Negligent Infliction of Emotional Distress: Has the Legislative Response to Diane Whipple's Death Rendered the Hard-Line Stance of Elden and Thing Obsolete

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by

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Introduction

The California Supreme Court has often been credited with leading the nation in creating new and progressive avenues of tort recovery. In 1968, the court created one such avenue of recovery

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1. See Leslie Benton Sandor & Carol Berry, Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, 37 ARIZ. L. REV. 1247, 1247 (1995). Ms. Sandor and Professor Berry further explain that California is “widely known for shaping the contours of tort law; it is certainly in the vanguard with respect to compensation for emotional injury.” Id. at n.2. Additionally, Sandor and Berry observe that California’s “liberal tendencies rigorously test the received wisdom behind doctrinal restrictions on recovery.” Id. (citing Robert L. Rabin, Tort Recovery for Negligently Inflicted Economic Loss, 37 STAN. L. REV. 1513, 1515 n.7 (1985)) (internal quotations omitted).

Interestingly, California’s “liberal tendencies” with respect to providing progressive forms of recovery appear to extend far beyond traditional notions of tort law. For example, California has become one of the first few states to recognize a “moral rights” theory for the protection of fine art in intellectual property law. Section 987 of the Civil Code now provides that the “physical alteration or destruction of fine art, which is an expression of the artist’s personality, is detrimental to the artist’s reputation,” and that there is “a public interest in preserving the integrity of cultural and artistic creations.” CAL. CIV. CODE § 987(a) (Deering 2001). California’s attempts to stay at the forefront of recovery, however, may at some times be too progressive; as the Visual Artists Rights Act adopted by Congress in 1990, 17 U.S.C. § 301(f) (2000), has not embraced the same widespread theory of protection that California has, there may be serious questions as to whether California’s fine art protection statute is preempted by its federal counterpart. See MARGRETH BARRETT, INTELLECTUAL PROPERTY: CASES AND MATERIALS 576 (2d ed. 2001).
when it decided *Dillon v. Legg*.

In *Dillon*, the court held for the first time that a bystander who witnessed the negligently caused injury of another need not be in the “zone of danger” in order to recover for her resulting emotional distress. The court explained that the primary consideration concerning the availability of bystander recovery was the foreseeability that a particular plaintiff would suffer emotional distress upon witnessing the negligently caused injury to a third person, and delineated three guidelines to assist courts in determining foreseeability on a case-by-case basis. Those guiding factors were: (1) whether the plaintiff was located near the scene of the accident, (2) whether the emotional shock resulted from the sensory and contemporaneous observance of the accident, and (3) whether the plaintiff and the victim shared a close relationship, as opposed to only a distant relationship or no relationship at all.

In the years following *Dillon*, confusion reigned as to who, exactly, could qualify as a “closely related” bystander for purposes of recovery for negligently inflicted emotional distress. In 1988, however, in what one commentator has dubbed the “beginning of the end of the *Dillon* era,” the supreme court held, in *Elden v. Sheldon*, that a plaintiff who witnesses the negligent injury of a person with whom he or she shares a cohabitant relationship akin to marriage may not recover for negligent infliction of emotional distress because such a plaintiff does not satisfy the third *Dillon* guideline—i.e., the guideline suggesting that recovery be limited to plaintiffs that are closely related to negligence victims. The following year, the court followed up its decision in *Elden* by holding in *Thing v. La Chusa* that in the absence of physical injury or impact to a bystander, that bystander should only be permitted to recover damages for negligent infliction of emotional distress if he is “closely related to the injury victim,” and went on to conclude that “[a]bsent exceptional

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2. 441 P.2d 912 (Cal. 1968).
3. Id. at 920.
4. Id.; see also John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 Hastings L.J. 477, 482 (1984) ("The *Dillon* court thus established foreseeability as the chief element limiting the defendant's duty and, therefore, liability.").
5. 441 P.2d at 920.
6. Id.
10. 771 P.2d at 815.
circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." Viewed together, therefore, Elden and Thing represent a decidedly hard-line approach to bystander recovery for negligent infliction of emotional distress, at least with respect to the "closely related" element suggested in Dillon and mandated in Thing.

Recent actions by the California legislature, however, appear to have undercut several of the policy concerns on which the supreme court has predicated its strict approach to negligent infliction of emotional distress over the last fourteen years. Those actions, culminating in the enactment of section 1714.01 of the Civil Code, found their origin in the bitter aftermath of the brutal dog-mauling death of Diane Whipple. On January 26, 2001, Diane Alexis Whipple, a thirty-three year old college lacrosse coach who stood just over five feet tall and weighed only 110 pounds, was unlocking the door of her sixth-floor apartment in San Francisco, when two Presa Canario dogs savagely attacked her. One of the dogs, 123-pound Bane, latched on to Whipple's neck and dragged the screaming woman twenty feet down the hallway, while 112-pound Hera continuously tore at Whipple's clothing. Whipple was pronounced dead at San Francisco General Hospital only hours later. Police officers attending the scene of the mauling were so horrified by the.

11. Id. at 829 n.10. The court also decreed that recovery should be permitted only when the closely related plaintiff is "present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim," and when the plaintiff "suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." Id. at 829-30. As will be explained later in this Note, the court premised these requirements on a host of policy concerns, such as the potential for "unlimited liability for emotional distress on a defendant whose conduct is simply negligent." Id.

12. Indeed, at least one court has seriously questioned the California Supreme Court's position that recovery for emotional distress should be limited to persons closely related by blood or marriage because those are the only persons most likely to suffer serious emotional distress upon witnessing injury to a loved one. See Dunphy v. Gregor, 642 A.2d 372, 375 (N.J. 1994).

13. CAL. CIV. CODE § 1714.01 (Deering Supp. 2002).


15. Presa Canarios are actually a mixed breed that is part English mastiff, and part Canary Island cattle dog. See Maria L. LaGanga & John M. Glionna, San Franciscans Outraged as They Mourn Dog Attack Victim; Tragedy: Many Demand Prosecution for Owners of Animal that Mauled Woman. Others Fear New Rules on Pets, L.A. TIMES, Jan. 30, 2001, at A1. The breed is so large that neighbors referred to Bane, who was euthanized following the attack, as the Beast, Killer Dog, and Dog of Death. Id.

16. Id.

17. Id.
presence of “blood and human hair all over the place” that several needed psychological counseling. 18

Following Whipple’s bloody death, her partner, Sharon Smith, a vice president at Charles Schwab, was “overcome with shock [and] numbed by grief.” 19 On March 12, 2001, Smith filed a wrongful death lawsuit against Marjorie Knoller and Robert Noel, the owners of the two dogs that attacked and killed Whipple. 20 In apparent recognition of the reality that Smith’s lawsuit would probably not survive a motion to dismiss, because “[c]urrent law makes [her] relationship invisible [for purposes of wrongful death actions],” 21 Assemblywoman Carole Migden, D-San Francisco, introduced Assembly Bill 25. 22 While the bill was not introduced in order to quietly sanction gay marriages, and would arguably only modestly broaden the rights of domestic partners who register with the state, 23 the bill would give domestic partners the right to bring actions for the wrongful death of their partners. 24 Of more significance for purposes of this Note, however, the bill would also amend the California Civil Code to provide domestic partners with the right to recover damages for negligent infliction of emotional distress. 25 After considerable debate, the California legislature substantially adopted Assemblywoman

18. Id.
21. Id. (“As a partner, Smith has no standing under California law to file a wrongful death suit—only surviving spouses, children or parents do.”). Ironically, Superior Court Judge A. James Robertson II, who is currently presiding over Smith’s wrongful death action, actually denied Noel’s and Knoller’s motions to dismiss, finding that Smith had the right to bring the action pursuant to the California Constitution. See Peter Hartlaub, Same-sex Partner Can Sue for Damages; Wrongful-Death Claim in Dog-Mauling Case, S.F. CHRON., July 28, 2001, at A1. Even Smith’s attorneys recognize, however, that Judge Robertson’s ruling is unlikely to be the final word in the matter. Id.
23. See Lucas, supra note 20, at A3. It should also be noted that “[d]omestic partnership is not marriage for same-sex couples. It does not approach the stature of marriage in terms of the rights and obligations it offers.” Kitty Mak, Partners in Law, 24 L.A. LAW. 35 (July/Aug. 2001).
25. See S. JUD. COMM., supra note 24 (“Among the rights, privileges, and standing this bill provides domestic partners consistent with the rights, privileges and standing of spouses . . . are: [t]he right to recover damages for negligent infliction of emotional distress. . . .”).
Migden's bill, and enacted, among other things, section 1714.01 of the Civil Code. Section 1714.01 provides, "Domestic partners shall be entitled to recover damages for negligent infliction of emotional distress to the same extent that spouses are entitled to do so under California law."

Certainly, the Legislature's approval of Assembly Bill 25 and its enactment of section 1714.01 appears to be in contravention of the position taken by the supreme court in *Elden* and *Thing*—specifically, that public policy demands limiting recovery for negligent infliction of emotional distress to spouses and blood relatives. This Note, without directly addressing the merits of the California legislature's extension of the right to recover for negligent infliction of emotional distress to domestic partners, will assert that since the legislature has extended that right to domestic partners, we must seriously question the continuing validity of the supreme court's hard-line approach to recovery, as represented by its decisions in *Elden* and *Thing*.

Section I of this Note will briefly catalogue the development of emotional distress law in the United States and, more specifically, in California. It will first address the traditional reluctance of the courts in this country to award damages for emotional distress, and will conclude with a discussion of the California Supreme Court's groundbreaking decision in *Dillon v. Legg*. Section II will address the reaction to *Dillon* in the California courts, focusing specifically on judicial treatment of the third *Dillon* guideline, which suggested that recovery be limited to those plaintiffs who share a close relationship with the negligence victim. The section will recount the few decisions that extended the right to recover to plaintiffs related to negligence victims by neither blood nor marriage, and will conclude by exploring the policy justifications underlying the court's decisions in *Elden* and *Thing*. Finally, section III of this Note will assert that in light of the

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27. *Id.*
28. Opponents of Assemblywoman Migden's bill and of the enactment of section 1714.01 have forcefully argued that the bill contravenes the will of the majority of Californians, who overwhelmingly approved Proposition 22, which specifically provided that only marriages between men and women will be recognized as valid in California. See *Lucas*, *supra* note 20, at A3. According to Randy Thomasson, the executive director of the Campaign for California Families, Assembly Bill 25 represents "an end run around voters. It's an end run around marriage. It's unconscionable to give 11 married rights to people who are not married." *Id.* Still others have persuasively argued that by "awarding spousal rights to non-spouses, [Assembly Bill] 25 would reject 61.4 percent of the voters in the state who want to protect marriage rights between a man and a woman." S. FLOOR, *supra* note 24.
California legislature's apparent willingness to accept the proposition that relationships other than those grounded in blood or marriage, such as domestic partnerships, may be sufficiently intimate to justify the extension of the right to recover for negligently inflicted emotional distress, the court's current hard-line approach, as represented by its holdings in *Elden* and *Thing*, should be discarded. Specifically, this Note will argue for the adoption of the approach taken by the New Jersey Supreme Court in *Dunphy v. Gregor*, in which the court held that the law "should not ignore the fact of a deep emotional attachment between... any two persons who share an adequately earnest emotional commitment in a relationship that is functionally equivalent to familial." 29 Indeed, this is the only approach that can be reconciled with the legislature's extension of the right to recover for negligent infliction of emotional distress to domestic partners.

I. Emotional Distress: An Historical Analysis of Recovery

Today, claims for emotional distress damages are literally a staple of trial practice. 31 "To the plaintiff's attorney, claims for emotional distress damages are precursors to impassioned closing arguments for damages well above the claimant's fairly ascertainable compensatory damages." 32 Indeed, the widespread availability of damages for emotional distress is so pervasive in the realm of tort law that the ability of parties to avoid potentially costly litigation by settling out of court often depends on the extent to which the parties can successfully "assess a claimant's emotional distress damages at either the outset of a case or during the early stages of discovery." 33 The availability of damages for various forms of emotional distress, however, has not always been a certainty, and was, in fact, completely foreclosed at common law.

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30. The term "emotional distress" commonly encompasses a variety of breeds of mental suffering, including anxiety, worry, fright, grief, nervousness, shock, humiliation, and indignity. See *Thing v. La Chusa*, 771 P.2d 814, 816 (Cal. 1989) (citing *Deevy v. Tassi*, 130 P.2d 389, 396 (Cal. 1942)).
32. *Id.*
33. *Id.*
A. The Early Days

The opportunity to recover damages for emotional distress was almost non-existent at common law.\(^3\)\(^4\) Despite the commonly repeated, and almost universally accepted, “fundamental principle of our judicial system”—that for every wrong there is a remedy\(^5\)—common law courts simply refused to recognize emotional injury, as opposed to physical injury, as legally cognizable.\(^6\) Among the several and varied justifications set forth for denying recovery for emotional distress were: (1) emotional distress is too remote from a negligent defendant’s actions, and thus fails to satisfy the proximate causation requirement of recovery;\(^7\) (2) mental or emotional harms, unlike physical injuries, are incapable of quantification, and thus might lead to the prevalence of falsified or severely exaggerated claims;\(^8\) and (3) suddenly allowing plaintiffs to recover for claims of emotional distress, when the availability of such a remedy had never before...
existed, would lead to unmanageable civil dockets as plaintiffs rushed to seek compensation for their injured feelings.\textsuperscript{39} Of course, denial of recovery for various aspects of emotional injury did not remain absolute. Increasingly, advances in science and medicine began to erode the belief that psychic injury could not be sufficiently quantified to support an award of damages.\textsuperscript{40} Initially, emotional distress was recognized as an "aggravation of damages sought under intentional tort theories." In \textit{Molien v. Kaiser Foundation Hospitals}, the California Supreme Court observed, "As early as 1896, this court recognized that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of."\textsuperscript{42} In most jurisdictions, however, including California, causing mental distress did not, in and of itself, create a right of action.\textsuperscript{43} To the contrary, emotional distress continued to be relegated to the position of parasitic damages in intentional tort actions.\textsuperscript{44} As the California Supreme Court observed in \textit{Thing},

\begin{itemize}
  \item \textsuperscript{41} \textit{Thing v. La Chusa}, 771 P.2d 814, 816 (Cal. 1989); see also \textit{Diamond}, supra note 4, at 480 ("The initial common law rule allowed recovery for mental pain only as parasitic damages accompanying physical injury."); \textit{William L. Prosser, Handbook of the Law of Torts} § 12, at 50 (4th ed. 1971).
  \item \textsuperscript{42} \textit{616 P.2d 813}, 817 (Cal. 1980) (citing \textit{Sloane v. S. Cal. Ry. Co.}, 44 P. 320, 322 (Cal. 1896)) (internal quotations omitted).
  \item \textsuperscript{43} \textit{Thing}, 771 P.2d at 816; \textit{Sloane}, 44 P. at 322 (distinguishing nervous shock, paroxysm, and nervous system disorders on the one hand, from mere psychological harm on the other, and holding that psychological suffering alone would be insufficient to support a right of action and an award of damages).
  \item \textsuperscript{44} \textit{Thing}, 771 P.2d at 816 (citing \textit{5 Witkin, Summary of Cal. Law, Torts} § 402, at 483 (9th ed. 1988)). It is worth noting that an early exception to the general rule that emotional distress could only be compensated as a parasitic item of damages, was the intentional tort of assault. \textit{Id.} Perhaps the earliest recorded decision granting relief for the emotional distress caused as a result of an assault is the classic case of \textit{I de S et ux. v. W de S}, Y.B.Lib.Ass. folio 99, plactium 60 (Assizes 1348) (in \textit{Victor E. Schwartz et al., Prosser, Wade and Schwartz's Torts: Cases and Materials} 34 (10th ed. 2000)). Today, assault is commonly accepted as a tort that recognizes an individual's right to enjoy peace of mind and to live without fear of personal harm. \textit{See Id.} (citing \textit{Lowry v. Standard Oil Co.}, 146 P.2d 57, 60 (Cal. Ct. App. 1944)). Despite this common acceptance of the theory underlying recovery for assault, however, at least one commentator has stated that allowing recovery for emotional distress in actions based on intentional conduct was not originally in recognition of a plaintiff's right to mental tranquility, but was instead to provide an alternate dispute resolution mechanism, which would be preferable to exacting revenge via self-help. \textit{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, 486 (1982).
\end{itemize}
Recognition of emotional distress as a compensable injury when caused by an intentional tort carried with it a judgment that the defendant’s conduct was sufficiently outrageous or unacceptable that an award of damages was justified to punish the tortfeasor and deter such conduct by others.45

The court further explained that “[t]his development led in turn to a focus on the nature of the defendant’s conduct, rather than on identifying a traditional tort to justify recovery for infliction of emotional distress, and culminated in recognition of the tort now known as intentional infliction of emotional distress.”46

One of the first cases to recognize intentional infliction of emotional distress as a cognizable injury in tort was State Rubbish Collectors Ass’n v. Siliznoff.47 In Siliznoff, the California Supreme Court officially recognized that freedom from emotional distress is, under certain circumstances, an interest worthy of protection in its own right, and that “it is possible to quantify and compensate for the invasion of that interest through an award of monetary damages even when the severity of the emotional distress is not manifested in physical symptoms.”48 At the time Siliznoff was handed down, however, plaintiffs in negligence actions had not yet been permitted to recover for their emotional distress absent some showing of accompanying physical injury.49

B. Beyond Siliznoff: From Physical Injury to Dillon

Despite the unwillingness of courts to allow victims of negligence, as opposed to victims of intentional tortious conduct, to recover damages for their emotional distress, a less generous line of cases permitting the recovery of monetary damages for emotional distress resulting from negligence had begun to develop in American jurisdictions at the time Siliznoff was decided.50 This section will explore the development of that line of decisions, which initially required a negligence victim to have suffered physical injury either before or after the onslaught of emotional harm, and which culminated with the California Supreme Court’s decision in Dillon v. Legg, where the court departed from the majority rule and, for the first time, allowed a bystander to the negligently caused injury of a

45. 771 P.2d at 816-17.
46. Id. at 817.
47. 240 P.2d 282 (Cal. 1952).
48. See Thing, 771 P.2d at 817.
49. Id.
50. Id. at 818.
third person to recover for emotional distress, despite suffering no physical impact, and being located outside the "zone of danger." 53

(1) It's a Step: Injury and Impact

In cases involving negligence, rather than intentional torts such as battery or intentional infliction of emotional distress, the right to recover for emotional distress in California, as well as in most American jurisdictions, was initially limited to "circumstances in which the victim was himself injured and emotional distress was a 'parasitic' item of damages." 52 Going only a slight step further was the rule that permitted recovery if the plaintiff had not suffered physical injury as a direct result of the negligent act, but did suffer physical injury as a result or by-product of the emotional injury. 53 In what became known simply as the "injury rule," a plaintiff seeking damages for emotional distress resulting from the defendant's negligent act was required to "demonstrate some physical illness, injury or other manifestations of her emotional injury." 54

The most common explanation for requiring at least some manifestation of physical injury, either as a direct result of the negligent act or as a result of the emotional distress that resulted from the negligent act, was that physical injury provided concrete evidence of the genuineness of the claim. 55 Such concrete, ascertainable evidence would therefore aid the courts in limiting recovery to "truly deserving individuals." 56 Further, requiring the claimed emotional distress to result in or from physical injury served as a screening device that would "minimize a presumed risk of feigned injuries and false claims." 57 Several courts, however, began to hold that a plaintiff

51. 441 P.2d at 920-21; see also Diamond, supra note 4, at 477.
52. Thing, 771 P.2d at 817; see also Diamond, supra note 4, at 480 ("The initial common law rule allowed recovery for mental pain only as parasitic damages accompanying physical injury") (citing PROSSER, supra note 41, § 12, at 50); Cavanaugh, supra note 8, at 451; Appleberry, supra note 40, at 304 ("Traditionally, courts recognized emotional distress claims only when the psychic harm accompanied a physical injury"); Webb v. Francis J. Lewald Coal Co., 4 P.2d 532, 533 (Cal. 1931); Lindley v. Knowlton, 176 P.2d 440, 441 (Cal. 1918); Ward v. W. Jersey & Seashore R.R. Co., 47 A. 561, 561-62 (N.J. 1900); State v. Daniel, 48 S.E. 544, 545 (N.C. 1904); Brooker v. Silverthorne, 99 S.E. 350, 351-52 (S.C. 1919).
53. See, e.g., Thing, 771 P.2d at 817; Webb, 4 P.2d at 533; Lindley, 176 P.2d at 441.
54. See Sandor & Berry, supra note 1, at 1260-61.
55. See Appleberry, supra note 40, at 304; Cavanaugh, supra note 8, at 451.
56. Appleberry, supra note 40, at 304.
57. Molien v. Kaiser Found. Hosp., 616 P.2d 813, 818-19 (Cal. 1980) ("Our courts have instead devised various means of compensating for the infliction of emotional distress, provided there is some assurance of compensating for the validity of the claim. As we have seen, physical
seeking damages for negligently inflicted emotional distress did not have to demonstrate any physical injury, as long as the plaintiff had suffered some physical impact caused by the defendant’s negligent conduct. Under this “impact rule,” courts were able to extend recovery rights to a larger category of plaintiffs, while still maintaining their conviction that the emotional distress was nothing more than “parasitic damages.” Under the impact doctrine, however, the physical impact, even if it did not result in physical injury, nevertheless was treated as a “surrogate” for personal injury, and could therefore support a finding of parasitic emotional distress damages.

(2) The “Zone of Danger” and Amaya v. Home Ice, Fuel & Supply Co.

Once courts began to allow mere impact to take the place of genuine physical injury in cases involving claims for negligent infliction of emotional distress, the degree or severity of impact required to support an award of damages grew increasingly trivial. Indeed, Professors Sandor and Berry have observed that as a result of the general trend among American courts to interpret the “impact” requirement quite liberally, “the most trifling impact” began to

injury, whether it occurs contemporaneously with or is a consequence of emotional distress, provides one such guarantee.”); see also Capelouto v. Kaiser Found. Hosp., 500 P.2d 880, 882–83 (Cal. 1972).

It should be noted that two early exceptions to the rule that allowed recovery for negligently inflicted emotional distress only upon some physical manifestation, were the cases allowing recovery for emotional injury resulting from the negligent mishandling of a corpse, and that resulting from the negligent transmission of a message concerning the health of a family member. See Heidenreich, supra note 34, at 284. Indeed, in Chelini v. Nieri, 196 P.2d 915, 919 (Cal. 1948), the court approved a judgment in favor of a plaintiff whose mother the defendant mortuary had negligently sealed in a casket. Similarly, in Lamm v. Shingleton, 55 S.E.2d 810, 813–14 (N.C. 1949), the court upheld recovery for emotional distress where the defendant had negligently permitted mud and water to penetrate the vault of the plaintiff’s deceased husband. Finally, in two cases involving an early telecommunications giant, Western Union Telegraph Co. v. Redding, 129 So. 743, 747 (Fla. 1930), and Russ v. Western Union Telegraph Co., 23 S.E.2d 681, 683 (N.C. 1943), the courts upheld findings of liability for emotional distress where the defendant telegraph company misinterpreted a telegraphic message concerning the plaintiff’s daughter’s medical test results on one hand, and failed to deliver a message concerning the death of the plaintiff’s brother on the other hand.


59. Sandor & Berry, supra note 1, at 1260.

60. Id.

61. Id. (observing that “courts have found impact in [cases involving only] minor contacts with the person which play no part in causing the real harm, and in themselves, can have no importance”).
suffice in an action for negligent infliction of emotional distress. One case around the turn of the twentieth century even held that some tiny dust particles' invasion of the plaintiff's eye, as an indirect result of the defendant's negligence, was sufficient to support an award of damages for emotional distress.

The willingness of courts around the country to entertain actions for emotional distress damages upon only slight and trivial impact, and the occurrence of several cases involving "near misses," led the courts of most jurisdictions, including California, to adopt the "zone of danger" rule. Under this theory of recovery, a plaintiff would be entitled to damages for negligently inflicted emotional distress if she could demonstrate that she was proximately located so close to the defendant's negligent conduct that a physical injury, or at least a physical impact, could have occurred. Physical impact was not considered a prerequisite to recovery under the zone of danger analysis. The "zone of danger" theory of liability was quickly adopted by a majority of American jurisdictions. After 1950, the number of courts that had adopted the "zone of danger" theory of

62. Id. at 1261. See also Homans, 62 N.E. at 737, in which the "impact" that justified an award of damages for emotional distress was only a slight blow to the person, which resulted in no physical injury; Zelinsky, 175 A.2d at 354, where the court specifically conceded that "any degree of physical impact, however slight" will support an award of damages for negligently inflicted emotional distress.

63. See Porter v. Delaware, L. & W.R. Co., 63 A. 860, 860 (N.J. 1906). See also Heidenreich, supra note 34, at 285 ("The 'impact' could be met by relatively traditional incidences of impact, such as a vehicle colliding with the plaintiff, as well as seemingly minor incidences, such as inhalation of smoke, dust in the eye, a minor burn, electric shock, or even a slight jar or jolt.") (emphasis added) (citing Porter, 63 A. at 863; Howard v. Bloodworth, 224 S.E.2d 122, 123 (Ga. Ct. App. 1976); Sam Finley Inc., v. Russell, 42 S.E.2d 452, 456 (Ga. Ct. App. 1947)).

64. Diamond, supra note 4, at 480; see also Heidenreich, supra note 34. Heidenreich places the origin of the "zone of danger" rule in the "deterioration of the impact rule by way of minor incidences. . . ." Id.

65. Id.


67. See Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 518 (Cal. 1963). The court in Amaya observed, "In every jurisdiction that has ruled on this precise question—some 18 in addition to California—the decisions appear to be uniform in upholding the rule of nonliability [if the plaintiff was located outside the zone of danger]." Id. See also Waube v. Warrington, 258 N.W. 497, 501 (Wis. 1935), in which the Wisconsin Supreme Court unanimously held that a negligent defendant is not liable for any "physical injuries sustained by one out of the range of ordinary physical peril as a result of the shock of witnessing another's danger." (emphasis added).
liability drastically increased. Even the Supreme Court of the United States affixed its seal of approval to the zone of danger theory of liability in the context of the Federal Employer’s Liability Act.

In 1963, the California Supreme Court got its opportunity to end the rampant speculation as to whether the “zone of danger” rule had permanently replaced any requirement of physical injury or impact in California negligent infliction of emotional distress cases. That opportunity came in *Amaya v. Home Ice, Fuel & Supply Co.* The facts of *Amaya* were relatively straightforward, and therefore appeared to provide the court with an excellent opportunity to clarify the law regarding negligent infliction of emotional distress in California. In *Amaya*, the plaintiff was watching over her 17-month-old son, James, as he played near the street. At one point, the plaintiff became aware that the defendants’ negligently driven truck was bearing down on her son. She shouted a warning to the defendants as they approached James, but the warnings came too late and the plaintiff was “compelled to stand helpless and watch her infant son be struck and run over by the defendants’ truck.”

In *Amaya*, the plaintiff alleged that, as a direct and proximate result of the defendants’ negligent operation of their truck, she suffered an emotional shock and great


69. See Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 554-55 (1994). One commentator has suggested that the Court’s adoption of the zone of danger analysis in the context of Federal Employer’s Liability Act (FELA) was premised on the Court’s belief that a “more relaxed test for [negligent infliction of emotional distress] claims would not be faithful to legislative intent when enacting FELA.” Appleberry, supra note 40, at 306. For a brief yet insightful discussion of the merits of the Supreme Court’s decision in *Gottshall*, see generally, William T. Krizner, *Is There a Better Standard than the Zone of Danger Test for Negligent Emotional Distress Claims under the Federal Employers’ Liability Act?*, 34 TORT & INS. L.J. 907 (1999).

70. Prior to 1963, the question of whether a plaintiff was required to plead and prove some sort of physical injury or physical impact had come before the California Supreme Court on several occasions. In each of those cases, however, the court avoided resolving the issue. See *Amaya*, 379 P.2d at 514–15 (citing Easton v. United Trade School Contracting Co., 159 P.2d 597, 599 (Cal. 1963); Lindley v. Knowlton, 176 P. 440, 441 (Cal. 1918); Webb v. Francis J. Lewald Coal Co., 4 P.2d 532, 533 (Cal. 1931)).
mental disturbance... and became violently ill and nauseous [sic] and was hurt and injured in her health, strength and activity, sustaining injury to her body and shock and injury to her nervous system and person. 73

Significantly, however, the plaintiff did not allege that she suffered these injuries as a result of fear for her own safety. 76 Indeed, the trial court had even offered plaintiff the opportunity to amend her complaint to specifically allege that the emotional distress complained of was a result of the plaintiff's fear for her own well-being. 77 The plaintiff declined the offer, however, and reiterated that the psychological injuries she suffered, as well as the physical symptoms resulting from those injuries, were the "result of being compelled to watch her infant child crushed beneath the wheels of an ice truck, and that all the fright and shock she suffered was as a result of her fear for the safety of her child, and not out of fear for her own safety." 78 The California Supreme Court therefore accepted the defendants' position that plaintiff Amaya had stipulated to the issue as being, whether liability "may be predicated on fright or nervous shock (with consequent bodily illness) induced solely by the plaintiff's apprehension of negligently caused danger or injury to a third person." 79

Before determining whether the court of appeal had correctly rejected Amaya's claim for damages, the supreme court explained that "[a]t the outset it is necessary to determine whether or not the 'impact rule' is in force in California: i.e., in an action for personal injuries resulting from the internal operation of negligently induced fright or shock, need the plaintiff show that there was some contemporaneous physical impact upon her person?" 80 The court observed that if the "impact rule" was the law of the state, then it would be patently obvious that plaintiff Amaya could not recover, because at no point did she experience any impact with the defendants' ice truck. 81 The court concluded that no California court

75. Id. (citing plaintiff Amaya's complaint for damages, in which she requested relief in the amount of $50,000, in addition to medical expenses related to what she claimed was a permanent disability) (internal quotations omitted).
76. Id.
77. Id.
78. Id. (emphasis added).
79. Id. at 514.
80. Id. at 514-15 (citing 64 A.L.R.2d 100 et seq.).
81. Id. One might wonder, however, in light of a long line of American cases that had allowed recovery upon a showing of some de minimis impact, such as Porter v. Delaware, L. & W.R. Co., 63 A. 860, 860 (N.J. 1906), in which the court affirmed an award of
had expressly declared that the "impact rule" governed emotional distress claims in the state, and that the court was "not disposed to introduce [the impact rule] into our law now." Accordingly, the court held that plaintiff Amaya's failure to allege a "contemporaneous physical impact upon her person" did not, by itself, render the complaint defective.

After holding that the "impact rule" was not controlling in California, however, the Amaya court approvingly cited several earlier cases that, without using the phrase, "zone of danger," had nevertheless held that a plaintiff may only recover for emotional distress if she was sufficiently close to the defendant's negligent conduct to fear for her own safety. Perhaps even more persuasive in the eyes of the court, however, was the most recently completed draft of the Restatement (Second) of Torts, which expressly adopted the "zone of danger" theory of liability. The Amaya court therefore concluded that while a plaintiff seeking damages for negligently inflicted emotional distress need not suffer a physical injury or impact, the plaintiff must have at least been in the zone of danger created by the defendants' allegedly negligent conduct.

damages when the only 'impact' had resulted from some dust invading the plaintiff's eyes, whether Amaya might have been entitled to damages had she perhaps alleged that some snow or dirt from the street sprayed at her when the truck veered towards the curb and struck her son.

82. 379 P.2d at 515.
83. Id.
84. Id. at 515-17. The court placed its greatest reliance on Reed v. Moore, 319 P.2d 80, 81-82 (Cal. Ct. App. 1957), in which the court of appeal rejected the plaintiff's claim for emotional distress damages, where the plaintiff had suffered mental shock and a miscarriage as a result of being in fear of her husband's safety, but not her own. In Reed, the court held, "[t]he case, therefore, is authority to sustain the rule that physical injury due to fright or shock as a result of fear for one's own safety is compensable. It is not, however, authority to sustain an action for damages produced by an apprehended danger or peril to a third person." Id. at 81. (emphasis added).

85. Amaya, 379 P.2d at 518 ("The modern unanimity of view upon the issue now before us is reflected in the evolution of the relevant section of the Restatement of Torts."). The court further observed that one of the comments to a newly drafted section of the Restatement invoked an example that was directly analogous to the facts in Amaya. Indeed, comment d to subsection (2) provided: "Thus, where the actor negligently runs down and kills a child in the street, and its mother, in the immediate vicinity, witnesses the event and suffers severe emotional distress, resulting in a heart attack or other bodily harm to her, she cannot recover for such bodily harm unless she was herself in the path of the vehicle, or was in some other manner threatened with bodily harm, otherwise than through the emotional distress at the peril to her child." RESTATEMENT (SECOND) OF TORTS § 313(2) cmt. d (Tentative Draft No. 5, 1960).

86. 379 P.2d at 514 (concluding that "the complaint does not state facts sufficient to constitute a cause of action and that the judgment [granting the defendants' demurrer] should therefore by affirmed.").
Among the policy justifications invoked by the court in support of its holding were various “administrative and socioeconomic factors.”

On the administrative side, the court expressed its concern with what it considered the inherently complex and difficult task of proving and quantifying emotional injury.

With regard to the “socioeconomic and moral factors,” the court pointed to the inevitable effects on the insurance industry that would result from “the far-reaching extension of liability that would follow from judicial abrogation of the [zone of danger] rule.”

Amaya’s legacy, however, proved to be short-lived.

(3) Forseeability and the Dillon era

The physical injury and impact doctrines, as well as the “zone of danger” analysis adopted by the Amaya court, were premised on the notion that recovery for emotional distress should be limited to “direct” victims of a negligent defendant’s actions, or those victims to whom the defendant owed a direct duty.

Over time, however, increasing numbers of “bystander” victims, or those that had not been physically impacted or within the zone of danger, contended that they should be entitled to recover for the emotional distress caused by witnessing negligently caused injury to another.

Only five years after the California Supreme Court handed down its decision in Amaya, a grieving mother named Margery Dillon appeared before

87. Id. at 522–25. (“Justice . . . exists only when it can be effectively administered.”).
88. Id. at 522–24. The court recognized that in recent years, it had “become almost trite for legal writers to deprecate such reasoning,” id. at 522, and conceded that in State Rubbish Collectors Ass’n v. Siliznoff, 240 P.2d 282 (Cal. 1952), even the California Supreme Court had rejected the argument that quantifying emotional injury is too difficult to justify awarding compensatory damages. Id. The court, however, distinguished cases such as Siliznoff, where the defendant’s actions were intentional, from cases involving mere negligence: “To begin with the problem of proof, it is to be observed that in Siliznoff we were dealing with the intentional infliction of fright; we reasoned that [t]he jury is ordinarily in a better position, however, to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant’s conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury.” Id. at 522–23 (emphasis added) (internal quotations omitted). The court concluded that in cases involving negligently, as opposed to intentionally, inflicted emotional distress, that “difficult medical question” cannot be avoided. Id. at 523.
89. Id. at 525. See also Cavanaugh, supra note 8, at 452.
91. See Appleberry, supra note 40, at 309.
92. See id.
the high court and urged it to discard Amaya's adherence to the "zone of danger" rule.

In Dillon v. Legg, two persons witnessed the defendant negligently drive his automobile into a child named Erin Lee Dillon, as she lawfully crossed the street in front of her house. In Dillon v. Legg, two persons witnessed the defendant negligently drive his automobile into a child named Erin Lee Dillon, as she lawfully crossed the street in front of her house.93 One of the witnesses was the child's mother, and the other was her sister.94 Plaintiff Margery Dillon filed a complaint that stated three separate causes of action. The first claim was for the wrongful death of her daughter, and alleged that the defendant's negligent operation of his car caused it to "collide with the deceased Erin Lee Dillon resulting in injuries to decedent which proximately resulted in her death."95 The second cause of action alleged that Margery Dillon had been "in close proximity to the . . . collision and personally witnessed said collision," and that "because of the negligence of defendants . . . plaintiff . . . sustained great emotional disturbance and shock and injury to her nervous system," which shock had caused her severe physical and mental pain and suffering.96 Finally, the complaint's third cause of action substantially repeated the allegations of the second cause of action, but with respect to Cheryl Dillon, the decedent's sister, rather than Margery.97

After filing his answer, the defendant moved for judgment on the pleadings as to the latter two causes of action.98 In support of his motion, the defendant relied primarily on the California Supreme court's holding in Amaya, asserting, "No cause of action is stated in that allegation that plaintiff sustained emotional distress, fright or shock induced by apprehension of negligently caused danger or injury or the witnessing of negligently caused injury to a third person."99 The defendant further contended that "[e]ven where a child, sister or spouse is the object of the plaintiff's apprehension, no cause of action is stated unless the complaint alleges that the plaintiff suffered emotional distress, fright or shock as a result of fear for his own safety."100

The superior court granted the defendant's motion as to the mother's claim, but denied defendant's motion as to the sister's

93. 441 P.2d 912, 914 (Cal. 1968).
94. Id.
95. Id. (citing Pl.'s Compl. at 3) (internal quotations omitted).
96. Id.
97. Id.
98. Id. at 914–15.
99. Id. (citing Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 515 (Cal. 1963)).
100. Id. at 915 (citing Reed v. Moore, 319 P.2d 80, 81 (Cal. Ct. App. 1957)) (emphasis in original).
Then, in response to defendant's motion for summary judgment on the sister's claim of negligently inflicted emotional distress, the superior court ruled in favor of the plaintiffs. According to the supreme court, "[t]he trial court apparently sustained the motion for judgment on the pleadings on the second cause as to the mother because she was not within the zone of danger and denied that motion as to the third cause involving Cheryl because of the possibility that she was within such zone of danger or feared for her own safety." The supreme court accordingly characterized Dillon as a "case that dramatically illustrates 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 her own safety because she was actually within the zone of physical impact."

The Dillon court faced a factual scenario that acutely illustrated the possibility of a surprisingly arbitrary result under the "zone of danger" analysis it adopted in Amaya: that a difference of only a few feet could effectively determine which of several similarly situated plaintiffs could recover for emotional distress caused by an act of negligence. The court, itself, exclaimed, "[t]he case thus illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other." Therefore, the court laid the "zone of danger" theory of liability to rest, observing that the facts of Dillon served to expose the "hopeless artificiality of the zone-of-danger rule."

In place of the "zone of danger" rule that had prevailed under Amaya, the California Supreme Court in Dillon interposed a duty analysis, which mandated that "[i]n the absence of 'overriding policy considerations . . . foreseeability of risk is of . . . primary importance in establishing the element of duty.'" In establishing foreseeability as

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101. Id.
102. Id.
103. Id.
104. Id.
105. See Cavanaugh, supra note 8, at 452. See also Diamond, supra note 4, at 482 ("The plaintiffs, a mother and daughter, both witnessed another daughter being hit and killed, but only the surviving daughter was arguably in the zone of physical danger.")
106. Dillon, 441 P.2d at 915.
107. Id.
108. Id. at 919 (citing Grafton v. Mollica, 42 Cal. Rptr. 306, 310 (Cal. Ct. App. 1965). Additionally, the court found persuasive the reasoning of Palsgraf v. Long Island R.R. Co., 344 N.E. 99, 100 (N.Y. 1928), in which Chief Judge Cardozo eloquently opined, "The risk reasonably to be perceived defines the duty to be obeyed. . . ."
the "chief element limiting the defendant's duty and, therefore [his] liability," the Dillon court rejected the policy arguments that the same court had heavily relied upon only five years earlier when it decided Amaya.\footnote{109} For example, the majority flatly rejected the defendant's contention that extending recovery rights to plaintiffs outside the zone of danger would result in a flood of fraudulent claims of emotional distress.\footnote{110} The court reasoned that while it was true that liability for any negligent act might extend infinitely if mere foreseeability were the only guiding factor, negligent defendants would not be unfairly subjected to liability because "the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable."\footnote{111}

In setting forth foreseeability, and thus, the defendant's duty, as the primary focal point in determining whether a plaintiff might recover for negligently inflicted emotional distress, the Dillon court observed that because a negligent actor's duty is "inherently intertwined with foreseeability," a defendant's duty "must necessarily be adjudicated only upon a case-by-case basis."\footnote{112} Commenting that no "immutable rule" can be used to pre-formulate every negligent defendant's duty in every conceivable circumstance, the court delineated a set of "guidelines" which it hoped would aid lower courts in determining duty and liability on a case-by-case basis.\footnote{113} The three factors set forth by the court were: (1) whether the plaintiff was located near the scene of the accident, as opposed to far away from it; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from the "sensory and contemporaneous observance" of the negligent act; and (3) whether the plaintiff and victim were "closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."\footnote{114} Although the Dillon court anticipated that future courts would be able to mechanically apply its guidelines in determining liability for negligent infliction of emotional distress, California courts struggled with the factors and often reached inconsistent results.\footnote{115}

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109. Diamond, supra note 4, at 482.
110. Dillon, 441 P.2d at 917-19.
111. Id. at 919 (emphasis added).
112. Id. at 920.
113. Id.
114. Id.
115. Cavanaugh, supra note 8, at 453.
II. The Aftermath of Dillon: Who is “Closely Related”?

Professor John Diamond has commented that “[t]he Dillon criterion that requires a close relationship between the victim and the bystander plaintiff is clearly relevant to a foreseeability analysis.”\(^\text{116}\) He explains that it is “relatively unlikely that a bystander will suffer profound mental distress upon learning of a stranger’s tragedy.”\(^\text{117}\) However, neither Professor Diamond, nor the Dillon majority itself, apparently credited the possibility that the court’s failure to define “closely related” might wreak havoc on the lower courts. Moreover, both Diamond and the court failed to recognize that if the courts were to ever apply a strict “blood or marriage” definition to “closely related,” then a significant class of deserving and foreseeable plaintiffs—the class existing between the two extremes of blood and marriage relations on one hand, and mere strangers on the other hand—would be effectively foreclosed from recovering for negligently inflicted emotional distress.\(^\text{118}\) More specifically, those plaintiffs that could allege and demonstrate relationships “functionally equivalent” to intimate familial relationships would be denied recovery.\(^\text{119}\)

A. Confusion in the Lower Courts

When the California Supreme Court handed down its decision in Dillon, delineating its three guidelines in the process, the court expected that the lower courts would, on a case-by-case basis, utilize those guidelines to determine the extent of negligent defendants’ liability.\(^\text{120}\) The court hoped that over time, the lower courts and the courts of appeal would “mark out the areas of liability, excluding the

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\(^\text{116}\) Diamond, supra note 4, at 488.

\(^\text{117}\) Id. Indeed, Professor Diamond posits that if this “close relationship” prong were the only aspect of the Dillon guidelines used to limit a defendant’s liability, “it could hardly be called arbitrary or inconsistent with foreseeability concepts. . . .” Id. at 488–89. He then goes on to state that it was the other two prongs of the Dillon guidelines that wrought havoc on the courts in the years following Dillon. Id. at 489.

\(^\text{118}\) Another commentator has observed, “A bystander’s mental distress is directly correlative to the strength of the [emotional] bond between that bystander and the victim. Therefore, recovery should logically be based on exactly that, the strength of the bond.” Sheila A. Hallahan, The Appellate Division, Fourth Department, Declines to Expand the Scope of the ‘Immediate Family’ Requirement for Bystander Recovery under the Negligent Infliction of Emotional Distress Doctrine, 67 ST. JOHN’S L. REV. 439, 445 (1993).

\(^\text{119}\) Dunphy v. Gregor, 642 A.2d 372, 373 (N.J. 1994). Such a result would violate the intuitive maxim that the ability to recover should be based on the strength of the bond between the plaintiff and the negligence victim. See Hallahan, supra note 118, at 445.

\(^\text{120}\) Dillon, 441 P.2d at 921.
More than twenty years later, however, the California Supreme Court recognized that the “expectation of the Dillon majority that the parameters of the tort would be further defined in future cases has not been fulfilled.” To the contrary, the court observed, “subsequent decisions of the Courts of Appeal and this court have created more uncertainty.”

In the years following the supreme court’s decision in Dillon, the “closely related” element of the Dillon guidelines was the subject of several conflicting opinions, with no definitive ruling from the supreme court to clarify the matter. Ironically, however, the California courts did not have the first opportunity to interpret the meaning of the third Dillon guideline. In Leong v. Takasaki, the Supreme Court of Hawaii, which had already adopted the Dillon guidelines for determining liability in negligent infliction of emotional distress actions, allowed a child to state a cause of action for emotional distress where the child had seen a negligently driven automobile strike his stepfather’s mother, with whom the child had pled a very close relationship akin to that between a child and natural grandmother. Although the court recognized that the victim could not be fairly categorized as a true member of the plaintiff’s nuclear family, because there was no blood relation, the court nevertheless held that the plaintiff could maintain his action because he allegedly shared a relationship that was the functional and emotional equivalent of a nuclear family relationship.

Only two years after the Hawaii Supreme Court decided Leong, a California court of appeal had the opportunity to interpret the third prong of the Dillon guidelines. In Mobaldi v. Regents of the University of California, the appellate court permitted a woman to recover for emotional distress suffered as a result of watching hospital employees negligently administer a fatal dose of glucose solution to her foster son. After the child received the solution, the plaintiff foster mother held him in her arms as he experienced convulsions and

121. Id.
123. Id. (emphasis added).
125. 520 P.2d 758, 766 (Haw. 1974).
126. Id. For other cases adopting a similarly liberal application of the third Dillon guideline, see Haught v. Maceluch, 681 F.2d 291 (5th Cir. 1982); Beanland v. Chicago, Rock Island & Pacific R.R. Co., 480 F.2d 109 (8th Cir. 1973); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318 (Or. 1982);.
ultimately drifted into a life-threatening coma.\footnote{128} In response to the defendants' contentions that the plaintiff could not recover because she lacked a blood-relationship with the victim, the \textit{Mobaldi} court held “[t]he emotional attachments of the family relationship and not legal status are . . . relevant to foreseeability” for purposes of a \textit{Dillon} analysis.\footnote{129} The court went on to summarize the individual features of the relationship between the victim and plaintiff, noting that the child had lived with the plaintiff since he was only five months old, that the plaintiff had unsuccessfully attempted to formally adopt the child, and that the child had been baptized and given the last name of plaintiff and her husband.\footnote{130} The court concluded that the relationship between the plaintiff and her foster child demonstrated all the qualities of a true parent-child relationship, “except those flowing as a matter of law,” and allowed recovery.\footnote{131}

Four years later, in \textit{Drew v. Drake}, another California appellate court refused to extend the right to recover for negligent infliction of emotional distress to a plaintiff who claimed to have lived with the decedent in a “de facto spouse” situation.\footnote{132} In \textit{Drew}, the plaintiff had lived with her companion for three years, and allegedly shared a relationship that bore all the indications and attributes of a true spousal relationship, except those flowing from the law itself.\footnote{133} The court reasoned that while emotional distress suffered by spouses or parents meets the \textit{Dillon} “closely related” guideline, “[t]o allow persons standing in a ‘meaningful relationship’ (to use a contemporary colloquialism) to recover for emotional distress resulting in physical injury would abandon the \textit{Dillon} requirement that the courts . . . mark out the areas of liability. . . .”\footnote{134} The court of appeal distinguished \textit{Mobaldi} by noting that the hospital staff in \textit{Mobaldi} “knew the nature of the relationship” between the plaintiff

\footnote{128} \textit{Mobaldi}, 172 Cal. Rptr. at 723.\footnote{129} \textit{Id.} at 726.\footnote{130} \textit{Id.} at 723. This is, of course, quite possibly how the \textit{Dillon} majority anticipated that “bystander” claims for negligent infliction of emotional distress would be resolved by applying its guidelines. Indeed, the court in \textit{Mobaldi} attempted to do nothing more than, “on a case-to-case basis, analyzing all the circumstances, . . . decide what the ordinary man under such circumstances should reasonably have foreseen.” \textit{Dillon}, 441 P.2d at 921 (emphasis added).\footnote{131} \textit{Mobaldi}, 172 Cal. Rptr. at 723.\footnote{132} 168 Cal. Rptr. 65, 65 (Cal. Ct. App. 1980).\footnote{133} \textit{Id.} at 66. (citing \textit{Mobaldi}, 172 Cal. Rptr. at 726).\footnote{134} \textit{Id.} (internal quotations omitted).
and her foster child, thus rendering the plaintiff's emotional distress reasonably foreseeable.\textsuperscript{135}

In two 1983 cases, \textit{Trapp v. Schuyler Construction},\textsuperscript{136} and \textit{Kately v. Wilkinson},\textsuperscript{137} the courts of appeal found the \textit{Drew} court's reasoning persuasive, and denied recovery for emotional distress. In \textit{Kately}, two plaintiffs sought damages for the severe emotional distress they suffered after observing a motorboat negligently manufactured by the defendant, curve back towards a fallen skier and fatally injure her.\textsuperscript{138} The court first recognized that the relationship between one of the plaintiffs, Rebecca, and the victim, Rhonda, was quite close:

\begin{quote}
Rhonda and Rebecca were both 14 years old at the time of the accident. They were best friends and were frequently in each other's company, in each other's homes, and together on social and recreational outings. Rhonda was treated as a "filial member" of the \textit{Kately} family, and Rebecca loved Rhonda, cared for her, and held her life as dear as she would have a natural sister.\textsuperscript{139}
\end{quote}

The court similarly observed that the relationship between the other plaintiff, Rebecca's mother, and Rhonda, "was very much akin to that of mother and daughter."\textsuperscript{140} The court explained, "Kately loved Rhonda and cared for her and held her life as dear as she did that of her natural daughter."\textsuperscript{141} Nonetheless, the court held that

\begin{itemize}
\item[\textsuperscript{135}] Id. Certainly, this reasoning is highly questionable in light of the reality that negligent actors will rarely be aware of the status of the various familial relationships of their victims. Indeed, if a defendant has knowledge beforehand of persons to whom he will owe a duty to avoid inflicting emotional distress, then it is likely that the plaintiffs' claims in such cases would be properly analyzed under the "direct victim" theory of liability established by the California Supreme Court in a line of cases beginning with \textit{Molien v. Kaiser Found. Hosp.}, 616 P.2d 813 (Cal. 1980). For a discussion of how the supreme court generally muddied the waters of negligent infliction of emotional distress recovery by adhering to its direct victim/ bystander dichotomy, see Heidenreich, \textit{supra} note 34.
\item[\textsuperscript{136}] 197 Cal. Rptr. 411 (Cal. Ct. App. 1983).
\item[\textsuperscript{137}] 195 Cal. Rptr. 902 (Cal. Ct. App. 1983).
\item[\textsuperscript{138}] Id. at 903-04. Apparently, the steering column on the boat had locked, thereby preventing plaintiffs from steering the boat. When the column locked, the boat circled back and struck the decedent's body, partially dismembering the skier's leg, and tearing deep lacerations into her breast area, her groin, and her thigh. \textit{Id.} at 904. Additionally, the impact ripped a gash in the decedent's abdomen area, which resulted in partial evisceration. \textit{Id.} Aggravating matters further, when the two operators of the boat finally managed to grab hold of their companion, one of the plaintiffs inadvertently "thrust her hand into Rhonda's body through one of her wounds." \textit{Id.} Finally, although the skier was still alive when pulled from the water, the malfunctioning steering mechanism prevented the party from returning to land; as a result, both plaintiffs were compelled to sit in the boat with their mutilated companion until a rescue could be mounted. \textit{Id.}
\item[\textsuperscript{139}] Id. (emphasis added).
\item[\textsuperscript{140}] Id.
\item[\textsuperscript{141}] Id.
\end{itemize}
where, as here, the relationship is not a family relationship but one [merely] akin to a family relationship because of friendship and past associations, the relationship guideline [of Dillon] is not satisfied.142

Similarly, in Trapp, a brother and sister brought an action for the severe emotional distress that resulted from witnessing their first cousin drown in a swimming pool negligently maintained by the defendant.143 Although there existed only a first cousin relationship between the plaintiffs and the victim, each plaintiff had alleged that they “played together often and had a relationship analogous to a relationship between siblings.”144 The complaint further alleged that the plaintiffs “loved [the decedent] as they would their own brother.”145 In sustaining the trial court’s grant of defendant’s demurrer without leave to amend, the court of appeal plainly stated that it perceived “no reason to extend reasonable foreseeability under these facts to include first cousins, family members well beyond the ‘immediate’ family unit of parents and children.”146 The Trapp court concluded that even though it accepted as true the plaintiffs’ allegation that their relationship with the victim was akin to that of siblings, the defendant could not have foreseen the quality of the relationship, or that the plaintiffs “would witness the death of their first cousin.”147

In Ledger v. Tippitt, however, the court of appeal again reversed its position on the application of the third Dillon guideline, and permitted a plaintiff to recover for emotional distress suffered as a result of witnessing the stabbing of her fiancé.148 In Ledger, the plaintiff observed the defendant stab her fiancé after the two men had engaged in a verbal altercation by the side of the road.149 Extending

142. Id. at 903 (emphasis added). Interestingly, the court appeared to challenge the supreme court to take a firmer stance on the issue than it previously had in Dillon: “If we err in construing the ‘close relationship’ guideline of Dillon v. Legg as requiring a relationship at least legally cognizable, even if not one of blood or marriage (citing Mobaldi), then it is for the Supreme Court to expand the rationale of Dillon.” Id. at 907.

143. 197 Cal. Rptr. at 411. The emotional distress suffered by the plaintiffs had allegedly resulted in “disturbance [sic] and shock and injury to their nervous system, [sic] resulting in gastrointestinal disorders, headaches, shock, anxiety, and loss of sleep.” Id.

144. Id.

145. Id.

146. Id. at 412.

147. Id. This rationale, however, much like that given by the Drake court, appears to confuse the duties owed to bystander plaintiffs and those owed to direct victims of negligent conduct.


149. Id. at 816. Given the arguably intentional and outrageous nature of the act of stabbing someone, it is curious that plaintiff did not plead intentional infliction of
the reasoning of Mobaldi, the Ledger court observed: (1) the plaintiff and victim had begun living together more than two years before the accident, when the plaintiff was only fifteen years old and the victim was nineteen; (2) the couple had a son that lived with them; (3) the couple had tried to get married twice, but had been frustrated both times by a car accident and the birth of their son; and (4) the decedent had consistently provided the sole source of income for the family and the plaintiff had been economically dependent on him. The court concluded that "it is foreseeable, as a matter of law, that when defendant drew his knife, and stabbed [the decedent] . . . the woman a few feet distant seated in the vehicle was likely a loved one who would suffer extreme emotional distress when [the decedent] died in her arms." 

Finally, in Coon v. Joseph, the court of appeal refused to extend the right to recover for emotional distress to a plaintiff who alleged an "emotionally significant," "stable," and "exclusive" relationship with his life partner. There, plaintiff and his "intimate male friend" were boarding a bus operated by the City and County of San Francisco when the driver of the bus "verbally abused [plaintiff's partner] and struck his face." In his complaint for negligent infliction of emotional distress, the plaintiff alleged that he had been "living with his friend for a year," and that the two men shared an "intimate, stable and 'emotionally significant' relationship as 'exclusive life partners.'" In rejecting the plaintiff's claim, the court recognized that a sufficiently close relationship to warrant recovery exists between a parent and child, a husband and wife, and between a man and woman who could establish a valid common law marriage in a state that recognizes such arrangements. The court nevertheless concluded that the extension of the right to recover for emotional distress to a plaintiff in an "intimate homosexual relationship . . . emotional distress in addition to her claims for negligent infliction of emotional distress and loss of consortium. See discussion of State Rubbish Collectors Ass'n v. Siliznoff, supra note 88.

150. Ledger, 210 Cal. Rptr. at 816.
151. Id. at 826 (citations omitted).
153. Id. at 874.
154. Id.
155. Id. at 876 (citing Dillon v. Legg, 441 P.2d 912 (Cal. 1968); Ochoa v. Super. Ct., 703 P.2d 1, 5-6 (Cal. 1985).
156. Id. (citing Krouse v. Graham, 562 P.2d 1022 (Cal. 1977).
would render ambivalent and weaken the necessary limits on a tortfeasor's liability mandated by *Dillon.*

**B. The Supreme Court Speaks: *Elden* and *Thing***

In 1988, the California Supreme Court, undoubtedly frustrated by the inability of the courts of appeal to reach a consensus on the proper scope of the third *Dillon* guideline, “broke new ground in the area of negligent infliction of emotional distress” when it decided *Elden v. Sheldon.* Only one year later, in *Thing v. La Chusa,* the court set out to “resolve some of the uncertainty over the parameters of the NIED action.”

(1) *Elden*

The facts of *Elden* were simple. Plaintiff and his cohabitating girlfriend were involved in a car accident caused by the defendant's negligence, and the plaintiff's girlfriend, Linda Ebeling, was killed. Plaintiff Elden brought an action against the defendant, in which the complaint stated three causes of action. The first of plaintiff's claims was for the physical injuries he sustained as a result of the collision. The second and third claims were for negligent infliction of emotional distress suffered as a result of witnessing the fatal injury to Ebeling, and loss of consortium, respectively. After the trial court sustained the defendant's demurrer to the latter two causes of action, plaintiff Elden appealed to the California Supreme Court.

One commentator has suggested that had the supreme court in *Elden* subjected the facts of that case to a traditional *Dillon* analysis, plaintiff Elden “clearly would have recovered for his emotional distress.”

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158. *Id.* at 877. The court attempted to distinguish *Ledger.* “The complaint here does not allege facts establishing a 'de facto' marital relationship . . . [n]or could such allegation be made because appellant and [victim] are both males and the Legislature has made a determination that a legal marriage is between a man and a woman.” *Id.* at 877–78. Of course, this aspect of the court's decision has been completely superceded by the Legislature's recent enactment of section 1714.01 of the Civil Code.

159. Cavanaugh, *supra* note 8, at 462.

160. 758 P.2d 582 (Cal. 1988).


162. 758 P.2d at 582. Although plaintiff sustained serious personal injuries from the accident, Ebeling was actually thrown from the car, and died a few hours later as a result of her injuries. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 582–83.
distress.” The court, however, for a variety of policy reasons, disposed of the Dillon analysis and concluded that unmarried cohabitant plaintiffs could not recover damages for negligently inflicted emotional distress under a bystander theory of recovery. Citing Ledger and Mobaldi, the plaintiff in Elder contended before the supreme court that he should have been allowed to demonstrate that his relationship with the decedent had been a “de facto” marriage, and therefore satisfied the “closely related” guideline set forth in Dillon. Plaintiff further relied on statistics showing that in the years preceding the car crash, the number of unmarried cohabitating couples had sharply increased, thereby rendering the possibility that two occupants of a car are a couple involved in a de facto marriage situation more foreseeable than ever before.

The Elder court began its analysis by conceding that it did not dispute the factual premise underlying the plaintiff’s contention:

There can be no doubt that the last two decades have seen a dramatic increase in the number of couples who live together without formal marriage, that some of these couples are bound by emotional ties as strong as those that bind formally married partners, and that they may share financial resources and expenses in the same manner as married couples.

Significantly, the court further conceded that the frequency of cohabitating couples in de facto marriage situations had increased to the point that “emotional trauma suffered by a partner in such an

166. Cavanaugh, supra note 8, at 463. Cavanaugh suggests that the Elder majority actually did find the relationship between Elder and Ebeling sufficiently close to warrant protection under the third prong of the Dillon analysis, and further contends that “there is little doubt that the facts of Elder would have fulfilled [the other two requirements] as well: the plaintiff was ‘located near the scene of the accident’ since he was in the car with the victim when the accident occurred, and his emotional injury apparently ‘resulted from sensory and contemporaneous observance of the accident.’” Id.

167. Elder, 758 P.2d at 586. It might plausibly be argued that the court did not dispose of the Dillon analysis at all, but merely decided one of the Dillon factors against the plaintiff and concluded that because the analysis rests so heavily on the presence of each of the three factors, that evaluating the applicability of the remaining two guidelines would be pointless. For purposes of this discussion, however, the result is the same, and one should not place extensive importance on the author’s styling of the court’s decision as “disposing” of the Dillon analysis.

168. Id. at 585.

169. Id.

170. Id. at 585–86. (citing Marvin v. Marvin, 557 P.2d 106, 109 n.1 (1976), in which the court noted that the incidence of cohabitation without marriage increased 800 percent between 1960 and 1970, and U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, No. 399 at 7 (Mar. 1984), in which the Department documented the number of unmarried, cohabitating couples as having tripled between 1970 and 1984).
arrangement from injury to his companion cannot be characterized as 'unexpected or remote.' However, the court relied upon the Dillon majority's apparent acceptance of the proposition that "policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk." The court concluded that this proposition is self-evident, for the simple reason that the liability assigned to a defendant whose conduct was merely negligent, must be restricted "in order to avoid an intolerable burden on society." Finally, the court delineated several policy reasons that, according to the majority, justified rejecting plaintiff Elden's emotional distress claim.

The first policy consideration cited by the Elden majority was the state's interest in promoting the marital relationship. The court reasoned that if unmarried, cohabitating couples were freely granted the same rights and privileges as afforded married couples, then the state's interest in promoting marriage would be hindered. Moreover, the court attempted to ward off criticism by explaining that its emphasis on the state's interest in marriage was not related to any "anachronistic notions of morality," but rather was based on the "necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society." The court concluded that the plaintiff had not provided a convincing reason why unmarried cohabitants, who do not bear any of the legal responsibilities of marriage, should be permitted to share in the privileges of marriage.

The second justification set forth by the Elden court for rejecting the plaintiff's emotional distress claim was the burden that would be placed on the courts if they were required to determine, on a case-by-case basis, whether the emotional bonds between plaintiffs and

171. Id. at 586.
172. Id. The specific language relied upon by the majority was the Dillon court's admonition, in its preface of its discussion of foreseeability, that foreseeability will only be of primary importance in determining a negligent defendant's duty, and thus the extent of his liability, "[I]n the absence of overriding policy considerations." 441 P.2d at 919 (emphasis added).
173. Elden, 758 P.2d at 586 (citing Diamond, supra note 4, at 490-93).
174. Id. at 586–88.
175. Id.
176. Id. The court found support in favor of its restriction of the right to recover for emotional distress to only legally married couples in the state's decision to abolish common law marriage in 1895. Id. at 587 (citing Norman v. Thomson, 54 P. 143, 145-46 (Cal. 1898)).
177. Id. (citing Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983)).
178. Id.
negligence victims were functionally equivalent to those between legally married couples.\textsuperscript{179} The court reasoned that a thorough determination of whether an unmarried couple’s relationship sufficiently approximated a legally married couple’s relationship to support an award of damages for emotional distress, would require courts to “undertake a massive intrusion into the private life of the partners,” considering matters such as the sexual fidelity of the partners and the degree to which each partner emotionally and financially relied on the other.\textsuperscript{180} Finally, the court set forth a third policy rationale for rejecting Elden’s emotional distress claim: “the need to limit the number of persons to whom a negligent defendant owes a duty of care.”\textsuperscript{181}

Justice Broussard filed a well-reasoned dissent in \textit{Elden}, in which he disposed of each of the majority’s policy justifications, asserting that “[o]ne need barely scratch the surface of these purported policies to discover their hollowness.”\textsuperscript{182} With regard to the state’s interest in promoting marriage, Justice Broussard countered that granting relief to one who is already injured would be unlikely to detract from the state’s policy in promoting marriage.\textsuperscript{183} He further reasoned that cohabitating couples that had chosen not to marry, for whatever reason, would probably not choose to do so merely to gain standing in some future emotional distress action, and that married couples would still have “preferential status” in tort law since they are \textit{presumed} to be “closely related” under the third prong of the \textit{Dillon} guidelines.\textsuperscript{184} Turning to the majority’s second justification for

\begin{itemize}
  \item[179. \textit{Id.}]
  \item[180. \textit{Id.}]
  \item[181. \textit{Id.} at 588. The court referred to an often-cited New York case, \textit{Tobin v. Grossman}, 249 N.E.2d 419, 424 (N.Y. 1969), in which the New York Court of Appeals observed, “Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.” Perhaps Dean Prosser explained this principle more succinctly: “[I]f recovery [for mental distress] is to be permitted, there must be some limitation. It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends.” \textit{Elden}, 758 P.2d at 588 (citing PROSSER, supra note 41, at § 54, 334).
  \item[182. 758 P.2d at 590 (Broussard, J., dissenting).]
  \item[183. \textit{Id.} at 591.]
  \item[184. \textit{Id.}. Of course, Justice Broussard’s “preferential status” theory, if adopted by California courts, would foreclose the possibility of a system in which a negligent defendant could, “even in the case of a parent and child or husband and wife, . . . test the operative facts upon which the claim is based irrespective of the \textit{de jure} relationship.”]
\end{itemize}
rejecting Elden's claim—that extending the right to recover would unduly burden the courts—Justice Broussard observed that in the past, the court had soundly rejected the proposition that all plaintiffs should be denied recovery in a particular field of tort merely because of the difficulty in determining which plaintiffs truly deserved to recover.

Indeed, Broussard argued that courts regularly and capably evaluated the sensitive issues to which the majority had apparently taken offense, each time they tried cases in which loss of consortium was alleged. There, of course, the trier of fact must calculate damages based almost entirely on the "intangible loss of relational interests that include love, companionship, emotional support, society and sexual relations." According to Broussard, therefore, the "burden on the courts" rationale espoused by the Elden majority had been discredited by years and years of decisions recognizing the validity of damages awards in actions involving loss of consortium claims.

Finally, Justice Broussard rejected the majority's contention that summarily denying recovery for emotional distress to unmarried cohabitating couples adequately adhered to the foreseeability concerns of the Dillon court. Although Broussard conceded that a line must be drawn at some point in order to limit a negligent defendant's liability, he nevertheless argued, "I do not share in the majority's enthusiasm for crude, bright lines." Instead, Broussard stated that the extent of a defendant's duty, and thus his liability, should "not be cut off on arbitrary, definitional grounds but on functional grounds that correspond with real loss." Broussard further recognized that under the hard-line stance of the Elden majority, "[o]nly tortfeasors lucky enough to have injured a de facto rather than a de jure spouse benefit from a bright line based on marriage." In conclusion, Justice Broussard quipped that the


185. _Elden_, 758 P.2d at 592 (Broussard, J., dissenting). Broussard noted that Justice Mosk, who authored the majority opinion in _Elden_, had rejected the "burden on the courts" rationale in his dissenting opinion in _Borer v. American Airlines, Inc._, 563 P.2d 858 (Cal. 1977). _Id._ at 592 n.4 (Broussard, J., dissenting).

186. _Id._ at 592.

187. _Id._ Broussard continued, "[t]his assessment often requires consideration of evidence concerning the quality and nature of the plaintiff's relationship with his or her partner before and after the partner's injury." _Id._

188. _Id._ at 593.

189. _Id._ (emphasis added).

190. _Id._ (emphasis added).
majority’s apprehension regarding the possibility of an ever-expanding class of tort plaintiffs “is just as empty now as it was in *Dillon.*”

(2) **Thing**

In *Thing v. La Chusa,* the legal question before the California Supreme Court was “whether the court of appeal correctly held that a mother who did not witness an accident in which an automobile struck and injured her child may recover damages from the negligent driver for the emotional distress she suffered when she arrived at the accident scene.” Upon first glance, it would seem that the high court had no occasion to visit the third *Dillon* guideline; neither the defendant nor any reported decision contended that a mother is not “closely related” to her child for purposes of recovery under *Dillon.* The court, however, by broadly framing the legal issue as “whether the ‘guidelines’ enunciated by this court in *Dillon v. Legg* are adequate, or if they should be refined to create greater certainty in this area of the law,” found a way to inject itself into the debate concerning the “closely related” prong of the *Dillon* guidelines.

The *Thing* court observed that reliance solely on the foreseeability of injury to a particular plaintiff had proven an inadequate limit on liability in cases involving negligently inflicted emotional distress. The court further proclaimed that if liability out of all proportion to a negligent defendant’s culpability were to be avoided, then the right to recover for negligently inflicted emotional distress must be limited via the adoption of a bright line rule. Finally, despite its recognition that a bright line rule could lead to arbitrary results, the court nonetheless concluded that recovery for negligently inflicted emotional distress should be limited to persons “closely related by blood or marriage since, in common experience, it is more likely that they will suffer a greater degree of emotional distress than a disinterested witness.” By the time the *Thing*

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191. Id.
193. Id. at 815 (citation omitted).
194. Id. at 826.
195. Id. at 827. The majority, therefore, flatly rejected the reasoning that Justice Broussard had espoused in his *Elden* dissent, in which he specifically argued that a bright line rule in this area of the law contravened the underlying emphasis on foreseeability that had provided the momentum for the court’s decision in *Dillon.*
196. Id. at 827-28. The court explained: “Such limitations are indisputably arbitrary since it is foreseeable that in some cases unrelated persons have a relationship to the victim or are so affected by the traumatic event that they suffer equivalent emotional
court finished rearranging the *Dillon* guidelines, a plaintiff could recover for emotional distress caused by witnessing another's negligently caused injury,

if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. 197

III. The Validity of *Elden* and *Thing*  
After the Enactment of Civil Code Section 1714.01:  
A Proposed Standard

The California Supreme Court’s hard-line approach to the question of who qualifies to recover for negligently inflicted emotional distress, as represented by its decisions in *Elden* and *Thing*,

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197. *Id.* at 829–30. Interestingly, the court qualified the first prong of its analysis with a footnote that stated, “In most cases no justification exists for permitting recovery for NIED by persons who are only distantly related to the injury victim. Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.” *Id.* at 829 n.10. Although some commentators have suggested that this “exceptional circumstances” footnote adequately responded to critics who maintained that a strict, bright-line rule would unduly deny recovery for unmarried couples in de facto marriage situations, or for first cousins in relationships identical to sibling relationships, see generally Hallahan, *supra* note 118, at 444-45, one court of appeal decision has questioned whether that footnote is properly regarded as creating an exception at all: “Even if we were to presume that the footnote created an exception to the ‘closely related’ requirement . . .” *Moon v. Guardian Postacute Servs., Inc.*, 116 Cal. Rptr. 2d 218, 223 (Cal. Ct. App. 2002). Additionally, even if it were presumed that footnote 10 actually does create an “exceptional circumstances” exception to the rule requiring a blood or marriage relationship, it is not clear that any decision has relied solely on this exception in granting recovery to a plaintiff unrelated by blood or marriage to a negligence victim. One recent federal opinion applying California law *did* find that the plaintiff had alleged facts sufficient to fall with the “exceptional circumstances” exception of *Thing*. See *Estate of Figueroa v. City of Santa Maria*, No. CV 01-03319 FMC (Rex) (C.D. Ca. Aug. 6, 2001) (order denying motions to dismiss for failure to state a claim). In *Figueroa*, however, the court's reliance on footnote 10 of the *Thing* decision might be fairly viewed as dicta; the court first concluded that the plaintiff’s emotional distress claim was properly before the court on a “direct” victim theory, thus rendering the *Thing* factors inapplicable: “In sum, the court finds that the *Thing* limitations to NIED liability do not apply to the present case because Plaintiff Thornhill is a ‘direct victim,’ as opposed to a mere ‘bystander’ witness, of Defendants' alleged negligent conduct.” *Id.* at 12.
Reflect[s] a public policy exception which limits the right of a bystander who did not suffer physical injury and was not threatened with such injury to recover damages for the emotional distress [the bystander] suffered as a result of witnessing negligent conduct which caused physical injury to a third person.198

Indeed, if any and all bystanders who observe a negligently caused physical injury to another were permitted to recover for any resulting emotional distress, the defendant's liability "could be out of all proportion to the degree of fault."199 However, the specific policy justifications espoused by the supreme court, first in Elden, and then in Thing, appear to have been seriously undermined by the Legislature's willingness to extend the right to recover for emotional distress to persons other than those related by blood or marriage.200

A. Policy Justifications Questioned

In Elden, the California Supreme Court premised its refusal to extend recovery rights to an unmarried plaintiff that had cohabitated with the decedent in a de facto spousal situation on three primary policy considerations. The first of these policy justifications has been the one perhaps most critically impacted by the Legislature's enactment of Civil Code section 1714.01. The essence of the court's first policy justification was that "to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited."201 Certainly, the Legislature's grant of the right to recover for emotional distress to domestic partners, however, has at least partially, if not entirely, eroded the court's doctrinal philosophy that the state's interest in marriage would be harmed by the extension of the right to recover to persons other than married couples and immediate family members.

The enactment of section 1714.01, however, should not be interpreted so narrowly as to presume that the Legislature believed that only domestic partners should be entitled to seek damages for emotional distress, because only their relationships are sufficiently foreseeable to justify extending a defendant's duty of care. To the contrary, section 1714.01 plainly represents the Legislature's willingness to discredit one of the fundamental underlying premises

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200. See CAL. CIV. CODE § 1714.01 (West 2002) (granting right to recover for negligently inflicted emotional distress to domestic partners).
201. See Elden, 758 P.2d at 586.
of both Elden and Thing—that only the relationships between legal spouses and blood relatives are sufficiently intimate to justify extending a negligent defendant’s duty of care to avoid inflicting emotional distress.

Finally, once it is recognized that the state legislature has taken a significant step towards completely undermining the first of the supreme court’s justifications for limiting the right to recover for emotional distress to blood relatives and spouses, it is far from clear that either of the remaining justifications, in and of themselves, justify a continued adherence to the court’s hard-line approach in contexts other than the domestic partnership.202

B. Dunphy v. Gregor

The specific issue before the New Jersey Supreme Court in Dunphy v. Gregor was “whether bystander liability allows recovery by a person who was not legally married to a deceased victim but who cohabitated with and was engaged to marry the decedent.” Answering in the affirmative, the Dunphy court approvingly cited the Appellate Division’s conclusion that the law “should not ignore the fact of a deep emotional attachment between . . . any two persons who share an adequately earnest emotional commitment in a relationship that is functionally equivalent to familial.”203

The court in Dunphy went on to specifically reject the reasoning espoused by the California Supreme Court in Elden and Thing.204

202. If the courts, perhaps aided by the Legislature’s enactment of section 1714.01, begin to realize that familial bonds akin to those of blood or spousal relations may promote society’s interests to the extent that marriage and traditional family relationships do, then Justice Broussard’s comments on the remaining two policy justifications in Elden would take on increasing significance. Again, Broussard discounted the Elden majority’s “burden on the courts” rationale as patently inconsistent with precedent, and rejected the “limitation of liability” argument as permitting a negligent actor to “get lucky” by injuring a de facto spouse, rather than a legal spouse. Elden, 758 P.2d at 592–93 (Broussard, J., dissenting).


204. Id. at 374 (citing 617 A.2d at 1248) (emphasis added).

205. Id. at 375. On somewhat of a procedural note, the court first noted that the California Supreme Court’s clear frustration with what had proven to be an ambitious expansion of bystander liability under the Dillon guidelines, had been a result of liberal applications of the first two prongs of the Dillon analysis, rather than of the “closely related” prong. Id. Despite the question as to whether the New Jersey court’s observation was accurate, in light of Mobaldi and Ledger, for example, the Dunphy court concluded that New Jersey had not experienced any such liberal expansion of other elements of the test under Dillon (Dillon had been expressly adopted as the law of New Jersey in Portee v. Jaffee, 417 A.2d 521 (N.J. 1980)). The court therefore held that it had
Positing that whether a duty exists in a particular case is ultimately a "matter of fairness," the court concluded that requiring a bystander plaintiff to plead and prove an "intimate familial relationship" is hardly unfair.\textsuperscript{206} In a refreshingly simple return to the basic tort principle of foreseeability, the court further explained that "[o]ne can reasonably foresee that people who enjoy an intimate familial relationship with one another will be especially vulnerable to emotional injury resulting from a tragedy befalling one of them."\textsuperscript{207} Adopting such a standard, according to the court, would allow lower courts, on a case-by-case basis, to preserve the fundamental distinction between the ordinary types of injuries that might be expected among friends and distant relatives, and those "indelibly stunning" emotional injuries suffered by one whose relationship with the victim "at the time of the injury is deep, lasting, and genuinely intimate."\textsuperscript{208} Stabbing at the majority decision in \textit{Elden}, and specifically adopting the reasoning of Justice Broussard's dissenting opinion, the \textit{Dunphy} court held that a standard based on the significance and stability of the relationship between the plaintiff and the negligence victim would adequately advance the primary goal of tort law—to compensate innocent victims for their injuries—while sufficiently limiting the liability of defendants whose conduct was merely negligent.\textsuperscript{209}

In sum, the court in \textit{Dunphy} observed, "[c]entral to a claim under bystander liability is the existence of an intimate familial relationship and the strength of the emotional bonds that surround that relationship."\textsuperscript{210} After all, it is the quality of that familial relationship that defines the severity of the emotional distress suffered as a result of witnessing injury to another.\textsuperscript{211} The court then proposed a multi-factored balancing test to aid courts in determining whether the relationship between a plaintiff and a victim is sufficiently intimate to support an award of damages for emotional distress:

"[t]hat standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of

\begin{footnotesize}
\textsuperscript{206} \textit{Dunphy}, 642 A.2d at 376–377.
\textsuperscript{207} \textit{Id.} at 377.
\textsuperscript{208} \textit{Id.} (citing the opinion of the Appellate Division, 617 A.2d at 1254–55).
\textsuperscript{209} \textit{Id.}
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id.} at 377–78.
\end{footnotesize}
common contributions to a life together, the extent and quality of shared experience, and... whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, ... and the manner in which they related to each other in attending to life’s mundane requirements.”

C. Proposed Standard

An approach substantially similar to that taken by the New Jersey Supreme Court in Dunphy appears to be the approach most compatible with the California Legislature’s recent recognition that persons other than spouses and blood relatives should be entitled to recover for negligent infliction of emotional distress. Indeed, the Legislature has effectively codified the primary principle recognized by the Dunphy majority—that an intimate, stable, caring, supportive familial relationship should give rise to a cognizable interest in the emotional well-being derived from that relationship. That the Legislature has only thus far extended the right to recover for emotional distress to domestic partners should not prevent the California Supreme Court from generally adopting the multi-factored Dunphy analysis for use in all bystander negligent infliction of emotional distress cases. Only in that way will the courts adequately insure that recovery is permitted on the basis of an “intimate familial relationship with the victim of the defendant’s negligence.”

Conclusion

In 1881, Oliver Wendell Holmes posited, “[t]he life of the law has not been logic; it has been experience.” For years, however, the

212. Id. at 378 (internal quotations omitted).
213. As noted above, supra note 184, the Dunphy majority held that the “intimate familial relationship” requirement should be viewed as a two-way street; i.e., if an unmarried cohabitating plaintiff is entitled to show that his relationship with the negligence victim was “functionally equivalent” to a loving spousal relationship, then a “defendant should always have the right, even in the case of a parent and child or a husband and wife, to test the operative facts upon which the claim is based irrespective of the de jure relationship.” 642 A.2d at 378. However, adopting this portion of the Dunphy court’s analysis would undermine Justice Broussard’s theory that actual de jure blood and spousal relationships would always maintain their “preferred status” because courts will assume that the emotional bonds in those relationships are sufficiently close and intimate to support an inference of foreseeability and the extension of liability. That provision of Dunphy should therefore be rejected in California as unnecessarily complicated and in contravention of the state’s established interest in preserving the importance of family relationships.

214. See 642 A.2d at 380.
California Supreme Court, with its hard line approach to who may recover for negligent infliction of emotional distress, as represented by its decisions in Elden and Thing, has turned a blind eye to our common experience. That experience, as Justice Broussard recognized in his Elden dissent, and as the New Jersey Supreme Court recognized in its progressive holding in Dunphy, has been that close familial relationships, "functionally equivalent" to relationships based on blood or marriage, are far too prevalent in our society to summarily shut them off from recovery for negligent infliction of emotional distress. Perhaps now that the California Legislature, in response to the tragic death of a woman whose partner could not have recovered for negligent infliction of emotional distress even if she had witnessed her fatal mauling, has taken the first step in codifying that common experience, the California Supreme Court will soften its hard line stance.