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Comment

A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)

by
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In 1968, the California Supreme Court broke new ground in deciding *Dillon v. Legg,*[1] holding that a person need not be within the "zone of danger" to recover for negligent infliction of emotional distress.[2] The court relied heavily upon the concept of "foreseeability," finding it to be the most important factor in determining liability for negligent infliction of emotional distress.[3] Thus, the court held that a plaintiff whose emotional injury was reasonably foreseeable should be entitled to recover for the defendant's negligence.[4] To determine foreseeability, and therefore duty and liability, in negligent infliction of emotional distress cases, the *Dillon* court set out a three-factor test asking whether the plaintiff was near the scene of the accident; whether the shock resulted from a sensory and contemporaneous observance of the accident; and whether the plaintiff and the victim were closely related.[5] As will be seen, however, courts had a difficult time applying the *Dillon* factors consistently and equitably.[6]

Twenty years later, the California Supreme Court decided *Elden v. Sheldon,*[7] declining to use the *Dillon* foreseeability test because of "overriding policy considerations."[8] In *Elden,* Richard Elden and Linda Eberling, a couple who lived together in a de facto marriage situation,

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1. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
2. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.
3. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.
4. *Id.*, 441 P.2d at 919, 69 Cal. Rptr. at 79.
5. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
6. *See infra* notes 72-88 and accompanying text.
7. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).
8. *Id.* at 274 n.4, 758 P.2d at 586 n.4, 250 Cal. Rptr. at 258 n.4 (quoting *Dillon,* 68 Cal. 2d at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79).

were riding in a car together when they were broadsided by a truck driven by the defendant. Eberling suffered massive injuries resulting in her death a few hours later. Elden sued Sheldon and the owner of the vehicle for negligence, negligent infliction of emotional distress, and loss of consortium.

The *Elden* court denied recovery on both the negligent infliction of emotional distress and the loss of consortium claims. The fact that the court used policy considerations, primarily the state's interest in marriage,[9] to deny recovery, thus overriding the twenty year-old *Dillon* factors, appeared to be an acknowledgement that it had given up the struggle to make *Dillon* a workable test. Then in April 1989 the California Supreme Court decided *Thing v. La Chusa.*[10] The court in *La Chusa* claims to have "create[d] a clear rule under which liability may be determined" in negligent infliction of emotional distress cases."[11] *La Chusa* sets out new set factors that allegedly refine the *Dillon* factors.[12] But *La Chusa* does not resolve many of the problems that have been raised by courts dealing with negligent infliction of emotional distress in the twenty years since *Dillon.* Specifically, because *La Chusa* affirms *Elden* and its denial of recovery based upon an unfair and illogical definition of "closely-related" persons, many deserving plaintiffs continue to be denied recovery in negligent infliction of emotional distress cases.

Because of the multitude of problems courts have had with this tort, California may be on the road to an earlier view of negligent infliction of emotional distress—denying recovery for negligently inflicted emotional trauma or allowing recovery in very limited situations. In short, *Elden* may have marked the beginning of the end of the *Dillon* era and of the tort of negligent infliction of emotional distress in California.

Part I of this Comment briefly discusses the history of the tort of negligent infliction of emotional distress, focusing particularly upon California law, *Dillon v. Legg,* and *Elden v. Sheldon.* This Part also explores the court's departure from previous California negligent infliction of emotional distress cases.

Part II discusses criticisms of *Dillon* and post-*Dillon* cases. Section A focuses on the mechanical application of the *Dillon* "sensory and contemporaneous observance" factor by post-*Dillon* courts that has resulted in inconsistent and inequitable holdings. Section B discusses problems that have arisen when courts have read a "knowledge" requirement into the *Dillon* test. Section C focuses on criticisms of the foreseeability test and queries whether foreseeability is an accurate measure of liability in negligent infliction of emotional distress cases. This section analyzes

9. *Id.* at 274-75, 758 P.2d at 586-87, 250 Cal. Rptr. at 258-59.
10. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).
11. *Id.* at 664, 771 P.2d at 927, 257 Cal. Rptr. at 878.
12. *Id.* at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81.

how the concept of foreseeability should be used in determining liability in tort law and, in particular, how it pertains to negligent infliction of emotional distress cases.

Section A of Part III focuses on *Elden*'s departure from *Dillon* and how it represents a turnaround by the California Supreme Court in dealing with negligent infliction of emotional distress. Section A also discusses and critiques the reasons given by the *Elden* court to justify overriding the *Dillon* factors and the attempt in *La Chusa* to refine those factors. Section B of Part III considers policy reasons regarding foreseeability and the tort of negligent infliction of emotional distress. This discussion then focuses on how these policy justifications are unfulfilled by the *Elden* holding and speculates as to the "real" reasons behind the court's holding. Finally, this section posits a more logical rationale by which the *Elden* court could have attained its objectives. In conclusion, the Comment discusses what *Elden* signals for the future of the tort of negligent infliction of emotional distress.

I. Recovery for Emotional Distress: A Brief History

This section presents a brief history of recovery in emotional distress, focusing particularly on California law. The discussion begins with the common law, when no recovery was allowed for mental distress, and follows the development of recognition of a cause of action for recovery in emotional distress cases through the "physical impact" and "zone of danger" rules, leading up to *Dillon v. Legg*, which laid out a set of factors to be considered in determining liability in negligent infliction of emotional distress cases.

A. From Common Law to *Dillon v. Legg*

To fully appreciate the distinctions between *Dillon v. Legg*[13] and *Elden v. Sheldon,*[14] it is helpful to understand the history and development of the tort of negligent infliction of emotional distress. Common law denied recovery for emotional trauma.[15] Several arguments were used to justify this denial of a cause of action for emotional distress. First, because mental distress cannot be quantified like other types of injury to property or "physical" bodily harm, it was thought that the lack of a basis for a cause of action would result in falsified claims.[16] Second, common-law courts saw emotional distress as too remote from

13. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

14. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr 254 (1988).

15. Amaya v. Home Ice, Fuel, & Supply Co., 59 Cal. 2d 295, 319, 379 P.2d 513, 527-28, 29 Cal. Rptr. 33, 47-48 (1963) (Peters, J., dissenting).

16. *See, e.g.*, Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 109-10, 45 N.E. 354, 354-55 (1896); Lynch v. Knight, 9 H.L.C. 577, 11 Eng. Rep. 854 (1861).

the negligent defendant's act and not proximately caused[17] by the defendant's negligence.[18] Thus, even though a defendant may have been negligent, she would not be held responsible for the emotional distress resulting from her conduct.[19] Third, courts denied recovery for emotional distress because they lacked precedent for recognizing a cause of action for such harm[20] and because they thought that recognition of such a claim would increase litigation greatly.[21]

Various commentators and judges began to speak up in favor of recovery for emotional distress. These advocates pointed out that mental suffering was no more difficult to determine and quantify than "physical" pain.[22] They also argued that emotional distress was *not* an independent intervening cause and thus should be compensated.[23] In addition, these commentators advocated that courts should make precedent when a wrong calls for redress, even if more litigation would result.[24]

Courts gradually accepted these views, but they imposed restrictions on emotional distress claims. The first recovery for emotional distress was found only as an aggravation of damages sought under intentional tort theories; emotional distress did not, by itself, create a cause of action.[25] Eventually, courts began to focus on the defendant's conduct and not on the nature of the injury to recognize what is now called the tort of intentional infliction of emotional distress.[26] In California, one of the first cases allowing recovery for emotional distress as an independent tort stated that "[i]n cases where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's in-

17. *See infra* notes 91-95 and accompanying text.

18. *See, e.g.,* Chittick v. Philadelphia Rapid Transit Co., 224 Pa. 13, 16, 73 A. 4, 5 (1909); *Mitchell,* 151 N.Y at 110, 45 N.E. at 355; Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (1888).

19. *See, e.g., Mitchell,* 151 N.Y. at 109, 45 N.E. at 354 ("assuming that . . . the defendant . . . was negligent . . . we think the . . . cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover").

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

21. Spade v. Lynn & Boston R.R. Co., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897); *Mitchell,* 151 N.Y. at 110, 45 N.E. at 354-55.

22. *See, e.g.,* Goodrich, *Emotional Disturbance as Legal Damage,* 20 MICH. L. REV. 497, 503 (1922).

23. Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 138, 50 N.W. 1034, 1035 (1892); Simone v. Rhode Island Co., 28 R.I. 186, 195-99, 66 A. 202, 206-08 (1907).

24. Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 321, 73 So. 205, 207-08 (1916); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 333-35, 150 A. 540, 542-43 (1930).

25. B. WITKIN, SUMMARY OF CALIFORNIA LAW § 402, at 483 (9th ed. 1988).

26. F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS 606-07 (2d ed. 1986) (footnotes omitted).

tentional misconduct fell short of producing some physical injury."[27] Thus, intentional infliction of emotional distress became an independent tort.

By this time California courts also had developed a line of cases recognizing recovery for negligently inflicted mental trauma. These cases, however, limited recovery to persons who were *physically injured* and whose emotional distress was parasitic to that injury, or to those who were not physically injured from the impact, but who suffered *physical injury* as a result of the mental distress.[28] Courts eventually developed the "physical impact" rule, allowing recovery in negligent infliction of emotional distress cases when there was physical impact, whether or not the impact resulted in physical injury.[29] Later cases replaced the "physical impact rule" with the "zone of danger rule," which allowed compensation to plaintiffs in negligent infliction of emotional distress cases who were within the zone of physical danger, without the need for any physical impact.[30]

In California, *Dillon v. Legg*[31] took the first step beyond the physical impact rule. A discussion of *Dillon* should begin with the case that it overruled, namely *Amaya v. Home Ice, Fuel & Supply Co.*[32] After confirming that physical impact was not necessary for recovery in a negligent infliction of emotional distress case in California, the *Amaya* court held that the plaintiff must be in the zone of danger and must fear for her own safety as a result of defendant's conduct in order to recover for emotional harm.[33] In *Amaya,* a mother observed the defendant's truck strike and kill her infant son. The mother alleged that she had suffered emotional distress, not because she had feared for her own safety, but because she had witnessed the death of her son. Because the mother had not alleged fear for her own life as a basis for her negligent infliction of emotional distress claim, that is, she was not within the zone of danger, the California Supreme Court had the opportunity to decide whether the defendant could be held liable without this factor. The court refused to hold the defendant liable,[34] citing among other reasons, "administrative and socioeconomic factors."[35] The court was concerned with the difficulties inherent in determining liability in negligent infliction of emo-

27. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952).

28. *See* Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 184, 4 P.2d 532, 533 (1931); Lindley v. Knowlton, 179 Cal. 298, 301-02, 176 P. 440, 441 (1918).

29. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 331 (1971).

30. *See, e.g.,* Tubin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

31. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

32. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

33. 59 Cal. 2d at 305-06, 379 P.2d at 519, 29 Cal. Rptr. at 39.

34. *Id.* at 315, 379 P.2d at 525, 29 Cal. Rptr. at 45.

35. *Id.* at 310-15, 379 P.2d at 523-25, 29 Cal. Rptr. at 42-45.

tional distress cases without the consistency that comes with the a bright-line rule.[36] Specifically, the court expressed its concern about the difficulty of proving and quantifying emotional harm.[37]

As to the "socioeconomic factors," in reaffirming the zone of danger rule, the court cited the negative effects on economic growth and the insurance industry that would result if liability were found where the plaintiffs themselves were not actually in physical danger. The court asked: "[C]ould [the insurance] system —imperfect at best—adequately and fairly absorb the far-reaching extension of liability that would follow from judicial abrogation of the [zone of danger rule] . . . ?"[38] Apparently, the court believed the answer to this question was no.

Five years later the court decided *Dillon v. Legg.*[39] In *Dillon,* a young girl within the "zone of danger" witnessed the death of her sister caused by the defendant's negligence. The mother of the two girls witnessed the same event from a few feet away. Because the mother was outside the "zone of danger," she would not have been able to recover for her emotional distress under then-existing California law.

Dillon thus presented a fact pattern illustrating the arbitrary nature of negligent infliction of emotional distress law at the time: that the difference of a few feet could determine compensation for emotional distress. The fact that the daughter feared for her own safety while the mother did not was irrelevant to the degree of emotional distress suffered by either party. Arguably, the mother's emotional distress may have been *greater* than her daughter's because the mother was forced to watch as both of her daughters nearly were killed as a result of the defendant's negligence. The *Dillon* court took this opportunity to reassess the tort of negligent infliction of emotional distress in California and, in overruling *Amaya,* threw out the policy reasons and rationales from earlier cases. The court set out the following three factors to evaluate liability in negligent infliction of emotional distress cases:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[40]

36. *Id.* at 313, 379 P.2d at 524, 29 Cal. Rptr. at 44.

37. *Id.* at 311-12, 379 P.2d at 523, 29 Cal. Rptr. at 43.

38. *Id.* at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.

39. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

40. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

The *Dillon* court focused on the foreseeability of the risk.[41] The court believed that the three factors represented a test for foreseeability, and thus reasonably measured the defendant's liability. The *Dillon* opinion indicates that these three factors are *guidelines* and are not to be strictly applied.[42] In this context, the court warned that in future cases courts would need to determine a defendant's liability on a case-by-case basis.[43]

The *Dillon* court rejected the argument that to allow mere bystanders to recover for negligent infliction of emotional distress would greatly increase litigation of "fraudulent" and "inadequate" claims,[44] stating that the requirement of foreseeability would limit the defendant's duty and liability. The court reasoned that foreseeability limits liability because persons would be held responsible only for situations in which it was reasonably foreseeable that their negligent acts would cause emotional distress.[45]

Although the *Dillon* court laid down a fairly specific test for future negligent infliction of emotional distress cases, the factors themselves proved to be difficult to apply, as is evidenced by the lower courts' varied and often inconsistent applications of the test.[46]

B. *Elden v. Sheldon*

Elden v. Sheldon[47] is a landmark case in the history of negligent infliction of emotional distress in California. Without specifically overruling *Dillon,* the California Supreme Court virtually abandoned the *Dillon* criteria in deciding a negligent infliction of emotional distress claim.

The facts of *Elden* were undisputed. The plaintiff, Richard Elden, and Linda Eberling, his live-in lover, were involved in an automobile accident allegedly caused by defendant Richard Sheldon's negligence.[48] The plaintiff sustained serious injuries. Eberling was thrown from the car and died a few hours later.[49] The defendants (Sheldon and the owner of the vehicle Sheldon was driving) demurred to the causes of action for negligent infliction of emotional distress and loss of consortium.[50] The

41. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

42. *Id.*, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

43. *Id.*, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. Whether the factors actually do test for foreseeability is questionable, see *supra* notes 89-107 and accompanying text.

44. *Dillon,* 68 Cal. 2d at 736-39, 441 P.2d at 917-19, 69 Cal. Rptr. at 77-79.

45. The *Dillon* court did, however, retain the need for a physical manifestation of the emotional distress. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

46. *See supra* text accompanying notes 72-88.

47. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

48. *Id.* at 269, 758 P.2d at 582, 250 Cal. Rptr. at 254.

49. *Id.*, 758 P.2d at 582, 250 Cal. Rptr. at 254-55.

50. *Id.*, 758 P.2d at 583, 250 Cal. Rptr. at 255.

trial court sustained the demurrer without leave to amend and entered a judgment of dismissal, and the plaintiff appealed.[51]

The California Supreme Court's discussion focused particularly upon *Dillon v. Legg*[52] and its effect upon the tort of negligent infliction of emotional distress in California.[53] According to *Elden,* although the *Dillon* test used foreseeability of the risk as determinative of whether the defendant owed a duty to the plaintiff, the test also "recognize[d] that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk."[54] Elden claimed this proposition to be "self-evident," because "the consequences of a negligent act must be limited to avoid an intolerable burden on society."[55]

The *Elden* court found three policy reasons to justify rejecting plaintiff's claim for emotional distress. First, the court stated that "the state has a strong interest in the marriage relationship; to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited."[56] The court also cited an interest in judicial efficiency, stating that "the allowance of a cause of action in the circumstances of this case could impose a difficult burden on the courts."[57] Finally, the court stated that "the need to limit the number of persons to whom a negligent defendant owes a duty of care"[58] also justified denial of the plaintiff's emotional distress claim.

Regarding the state's interest in the marriage relationship, the court pointed out that married couples are granted certain rights and bear certain responsibilities that unmarried couples do not share. As an example, the court referred to statutes governing "the requirements for the entry into and termination of marriage and the property rights which flow from that relationship, and the law imposes various obligations on spouses, such as the duty of support."[59] The court emphasized that the state's policy favoring marriage "is not based on anachronistic notions of morality . . . [but instead] is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.' "[60]

The majority also said that recognizing a cause of action for negligent infliction of emotional distress in this case would burden the courts

51. *Id.*, 758 P.2d at 583, 250 Cal. Rptr. at 255.
52. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
53. 46 Cal. 3d at 269-74, 758 P.2d at 583-86, 250 Cal. Rptr. at 255-58.
54. *Id.* at 274, 758 P.2d at 586, 250 Cal. Rptr. at 258.
55. *Id.*, 758 P.2d at 586, 250 Cal. Rptr. at 258.
56. *Id.*, 758 P.2d at 586, 250 Cal. Rptr. at 258.
57. *Id.* at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259.
58. *Id.* at 276, 758 P.2d at 587-88, 250 Cal. Rptr. at 260.
59. *Id.* at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259 (citations omitted).
60. *Id.*, 758 P.2d at 587, 250 Cal. Rptr. at 259 (quoting Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983)).

because "[i]t would require a court to inquire into the relationship of the partners to determine whether the 'emotional attachments of the family relationship' existed between the parties, and whether the relationship was 'stable and significant.' "[61] The *Elden* court claimed that such an inquiry would be "a massive intrusion" into the litigants' private lives and would lead to inconsistent applications in future cases.[62]

On the third rationale, the need to limit the number of plaintiffs to whom a negligent person owes a duty of care, the court cited Dean Prosser, saying that " '[i]t 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.' "[63]

As the sole dissenter, Justice Broussard stated that the court had chosen a bright-line rule that the majority admitted had "no relationship to the nature or foreseeability of the plaintiff's injury, factors usually considered important in defining the perimeters of tort liability."[64] The dissent also observed that "[t]he convenience and certainty of a foolproof bright line is not sufficient to justify denying recovery to an entire class of deserving plaintiffs on the arbitrary ground of marital status."[65]

Justice Broussard took issue with each of the majority's factors and found them lacking in both logic and precedent.[66] He dismissed the "state's interest in marriage" justification, finding it "difficult to fathom how granting relief to a person who is already injured, regardless of marital status, will detract from society's interest in marriage."[67] He admitted that the state has an interest in the institution of marriage, but that it does not "imply a corresponding policy *against* non-marital relationships."[68]

Justice Broussard also stated that the "burden on the courts" rationale had been brought up before and soundly rejected in past cases, including *Dillon*.[69] Although finding the "limitation of liability"

61. *Elden*, 46 Cal. 3d 275, 758 P.2d at 587, 250 Cal. Rptr. at 259 (quoting Butcher v. Superior Court, 139 Cal. App. 3d 58, 70, 188 Cal. Rptr. 503, 512 (1983); Mobaldi v. Regents of Univ. of Cal., 55 Cal. App. 3d 573, 582, 127 Cal. Rptr. 720, 726 (1976)).

62. *Elden*, 46 Cal. 3d at 276, 758 P.2d at 587, 250 Cal. Rptr. at 260.

63. *Id.* at 276, 758 P.2d at 587, 250 Cal.Rptr. at 260 (quoting W. PROSSER, LAW OF TORTS § 55, at 353-54 (3d ed. 1964)).

64. *Elden*, 46 Cal. 3d at 280, 758 P.2d at 590, 250 Cal. Rptr. at 262. (Broussard, J., dissenting).

65. *Id.*, 758 P.2d at 590, 250 Cal. Rptr. at 262 (Broussard, J., dissenting).

66. *Id.* at 281-84, 758 P.2d at 591-93, 250 Cal. Rptr. at 263-66 (Broussard, J., dissenting).

67. *Id.* at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

68. *Id.*, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting) (citing Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 14, 663 P.2d 904, 912, 192 Cal. Rptr. 134, 142 (1983)).

69. *Elden*, 46 Cal. 3d at 282-83, 758 P.2d at 592, 250 Cal. Rptr. at 264 (Broussard, J., dissenting).

justification reasonable, Justice Broussard described the majority's bright-line rule as "crude" and "arbitrary," and not based upon "functional grounds that correspond with real loss."[70]

II. Criticisms of *Dillon v. Legg*

There has been much criticism of *Dillon v. Legg*[71] in the past twenty years. Some of this commentary has come about because application of the "sensory and contemporaneous observance" factor has brought inconsistent results. These criticisms are discussed in section A below. Section B discusses another line of criticism focusing on the problems resulting from the "knowledge" requirement read into the *Dillon* factors by some courts. Section C examines criticisms of the foreseeability test as an indicator of liability in negligent infliction of emotional distress cases.

A. The Sensory and Contemporaneous Observance Requirement

The *Dillon* factors appear to reflect accurately what a court should consider when deciding who may and who may not recover for negligent infliction of emotional distress. The lower courts, however, have experienced difficulty in applying the factors to differing factual situations, resulting in confusion and inconsistency.

Consequently, there have been many problems with the tort of negligent infliction of emotional distress in the twenty years since *Dillon*. Though there has been little misinterpretation of the first factor in *Dillon*, requiring that the plaintiff be near the scene of the accident, the other two factors, requiring the plaintiff to have had a "close relationship" to the victim and "sensory and contemporaneous observance" of the accident, have proven difficult for courts to apply. Part of the problem is that, despite the caution in the *Dillon* opinion that the factors are merely guidelines,[72] courts have applied the *Dillon* factors inflexibly, resulting in conflicting and inequitable decisions.

When applying the sensory and contemporaneous observance requirement, the difference between a plaintiff who recovers and one who does not has often been based upon arbitrary factors such as whether the plaintiff *actually* witnessed the defendant's negligent conduct, or instead

70. *Id.* at 284, 758 P.2d at 593, 250 Cal. Rptr. at 265 (Broussard, J., dissenting).

71. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). Many scholars have attempted to reconcile the inconsistent rulings since *Dillon*. *See, e.g.*, Bell, *The Bell Tolls: Toward a Full Recovery For Psychic Injury*, 36 U. FLA. L. REV. 333 (1984); Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 34 HASTINGS L.J. 477 (1984); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging From Chaos*, 33 HASTINGS L.J. 583 (1982); RABIN, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

72. *Id.* at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

observed the results of the negligence a few moments later. For example, in *Hathaway v. Superior Court,*[73] the plaintiff's son, Michael, electrocuted himself by touching an electrically-charged water cooler while playing just outside his home. The boy's mother, who was inside the house, heard him make a noise, but "it did not alarm her."[74] When notified by Michael's friend that something was wrong, however, Mrs. Hathaway and her husband went outside and saw Michael lying by the cooler in a "dying state."[75] Because the child no longer actually was receiving the electrical charge, the court of appeal held that the parents had not "sensorily perceive[d] the injury-causing event"[76] and thus did not meet the second *Dillon* requirement of a "sensory and contemporaneous observance of the accident."[77]

Hathaway is at odds with an earlier case, *Nazaroff v. Superior Court.*[78] In *Nazaroff,* the court of appeal allowed recovery to a mother who watched her drowned son being dragged from a neighbor's pool. Though the mother did not witness the actual drowning, as the Hathaways did not witness their son being electrocuted, the *Hathaway* court distinguished *Nazaroff,* saying that in *Nazaroff* the child still could have been in the process of drowning, so the mother actually could have observed the accident.[79]

Great inequities result when cases such as *Hathaway* strictly and unreasonably apply the sensory and contemporaneous observance factor from *Dillon.* The language in *Dillon* does not require that the plaintiff actually *see* the harm-causing event. It requires a "*direct emotional impact* . . . from the sensory and contemporaneous observance of the accident,"[80] not an emotional impact from a direct *visual* observance of the accident itself. The *emotional impact* must be a direct result of the accident, not a result of having observed the accident directly.

This reading of the second *Dillon* factor is supported by the language following, and limiting, the above-quoted language: the shock must result from a "direct emotional impact . . . from the sensory and contemporaneous observance of the accident *as contrasted with learning of the accident from others after its occurrence.*"[81] This language suggests that *Dillon* established a continuum. At one end of the spectrum is the person who is at the scene, is directly involved in the accident, actually

73. 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980).

74. *Id.* at 730, 169 Cal. Rptr. at 436.

75. *Id.* at 731, 169 Cal. Rptr. at 437.

76. *Id.* at 736, 169 Cal. Rptr. at 440.

77. Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

78. 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978).

79. *Id.* at 566-67, 145 Cal. Rptr. at 664.

80. *Dillon,* 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80 (emphasis added).

81. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80 (emphasis added).

sees the injury-causing event, and is personally injured as a result of the event itself. This person clearly falls within the sensory and contemporaneous observance factor in *Dillon.* At the other end of the spectrum is the person who is remote in both distance and time from the injury-causing event and who learns of the accident by means other than his or her own personal experience of the event. This person clearly would not recover under the observance factor in *Dillon.*

Hathaway and most other hard cases are somewhere between these two extremes. In these types of cases, the courts should determine the spirit behind *Dillon* and apply the test accordingly. When analyzed in this way, the facts in *Hathaway* are much closer to the "recovery" end of the spectrum than they are to the "remote, non-recovery" end. The parents in *Hathaway* watched their son die after he had been electrocuted as a result of the defendant's negligence. It is extremely harsh to deny recovery in situations such as this.

The *Dillon* court intended to allow recovery for nearly everyone who sensorily and contemporaneously observes a negligently caused event that causes emotional harm, assuming, of course, satisfaction of the other two factors. This group of persons includes those who view the scene after the actual negligent act has occurred, but at a time when it is still clear, from observing the victim and the scene of the accident, what actually has taken place. This reading of *Dillon* is more in line with the intent underlying the decision than the strict mechanical applications that have been used by the California courts. Under this reading, persons who suffer emotional harm as a result of observing the results of defendant's negligence are allowed to recover.

B. The "Knowledge" Requirement

Other cases illustrate another problem created as a result of strict, mechanical application of the sensory and contemporaneous factor. This problem arises when courts read a "knowledge" requirement into the sensory and contemporaneous factor. Under this requirement, the plaintiff cannot recover for emotional distress unless she suffered great emotional distress from observing the results of the defendant's negligence and also knew at the time of this observation that the defendant's negligence had harmed the victim.

In *Cortez v. Macias,*[82] for example, a mother saw her son die in a hospital. The fact that the death was a result of the hospital's negligence was unknown to the mother at the time; she thought that her child had fallen asleep.[83] The court held that since she lacked this knowledge when she witnessed the distress-causing event, she could not be compensated

82. 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980).
83. *Id.* at 650, 167 Cal. Rptr. at 910.

for her emotional distress.[84] The court came to this conclusion despite the presence of the other elements of the tort of negligent infliction of emotional distress: the hospital was negligent, the hospital's negligence caused the child's death, and the mother suffered emotional distress as a direct result of having observed her child's death.

Yet, in *Mobaldi v. Regents of University of California,*[85] which was factually similar to *Cortez,* the plaintiff was found to have satisfied the "sensory and contemporaneous observance" factor from *Dillon.*[86] The plaintiff in *Mobaldi,* a foster mother, witnessed her foster child convulse and eventually become comatose after having been injected with a fifty percent glucose solution instead of the prescribed five percent. The mother did not know at the time that the defendant's negligence caused the child's reactions, and yet she was allowed to recover for her emotional distress.[87] The *Mobaldi* court reasoned that since observing the consequences of the negligent act caused the trauma, not the negligent act itself, "there is no significance in the plaintiff's lack of awareness that the defendant's conduct . . . is negligent."[88] The findings were different in each case even though both plaintiffs were unaware that the defendants' negligence had caused the harm and both plaintiffs suffered emotional distress.

These cases are inequitable because one plaintiff recovered while the other did not. These conflicting results are especially disturbing given *Dillon*'s emphasis on the foreseeability of harm to the plaintiff being a primary indicator of liability; and in *Cortez* the plaintiff's harm was arguably as foreseeable as in *Mobaldi.*

C. The Foreseeability Test

A discussion of foreseeability is important because of the California Supreme Court's disparate use of the concept in determining liability in negligent infliction of emotional distress cases. In *Dillon,* the court stated that, "the law of torts holds defendants amenable only for injuries to others which to defendant at the time were reasonably foreseeable."[89] In *Elden,* however, the court found that "policy considerations . . . dictate[d that] a cause of action should not be sanctioned no matter how foreseeable the risk."[90] This discussion analyzes foreseeability in an attempt to

84. *Id.*, 167 Cal. Rptr. at 910.

85. 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

86. *Id.* at 583, 127 Cal. Rptr. at 727 (quoting Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968)).

87. *Id.* at 578, 127 Cal. Rptr. at 723.

88. *Id.* at 583, 127 Cal. Rptr. at 727.

89. Dillon v. Legg, 68 Cal. 2d 782, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968).

90. Elden v. Sheldon, 467 Cal. 3d 267, 274, 758 P.2d 582, 586, 250 Cal. Rptr. 254, 258 (1988).

find its proper place in determining liability in negligent infliction of emotional distress cases.

Generally, the defendant is liable for all injuries that he proximately causes.[91] Proximate cause is a doctrine that limits liability. Even when a defendent is the actual cause of the plaintiff's harm, he may not be held liable for the injury because the injury caused was not a reasonably foreseeable result—it was not the "legal," or proximate cause.[92]

The defendant is not responsible for consequences that are too remote from his conduct[93] and is liable for only those consequences that reasonably can be anticipated or foreseen.[94] Thus, the concept of foreseeability defines whether the defendant owes a duty to the plaintiff and helps courts to determine whether the injury was proximately caused by the defendant's negligent act.[95]

"Foresee" generally means "to see beforehand; know beforehand; foreknow."[96] This definition indicates a subjective standard: what a specific person saw or knew beforehand. But in law, foreseeability has come to be an objective standard: what the "reasonable person" would foresee.[97] The reasons the law uses an objective standard are clear.[98] One reason is the difficulty of proving what went on in [a] person's head.[99] Second, an objective standard is used because of the general need in society to establish reasonable standards of conduct.[100]

There are problems, however, with the use of an objective standard when discussing foreseeability. Under this standard, liability is based upon how a "reasonable person" would act.[101] Using the reasonable person standard, a person may be accountable for his actions, though he was

91. W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS §§ 41-45 (5th ed. 1984) [hereinafter PROSSER & KEETON].

92. B. WITKIN, *supra* note 25, § 968. Black's Law Dictionary defines the proximate cause of an injury as:

> [T]he primary or moving cause, or that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.

BLACK'S LAW DICTIONARY 1103 (5th ed. 1979)

93. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 345, 162 N.E. 99, 101 (1928) (finding no duty to the plaintiff because the harm done was completely unforeseeable).

94. *See* PROSSER & KEETON, *supra* note 91.

95. *See* PROSSER AND KEETON, *supra note* 91, § 43.

96. WEBSTER'S NEW WORLD DICTIONARY 546 (2d ed. 1980).

97. *See* PROSSER & KEETON, *supra* note 91, § 31.

98. *See* PROSSER & KEETON, *supra* note 91, § 32.

99. *See* PROSSER & KEETON, *supra* note 91, § 32, at 177.

100. *See id.*

101. The "reasonable person" standard is one that is used throughout tort law. Various definitions of the "reasonable person" have been posited. In Vaughan v. Menlove, Eng. Rep. 490, 493 (1837), Chief Justice Tindal said the standard should be "a regard to caution such as a man of ordinary prudence would observe." The reasonable man has also been described as

not actually aware of the potential results of those actions, if a "reasonable person" would have been aware of the consequences. This rule seems to punish persons who have done nothing wrong. But in a legal context, foreseeability is used as a directive as to how the law believes people should act in a well-ordered society. This aspect of foreseeability allows the legal system to assign responsibility to certain persons for damage caused as a result of their crossing the line of "proper" behavior.

The concept of fault is, of course, implicit within the law's choice in using foreseeability to determine liability in negligent infliction of emotional distress cases. It would be fundamentally unfair to hold people responsible for injuries that were not their fault. Fault also encompasses the idea of moral blame, implying that a choice exists. If no socially permissible choice exists, as in the defenses of necessity or duress, for example, there is no liability because there has been no "fault."[102] Thus, in a sense, the law says that someone is at fault if they make the incorrect choice—the choice that the "reasonable person" would not have made because she would have *foreseen* that the incorrect choice could have harmful consequences.

But exactly what one is expected to foresee is troublesome because it seems possible to foresee almost anything. The law, however, limits what one is required to foresee: a defendant is liable if a reasonable person would have avoided the foreseeable harm.[103] A reasonable person would act to avoid foreseeable harm after determining that the costs of a certain course of action outweigh the benefits.[104] Clearly, the concept of foreseeability in tort law has been established by the courts to indicate where to draw the line between liable and nonliable conduct. Thus, to say that the defendant does not owe a duty to an injured plaintiff because the outcome was not foreseeable is to say that it would have been unreasonable to require someone to take into account the possibility of that type of injury occurring.

In sum, foreseeability in tort law has become a term of art having less to do with describing the imaginable consequences of people's actions than with limiting conduct for which society will hold its members responsible. Courts have deemed that liability for every imaginable consequence of people's actions is bad policy because other factors such as economics and general practicality should be taken into account.[105] As a result, the definition of foreseeability in tort law has been limited and defined to the point where it has lost its effectiveness as a dispositive

"the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves." Hall v. Brooklands Club, 1 K.B. 205, 224 (1933).

102. *See* PROSSER & KEETON, *supra* note 91, § 24.

103. B. WITKIN, *supra* note 25, § 751.

104. *See* PROSSER & KEETON, *supra* note 91, § 31.

105. *See id.*

indicator of liability.[106] Nonetheless, even though "foreseeability" may have become a conclusory term and not a tool used to validate policy considerations to determine liability, this development does not render the concept necessarily unworkable or one that should be thrown out completely, as the *Elden* court appears to have done. Foreseeability still should be used as a factor when a court is deciding whether to hold a defendant liable for the emotional distress she causes. But as the California Supreme Court recently recognized in *La Chusa*, it should be just one factor and not the deciding factor in determining whether liability exists.[107]

III. *Elden v. Sheldon*: A New Approach

The California Supreme Court broke new ground in the area of negligent infliction of emotional distress in *Elden v. Sheldon.*[108] The court appeared to realize the shortcomings of using "foreseeability" as the primary indicator of liability in negligent infliction of emotional distress claims and declined to use the *Dillon v. Legg*[109] foreseeability test.

In not following *Dillon,* the *Elden* court used an analytic approach that is more similar to pre-*Dillon* cases such as *Amaya v. Home Ice, Fuel & Supply Co.*[110] than to anything since *Dillon.*[111] For example, *Elden* did not use a specific test or set of guidelines in determining liability, but instead found policy reasons to justify its result.[112] There are also differences between *Elden* and pre-*Dillon* cases, however. One distinction is that although the *Elden* court explicitly used policy reasons to override the use of foreseeability as the litmus test for liability,[113] the court did not adequately justify its result. The connection between the policy reasons stated and the court's holding, as Justice Broussard pointed out in his dissent,[114] goes against common sense and prior case law.

The first section of Part III discusses how the court's analysis in *Elden* changed *Dillon,* and how this change represents a new approach to negligent infliction of emotional distress cases in California. This change is demonstrated by analyzing *Elden* under a traditional *Dillon* analysis—

106. The *La Chusa* court acknowledged this fact in stating that "it is clear that foreseeability of the injury alone is not a useful 'guideline' or a meaningful restriction on the scope of the negligent infliction of emotional distress action." Thing v. La Chusa, 48 Cal. 3d 644, 663, 771 P.2d 814, 826, 257 Cal. Rptr. 865, 877 (1989).

107. *Id.,* 771 P.2d at 826-27, 257 Cal. Rptr. at 877.

108. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

109. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1960).

110. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *See supra* text accompanying notes 32-38.

111. *See supra* text accompanying notes 72-88.

112. *Elden,* 46 Cal. 3d at 274, 758 P.2d at 586, 250 Cal. Rptr. at 258.

113. *See supra* notes 45-58 and accompanying text.

114. *Elden,* 46 Cal. 3d at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263.

and seeing that the plaintiff would have been allowed recovery for his emotional distress if the *Elden* court had followed *Dillon.* Section A then discusses the reasons given in the *Elden* opinion for this change in analysis—and the inadequacies of these reasons. The section concludes with a discussion of *Thing v. La Chusa,*[115] its attempt to refine the *Dillon* factors, and the inadequacy of these factors in defining the close-relationship requirement.

Section B of Part III begins with a general discussion of the role of policy rationales regarding foreseeability and, particularly, the policy reasons behind having a tort of negligent infliction of emotional distress at all. This discussion then focuses on how the original reasons for having a tort of negligent infliction of emotional distress have not been furthered by *Elden.* Part III then discusses what might be some of the "real" policy reasons for *Elden*'s break with twenty years of case precedent in California—and posits what would have been better ways to attain those policy objectives.

A. A Departure from *Dillon*

Elden did not expressly overrule *Dillon* but it is clear that in *Elden* the California Supreme Court strayed from the course of twenty years of negligent infliction of emotional distress case law. This movement away from *Dillon* is exemplified most clearly by subjecting the facts of *Elden* to a traditional *Dillon* analysis.

The *Elden* court never attempted to analyze the facts before it under the *Dillon* test. Perhaps it did not do so because, if it had, the plaintiff clearly would have recovered for his emotional distress. As I believe the *Elden* court implied,[116] the relationship between the plaintiff and the victim was sufficiently close to satisfy the first prong of the *Dillon* test.[117] As to the other two factors, there is little doubt that the facts of *Elden* would have fulfilled those 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."[118]

The facts of *Elden* therefore establish a prima facie case for recovery under *Dillon.* In order for the *Elden* court to deny recovery, it could not use the *Dillon* test. The court avoided the *Dillon* analysis by finding pol-

115. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

116. *Elden,* 46 Cal. 3d at 273, 758 P.2d at 585-86, 250 Cal. Rptr. at 257-58. I infer this because of the fact that the court did not take issue with the finding of the trial court that the plaintiff and Eberling had a de facto marriage. *Id.* at 269, 758 P.2d at 582, 250 Cal. Rptr. at 254.

117. *Id.*, 758 P.2d at 585-86, 250 Cal. Rptr. at 257-58.

118. Dillon v. Legg 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

icy justifications that it believed sufficiently warranted the dismissal of the *Dillon* factors.

The three-factor test laid out in *Dillon* focused on determining the foreseeability of harm to the plaintiff. The *Dillon* court qualified its test, however, when it stated that, "*[i]n the absence of 'overriding policy considerations* . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty."[119] Yet, the *Elden* court granted far more weight to this potential overriding effect of policy considerations than appears warranted under *Dillon*. As the third *Dillon* factor is "[w]hether plaintiff and the victim were closely related,"[120] it is simply inconsistent with *Dillon* to base a policy overriding this factor upon the relationship between the plaintiff and the victim, unless the two *were not closely related,* which was not the case in *Elden.*

The plaintiff and the victim were closely involved,[121] especially "as contrasted with an absence of any relationship or the presence of only a distant relationship,"[122] as was the distinction made in *Dillon.* If a policy consideration were to override the "closely-related" factor, it should not be a policy favoring one type of close relationship over another. If *Dillon* had intended to limit the tort to legally sanctioned relationships, it might have explicitly stated so. The lack of such a limitation suggests that the *Dillon* court preferred a more flexible analysis, perhaps realizing that many persons, in many different types of relationships, would suffer emotional distress upon witnessing the injury or death of their loved ones—not only those persons who are legally married. *Elden* ignored this sensible and intuitive idea. Even *La Chusa* acknowledged that "limiting recovery to persons closely related by blood or marriage [was] indisputably arbitrary," although attempting to justify this illogical result by claiming that "drawing arbitrary lines is unavoidable."[123]

Previous decisions recognized *Dillon's* emphasis on the substance of a relationship over its legal form. As the court of appeals stated in *Mobaldi v. Regents of University of California:*[124]

> The 'close relationship' element of *Dillon* is expressed as one test of foreseeability that negligent infliction of injury upon one person will cause emotional distress and consequent physical harm to another. The emotional attachments of the family relationship and not the legal status are those which are relevant to foreseeability. . . . The public policy limitation on loss shifting inherent in the *Dillon v. Legg* guide-

119. 68 Cal. 2d at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79 (quoting Grafton v. Mollica, 231 Cal. App. 2d 860, 865, 42 Cal. Rptr. 306, 310 (1965)) (emphasis added).

120. *Dillon,* 68 Cal. 2d at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80.

121. *Elden,* 46 Cal. 3d at 269, 758 P.2d at 582, 250 Cal. Rptr. at 254.

122. *Dillon,* 68 Cal. 2d at 741, 441 P.2d at 920, 69 Cal Rptr. at 80.

123. Thing v. La Chusa, 48 Cal. 3d 644, 666, 771 P.2d 814, 824, 257 Cal. Rptr. 865, 879 (1989).

124. 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

> lines seemingly does not limit the close relationship requirement to one of blood, marriage, or adoption.[125]

Following the *Mobaldi* court's interpretation of the "close relationship" element, *Elden* clearly violates the spirit and intent of *Dillon* by limiting the close relationship requirement to one that is legally recognized, such as marriage.

Elden also represents a departure from well-established principles of existing case law. The California Supreme Court has rejected two of the three policy reasons set forth in *Elden* to justify denying liability on several previous occasions: that allowing the plaintiff recovery in this case will "impose a difficult burden on the courts,"[126] and that "the need to limit the number of persons to whom a negligent defendant owes a duty of care."[127]

Referring to the "burden on the courts" rationale, Justice Broussard stated in his dissent, "this court — including the author of the majority opinion — has soundly rejected the argument that compensation should be denied to all plaintiffs because of the difficulty of determining which plaintiffs are deserving and how much they deserve."[128] Broussard continued: "Assessing the stability and significance of a relationship is certainly no more burdensome than quantifying subjective and intangible emotional loss, and we should have confidence in the ability of the fact finder to 'separate wheat from chaff.' "[129] Thus, Justice Broussard argued that the difficulty of the factfinder's task does not justify denial of the plaintiff's claim for relief.

The *Elden* court also cited "the need to limit the number of persons to whom a negligent defendant owes a duty of care"[130] to justify denying recovery to the plaintiff. Clearly, a defendant should not be held liable for every consequence of his actions; a line must be drawn between liable conduct and actions resulting in consequences too remote to warrant liability. Drawing the line at marriage, however, is neither fair nor logical. Justice Broussard, in his *Elden* dissent, cited *Dillon* itself to support this position:

> As the commentators have suggested, the problem should be solved by the application of the principles of tort, not by the creation of exceptions to them. Legal history shows that artificial islands of exceptions,

125. *Id.* at 582, 127 Cal. Rptr. at 726.

126. Elden v. Sheldon, 46 Cal. 3d 267, 275, 758 P.2d 582, 587, 250 Cal. Rptr. 254, 259 (1988).

127. *Id.* at 276, 758 P.2d at 588, 250 Cal Rptr. at 260.

128. *Id.* at 282, 758 P.2d at 592, 250 Cal. Rptr. at 264 (citing Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 401-04, 525 P.2d 669, 681-83, 115 Cal. Rptr. 765, 776-79 (1979); Dillon v. Legg, 68 Cal. 2d 728, 742-43, 441 P.2d 912, 921-22, 69 Cal. Rptr. 72, 81-82 (1968) (Broussard J., dissenting)).

129. *Elden,* 46 Cal. 3d at 283, 758 P.2d at 593, 250 Cal. Rptr. at 265 (Broussard, J., dissenting) (citing Bulloch v. United States, 487 F. Supp. 1078, 1088 (D.N.J. 1980)).

130. *Id.* at 276, 758 P.2d at 588, 250 Cal. Rptr. at 260.

> created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion.[131]

An analysis under *Thing v. La Chusa,*[132] decided just eight months after *Elden,* does not, unfortunately, change the outcome under the *Elden* scenario. *La Chusa* sets out a new three-factor test allowing recovery for negligent infliction of emotional distress if the 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.[133]

Though application of the *La Chusa* test in future cases will inevitably help to resolve some of the inconsistencies presented in the post-*Dillon* cases discussed above, it will do so on unjust and arbitrary grounds.

In a footnote to the first prong of the *La Chusa* test, the court states that "[a]bsent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim."[134] *La Chusa* thus affirms the unjust holding of *Elden*—permitting "the sometimes arbitrary result" of not allowing recovery to unmarried cohabitants in negligent infliction of emotional distress cases, despite the closeness of the relationship.[135] The "absent exceptional circumstances" qualification presents an opportunity for lower courts to grant recovery in future *Elden*-type situations. But even this chance is doubtful because it is clear from the holding in *Elden* itself that exceptional circumstances do not contemplate unmarried couples. Accordingly, the *La Chusa* court later states that "[n]o policy supports extension of the right to recover for [negligent infliction of emotional distress] to a larger class of plaintiffs."[136] Simple logic and fairness justify extending recovery to persons beyond those arbitrarily defined by both *Elden* and *La Chusa.* The factfinder would have no more difficulty in determining a sufficiently close relationship any more than in determining many other findings of fact.

B. Policy Justifications

Elden is not the first case to deny recovery on the basis of policy considerations. Courts always have limited the scope of foreseeability, citing policy reasons as a justification.[137] In negligent infliction of emo-

131. *Id.* at 284, 758 P.2d at 593, 250 Cal. Rptr. at 265 (Broussard, J., dissenting) (citing Dillon v. Legg, 68 Cal. 2d 728, 747, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968)).

132. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

133. *Id.* at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81.

134. *Id.* at 668 n.10, 771 P.2d at 829 n.10, 257 Cal. Rptr. at 880 n.10.

135. *Id.* at 664, 771 P.2d at 827, 257 Cal. Rptr. at 878.

136. *Id.* at 666, 771 P.2d at 828, 257 Cal. Rptr. at 879.

137. *See, e.g., id.* at 654, 771 P.2d at 820, 257 Cal. Rptr. at 87 n.3 (the "court's role in

tional distress cases, the policy justifications that courts have found to deny recovery include

> the burden on the courts applying 'vaguely defined criteria[,] . . . the importance of limiting the scope of liability[,] . . . the importance of clear guidelines under which litigants and trial courts may resolve disputes[,] . . . the social cost of imposing liability . . . for all foreseeable emotional distress suffered by relatives who witnessed the injury[,] . . . the intangible nature of the loss, the inadequacy of monetary damages to make whole the loss, the difficulty in measuring the damage and the societal cost of attempting to compensate the plaintiff.[138]

The *Elden* court appeared to rely on the first two of these rationales in finding no liability because it reasoned that unmarried people do not constitute the close relationship contemplated by the *Dillon* guidelines regardless of the closeness of their relationship, the foreseeability of the harm they suffer, or the severity of the harm that is caused them. Yet, this position is at odds with the reasons for having a tort of negligent infliction of emotional distress in the first place.

The tort of negligent infliction of emotional distress in California allows recovery to someone, for example a mother, for the emotional distress she suffers when a tortfeasor negligently causes injury to someone emotionally close enough to the mother, such as her child, to cause her emotional distress.[139] It is difficult to see how limiting recovery for negligent infliction of emotional distress to legally-sanctioned relationships in any way furthers this intent. Quite simply, it does not. The marriage factor is an artificial wall constructed by the court to mechanically redefine the tort, the inevitable result of which will be to deny recovery to deserving plaintiffs for their emotional distress.

There are several possible reasons why the court chose to stray from the path it had laid out in *Dillon.* First, the court may have been attempting to limit strictly the *Dillon* holding because of the problems courts have had interpreting it in the past twenty years.[140] A second explanation for the *Elden* holding is that the court may have feared that if it allowed recovery, it would have a very difficult time not allowing recovery in future cases involving gay and lesbian couples under similar circumstances—something that the conservative court probably would not be willing to do. Finally, the court in *Elden* may have chosen to take a first step toward eliminating the tort of negligent infliction of emotional distress altogether, a task the court furthered by its holding in *La Chusa.*

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deciding whether a duty to . . . persons should be recognized does not depend solely on the 'foreseeability' of the emotional distress, but on . . . policy considerations").

138. *Id.* at 664-65, 771 P.2d at 827-28, 257 Cal. Rptr. at 878-79.

139. *See, e.g.,* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (mother able to recover for emotional trauma caused by witnessing the injury of her child due to the acts of a negligent tortfeasor).

140. *See supra* notes 72-88 and accompanying text.

(1) Limiting Dillon *Without Abolishing It*

The lower courts in California have had difficulty interpreting the *Dillon* factors in such a way as to create a consistent body of case law on negligent infliction of emotional distress.[141] This fact, however, is not reason enough to draw a bright-line rule that goes against at least twenty years of precedent, ignores the reasons for having a tort of negligent infliction of emotional distress, and leaves a great number of deserving plaintiffs without a cause of action.

With *Dillon,* the California Supreme Court was on the right track. The *Elden* court should have expanded on the *Dillon* requirements explaining and refining further the factors so that the lower courts could apply them more equitably. Though this was allegedly done in *La Chusa,* the close relationship issue remains unchanged. As Justice Broussard stated in his dissent in *Elden,* factfinders can evaluate the closeness of relationships on a case-by-case basis to determine whether liability for a negligent infliction of emotional distress claim is warranted.[142] The *Elden* court should have laid out guidelines by which the lower courts and juries might evaluate the closeness of relationships.

For example, the court might have allowed a presumption of a "close relationship" for immediate family members, significant others, and persons who had lived in the plaintiff's household as a member of the plaintiff's family for a specified period of time. If the defendant could rebut this presumption, the burden of persuasion would shift to the plaintiff to prove "closely-related," and the issue would then be sent to the jury. For other relationships, such as friends, neighbors, and more distant relatives, a set of factors could be established that would be applied on a case-by-case basis and given to the trier of fact to decide the sufficiency of the closeness of the relationship.

Although there will always be cases that present facts that do not fit neatly into guidelines, it is the responsibility of the courts to deal with these problems as they are encountered, not to set out arbitrary rules just to make things easier.

(2) The Problem of Same-Sex Couples

The second possible reason for *Elden*'s limitation on negligent infliction of emotional distress claims may be that to have done otherwise would have forced the court into an area where it is unwilling to go. If the court had allowed unmarried cohabitants to recover for negligent infliction of emotional distress, they presumably would have had to develop criteria by which lower courts and juries could evaluate the

141. *Id.*

142. Elden v. Sheldon, 46 Cal. 3d 267, 282-84, 758 P.2d 582, 592-93, 250 Cal. Rptr. 254, 264-65 (1988) (Broussard, J., dissenting).

"legitimacy" of the cohabitants' relationship. This analysis might take into account such factors as the length of the relationship, the extent to which the couple shares money and assets, and whether they have children (by adoption or as biological parents). From the court's perspective the possible problem with these factors is that they do not distinguish between heterosexual and gay and lesbian unmarried cohabitants. This situation would not only greatly increase the potential plaintiffs in negligent infliction of emotional distress cases, but, more importantly, would require the courts to recognize gay, lesbian, and unmarried heterosexual couples as deserving of at least some of the same protections and advantages as legally married couples. Although a just and equitable position, this recognition would be a giant step that the California Supreme Court apparently is not willing to take.

(3) "Administrative and Socioeconomic" Factors

The third reason why the *Elden* court denied recovery may have to do with the same "administrative and socioeconomic" factors cited in *Amaya v. Home Ice, Fuel & Supply Co.*[143] The cost to society of awarding people what may be huge amounts of money for emotional distress may be something that society is simply not willing to continue doing. The resulting rise in insurance costs and the hindrance to economic growth resulting from large jury verdicts in negligent infliction of emotional distress cases may outweigh the benefits to society of compensating people for their emotional harm. The fears and rationales expressed in *Amaya*[144] concerning recovery for negligently inflicted emotional distress are likely behind *Elden*'s reasoning.[145] Indeed, those same reasons might justify doing away with the tort of negligent infliction of emotional distress altogether, especially if the tort is retained in its present state, arbitrarily rewarding only a select group of plaintiffs.

Conclusion

In 1968, the California Supreme Court established a set of guidelines in *Dillon v. Legg* that was to determine foreseeability of harm to the plaintiff in negligent infliction of emotional distress cases. The tort of negligent infliction of emotional distress in California has been in a state of disarray because of different courts' widely-varying applications of the *Dillon* guidelines. In *Elden v. Sheldon* and *Thing v. La Chusa,* the California Supreme Court expressed its dissatisfaction with the inconsisten-

143. 59 Cal. 2d 295, 310-15, 379 P.2d 513, 522-25, 29 Cal. Rptr. 33, 42-45 (1963).

144. *See supra* text accompanying notes 32-38.

145. This idea is supported by the fact that the court in *La Chusa* did, in fact, "return to the concerns which prompted the *Amaya* court . . . to deny recovery for negligent infliction of emotional distress." Thing v. La Chusa, 48 Cal. 3d 644, 664, 771 P.2d 814, 827, 257 Cal. Rptr. 865, 878 (1989).

cies and inequities that have resulted because of the misapplication of these guidelines.

Though the holding in *La Chusa* undoubtedly will help to resolve some of the post-*Dillon* inconsistencies, it does nothing to rectify the unjust result in *Elden.* The tort of negligent infliction of emotional distress is supposed to compensate persons for the severe emotional pain they suffer when they witness a loved one being injured by the negligent act of another. Admittedly, there must be limits put on recovery in these types of cases, but the policy considerations cited by *Elden* simply do not justify denying recovery to a person who fits all the requirements of the paradigm case—with the sole exception being that they are neither married nor related by blood to the victim.

This arbitrary line-drawing cannot be justified if we are to believe that the purpose for having a tort of negligent infliction of emotional distress is to compensate mental suffering. It is the court's responsibility to establish guidelines for recovery that attorneys, plaintiffs, courts, and others can follow in determining liability in future cases. When those parameters become illogically and unjustly built walls, as in *Elden,* we all lose. The court fails in fulfilling its responsibilities, our faith in the court's ability to be fair and just is scarred, and deserving plaintiffs are denied a remedy for the injuries they suffer.

There is no just reason for denying recovery to unmarried cohabitants and other truly "sufficiently close" relationships in negligent infliction of emotional distress cases. The California Supreme Court, in *Thing v. La Chusa,* while "refining" the *Dillon* factors, unfortunately failed to formulate a law that reflects the realities of the society and rectify the injustice created by the ruling of *Elden v. Sheldon.*