payton v. Abbott Labs, 437 N.E.2d 171, 178 (Mass. 1982); Lynch v. Knight, 11 Eng. Rep. 854 (1861); *see also* Douglas B. Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781, 784 (1988). Other courts simply felt that notwithstanding fraud, recognizing emotional distress would lead to an extraordinary increase in litigation. *See, e.g.*, *Kraus*, 723 F. Supp. at 1090; Gates v. Richardson, 719 P.2d 193, 197 (Wyo. 1986); Spade v. Lynn & Boston R.R., 47 N.E. 88, 89 (Mass. 1897), *overruled by* Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978).

However, subsequent advancements in various fields of science have dispelled

the lack of legal precedent as a justification for not recognizing such a cause of action.[29] Finally, the judiciary feared that the recognition of emotional distress would expose defendants to unlimited liability.[30]

Ensuing decisions criticized the arbitrary bar of all actions for emotional distress because of the judiciary's fear that some fraudulent claims may succeed.[31] These courts reasoned that the interests of administrative convenience should not supersede those of a meritorious claim. Beginning in the nineteenth century, reform oriented scholars suggested that the law should allow compensation in areas other than those involving damage to property or bodily harm.[32] Gradually, courts used the common law torts of assault,[33] seduction,[34] battery,[35] and false imprisonment[36] as a catalyst in recogniz-

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many of the fears which the above mentioned policy reasons invoked. Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917 (1975) (noting that advancements in the field of psychology have established emotional distress as a measurable injury). See generally Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, Part II (1992), for an excellent discussion of the advancements in science, technology, and epistemology and how they relate to emotional distress.

29. Lehman v. Brooklyn City R.R., 53 N.Y. Sup. Ct. 355, 356 (1888); *Victorian*, 13 App. Cas. at 225.

30. *See* KEETON ET AL., *supra* note 1, § 54, at 361. Prosser notes that courts generally perceive that imposing a heavy duty on a defendant for such a remote, negligent act would be unfair and disproportionately burdensome. *Id*.; *see also Kraus*, 723 F. Supp. at 1090.

31. *Jarchow*, 48 Cal. App. 3d at 934; Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969), *overruled by* Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984).

32. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Brandeis and Warren suggested that a tort cause of action for invasion of privacy could be construed through an interpretation of privacy-like interests in early contract and intellectual property case law. *Id*. at 195, 219.

33. *See, e.g.*, Kline v. Kline, 64 N.E. 9 (Ind. 1902) (defendant threatened to burn down house and pointed a pistol at plaintiff); Trogdon v. Terry, 90 S.E. 583, 584 (N.C. 1916) (defendant forced plaintiff to sign paper as he threatened to "whip hell out of" him with his walking stick); Allen v. Hannaford, 244 P. 700 (Wash. 1926) (defendant pointed pistol at plaintiff and threatened to shoot him). Assault protects an individual's "interest in freedom from apprehension of a harmful or offensive contact with [another] . . . person." KEETON ET AL., *supra* note 1, § 10 at 43.

34. *See, e.g.*, Anthony v. Norton, 56 P. 529 (Kan. 1899) (seduction of 25-year old daughter); Haeissig v. Decker, 166 N.W. 1085 (Minn. 1918) (seduction of 22-year old daughter).

35. *See, e.g.*, Williams v. Underhill, 71 N.Y.S. 291 (1901) (defendant laid his "violent hands" upon plaintiff); Draper v. Baker, 21 N.W. 527 (Wis. 1884) (defendant spat in plaintiff's face). Battery protects an individual's right to be free from "harmful or offensive contact." KEETON ET AL., *supra* note 1, § 9 at 39.

36. *See, e.g.*, Gadsen Gen. Hosp. v. Hamilton, 103 So. 553 (Ala. 1925) (wrongful

ing intentional infliction of emotional distress.[37]

By the time the American Law Institute drafted the *Restatement (Second) of Torts*,[38] jurisdictions had begun to recognize intentional infliction of emotional distress as an independent tort.[39] Today, the majority of states recognize this tort as an independent cause of action in one form or another.[40] Nonetheless, bystanders who claim intentional infliction of emotional distress continue to have difficulty stating a cause of action. In fact, courts have tended to limit liability in such circumstances to instances in which the

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detention of patient in hospital for failure to pay bill); Fisher v. Rumler, 214 N.W. 310 (Mich. 1927) (police officers illegally entered home to conduct search and improperly detained plaintiff as she attempted to leave). False imprisonment protects an individual's interest to be free "from restraint of movement." KEETON ET AL., *supra* note 1, § 11, at 47.

37. At this time many courts still held that mere words, regardless of how threatening, violent, or outrageous, were insufficient to state a cause of action for intentional infliction of emotional distress. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965). *Cf.* Kramer v. Ricksmeier, 139 N.W. 1091 (Iowa 1913); Hixson v. Slocum, 161 S.W. 522 (Ky. 1913); Grayson v. St. Louis Transit Co., 71 S.W. 730 (Mo. Ct. App. 1903); State v. Daniel, 48 S.E. 544 (N.C. 1904); Brooker v. Silverthorne, 99 S.E. 350 (S.C. 1919).

38. RESTATEMENT (SECOND) OF TORTS § 46 (1965) (reversing the RESTATEMENT OF TORTS § 46 (1934), which argued that intentional infliction of emotional distress should not be recognized as an independent tort).

39. *See, e.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 286 (Cal. 1952) (recognizing a cause of action where a union member used threats to extort money from a non-union plaintiff); Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277, 278–79 (Fla. 1985) (adopting the standard set out in section 46 of the Restatement); Dunn v. Western Union Tel. Co., 59 S.E. 189 (Ga. Ct. App. 1907) (employee insulted customer by stating "go to hell with your God damn message"); Wilkonson v. Downtown, 2 Q.B. 57, 57 (1897) (practical joker intentionally inflicted emotional distress by telling plaintiff that her husband had been in a serious accident and was lying in the street with two broken legs).

The *Restatement (Second) of Torts* § 46 confines its definition of intentional infliction of emotional distress to intentional acts which are "extreme and outrageous" and cause "severe emotional distress." RESTATEMENT (SECOND) OF TORTS § 46 (1965). Jurisdictions which have adopted this approach will not find liability unless the defendant's conduct is "extreme and outrageous." *See, e.g.*, Wiehe v. Kukal, 592 P.2d 860, 863–64 (Kan. 1979) (attacking neighbor with pitchfork not found to be "extreme and outrageous" conduct). Thus, although an individual may intentionally inflict emotional distress, a court following the *Restatement* would not find her liable if the conduct was not "extreme and outrageous." *See* Paul V. Calandrella, Note, *Safe Haven for a Troubled Tort: A Return to the Zone of Danger for the Negligent Infliction of Emotional Distress*, 26 SUFFOLK U. L. REV. 79, 82 (1992). When the intentional conduct is directed at a third person not related to the actor, such emotional distress must result in "bodily harm." RESTATEMENT (SECOND) OF TORTS § 46 (1965).

40. *See* Givelber, *supra* note 26, at 43–44 n.9 (identifying case law which has adopted the definition of the *Restatement* or some variation thereof).

tortfeasor was aware that the bystander was present.[41]

B. The Development of Negligent Infliction of Emotional Distress

Where an actor's intentional actions failed to meet the requirements of extreme outrage and moral dereliction in the context of intentional infliction of emotional distress, courts were reluctant to protect a plaintiff's independent interest in peace of mind through the law of negligence.[42] Thus, when an individual suffered severe emotional distress alone, without an accompanying physical injury,[43] and without an independent tort, courts held that there could be no recovery.[44] Despite the judiciary's aversion to recognizing emotional distress as a negligence based tort,[45] some historical situations existed in which courts did extend liability. Classic examples include the mishandling of corpses,[46] negligent communication concerning

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41. *See, e.g.*, Taylor v. Vallelunga, 339 P.2d 910, 911 (Cal. Ct. App. 1959) (precluding recovery, although plaintiff witnessed the beating of her father, because defendant did not know of bystander plaintiff's presence). Prosser states that the court's reasoning is that defendants cannot reasonably anticipate injury to an unknown bystander. KEETON ET AL., *supra* note 1, § 12, at 65.

42. For a brief discussion of intentional infliction of emotional distress, as well as the judiciary's aversion toward that cause of action see *supra* notes 24–41.

43. Interestingly, some courts treated shock to the nervous system as injury to the body, instead of to the mind, thus satisfying the threshold prerequisite of accompanying physical injury. *See, e.g.*, Vanoni v. Western Airlines, 247 Cal. App. 2d 793 (1967).

44. *See, e.g.*, Espinosa v. Beverly Hosp., 249 P.2d 843 (Cal. 1952) (denying recovery when wrong newborn was given to mother); Sullivan v. H.P. Hood & Sons, Inc., 168 N.E.2d 80 (Mass. 1960) (ingestion of milk containing fecal matter of mouse); Tuttle v. Meyer Dairy Prods. Co., 138 N.E.2d 429 (Ohio 1956) (plaintiff got a mouthful of broken glass, without actually being cut, while eating cottage cheese); Seidenbach's Inc. v. Williams, 361 P.2d 185 (Okla. 1961) (failing to deliver bride's wedding gown before wedding).

45. *See* Kline v. Kline, 64 N.E. 9, 10 (Ind. 1902) (holding that current authority prevents recovery for emotional distress in ordinary acts of negligence where there has been no physical injury); Hickey v. Welch, 91 Mo. App. 4, 13 (1901) (finding that recovery is impermissible where act is negligent; however, it is permissible if the act is "willful, malicious or accompanied by circumstances of inhumanity and oppression . . . whether physical harm was done or not").

46. *See, e.g.*, St. Louis S.W. Ry. v. White, 91 S.W.2d 277 (Ark. 1936) (railroad company failed to properly and promptly gather remains of body after being run over); Chelini v. Nieri, 196 P.2d 915 (Cal. 1948) (plaintiff suffered cerebral spasms and fainted after discovering that mother's body had severely decomposed, although defendant assured otherwise); Allen v. Jones, 104 Cal. App. 3d 207 (1980) (plaintiff's deceased brother's remains lost during transit); Carey v. Lima, Salmon & Tully Mortuary, 168 Cal. App. 2d 42 (1959) (deceased father's body arrived from shipment in a malodorous,

the death of a relative,[47] and common carriers' mistreatment of passengers.[48]

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decayed condition); Pollard v. Phelps, 193 S.E. 102 (Ga. Ct. App. 1937) (no attempt made to stop for corpse and as a result severe mutilation and destruction of corpse occurred); Morgan v. Richmond, 336 So. 2d 342 (La. Ct. App. 1976) (plaintiff's mother's body wrongfully retained); Blanchard v. Brawley, 75 So. 2d 891 (La. Ct. App. 1954) (wanton mutilation of decedent's corpse); Larson v. Chase, 50 N.W. 238 (Minn. 1891) (unlawful dissection and mutilation of body); Muniz v. United Hosps. Med. Ctr. Presbyterian Hosp., 379 A.2d 57 (N.J. Super. Ct. App. Div. 1977) (hospital's negligent handling of informing parents of baby's death and its failure to locate body and confirm death for three weeks); Torres v. State, 228 N.Y.S.2d 1005 (Ct. Cl. 1962) (state hospital's effort to notify family of death was not reasonable as it occurred after unauthorized autopsy); Lamm v. Shingleton, 55 S.E.2d 810 (N.C. 1949) (cemetery failed to secure vault allowing mud to seep into casket); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 650–54 (Tex. 1987) (stillborn baby's body disposed of in unmarked, common grave without consent); Clark v. Smith, 494 S.W.2d 192, 197 (Tex. Ct. App. 1973) (implied common law duty to embalm body); Corrigal v. Ball & Dodd Funeral Home, Inc., 577 P.2d 580 (Wash. 1978) (cremated remains of son's deceased body placed in cardboard box rather than urn). However, some jurisdictions still require some form of malice or aggravating circumstances. *See, e.g.*, Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950) (en banc) (allowing recovery where defendant took body of plaintiff's child without consent and refused to embalm and return body until payment of excessive fee was made); Dunahoo v. Bess, 200 So. 541 (Fla. 1941) (careless embalming of deceased's body did not rise to level necessary to recover for mental anguish); Chisum v. Behrens Mortuary, Inc., 283 N.W.2d 235 (S.D. 1979) (plaintiff had burden of showing defendant mortician acted intentionally or maliciously rather than negligently when interfering with custody of body and making unauthorized incision in body).

47. *See, e.g.*, Western Union Tel. Co. v. Redding, 129 So. 743 (Fla. 1930) (telegraph company must have contemplated mental anguish); Johnson v. New York, 334 N.E.2d 590 (N.Y. 1975) (hospital falsely advised that plaintiff's mother had died); Western Union Tel. Co. v. Shaw, 177 S.W.2d 52 (Tex. 1944) (company failed to transmit telegram notifying of grandchild's death); So Relle v. Western Union Tel. Co., 55 Tex. 308 (1881) (defendant failed to deliver message, causing plaintiff to miss his mother's funeral). *But see* International Ocean Tel. Co. v. Saunders, 14 So. 148, 152 (Fla. 1893) (denying emotional distress claim in negligent telegraph of death), *overruled by* Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974).

48. *See, e.g.*, Gulf, C. & S. F. Ry. v. Luther, 90 S.W. 44 (Tex. Ct. App. 1905). Scholars cite two different justifications for these common law exceptions. First, the special circumstances of these situations virtually guarantee genuine distress. KEETON ET AL., *supra* note 1, § 54, at 362. Second, although these cases involve breach of an implied contract, the nature of the injuries resemble damages which are associated with tort law. David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 458 (1992). *But see* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 513 n.198 (1982).

By the middle of this century, courts had accepted a more liberal application of negligence principles to claims of emotional distress.[49] Nonetheless, courts still imposed restrictions on recovery. At first, courts limited recovery to individuals who showed some physical manifestation as a consequence of their emotional distress.[50] Courts also found that recovery turned on whether the plaintiff suffered any physical contact at the time of the injury as a result of the defendant's actions.[51] The limited knowledge of psychology during the early development of emotional distress motivated courts to require physical impact as a prerequisite to recovery. This require-

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49. *See, e.g.*, Ferrara v. Galluchio, 152 N.E.2d 249, 252 (N.Y. 1958) (declaring "[f]reedom from mental disturbance is now a protected interest in this State").

50. *See* Webb v. Francis J. Lewald Coal Co., 4 P.2d 532, 533 (Cal. 1931) (holding that physical injury caused by fear of a third party does not support a recovery), *overruled by* San Francisco v. Superior Court, 231 P.2d 26, 28 (Cal. 1951); Lindley v. Knowlton, 176 P. 440, 441 (Cal. 1918) (finding a cause of action was stated when plaintiff alleged that she suffered personal physical disorders as a proximate result of an attack by an escaped chimpanzee, even though the subsequent injury and fright did not happen simultaneously).

51. *See* Comstock v. Wilson, 177 N.E. 431, 433–34 (N.Y. 1931) (holding that collision in an automobile accident is sufficient contact); Bosley v. Andrews, 142 A.2d 263, 264 (Pa. 1958) (finding that there can be no compensation which results from shock or fright absent an accompanying physical injury *or* physical impact), *overruled by* Niederman v. Brodsky, 261 A.2d 84 (Pa. 1970). *See also* Plummer v. Abbott Labs, 568 F. Supp. 920, 925 (D.R.I. 1983) (finding that fear based on daughter's heightened risk of contracting cancer after mother ingested prescribed drug was not sufficient to allow recovery for emotional distress). *Cf.* Mitchell v. Rochester Ry., 45 N.E. 354, 354 (N.Y. 1896) (holding that although medical testimony showed that fear of being struck by negligently driven carriage may have contributed to miscarriage, there was no cause of action stated because there was no physical impact), *overruled by* Battalla v. State, 176 N.E.2d 729 (N.Y. 1961).

The *Restatement* also states that absent physical harm, compensation for emotional distress will be denied. "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." RESTATEMENT (SECOND) OF TORTS § 436A (1965). This came to be known as the impact rule.

By the nineteenth century some courts relied on the impact rule to determine recovery. *See, e.g.*, Spade v. Lynn & Boston R.R., 47 N.E. 88 (Mass. 1897) (recovery not allowed for injuries sustained solely because of emotional distress), *overruled by* Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978) (plaintiff may recover for emotional distress damages regardless of physical impact); Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896) (precluded recovery for mental injuries), *overruled by* Battalla v. State, 176 N.E.2d 729 (N.Y. 1961) (recovery allowed for mental injuries resulting solely from emotional distress regardless of physical impact); *see also* Terri Krivosha Herring, Note, *Administering the Tort of Negligent Infliction of Mental Distress: A Synthesis*, 4 CARDOZO L. REV. 487, 492–97 (1983).

ment, in the judiciary's view, ensured deterrence of fraudulent claims.[52]

Although courts utilized physical impact as a condition precedent to recovery, the severity of the contact gradually became less significant.[53] Often, plaintiffs could satisfy the doctrine's threshold with the slightest of impacts.[54] Eventually, the doctrine was overturned in the same jurisdiction in which it originated.[55] Today, most American jurisdictions have abrogated the impact rule in favor of a more modern approach.[56]

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52. *See* David J. Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 163–64 (1976–77).

53. *See* Zelinsky v. Chimics, 175 A.2d 351, 353 (Pa. 1961) (acknowledging that even the slightest impact, which did not result in injury, sufficed to meet threshold physical injury).

54. *See, e.g.*, Plummer v. United States, 580 F.2d 72, 76 (3d Cir. 1978) (impact with bacilli); Clark v. Choctawhatchee Elec. Coop., 107 So. 2d 609 (Fla. 1958) (electrical shock); Christy Bros. Circus v. Turnage, 144 S.E. 680 (Ga. Ct. App. 1928) (defendant's horse "evacuated his bowels" into plaintiff's lap); Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980) (x-rays of pregnant woman); Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272 (Ky. 1929) (a trifling burn); Driscoll v. Gaffey, 92 N.E. 1010 (Mass. 1910) (forcible seating on a floor); Homans v. Boston Elevated Ry., 62 N.E. 737 (Mass. 1902) (slight bump against car seat); Spade v. Lynn & Boston R.R., 52 N.E. 747 (Mass. 1899) (slight blow), *overruled by* Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Porter v. Delaware L. & W. R., 63 A. 860 (N.J. 1906) (dust in the eyes); Comstock v. Wilson, 177 N.E. 431 (N.Y. 1931) (falling after fainting); Morton v. Stack, 170 N.E. 869 (Ohio 1930) (inhalation of smoke), *overruled by* Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983); Zelinski v. Chimics, 175 A.2d 351 (Pa. 1961) (a trivial jolt, however slight); Hess v. Philadelphia Transp. Co., 56 A.2d 89 (Pa. 1948) (electrical shock); Johnson Freight Lines, Inc. v. Tallent, 384 S.W.2d 46 (Tenn. 1964) (slight jar). Ironically, the dictionary defines "impact" as a forceful physical collision, impetus, or onset. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 904 (3d ed. 1992).

55. Dulieu v. White & Sons, 2 K.B. 669 (1901), *overruling* Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888).

56. *See* HARPER, *supra* note 3, at 687, § 18.4; Burley, *supra* note 7, at 933 n.29; *see also* Champion v. Gray, 478 So. 2d 17, 18–19 (Fla. 1985) (interest in psychic injury to bystander plaintiff who witnessed injury to close family member is too great to require physical impact), *modified on other grounds by* Zell v. Meek, 665 So. 2d 1048 (Fla. 1995). *But see* St. Louis, I. M. & S. R.R. v. Bragg, 64 S.W. 226 (Ark. 1901) (no recovery for emotional distress allegedly resulting from railroad company informing plaintiff that she must cross cattle guard); Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974) (precluding recovery for mental anguish absent physical impact), *modified by* Champion v. Gray, 478 So. 2d 17 (Fla. 1985) (adopting a modified *Dillon* approach for bystander plaintiffs); Braun v. Craven, 51 N.E. 657 (Ill. 1898) (no recovery where defendant landlord merely yelled at tenant in a loud and boisterous manner); Kalen v. Terre Haute & I. R.R., 47 N.E. 694 (Ind. App. 1897) (barring recovery for emotional distress caused by defendant's actions which resulted in a horse and buggy running away with plaintiff in it); Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272 (Ky. 1929) (cause of action did not exist absent physical impact from trolley wire); Babcock & Wilcox Co. v. Nolton, 71 P.2d

Zone of Danger

Most jurisdictions eventually replaced the impact rule with the zone of danger rule as the standard test for determining culpability.[57] This enabled courts to expand the scope of liability for emo-

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1051 (Nev. 1937) (recovery allowed where defendant backed truck into plaintiff's automobile); Held v. Red Malcuit, Inc., 230 N.E.2d 674 (Ohio Misc. 1967) (no recovery for acts of negligence causing fright and shock unaccompanied by direct physical injury). Moreover, at least seven states continue to follow the impact rule. *See, e.g.*, M.B.M. Co. v. Counce, 596 S.W.2d 681 (Ark. 1980); OB-GYN Assocs. of Albany v. Littleton, 386 S.E.2d 146 (Ga. 1989); Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991); Anderson v. Scheffler, 752 P.2d 667 (Kan. 1988); Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980); Van Hoy v. Oklahoma Coca-Cola Bottling Co., 235 P.2d 948 (Okla. 1951); Hammond v. Central Lane Communications Ctr., 816 P.2d 593 (Or. 1991).

Peculiarly, Florida is an example of one jurisdiction which abides by the impact rule for direct victims and abandons it in favor of a modified foreseeability test for bystander plaintiffs. *See* Zell v. Meek, 665 So. 2d 1048, 1050–54 (Fla. 1995); Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So. 2d 1294, 1299 (Fla. 4th Dist. Ct. App. 1992) (Farmer, J., dissenting). *Compare* Champion v. Gray, 478 So. 2d 17 (Fla. 1985) (finding that mother could recover for emotional distress where she arrived immediately after the accident but witnessed the gruesome aftermath of her daughter's negligently caused death), *modified on other grounds by* Zell v. Meek, 665 So. 2d 1048 (Fla. 1995) *with* Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974) (holding that the direct victim plaintiff could not recover for emotional distress absent impact). At least one legal commentator has advocated that Florida abandon the impact rule in favor of a more modern and uniform approach. *See* Lester E. Segal, *Recovery for Direct Negligent Infliction of Emotional Distress: The Impact Rule, or a Better Idea?*, 69 FLA. B.J. 10 (Feb. 1995). See *supra* notes 6 and 7 and accompanying text for a definition of how the terms "direct victim" and "bystander" plaintiff, respectively, are used in this Article.

57. *See, e.g.*, Consolidated Rail Corp. v. Gottshall, ___ U.S. ___, 114 S. Ct. 2396 (1994); Keck v. Jackson, 593 P.2d 668 (Ariz. 1979); Towns v. Anderson, 579 P.2d 1163 (Colo. 1978); Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Williams v. Baker, 572 A.2d 1062 (D.C. App. 1990); Williamson v. Central Ga. Ry., 56 S.E. 119 (Ga. 1906); Summers v. Western Idaho Potato Processing Co., 479 P.2d 292 (Idaho 1970); Rickey v. Chicago Transit Auth., 457 N.E.2d 1 (Ill. 1983); Whitsel v. Watts, 159 P. 401 (Kan. 1916); Mahnke v. Moore, 77 A.2d 923 (Md. 1951); Purcell v. St. Paul City Ry., 50 N.W. 1034 (Minn. 1892); First Nat'l Bank v. Langley, 314 So. 2d 324 (Miss. 1975); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (en banc); Cashin v. Northern Pac. Ry., 28 P.2d 862 (Mont. 1934); Hanford v. Omaha & C. B. St. Ry., 203 N.W. 643 (Neb. 1925); Falzone v. Busch, 214 A.2d 12 (N.J. 1965); Higgins v. Hermes, 552 P.2d 1227 (N.M. Ct. App.), *cert. denied*, 558 P.2d 620 (N.M. 1976); Battalla v. State, 176 N.E.2d 729 (N.Y. 1961); Kimberly v. Howland, 55 S.E. 778 (N.C. 1906); Wilson v. Northern Pac. Ry., 153 N.W. 429 (N.D. 1915); Salmi v. Columbia & Nehalem Rive R.R., 146 P. 819 (Or. 1915); Turner v. ABC Jalousie Co., 160 S.E.2d 528 (S.C. 1968); Sternhagen v. Kozel, 167 N.W. 398 (S.D. 1918); Trent v. Barrows, 397 S.W.2d 409 (Tenn. 1965); Boucher v. Dixie Medical Ctr., 850 P.2d 1179 (Utah 1992); Savard v. Cody Chevrolet, Inc., 234 A.2d 656 (Vt. 1967); Lambert v. Brewster, 125 S.E. 244 (W. Va. 1924).

tional distress.[58] Although *Palsgraf v. Long Island Railroad Co.*[59] is not thought of as an emotional distress case, it established the rationale implementing the zone of danger rule in many jurisdictions.[60] Justice Cardozo's holding extended a duty of due care to individuals who were within a reasonable "range of apprehension."[61] Specifically, Justice Cardozo found an existing duty of care when the defendant's negligent conduct put the plaintiff in a state of reasonable apprehension for her own safety, which, in turn, resulted in emotional distress.[62] Thus, in jurisdictions that utilize the zone of danger rule,[63] a bystander[64] may recover for emotional distress if she witnesses the injury to a third party while in the range of such apprehension.[65] The basis of this rule is that reasonable fear and anxiety for one's own safety, while in the zone of danger, generates emotional distress rather than fear for another.[66]

Although the courts' use of the rule does provide for recovery in instances where a bystander witnesses injury to a third person while in the zone of danger, courts differ in defining the extension of those parameters. Some courts' aversion to fraudulent claims have caused them to limit bystander recovery to circumstances in which the direct victim and the bystander were members of the same family.[67] Other courts have not been so restrictive.[68] Howev

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58. *See* Rasmussen, *supra* note 1, at 932.

59. 162 N.E. 99 (N.Y. 1928).

60. *See* Calandrella, *supra* note 39, at 92; *see also* Williams v. Baker, 572 A.2d 1062, 1069 (D.C. 1990); Waube v. Warrington, 258 N.W. 497 (Wis. 1935).

61. *Palsgraf*, 162 N.E. at 100.

62. *See* Rasmussen, *supra* 1, at 932. *See also* Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513 (Cal. 1963), *overruled by* Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

63. See *supra* note 57 and accompanying text for a list of jurisdictions which have adopted the zone of danger rule.

64. See *supra* note 7 for a definition of the term "bystander" as it is used in this Article.

65. *See, e.g.*, Williams v. Baker, 572 A.2d 1062, 1069 (D.C. 1990) (finding that a mother could not recover for emotional distress caused by witnessing her child suffer as a result of a negligent misdiagnosis because the mother did not reasonably fear for her own safety). *See also* Burley, *supra* note 7, at 934. Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969), *overruled by* Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984), "is generally regarded as the leading decision opposing recovery for psychic injury by a bystander outside the zone of physical danger." Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery For Psychic Injury*, 36 U. FLA. L. REV. 333, 339 n.32 (1984).

66. *See* Bell, *supra* note 65, at 339; Burley, *supra* note 7, at 934.

67. *See, e.g.*, Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984) (holding that a plaintiff may recover for emotional distress which is a consequence of witnessing injury or death to a member of her immediate family). The *Bovsun* court failed to discuss how

er, the zone of danger rule clearly does not hold defendants to a duty of care to all "potential[ly] foreseeable plaintiff[s]."[69]

Dillon *and Its Progeny*

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closely related a bystander must be to the direct victim in order to state a cause of action. *See also* Pierce v. Casas Adobes Baptist Church, 782 P.2d 1162, 1165 (Ariz. 1989) (finding that plaintiff must be closely related to the victim as well as within the zone of danger); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861, 866 (Tenn. 1978) (plaintiff must be "near and dear" to the direct victim of the injury as well as being within the zone of danger).

68. *See, e.g.*, Owens v. Childrens Mem. Hosp., Omaha Neb., 480 F.2d 465 (8th Cir. 1973) (denying recovery to parents who were not in the zone of danger, but not stating that law was limited to family); Hopper v. United States, 244 F. Supp. 314, 317 (D. Colo. 1965) (no recovery where father "was not personally subjected to the hazard of physical harm," but making no mention of any limitations); Keck v. Jackson, 593 P.2d 668, 668 (Ariz. 1979) (en banc) (limiting recovery to third persons of close relationship, "by consanguinity *or otherwise*") (emphasis added); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983) (adopting zone of danger rule without imposing family limitations); Asaro v. Cardinal Glennon Mem. Hosp., 799 S.W.2d 595, 599–600 (Mo. 1990); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972) (adopting the zone of danger rule without making mention of familial limit); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861, 865 (Tenn. 1978) (dismissing father's cause of action because he was not within the zone of danger and refusing to overrule the zone of danger rule by replacing it with *Dillon*'s foreseeability test, but not stating that zone of danger test was restricted to family members); Vaillancourt v. Medical Ctr. Hosp. of Vt., Inc., 425 A.2d 92, 95 (Vt. 1980) (precluding recovery because plaintiff was not in the zone of danger, not because of relationship); Guilmette v. Alexander, 259 A.2d 12, (Vt. 1969) (reaffirming the zone of danger rule without imposing a limitation to family members); Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432, 444 n.28 (Wis. 1994) (indicating that author of majority opinion would not limit recovery to family members). Note that at least one court has cited to *Owens*, *Keck*, *Rickey*, *Whetham*, *Shelton*, and *Guilmette* as a limitation to family members. *Bovsun*, 461 N.E.2d at 847 n.6. Nonetheless, although the facts of these cases involved a close family member, the courts' decisions do not restrict their holdings to such. *See Owens*, 480 F.2d at 467–68; *Hopper*, 244 F. Supp. at 317; *Keck*, 593 P.2d at 670; *Rickey*, 457 N.E.2d at 5; *Whetham*, 197 N.W.2d at 684; *Shelton*, 570 S.W.2d at 864; *Vaillancourt*, 425 A.2d at 95; *Guilmette*, 259 A.2d at 13–14. Furthermore in 1994, the United States Supreme Court held that, under the Federal Employers' Liability Act (FELA), a railroad employee may bring a cause of action for emotional distress after witnessing the death of a co-worker. Consolidated Rail Corp. v. Gottshall, ___ U.S. ___, 114 S. Ct. 2396 (1994). Perhaps this is an indication that courts do not need to put restrictions on recovery based on blood or marital ties to prevent a flood of fictitious claims. See *supra* note 28 and accompanying text for a discussion of courts' fears of fraudulent claims; see *infra* notes 193–202 and accompanying text for a suggestion that the judiciary's fear is fallacious.

69. Asaro v. Cardinal Glennon Mem. Hosp., 799 S.W.2d 595, 599 (Mo. 1990) (en banc). See *infra* notes 77–80 and accompanying text for a discussion of *Dillon*'s extension to foreseeable plaintiffs.

For years, courts found that a defendant did not owe a duty of care to a bystander plaintiff[70] because the defendant could not reasonably expect his or her negligence to the direct victim to cause harm to a bystander.[71] However, in 1968, the California Supreme Court for the first time allowed a bystander to recover for her emotional distress even though she was not within the zone of danger.[72] In *Dillon*, the court permitted a mother to recover for emotional distress resulting from witnessing the negligent death of her daughter.[73] The defendant negligently killed the mother's infant daughter as the child lawfully crossed the street.[74] Had the *Dillon* court applied the zone of danger rule enunciated in *Amaya v. Home Ice, Fuel & Supply Co.*,[75] the mother could not have recovered for the mental anguish resulting from her daughter's death. In overruling *Amaya*, the majority noted that the facts of the instant case "expose[d] the

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70. Waube v. Warrington, 258 N.W. 497 (Wis. 1935), *overruled by* Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432 (Wisc. 1994). Prosser suggested that this reasoning is directly linked to *Palsgraf*. KEETON ET AL., *supra* note 1, § 54, at 365. See *supra* note 7 and accompanying text for a definition of how "bystander" plaintiff is used in this Article.

71. *See, e.g.*, Resavage v. Davies, 86 A.2d 879 (Md. 1952); Cote v. Litawa, 71 A.2d 792 (N.H. 1950); Waube v. Warrington, 258 N.W. 497 (Wis. 1935), *overruled by* Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432 (Wisc. 1994). See *supra* note 6 and accompanying text for a definition of how "direct victim" is used in this Article. See *supra* note 7 and accompanying text for a definition of "bystander."

72. *See* Dillon v. Legg, 441 P.2d 912 (Cal. 1968), *overruling* Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513 (Cal. 1963). English courts were quicker to recognize this cause of action. *See, e.g.*, Boardman v. Sanderson, 1 W.L.R. 1317 (C.A. 1964).

73. *Dillon*, 441 P.2d at 924–25.

74. *Id*. at 914. The mother's complaint alleged that she had suffered severe emotional shock as a proximate result of witnessing the defendant's negligent actions. *Id*. Under *Amaya*'s zone of danger rule, the decedent's sister, who was in closer proximity to the accident, would have been allowed to recover for her emotional trauma. *Id*. Thus, the court had before it "a case that dramatically illustrate[ed] the difference in result flowing from the alleged requirement that a plaintiff cannot recover for emotional trauma in witnessing the death of a child or sister unless she also feared for own safety because she was actually within the zone of physical impact." *Id*. at 915. The court found that the facts showed "the fallacy of the rule that would deny recovery in the one situation and grant it in the other." *Id*.

75. 379 P.2d 513 (Cal. 1963). When the California Supreme Court decided *Amaya*, it overruled, then, Judge Tobriner's lower court decision which enunciated a foreseeability test and focused on the "potential risk of harm to a class of persons which includes the plaintiff." Amaya v. Home Ice, Fuel & Supply Co., 23 Cal. Rptr. 131, 134 (Ct. App. 1962), *vacated*, 379 P.2d 513 (Cal. 1963). When Justice Tobriner was appointed to the California Supreme Court he authored the majority opinion in *Dillon v. Legg* and reintroduced his foreseeability analysis. *See Dillon*, 441 P.2d at 912 (Cal. 1968).

hopeless artificiality of the zone-of-danger rule."[76]

The *Dillon* court established foreseeability as "the chief element in determining whether [a] defendant owes a duty or an obligation to [the] plaintiff."[77] The court then went on to identify three factors to be used in determining whether a plaintiff's emotional distress was foreseeable:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[78]

The majority decided that a determination of whether these factors had been satisfied would have to be made on a case-by-case basis.[79] By doing so, the court, in essence, left it up to lower tribunals to decide whether an injured party's emotional distress was "*reasonably* foreseeable."[80]

In rejecting the zone of danger rule, the *Dillon* court rebutted the age old policy which held that duty did not extend to a bystander plaintiff outside the zone of danger.[81] The majority argued that denying meritorious claims because of the fear of encouraging

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76. *Dillon*, 441 P.2d at 915. For a criticism of *Dillon*, see Timothy M. Cavanaugh, Comment, *A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)*, 41 HAST. L.J. 447, Part II, 456–62 (1990).

77. *Dillon*, 441 P.2d at 920.

78. *Id*. Interestingly, *Dillon* also required the plaintiff to exhibit some form of physical manifestation as a result of the emotional distress. *Id*. See Levit, *supra* note 28, at 142 n.32 which lists cases requiring a physical manifestation to ensue from emotional distress. Historically, courts ignored this requirement because of its similarity to *Amaya's* requirement under the zone of danger rule and simply applied *Dillon*'s three-tier guidelines. *Cf*. Krouse v. Graham, 562 P.2d 1022, 1030–31 (Cal. 1977). Eventually, the California Supreme Court formally abandoned this requisite. Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980).

79. *Dillon*, 441 P.2d at 920.

80. *Id*. at 921. A case-by-case decision would have to be made as to "what the ordinary man under such circumstances should reasonably have foreseen." *Id*.

81. See *supra* notes 57–69 and accompanying text for a discussion of the zone of danger rule.

fraudulent ones was unjust.[82] It claimed that courts compromised the basic responsibility with which they were entrusted when they used a rule of law to sweep away a class of meritorious claims in the name of administrative convenience.[83] Furthermore, the majority argued that the possibility that some fraudulent claims may go undetected was remote.[84] The *Dillon* court also dismissed the prospect that an infinite amount of cases would find their way to the steps of the courthouse; it maintained that the guidelines it established were sufficiently concrete to avoid such a result.[85] Finally, the court reasoned that a case-by-case analysis would deter the threat of unlimited liability.[86]

By 1984, at least one scholar noted that *Dillon* was quickly becoming the majority view.[87] As courts began to adopt variations of

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82. *Dillon*, 441 P.2d at 917–18.

83. *Id*.

84. *Id*.

85. *Id*. at 919–20.

86. *Id*. at 920. See *supra* note 30 and accompanying text and *infra* notes 193–202 and accompanying text.

87. *See* Bell, *supra* note 65, at 339 (stating that a majority of courts are accepting *Dillon* at least to some extent); *see also* Marlowe, *supra* note 28, at 806–08 nn.139–42 (noting that almost one-third of all states have adopted *Dillon*'s guidelines in some form). For examples of various states adopting *Dillon*, see Croft v. Wicker, 737 P.2d 789 (Alaska 1987); Champion v. Gray, 478 So. 2d 17 (Fla. 1985), *modified on other grounds by* Zell v. Meek, 665 So. 2d 1048 (Fla. Oct. 5, 1995); Fineran v. Pickett, 465 N.W.2d 662 (Iowa 1991); Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990); Cameron v. Pepin, 610 A.2d 279 (Me. 1992); Stockdale v. Bird & Son, Inc., 503 N.E.2d 951 (Mass. 1987); Nugent v. Bauermeister, 489 N.W.2d 148 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 904 (Mich. 1993); Entex, Inc. v. McGuire, 414 So. 2d 437 (Miss. 1982); Maguire v. State, 835 P.2d 755 (Mont. 1992); James v. Lieb, 375 N.W.2d 109 (Neb. 1985); Buck v. Greyhound Lines, Inc., 783 P.2d 437 (Nev. 1989); Wilder v. Keene, 557 A.2d 636 (N.H. 1989); Folz v. State, 797 P.2d 246 (N.M. 1990), *cert. denied sub nom.* State v. Folz, 856 P.2d 250 (N.M. 1993); Johnson v. Ruark, Obstetrics and Gynecology Assocs., 395 S.E.2d 85 (N.C. 1990); Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983); Sinn v. Burd, 404 A.2d 672 (Pa. 1979); Reilly v. United States, 547 A.2d 894 (R.I. 1988); Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465 (S.C. 1985); Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993); Gain v. Carroll Mill Co., 787 P.2d 553 (Wash. 1990); Heldreth v. Marrs, 425 S.E.2d 157 (W. Va. 1992); Contreras v. Carbon County Sch. Dist. No. 1, 843 P.2d 589 (Wyo. 1992). However, many courts have also rejected *Dillon* in favor of the zone of danger rule. *See, e.g.*, Welsh v. Davis, 307 F. Supp. 416 (D. Mont. 1969); James v. Harris, 729 P.2d 986 (Colo. Ct. App. 1986); McGovern v. Piccolo, 372 A.2d 989 (Conn. 1976); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978); Guilmette v. Alexander, 259 A.2d 12 (Vt. 1969); Grimsby v. Samson, 530 P.2d 291 (Wash. 1975).

Dillon's three-pronged test, a debate arose over the scope of *Dillon*'s requirement that there be a close relationship.[88] Much of the debate focused on whether an unmarried bystander victim could meet that requirement.[89] While some courts believed that it was unwise to erect an absolute boundary limiting the class of possible bystander plaintiffs,[90] others found this restriction necessary.[91]

The Hawaii Supreme Court expanded liability for victims of emotional distress. However, it rejected *Dillon*'s foreseeability analysis to determine whether the defendant had breached its duty to the bystander, choosing instead a proximate cause approach. Leong v. Takasaki, 520 P.2d 758, 765 (Haw. 1974). The court assumed that the infliction of emotional distress alone constituted a breach of duty. *Id*. at 765. The *Leong* court adopted a proximate cause test similar to that of Justice Andrew's dissent in *Palsgraf* which found that once a defendant commits a negligent act, liability is established if it is connected to the injury, regardless of how remote the consequences. *Id*. at 764–65; Calandrella, *supra* note 39, at 95 n.106 (citing Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

88. *See, e.g.*, Krouse v. Graham, 562 P.2d 1022 (Cal. 1977) (holding that spouses are sufficiently related); Kately v. Wilkinson, 148 Cal. App. 3d 576 (1983) (holding that best friend of victim could not recover); Trapp v. Schuyler Constr., 149 Cal. App. 3d 1140 (1983) (finding that first cousin did not have standing to recover although relationship was analogous to that of siblings); Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 576–77 (1976) (finding that a foster mother could recover for witnessing the negligent death of her foster son), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988); Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974) (holding that child may recover for witnessing accident involving stepfather's mother); Walker v. Clark Equipment Co., 320 N.W.2d 561 (Iowa 1982) (holding that siblings are closely related); Genzer v. City of Mission, 666 S.W.2d 116 (Tex. Ct. App. 1983) (finding that a grandchild is closely related).

89. *See, e.g.*, Drew v. Drake, 110 Cal. App. 3d 555 (1985) (finding that female bystander who lived with victim for three years could not recover); Ledger v. Tippitt, 164 Cal. App. 3d 625 (1985) (holding that unmarried plaintiff who lived with victim for two years had standing to recover), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988). See *infra* notes 161–223 and accompanying text for the author's analysis of whether a close relationship should encompass unmarried cohabitants.

90. *See, e.g.*, Pieters v. B-Right Trucking, Inc., 669 F. Supp. 1463, 1473 (N.D. Ind. 1987) (allowing plaintiff to recover for emotional distress caused by her fiance's injuries and death); Paugh v. Hanks, 451 N.E.2d 759, 767 (Ohio 1983) ("declin[ing] to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress"); Heldeth v. Marrs, 425 S.E.2d 157, 163 (W. Va. 1992) (holding that no one element is determinative of a close relationship).

91. Coon v. Joseph, 192 Cal. App. 3d 1269 (1987) (life-long, exclusive partners of the same sex did not meet the "close relationship" requirement); Ferretti v. Weber, 513 So. 2d 1333, 1333 (Fla. 3d Dist. Ct. App. 1987) (no marriage with plaintiff's "live in" lady friend and, therefore, no legal relationship); Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981) (relationship must be that of husband and wife or "within the second degree of consanguinity"); Carlson v. Illinois Farmers Ins. Co., 520 N.W.2d 534, 538 (Minn. Ct. App. 1994) (refusing to extend liability to bystander who witnessed friend's death); Folz v. State, 797 P.2d 246 (N.M. 1990), *cert. denied sub nom.* State v. Folz, 856 P.2d 250 (N.M. 1993) (plaintiff and direct victim must enjoy a marital or familial relationship); Trombetta v. Conkling, 593 N.Y.S.2d 670, 671 (App. Div. 1993) (aunt, who did not reside

In *Thing v. La Chusa*,[92] the California Supreme Court commented that *Dillon*'s case-by-case analysis "not only produced inconsistent rulings in the lower courts, but ha[d] provoked considerable critical comment by scholars who [were] attempt[ing] to reconcile the cases."[93] The *Thing* court reasoned that California's difficulty in applying the *Dillon* factors justified redefining the guidelines.[94] Thus, the supreme court held that a mother who did not contemporaneously witness her child's accident could not recover for emotional distress.[95] In redefining the guidelines set forth in *Dillon*,[96] the court based its decision on familiar policy considerations: the limitation of potential liability;[97] the cost to society as a whole;[98] the inability of monetary damages to compensate for the loss and make the plaintiff whole;[99] the difficulty in measuring those damages;[100] and the intangible nature of the loss.[101]

The supreme court's retreat had been foreshadowed by a case decided seven months earlier when it modified *Dillon*.[102] In *Elden v. Sheldon*,[103] the court held that an individual may not state a cause of action for negligent infliction of emotional distress as a bystander if that person does not share a legally recognized relationship with

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with niece, was not "immediate family" and, therefore, could not recover for her emotional distress as bystander).

92. 771 P.2d 814 (Cal. 1989) (en banc).

93. *Id*. at 825.

94. *Id*.

95. *Id*. at 829. In *Thing*, a mother was denied the right to recover for her emotional injuries when, after being told that her son had been hit by a car and seriously injured, she rushed to his side and found him lying on the road. *Id*. at 815. *Contra* Champion v. Gray, 478 So. 2d 17 (Fla. 1985), *modified on other grounds by* Zell v. Meek, 665 So. 2d 1048 (Fla. 1995); Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432, 444–45 (Wis. 1994) (holding that a mother may bring a cause of action where she arrived after the accident but "witness[ed] . . . the gruesome aftermath").

96. *Thing*, 771 P.2d at 829.

97. *Id.* at 826. *Thing* rejected the idea that foreseeability alone should dictate liability, reasoning that other California courts had failed to curb the limitless exposure to liability created by *Dillon*'s foreseeability test. *Id*. at 821, 826.

98. *Id*. at 826–27.

99. *Id*. at 827.

100. *Id*.

101. *Id*. at 828–29.

102. *See* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988). *Elden*'s decision did not explicitly overrule *Dillon*. However, the court virtually abandoned the guidelines set out in *Dillon*. *See* Cavanaugh, *supra* note 76, at 453.

103. 758 P.2d 582 (Cal. 1988).

the direct victim.[104] In *Elden*, the plaintiff and his lover, with whom he cohabited, were involved in an automobile accident.[105] The plaintiff was seriously injured and his lover was thrown from the car and died a few hours later.[106] The plaintiff brought suit against the driver seeking damages for the emotional distress he sustained while witnessing the injuries to his "de facto spouse."[107] The court reasoned that although unmarried cohabitant claims were foreseeable, the state's interest in promoting marriage, preserving judicial efficiency and administration, and limiting liability overrode other social policy considerations.[108]

III. DUNPHY v. GREGOR*: THE FACTS*

In April of 1988, Eileen Dunphy and Michael Burwell became engaged to be married.[109] They began living together two months later and set their wedding date for February 29, 1992.[110] While helping a friend change his tire on the shoulder of the road on September 29, 1990, Michael was severely injured when James Gregor drove into him.[111] Eileen, who stood five feet behind her friend's disabled vehicle,[112] witnessed the collision as it occurred and imme-

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104. *Id*. at 588. The court also applied analogous reasoning to the plaintiff's cause of action for loss of consortium. *Id*. at 588–90. For a discussion of how *Elden* affected loss of consortium rights in California, see Rasmussen, *supra* note 1, at 942–47.

105. *Elden*, 758 P.2d at 582.

106. *Id*.

107. *Id*. at 583.

108. 758 P.2d at 586–88. See *infra* notes 166–208 for a critical analysis of these policy reasons.

109. Dunphy v. Gregor II, 642 A.2d 372, 373 (N.J. 1994). For the purposes of this Article the appellate court's decision will be referenced as Dunphy v. Gregor I and the New Jersey Supreme Court's opinion as Dunphy v. Gregor II. References to the *Dunphy* court are to the New Jersey Supreme Court.

110. *Id*.

111. Dunphy v. Gregor I, 617 A.2d 1248, 1250 (N.J. Super. Ct. App. Div. 1992). Michael was changing the left rear tire of the friend's car when he was struck. *Dunphy II*, 642 A.2d at 373. Presumably, Michael was changing the tire closest to the road in the same direction James Gregor drove his vehicle.

112. Although the court makes no mention of it, since Eileen was protected by her friend's disabled vehicle, she apparently stood outside the zone of danger. New Jersey law allows a plaintiff to recover for her emotional distress, if her injuries are foreseeable, even though she stands outside the zone of danger. *See* Portee v. Jaffee, 417 A.2d 521, 524–27 (N.J. 1980) (finding that although mother had not been subject to any risk of physical harm, she could recover for emotional distress caused by witnessing her seven year old son suffer and die while he was trapped in an elevator).

diately ran 240 feet to where Michael's body had been thrown.[113]

When Eileen realized that Michael was still alive, she removed gravel and blood from his mouth to ease his breathing.[114] She tried comforting him by holding down his hands and feet as they uncontrollably thrashed around.[115] As a result of the injuries he sustained, Michael died the following morning at a local hospital.[116] After the accident, Eileen Dunphy underwent psychological and psychiatric treatment for anxiety and depression.[117]

Thereafter, Eileen filed suit against James Gregor, the driver of the vehicle that struck Michael, seeking damages for the emotional distress she suffered as the result of witnessing the death of her fiancé of more than two years.[118] The trial court dismissed the action finding that an individual who was not married to and did not have an intimate familial relationship with the deceased did not have standing to file suit for negligent infliction of emotional distress.[119] The appellate division reversed,[120] holding that whether the relationship of engaged cohabitants constituted the equivalent of a familial relationship was a question of fact for a jury to decide.[121] The supreme court affirmed the appellate court's decision. In doing so, the court held that although an individual was not legally married to a deceased victim, that individual may have a legally recognizable cause of action for negligent infliction of emotional distress if she witnesses, as a bystander, the wrongful death or serious bodily injury of a person with whom she enjoyed an intimate familial relationship characterized as stable, enduring, substantial, and mutually supportive.[122]

IV. THE DUNPHY *COURT'S REASONING*

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113. *Dunphy II*, 642 A.2d at 373. The court described Michael's body as being "either dragged or propelled 240 feet." *Id*.

114. *Id*.

115. *Id*.

116. *Id*.

117. *Dunphy II*, 642 A.2d at 373.

118. *Id*.

119. *Id*.

120. Dunphy v. Gregor I, 617 A.2d 1248 (N.J. Super. Ct. App. Div. 1992). New Jersey's intermediate court is the Superior Court of New Jersey, Appellate Division; the New Jersey Supreme Court is the state's court of last resort.

121. *Dunphy* I, 617 A.2d at 1254.

122. *Dunphy II*, 642 A.2d at 380.

The majority began its analysis by acknowledging that many states, including its own, recognize bystander liability in cases involving negligent infliction of emotional distress.[123] The supreme court went on to note that typically such claims involve individuals who experience mental anguish as a result of having witnessed the wrongful death or serious physical injury of another with whom they had a "close, substantial, and enduring relationship."[124] Thus, the only issue before the *Dunphy* court was whether such a "relationship" was broad enough to permit an individual, who cohabited with and was engaged to marry the victim at the time of the accident, to recover for emotional distress when witnessing the wrongful death of her loved one.[125]

The court then discussed *Portee v. Jaffee*,[126] the first New Jersey case to recognize bystander liability in an action for negligent infliction of emotional distress.[127] The majority recognized that in adopting bystander liability, the *Portee* court approved of *Dillon*'s general proposition.[128] In doing so, *Portee* adopted a four-factor test, similar to the factors the *Dillon* court enunciated,[129] in determining whether a bystander has stated a cause of action for negligent infliction of emotional distress. Under *Portee*, a claimant must show: (1) that the defendant's negligence resulted in the death or serious physical injury of the direct victim;[130] (2) "`a marital *or in*

123. Dunphy v. Gregor II, 642 A.2d 372, 373 (N.J. 1994).

124. *Id*. For a discussion of other cases extending bystander liability to individuals other than those who are married or have a close familial relationship see *supra* note 68.

125. *Id*. Justice Handler, writing for the majority, then discussed the conflict dividing the lower courts when focusing on the nature of that relationship. For example, Justice Handler pointed out that the trial court dismissed Eileen Dunphy's suit because the judge felt that a legally recognized relationship must exist for a suit such as this one to survive. *Id*. However, Justice Handler acknowledged that the appellate court held that a jury should determine whether the relationship of a cohabitant parallels that of an intimate familial relationship, such as a married couple. *Id*.

126. 417 A.2d 521 (N.J. 1980).

127. *Dunphy II*, 642 A.2d at 373 (citing Portee v. Jaffee, 417 A.2d 521 (N.J. 1980)). In *Portee*, the court recognized a mother's right to sue for the severe mental anguish she suffered after witnessing her seven year old son's slow and horrifying death as a result of becoming wedged between the outer elevator door and the wall of the elevator shaft. *Portee*, 417 A.2d at 522–23.

128. *Dunphy II*, 642 A.2d at 375. See *supra* notes 72–86 and accompanying text for a discussion of Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

129. *See supra* text accompanying note 78.

130. See *supra* note 6 for a definition of "direct victim" as used by the author in

timate, familial *relationship* between the plaintiff and the injured person;'" (3) contemporaneous observation of the injury or death; and (4) resulting severe emotional distress.[131]

The *Dunphy* court reaffirmed its interpretation of an intimate familial relationship between the bystander and direct victim as discussed in *Portee*. The majority noted that it is the "`presence of deep, intimate, familial ties between the plaintiff and the physically injured person that makes the harm to emotional tranquility so serious and compelling.'"[132] The court found that the relationship standard set forth in *Portee* also could include the relationship between Eileen Dunphy and Michael Burwell.[133]

In affirming the appellate court's opinion, the majority refuted the appellate court's dissent which interpreted *Portee's* "familial relationship" requirement to be restricted to marriage or blood ties.[134] The court noted that New Jersey's application of bystander

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this Article.

131. *Dunphy II*, 642 A.2d at 374 (citing *Portee*, 417 A.2d at 528 (emphasis added)).

132. *Id*. (quoting *Portee*, 417 A.2d at 526–27). The court recognized that *Portee* found marriage or the presence of an intimate familial relationship to be essential. However, the *Dunphy* majority correctly recognized that nowhere in the *Portee* opinion is a familial relationship confined to blood ties or marriage. *Id*.

133. *Id*. See *supra* notes 109–17 and accompanying text for a discussion of the facts in Dunphy v. Gregor.

134. *Id*. (citing *Dunphy* I, 617 A.2d at 1255 (Muir, J., dissenting)). The appellate division's dissent argued that New Jersey should limit bystander recovery as the California Supreme Court had in Elden v. Sheldon. *Dunphy* I, 617 A.2d at 1256 (citing Elden v. Sheldon, 758 P.2d 582 (Cal. 1988)). For a discussion of *Elden* see *supra* notes 102–08 and accompanying text. In the supreme court's dissent, Justice Garibaldi concurred with the lower court's dissent assessing that *Portee* was intended to be limited to bystanders who had a marital or blood relationship with the direct victim. *Dunphy* II, 642 A.2d at 382. See *infra* notes 144–60 and accompanying text for a discussion of Justice Garibaldi's dissent in *Dunphy II*.

The majority argued that *Elden* was simply a reaction to California's impression that bystander liability law had become much too expansive in that state. *Dunphy* II, 642 A.2d at 375. Subsequent California courts' decisions had practically abandoned the boundaries set forth in *Dillon*'s three-prong test. *Id*. (citing Ochoa v. Superior Court, 703 P.2d 1, 6–7 (Cal. 1985)) (en banc) (permitting recovery although sudden and accidental prong not met); Molien v. Kaiser Foundation Hosp., 616 P.2d 813, 817–21 (Cal. 1980) (en banc) (creating a new class of "direct victims" by finding that accompanying physical injury did not apply to this class of plaintiffs); Krouse v. Graham, 562 P.2d 1022, 1031 (Cal. 1977) (en banc) (finding that contemporaneously witnessing the accident to direct victim does not require a "*visual* perception of the impact causing death or injury"); Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 566–67 (1978) (expanding the parameters of contemporaneously observing the injury)). The majority also cites to the California Supreme Court's opinion in Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) (en banc), as evidence of the court's fear that *Dillon*'s factors were being dissolved. *See Dunphy II*,

liability law had not been infested with the problems[135] that plagued the California court system.[136] Therefore, the court found there was no need to blindly restrict the *Portee* analysis with "a hastily-drawn `bright-line' distinction between married and unmarried persons . . . ."[137]

The court then turned to a discussion of unmarried cohabitants as foreseeable plaintiffs.[138] The court asserted that a duty to unmarried cohabitants is foreseeable since they represent a clear and distinct class of potential plaintiffs.[139] Arguing that recognizing a duty of care to unmarried cohabitants does not extend society's expected burden of care to unforeseeable plaintiffs, the majority noted that recognition of such a standard "`advances the goals of tort compensation and sufficiently limits liability.'"[140]

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642 A.2d at 375. For a brief discussion of *Thing*, see *supra* notes 92–101 and accompanying text.

Several other commentators have also noted that California precedent following *Dillon* led that state's supreme court to move toward strict application of the factors. *See* Calandrella, *supra* note 39, at 97–100; Cavanaugh, *supra* note 76, at 456–66; Lefler, *supra* note 16, at 981–91; Sheila O'Hare, Note, Elden v. Sheldon: *Negligent Infliction of Emotional Distress and Loss of Consortium Denied to Unmarried Cohabitants*, 26 CAL. W. L. REV. 175, 188–90 (1989).

135. *See supra* note 134.

136. *Dunphy* II, 642 A.2d at 375–76. The court contended that New Jersey, unlike California, had applied the *Dillon-Portee* factors restrictively and prudently. For example, the *Dunphy* court cited Eyrich *ex rel.* Eyrich v. Dam, 473 A.2d 539 (N.J. Super. Ct. App. Div.), *cert. denied*, 483 A.2d 127 (N.J. 1984). *Id*. In *Eyrich*, the court dismissed a bystander plaintiff's action when she witnessed the defendant's leopard fatally attack the young child of a close friend, who had entrusted the plaintiff to care for the child for the day. *Eyrich*, 473 A.2d at 547–48. The court found that the only way the plaintiff could state a cause of action would be to extend the *Portee* factor regarding a close familial relationship, which it was unwilling to do. *Id*. at 547. Conversely, the New Jersey Supreme Court argued, California had expanded all of the factors set out in *Dunphy* which were designed to contain liability. *Dunphy* II, 642 A.2d at 375. See *supra* note 134 for a discussion of how some California appellate courts broadly applied *Dillon*.

137. *Dunphy* II, 642 A.2d at 376 (citing People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 111 (N.J. 1985)).

138. *Id*. at 376–77.

139. *Id*. at 377. The court asserted that it is reasonably foreseeable that unmarried individuals may share the same qualities as a married couple. *Id*. Further, it endorsed the lower court's distinction between the emotional injuries suffered by close personal friends and relatives in general as compared to the mental anguish suffered by a bystander whose relationship with the direct victim "`at the time of the injury, is deep, lasting, and genuinely intimate.'" *Id*. (quoting *Dunphy* I, 617 A.2d at 1255).

140. *Id*. (quoting *Elden*, 758 P.2d at 593 (Broussard, J., dissenting)). Justice Handler's opinion depicts the court's trust in lower tribunals' ability to deal with the realities, rather than legalities, of relationships to ensure that cases are not frivolously

The *Dunphy* court then identified several different factors for a court to consider in determining whether a relationship is of a familial nature. New Jersey lower courts

> must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and, as expressed by the Appellate Division, "whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements."[141]

The court concluded by dismissing Justice Garibaldi's assertion that policy considerations should override foreseeability factors because of their antagonistic disregard of basic social concerns.[142] Unpersuaded by policy reasons which advocate the prevention of fraudulent claims, the promotion of marriage, and consideration of insurance premiums, the court found no reason to limit bystander recovery to married individuals.[143]

Justice Garibaldi's Dissent

Justice Garibaldi's dissent immediately conceded that an unmarried cohabitant may suffer the same emotional distress from witnessing the death or serious injury of a loved one as would a married bystander.[144] Her discord with the majority opinion was that she did not believe that the standards it set forth sufficiently limited who may qualify as an intimate family member.[145] She argued that an inquiry ending with an exhibition of a strong emotional

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presented before the court. *Id*. at 378. The court compared assessment of damages in loss of consortium cases where the characteristics of a relationship must be probed to accurately value the loss of that relationship. *Id*.

141. *Id*. (quoting *Dunphy* I, 617 A.2d at 1255).

142. *Dunphy* II, 642 A.2d at 378-79 (citing Garibaldi, J., dissenting). See *infra* notes 144–60 and accompanying text for a discussion of Justice Garibaldi's dissent in *Dunphy II*.

143. *Dunphy* II, 642 A.2d at 378–79. For a more complete discussion of the policy concerns expressed in the opinion, see Justice Garibaldi's dissent *infra* notes 144–60 and accompanying text. See *supra* notes 25–30 and accompanying text for a historical synopsis of how courts used various public policy concerns to limit emotional distress cases.

144. *Dunphy* II, 642 A.2d at 380 (Garibaldi, J., dissenting).

145. *Id*.

relationship and foreseeable emotional trauma fell short of a comprehensive analysis.[146]

In her dissent, Justice Garibaldi criticized the majority's disregard of California's opinion in *Dillon v. Legg*.[147] She reasoned that when New Jersey developed its analysis for negligent infliction of emotional distress in *Portee v. Jaffee*,[148] it relied on *Dillon*[149] as a model and, therefore, New Jersey should follow the California Supreme Court's lead and decline to expand *Dillon* to unmarried cohabitants.[150] Justice Garibaldi also argued that the inability to distinguish between *de facto* spouses, *de facto* children, *de facto* parents, or *de facto* siblings would result in an intolerable burden on society.[151] Interestingly, the dissent chose to rely on a recurring historical theme — fraud.[152] Although Justice Garibaldi agreed that drawing a bright-line distinction between married and unmarried individuals is arbitrary, she contended that "a certain degree of arbitrariness is necessary . . . in setting the outer limits of liability . . . for emotional distress."[153] She insisted that if engaged cohabitants

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146. *Id*. Justice Garibaldi found that such an analysis would allow recovery for emotional distress suffered amongst close friends. *Id*.

147. *Id*. at 380–81. For a discussion of *Dillon* see *supra* notes 72–86 and accompanying text.

148. 417 A.2d 521 (N.J. 1980). See *supra* notes 126–31 and accompanying text for a discussion of *Portee*.

149. 441 P.2d 912 (Cal. 1968). For a discussion of *Dillon* see *supra* notes 72–86 and accompanying text.

150. *Dunphy* II, 642 A.2d at 380 (Garibaldi, J., dissenting). Justice Garibaldi noted that although New Jersey had applied the *Dillon-Portee* factors narrowly, she did not see the need to expand its application. *Id*. at 380–81. See *supra* notes 134–37 and accompanying text to see how the majority decision disputes this reasoning.

151. *Dunphy* II, 642 A.2d at 381 (Garibaldi, J., dissenting) (citing Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988)).

152. *Id*. Justice Garibaldi asserted that courts should analyze emotional distress with vigilance because emotional injuries, unlike physical injuries, are difficult to define and may potentially present themselves limitlessly. *Id*. For a discussion of fraudulent claims as a basis for judicial reluctance in accepting emotional injuries see *supra* note 28 and accompanying text.

153. *Dunphy* II, 642 A.2d at 381 (Garibaldi, J., dissenting). Justice Garibaldi declared that at some point courts must always draw lines when providing remedies, and whenever a court does so, it runs the risk of being accused of arbitrariness. *Id*. (quoting Frame v. Kothari, 560 A.2d 675, 681 (N.J. 1989)). The dissent rhetorically asked the majority if it actually believed that a mother who is told that her child was killed or witnessed the agonizing death of her child without contemporaneously witnessing the fatal accident, suffers less mental anguish than a mother who was present when the accident occurred. *Dunphy* II, 642 A.2d at 381. Justice Garibaldi suggested that both mothers may suffer equal emotional distress, but the law chooses to compensate the mother who

may state a cognizable cause of action, one could argue that it would be arbitrary to keep engaged couples who do not live together from recovering for their emotional distress.[154]

Justice Garibaldi also identified other public policy considerations favoring the exclusion of unmarried cohabitants as a recognized class of plaintiffs eligible to recover for their emotional distress as bystanders.[155] For example, she noted that bright-line distinctions between married and unmarried couples exist in other areas of the law such as loss of consortium, inheritance by intestate succession, and alimony.[156] She feared that once the clear distinction of marriage was replaced in favor of a nebulous standard, liability may grow limitlessly.[157]

Finally, Justice Garibaldi criticized the standards the majority developed to determine who may qualify as a bystander plaintiff in emotional distress suits.[158] She warned that the relationship which the majority identified as "close, substantial, and enduring" would open a Pandora's box forcing courts to delve into intimate details of individuals' lives.[159] Thus, Justice Garibaldi concluded that the social policy concerns which result from the expensive and troublesome task of trying to define parameters to meet the open-ended nature of the majority's standards compelled a reversal.[160]

V. CRITICAL ANALYSIS

The majority and dissenting opinions in *Dunphy v. Gregor*[161] expressed two entirely different views regarding whether unmarried cohabitants met the *Dillon-Portee* close relationship standard in bystander liability.[162] The dissent advocated a narrow interpretation when it adopted the opinion expressed in *Elden v. Sheldon*[163] and

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was present at the time of the accident for her mental anguish. *Id*.

154. Dunphy II, 642 A.2d at 382 (Garibaldi, J., dissenting).

155. *Id*.

156. *Id*. at 382–83.

157. *Id*. at 383.

158. *Id*. *See supra* text accompanying notes 132, 141.

159. *Dunphy* II, 642 A.2d at 383 (Garibaldi, J., dissenting).

160. *Id*. at 384.

161. 642 A.2d 372 (N.J. 1994).

162. See *supra* notes 123–60 and accompanying text for a discussion of the two opinions.

163. 758 P.2d 582 (Cal. 1988). See *supra* notes 102–08 and accompanying text for a discussion of *Elden*.

the policy reasons discussed therein.[164] The majority chose to follow a broader and more liberal view. After considering the policy reasons on which the dissent relied, it found that the foreseeability of the injury outweighed those policy reasons.[165] As a result, the different rationales yielded different conclusions.

A. Policy Considerations

Courts repeatedly have recognized unmarried cohabitants as a foreseeable class of plaintiffs.[166] The *Dillon v. Legg*[167] court acknowledged a court's legal obligation to "promote natural justice" when it extended a cause of action to bystander plaintiffs.[168] Following this reasoning, the widespread increase and reality of unmarried cohabitants would not make the extension of liability unfair. *Dunphy* also used this reasoning to extend liability to what it referred to as an "eminently foreseeable but clearly discrete class of potential plaintiffs."[169] One can reasonably foresee that individuals who lack a familial relationship, but who have a stable, enduring, substantial, and mutually supportive relationship, "will be especially vulnerable to emotional injury resulting from a tragedy befalling one of them."[170] Nevertheless, not all foreseeable risks give rise to duty.[171] Courts put great emphasis on public policy when deciding whether to recognize a duty of care and a cause of action. However, the policy justifications set forth by Justice Garibaldi contradict the very reasons for recognizing negligent infliction of emotional distress in the first place.[172] The *Dunphy* court ap

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164. See *supra* note 108 and accompanying text for a brief discussion of these policy reasons.

165. *See supra* notes 142–43 and accompanying text.

166. *Dunphy* II, 642 A.2d at 377. Even *Elden* and Justice Garibaldi's dissent in *Dunphy* II acknowledged unmarried cohabitants as a foreseeable class of plaintiffs. *See Elden*, 758 P.2d at 586; *Dunphy* II, 642 A.2d at 380 (Garibaldi, J., dissenting).

167. 441 P.2d 912 (Cal. 1968). See *supra* notes 72–86 and accompanying text for a discussion of *Dillon*.

168. *Dillon*, 441 P.2d at 914.

169. *Dunphy* II, 642 A.2d at 377.

170. *Id*.

171. *See, e.g.*, *Elden*, 758 P.2d at 586 (although unmarried cohabitants are a foreseeable class of plaintiffs, policy reasons justify their exclusion); Tobin v. Grossman, 249 N.E.2d 419, 422–24 (N.Y. 1969), *overruled by* Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984) (policy reasons prevented mother from recovering for her emotional distress which resulted from witnessing her two year old son's serious injuries).

172. See *supra* notes 144–60 and accompanying text for a discussion of Justice Gari-

propriately refused to limit the scope of duty based on the policy reasons articulated in *Elden* and advocated by the dissent.

The State's Interest in Marriage

Utilizing the reasoning in *Elden*, Justice Garibaldi suggested that unmarried cohabitants should be treated differently than married couples.[173] She accurately declared that New Jersey law distinguishes between married and unmarried couples in several realms.[174] "Thus, the legal distinction between married and unmarried cohabitants remains."[175] However, although New Jersey, as well as other states, use marriage as the basis of legal distinction in some areas of the law, one needs to ask whether the dissent's concern regarding marriage is valid when confronted with a *Dunphy* issue.

The line of demarcation may be unjustly drawn when marriage is used as the sole arbitrary factor to determine whether a duty exists to an unmarried cohabitant.[176] When courts utilize matrimony as the primary basis for legal distinction, they should not unjustly target unmarried individuals, but instead should seek to significantly further society's interest in the institution of marriage.[177] Since the goal of tort law is to compensate victims,[178] there may be situations in which competing policy interests should override a legal distinction made between married and unmarried cohabitants. At least one scholar has recognized the need to advance other policy interests which deserve legal recognition, although conflict may exist between them and traditional family settings.[179]

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baldi's dissent in *Dunphy* II. *See* Cavanaugh, *supra* note 76, at 467. Whether *Elden's* reasoning would eventually lead to abolishing this tort is beyond the scope of this Article.

173. *Dunphy* II, 642 A.2d at 382 (Garibaldi, J., dissenting).

174. *Id*. She noted that the New Jersey legislature abolished common-law marriage in 1937. *Id*. Additionally, the areas of insurance law and workers' compensation treat married couples differently. *Id*. In New Jersey, unmarried cohabitants also cannot recover alimony or inherit by intestate succession. *Id*. at 382–83. *But see Elden*, 758 P.2d at 592 (Broussard, J., dissenting) (identifying areas of the law such as housing, family relations, and credit where unmarried couples are recognized as equal to married couples).

175. *Dunphy* II, 642 A.2d at 382 (Garibaldi, J., dissenting).

176. Lefler, *supra* note 16, at 987.

177. *See Elden*, 758 P.2d at 592 (Broussard, J., dissenting).

178. KEETON ET AL., *supra* note 1, § 54, at 360–61.

179. *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 561

In *Dunphy*, Justice Garibaldi treated recovery for bystander negligent infliction of emotional distress as if it derived from a marital contract.[180] Given the alarming rate of divorce, as well as other domestic concerns, it is suspect to equate marriage with a stable familial arrangement.[181] Furthermore, society's interest in marriage will not be advanced by unreasonably assuming that housemates will marry "in order to assure his or her legal standing in a future personal injury action should that person have the [unlikely] misfortune of witnessing the serious injury of his or her spouse."[182] Unmarried cohabitants anticipate that the law will recognize the value and emotions of their relationship.[183] The increase in the number of people who cohabit justifies the need to recognize a realistic relationship in society.[184] The *Dunphy* majority's "close, substantial, and enduring relationship" standard[185] supports the same qualities which should be found in marriage. Therefore, rather than a license, a relationship's structure, emotions, and stability should form the basis for recognizing a cognizable cause of action.[186]

Furthermore, had the *Dunphy* court adopted *Elden*'s reasoning, severe consequences would have resulted for same-sex couples.[187] As

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(1983) (citing welfare entitlements and employment rights affected by the state's preferential treatment of formal marriage).

180. *Dunphy* II, 642 A.2d at 382 (Garibaldi, J., dissenting).

181. See Philip S. Gutis, *What Is a Family? Traditional Limits Are Being Redrawn*, N.Y. TIMES, August 31, 1989, at C1; Leslie Phillips, *Family Ties: New Meanings; Cities Recognizing Non-Traditional Living Arrangements*, USA TODAY, July 12, 1989, at 3A, for a discussion of how the traditional family setting has evolved over the years. In 1994, 17.4 million divorced people were living in the United States. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, No. 58, *Marital Status of the Population, by Sex, Race, and Hispanic Origin: 1970 to 1994*.

182. *Elden*, 758 P.2d at 591 (Broussard, J., dissenting). Regardless, "[m]arriage would maintain its preferential status since marrieds are presumed to be `closely related,'" while cohabitants have the burden of showing "that their relationship is equivalent in all relevant respects to a good marriage . . . ." *Id*. *See infra* notes 215–23 and accompanying text.

183. *See Elden*, 758 P.2d at 591 (Broussard, J., dissenting).

184. See *infra* notes 198–200 and accompanying text for a statistical analysis of unmarried cohabitants in the United States.

185. *Dunphy* II, 642 A.2d at 373.

186. See *infra* notes 209–14 and accompanying text for a discussion of how the substance of the relationship should override its form.

187. See Cavanaugh, *supra* note 76, at 468–69 (noting that a possible reason the *Elden* court refused to recognize unmarried cohabitants as recognizable bystanders is because same-sex couples would then be deserving of some of the same legal rights as legally married couples). For an extensive discussion of how the law affects same-sex

same-sex couples are precluded from marrying,[188] a bright-line distinction between married and unmarried couples would thwart recovery.[189] Impeding recovery to couples who could not in any case choose marriage does not advance society's interest in marriage.[190] In contemporary society, same-sex relationships are foreseeable and thus merit an analysis as to whether such relationships may be characterized as "close, substantial, and enduring."[191] In short, the dissent's attempt to define recovery through marriage inevitably would serve as a mechanism to deny an unfairly targeted group recovery for genuine emotional distress.[192]

The Need to Limit Recovery

In her dissent, Justice Garibaldi additionally asserted that once courts disregard marital status in recognizing a cause of action, "no clear principle exists to limit liability."[193] Similarly, the California Supreme Court feared that if courts failed to use marital status as a limiting device, the legal consequences would generate an uncontrollable ripple.[194] Anxiety partly lies in the belief that if courts fail to draw an arbitrary bright-line distinguishing relationships, recovery would extend to all *de facto* relatives and friends.[195]

This argument fails for several reasons. First, if unlimited lia-

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couples, see generally David Link, Comment, *The Tie that Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOYOLA L.A. L. REV. 1055 (1990).

188. *But cf.* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). In *Baehr*, the Hawaii Supreme Court held that the State of Hawaii would no longer be permitted to deny marriage licenses simply because both applicants are of the same sex. *Id*. However, the court stopped short of granting same-sex couples the right to marry, as it found that the Constitution did not provide them with a fundamental right to do so. *Id*. at 57. The court remanded the case for an evidentiary hearing to determine whether the statute furthered the state's compelling interest in marriage and whether it was narrowly drafted so as to avoid an unnecessary abridgement of constitutional rights. *Id*.

189. *See, e.g.*, Coon v. Josephs, 192 Cal. App. 3d 1269 (1987) (finding that bystander plaintiff did not meet the "close relationship" requirement although the same-sex couple were life-long, exclusive partners).

190. *Elden*, 758 P.2d at 592 n.2 (Broussard, J., dissenting).

191. *Dunphy* II, 642 A.2d at 373.

192. Whether this rule would disproportionately impact same-sex couples and thus violate their 14th Amendment Constitutional rights is beyond the scope of this Article. *See supra* note 188.

193. *Dunphy* II, 642 A.2d at 383 (Garibaldi, J., dissenting).

194. *Elden*, 758 P.2d at 588 (citing Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969)).

195. *Dunphy* II, 642 A.2d at 381–82 (Garibaldi, J., dissenting).

bility is a sufficient justification for a court to prohibit unmarried cohabitants from recovery, valid emotional injuries would remain uncompensated.[196] When a court focuses solely on the nature of the legal relationship, it precludes foreseeable and valid claimants from recovering. Moreover, if foreseeability becomes the focus, distinctions among injuries to other *de facto* groups become evident. The commitment, love, and endurance found among engaged, unmarried cohabitants is equally as genuine and serious as that found in a marriage. Thus, the "principled distinction" amongst *de facto* groups which Justice Garibaldi pursues is readily realized.[197]

Finally, unlimited liability should not serve as a basis to limit the class of potential plaintiffs because unrelated bystanders are not likely to file a great number of new claims.[198] In 1994, 3,610,000 unmarried couples lived in the United States,[199] as compared to 54,251,000 total married couples.[200] Thus, approximately 6.24 couples out of 100 in the United States are unmarried cohabitants. Denying valid claims to a minute percentage of the population does not greatly further the judiciary's attempt to limit liability.[201] Furthermore, since courts may presume that unrelated bystanders are not sufficiently close to recover for their emotional injuries, the burden of showing that the degree of their relationship entitles them to recover for their emotional injuries would ensure that claimants would only file legitimate claims.[202]

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196. The dissent acknowledged that an unmarried cohabitant may suffer the same emotional distress at witnessing the death of her fiancé as would a married bystander witnessing the death of her spouse. *Id*. at 380. *See supra* notes 144, 166 and accompanying text.

197. *Id*. at 381.

198. See *infra* notes 199–200 and accompanying text for a statistical analysis showing the unlikelihood of a flood of new cases to be brought before the courts. Professor Bell has noted that only a trickle of new claims would arise because only those cases which are valued greater than the cost of bringing the claim would be filed. *See* Peter A. Bell, *Reply to a Generous Critic*, 36 U. FLA. L. REV. 437, 442–45 (1984).

199. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, No. 60, *Unmarried Couples, by Selected Characteristics: 1970 to 1994*. An "unmarried couple" is defined as "two unrelated adults of the opposite sex sharing the same household." *Id*.

200. *Id*. at No. 61, *Married Couples of Same or Mixed Races and Origins: 1970 to 1994*.

201. *Cf*. Bulloch v. United States, 487 F. Supp. 1078, 1086–87 (D. N.J. 1980) (allowing an unmarried cohabitant's loss of consortium action to proceed).

202. See *infra* notes 215–23 and accompanying text for a discussion of the author's suggestion of how a rebuttable presumption may help serve courts in ensuring that

Burden on the Courts

The dissent also expressed concern that an intolerable burden on courts would result if unmarried cohabitants are recognized as bystander claimants.[203] However, the minute number of new claims which would result from unmarried cohabitants would not result in such a burden.[204] The *Dunphy* majority recognized that courts are capable of deciding which claimants have a genuine and deserving legal right to recover for their emotional distress.[205] It compared loss of consortium actions and found that a *Dunphy* type issue would equally require a fact finder to scrutinize the quality and nature of a relationship to assess damages in terms of the severity of the loss.[206] Thus, a jury may also serve to find whether an unmarried relationship is close enough to justify recovery. Furthermore, "even if the persons are married, [a] probing inquiry into the nature of their relationship will nonetheless occur."[207] Very simply, the difficulty in determining which unmarried cohabitants deserve to recover for their emotional injuries does not justify a blanket rejection of valid claims.[208]

B. Substance of Relationship Over Form

When courts exclusively focus on the legality of the relationship rather than the nature, they threaten to stymie recovery for deserving victims. Rather than legal status, the emotional affection of any kind of familial relationship should indicate whether the emotional injury suffered is foreseeable.[209] Similarly, failing to evaluate the intimacy of an unmarried cohabitant relationship because of the lack of legal status does not further the doctrine of foreseeability

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fraudulent claims are impeded; *see also* Lefler, *supra* note 16, at 990.

203. *Dunphy* II, 642 A.2d at 381 (Garibaldi, J., dissenting).

204. See *supra* notes 198–200 and accompanying text for a statistical analysis of unmarried cohabitants.

205. *Dunphy* II, 642 A.2d at 378.

206. *Id*.

207. *Id*. at 379.

208. *Elden*, 758 P.2d at 593 (Broussard, J., dissenting).

209. *See* Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 582 (1976) (finding that foster mother could recover for emotional distress where foster parent-child relationship existed with all of the characterizations of a natural parent-child relationship), *disapproved by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988).

upon which *Dillon* is premised.[210]

Although a rebuttable presumption should exist when bystanders have a legally recognized relationship,[211] mere reliance on legal status, absent analysis, fails to reach the rational conclusion that courts, which blindly bar recovery, presuppose. The *Dillon* court required a close relationship, "as *contrasted with the absence of any* relationship, or the presence of only a distant relationship" in determining whether a defendant should have reasonably foreseen the plaintiff's emotional injury.[212] Clearly, unmarried cohabitants should have the opportunity to show a trier of fact that they share the same qualities found among married couples. Furthermore, since at least one court has used *Dillon* to extend recovery to a *de facto* parental relationship,[213] it is consistent to extend recovery to a *de facto* marital relationship.[214] Courts should adhere to *Dunphy*'s principle and recognize that the substance of a relationship overrides the form.

C. An Alternative to *Elden*

This Article does not suggest that courts should ignore the important role that marriage plays in society. In many cases, a successful marriage is the centerpiece of a strong family unit. Society expects a considerable degree of intimacy to be present in such legally recognized relationships.[215] However, this Article *does* suggest that courts need to evaluate an unmarried cohabitant's relationship and afford an individual the opportunity to show that his or her relationship parallels a marital one for purposes of tort liability arising from negligent infliction of emotional distress. A progressive interpretation of "marriage and family" would not denigrate their

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210. *Compare* Drew v. Drake, 110 Cal. App. 3d 555 (1980) *with* Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

211. *See infra* notes 215–23 and accompanying text.

212. *Dillon*, 441 P.2d at 920 (emphasis supplied).

213. *See Mobaldi*, 55 Cal. App. 3d at 581–82. In *Mobaldi*, the court interpreted *Dillon* to allow a foster mother to recover for her emotional distress after observing the defendant negligently administer a fatal dose of glucose solution to her foster son. *Id*. at 578. The court reasoned that since the foster child had been living with his foster family since the age of five months and treated the plaintiff as his true mother, the relationship possessed "all of the incidents of parent and child except those flowing as a matter of law . . . ." *Id*. at 583.

214. Unmarried cohabitants can be thought of as having a *de facto* marital relationship.

215. Burley, *supra* note 7, at 943.

importance in society.[216] Thus, courts should not arbitrarily distinguish between the two classes of plaintiffs.

However, if courts are reluctant to treat both classes equally, they may employ a presumption in favor of married couples. Therefore, as an alternative, this Article suggests that courts should afford married bystanders, who have suffered emotional distress as a result of witnessing their spouse's negligent death or serious injury, a rebuttable presumption in their favor suggesting that a close relationship exists. Accordingly, the defendant could present sufficient evidence to overcome that presumption by showing that the bystander and direct victim[217] lacked the intimacy found in a close relationship.[218] Thereafter, the burden of persuasion would shift to the plaintiff to show the trier of fact that the parties' relationship met the "closely related" requirement found in cases following *Dillon*.

Conversely, if a couple simply cohabited, a rebuttable presumption would exist suggesting that their relationship did not meet *Dillon*'s close relationship requirement. As Justice Broussard's dissent in *Elden* suggests, the plaintiff would have the burden of presenting evidence to show that the couple's relationship is sufficiently close to recover. For example, a plaintiff could utilize the following factors to show whether they are "closely related": 1) the duration of the relationship and whether it was continuous; 2) how long they cohabited; 3) whether they were engaged to be married at the time of the accident; 4) whether the couple represented themselves as husband and wife in public;[219] 5) whether the couple had married since the accident; 6) the exclusivity of their sexual relationship; 7) whether the couple had any children together or whether children from a previous marriage lived in the household; 8) whether the couple shared property and assets;[220] 9) whether the couple filed joint or separate income tax returns; 10) if any life insurance pol-

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216. Link, *supra* note 187, at 1107.

217. See *supra* notes 6 and 7 for a definition of the terms "direct victim" and "bystander," respectively, as they are used in this Article.

218. *Cf.* Cavanaugh, *supra* note 76, at 468 (suggesting a rebuttable presumption in favor of immediate family members, significant others, and persons living in the plaintiff's household and as a member of the plaintiff's family for a specified period of time).

219. Michael Burwell introduced Eileen Dunphy in public as his wife. *Dunphy* II, 642 A.2d at 373.

220. Eileen Dunphy shared a joint checking account and purchased an automobile with Michael Burwell. *Id*.

icies existed, whether the couple named each other as beneficiary;[221] and, 11) "their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements."[222] However, in both situations the trier of fact would decide whether the relationship presented meets *Dillon*'s standard.[223]

VI. CONCLUSION

In 1968, the California Supreme Court created a progressive approach in the area of negligent infliction of emotional distress when it decided *Dillon v. Legg*. The court shifted the focus to the foreseeability of the injury that bystanders suffer as a result of witnessing the death or serious injury of a loved one. Thereafter, in *Elden v. Sheldon*, California limited the class of plaintiffs who could recover for such injury by excluding unmarried cohabitants. The court found that social policy reasons, including the state's interest in marriage, the need to limit liability, and the burden on courts in evaluating such a relationship justified limiting recovery.

Dunphy v. Gregor presented the New Jersey Supreme Court with a similar situation. After a careful analysis, the *Dunphy* court held that the policy reasons enunciated in *Elden* and advocated by the dissent did not excuse precluding recovery to a clearly foreseeable class of plaintiffs. The court appropriately found that marriage is not the exclusive form of a close relationship and that a trier of fact is capable of finding what constitutes a sufficiently close relationship.

Dunphy suggests that injuries identifiable within the class of unmarried cohabitants are sufficiently foreseeable to create a duty of care. If a court is unwilling to consider unmarried couples in the same light as married couples, it could follow a rather simple and manageable approach which would provide unmarried cohabitants an opportunity to show that their relationship is sufficiently analo-

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221. Both individuals also purchased life insurance policies, each naming the other as beneficiary. *Id*.

222. *Id*. at 378 (citing *Dunphy v. Gregor I*, 617 A.2d 1248, 1255 (N.J. Super. Ct. App. Div. 1992)).

By applying these factors, courts would operate to prevent friends who simply cohabited from recovery.

223. This Article does not suggest that this analysis must simply be restricted to unmarried cohabitants. However, a discussion of other relationships is beyond its scope.

gous to a marital one and, thus, meets the *Dillon* requirement. The factors set forth in the *Dunphy* opinion, as well as others suggested by the author, sufficiently define parameters by which a trier of fact may decide the issue without compromising the importance of marriage in society. In other words,

> marriage would maintain its preferential status since married persons are presumed to be "closely related" for the purposes of *Dillon*. Rather, the proposal is merely to elevate unmarried cohabitants to a neutral status by permitting them to prove on a case-by-case basis that their relationship is equivalent in all relevant respects to a good marriage and equally deserving of legal protection.[224]

224. Elden v. Sheldon, 758 P.2d 582, 591 (Cal. 1988) (Broussard, J., dissenting).