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Elden v. Sheldon-Should Policy Outweigh Foreseeability?

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Elden v. Sheldon—Should Policy Outweigh Foreseeability?

The California Supreme Court decided in *Elden v. Sheldon*[1] that a claimant who witnesses the injury of a loved one cannot recover for negligent infliction of emotional distress if the two were only living together and were not legally married.[2] The court's reason for prohibiting recovery was not because unmarried cohabitant claims are unforeseeable; rather, the court concluded that the state's interest in promoting marriage, maintaining judicial economy, and limiting liability requires that cohabitants not recover for their emotional distress.[3] Whether the court's policies justify prohibiting a foreseeable claim is the subject of this casenote.[4]

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1. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

2. *Id.* at 277, 758 P.2d at 588, 250 Cal. Rptr. at 260. The court also decided that an unmarried cohabitant may not state a claim for loss of consortium. *Id.* at 277-79, 758 P.2d at 588-90, 250 Cal. Rptr. at 260-62. In its discussion of loss of consortium, the court noted that the policies which support denial of the claim for negligent infliction also support denying a claim for loss of consortium. *Id.* at 279, 758 P.2d at 589-90, 250 Cal. Rptr. at 262. However, the conclusions this article draws concerning negligent infliction of emotional distress do not apply as directly to loss of consortium for two reasons. First, a claim for loss of consortium is more closely connected with the marriage relationship than is negligent infliction. Second, the scope of recovery for negligent infliction was intended to depend on whether the emotional harm was foreseeable (*see infra* notes 7-10 and accompanying text), while recovery for loss of consortium does not depend upon foreseeability but upon whether a marriage relationship was disrupted.

3. *Elden*, 46 Cal. 3d at 274-77, 758 P.2d at 586-88, 250 Cal. Rptr. at 258-60. One member of the court, Justice Broussard, dissented because he concluded the policies do not warrant disallowing a foreseeable claim. *Id.* at 279-80, 758 P.2d at 590, 250 Cal. Rptr. at 262 (Broussard, J., dissenting).

4. The result in *Elden* is contrary to the recommendations of several commentators who advocated that recovery be extended to unmarried cohabitants. *See* Comment, *The Right of an Unmarried Cohabitant to an Action for Negligent Infliction of Emotional Distress in California*, 15 PAC. L.J. 925 (1984) [hereinafter *Unmarried Cohabitant*]; Comment, *The* Dillon *Dilemma: A Closer Look at the Close Relationship*, 11 W. ST. L. REV. 271, 283, 288-89 (1984). *See also* Comment, Dillon *Revisited: Toward a Better Paradigm for Bystander Cases*, 43 OHIO ST. L.J. 931, 943 (1982) (intimacy of the relationship not legal status should provide the basis for the decision). The class of unmarried cohabitants would apparently include homosexual couples. *See Unmarried Cohabitant, supra,* at 949-952. *But see infra* notes 20-21 and accompanying text.

I. BACKGROUND

In *Dillon v. Legg*,[5] the California Supreme Court extended recovery for negligent infliction of emotional distress from persons within the zone of danger—persons threatened but not harmed by a defendant's negligence—to bystanders.[6] Bystanders, persons who suffer emotional harm not because they were physically in danger but because they witnessed another's injury, were to recover if the "defendant should [have] reasonably foresee[n] injury to [the] plaintiff."[7] *Dillon* directed courts to determine foreseeability "upon a case-by-case basis," and to consider factors such as:

> (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.[8]

Using these guidelines based on the claimant's "physical, tempo-

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5. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

6. *Id.* at 739-40 & n.5, 441 P.2d at 920 & n.5, 69 Cal. Rptr. at 80 & n.5. For an overview of the development of negligent infliction of emotional distress see PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 359-67 (W. Keeton 5th ed. 1984).

7. *Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

8. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. *Dillon* also required that there be a physical manifestation of the emotional harm. *Id.* ("[W]e deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case."). The physical manifestation requirement was rejected by the supreme court in Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

In a case decided since *Elden*, Thing v. La Chusa, 48 Cal. 3d 664, 771 P.2d 814, 257 Cal. Rptr. 865 (1989), a majority of the California Supreme Court articulated the following narrowed version of the *Dillon* guidelines:

> [A] plaintiff may recover . . . 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.

Id. at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81 (footnotes omitted). The *Thing* test is narrower than *Dillon* because under *Thing*, each part of the test is a requirement rather than a guideline, and because *Thing* requires that claims be for *serious* emotional distress.

ral and relational proximity to the primary victim,"[9] courts were then to "mark out the areas of liability, excluding the remote and unexpected."[10]

Before *Elden*, whether unmarried cohabitants could recover for their emotional distress depended on courts' interpretation of the third, relational, *Dillon* guideline. The California Court of Appeal faced the issue in five cases. In the first, *Drew v. Drake*,[11] in which the claimant witnessed the death of her housemate in an automobile collision, the court denied an unmarried cohabitant's claim for emotional distress.[12] The court held that the "housemates" were not closely related as required by *Dillon* even though they had lived together for three years.[13]

In two subsequent cases, *Ledger v. Tippitt*,[14] and *Garcia v. Superior Court*,[15] the courts concluded that unmarried cohabitants may recover for negligent infliction of emotional distress. In *Ledger*, the court decided that it was "foreseeable, as a matter of law" that the claimant, who had witnessed the stabbing of her housemate, would suffer emotional harm because of the

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9. Elden v. Sheldon, 46 Cal. 3d 267, 270, 758 P.2d 582, 583, 250 Cal. Rptr. 254, 255 (1988).

10. *Dillon*, 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. The task of delineating the boundaries of foreseeability has proven to be difficult for California courts. Several cases and commentators have discussed the inconsistent interpretations of the *Dillon* guidelines. *See, e.g., Elden*, 46 Cal. 3d at 270-73, 758 P.2d at 583-85, 250 Cal. Rptr. at 255-57; Ochoa v. Superior Court, 39 Cal. 3d 159, 181-89, 703 P.2d 1, 16-22, 216 Cal. Rptr. 661, 676-82 (1985) (Bird, C.J., concurring and dissenting). *See also, e.g.*, Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477, 483-89 (1984); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 589-97 (1982).

The California Supreme Court has attempted to resolve this uncertainty by articulating a new standard of recovery for negligent infliction of emotional distress. *See supra* note 8. Commentators have proposed several solutions to the problem including adopting true foreseeability as the standard for recovery, *see* Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333 (1984), and using a modified foreseeability standard, *see* Nolan & Ursin, *supra*, at 620 (courts should only allow claims for *serious*, foreseeable harm), and Diamond, *supra*, at 504 (courts should limit recovery "to the extent of economic losses").

11. 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980).

12. *Id.* at 558, 168 Cal. Rptr. at 66.

13. *Id.* at 557, 168 Cal. Rptr. at 65-66. In a dissenting opinion, Justice Poche stated that the majority had rewritten "the third guideline . . . to require a formal marriage relationship." *Id.* at 558, 168 Cal. Rptr. at 66 (Poche, J., dissenting).

14. 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985).

15. 169 Cal. App. 3d 397, 215 Cal. Rptr. 189 (1985). The California Supreme Court granted review in *Garcia* (*see* 704 P.2d 1339, 217 Cal. Rptr. 848 (1985)), but later dismissed the case and remanded it to the court of appeal (*see* 728 P.2d 1154, 232 Cal. Rptr. 519 (1986)).

stabbing.[16] In *Garcia*, the court agreed with *Ledger* and concluded that "the underlying rationale of *Dillon* . . . compels a recognition of tort claims for emotional distress by 'de facto' spouses."[17]

In the two other court of appeal decisions, the courts found that cohabitating couples are not closely related as required by *Dillon*. In one, the court of appeal's decision in *Elden v. Sheldon*,[18] the court denied recovery because it "construe[d] the 'close relationship' guideline set forth in *Dillon v. Legg* as requiring at least a relationship which is legally cognizable."[19] In the other, *Coon v. Joseph*,[20] a case involving homosexual cohabitants, the court concluded that homosexual cohabitants are not closely related under *Dillon*.[21]

II. *Elden v. Sheldon*

A. *Factual Background*

Richard Elden and Linda Marie Eberling, who were living together as "de facto" spouses, were injured in an automobile accident.[22] Eberling died as a result of her injuries.[23] Elden sued the defendants for his personal injuries, and for negligent inflic-

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16. *Ledger*, 164 Cal. App. 3d at 646, 210 Cal. Rptr. at 826.

17. *Garcia*, 215 Cal. Rptr. 192-93 (court of appeal opinion deleted from official reporter).

18. 164 Cal. App. 3d 745, 210 Cal. Rptr. 755 (1985); *vacated*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

19. 210 Cal. Rptr. at 760 (court of appeal opinion deleted from official reporter).

20. 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987).

21. *Id.* at 1277, 237 Cal. Rptr. at 877-78. The court found that even if heterosexual cohabitants may recover their emotional distress, homosexuals may not because they cannot allege a "de facto" marriage since "the Legislature has made a determination that a legal marriage is between a man and a woman." *Id.* (citation omitted). Justice White dissented because he "disagree[d] that a homosexual relationship cannot be of a significant nature to sustain a cause of action for negligent infliction of emotional distress." *Id.* at 1285, 237 Cal. Rptr. at 883-84 (White, J., dissenting).

22. Elden v. Sheldon, 46 Cal. 3d 267, 269, 758 P.2d 582, 582-83, 250 Cal. Rptr. 254, 254-55 (1988). None of the courts apparently determined the quality of Elden's relationship with Eberling. The supreme court stated only that it had "no quarrel with the factual premise of plaintiff's position." *Id.* at 273, 758 P.2d at 585, 250 Cal. Rptr. at 257. Whether this statement means that the court concluded that the couple's relationship was sufficiently strong to qualify for recovery if housemates were allowed to recover for emotional distress is unclear.

If Elden had been allowed to raise a claim for emotional distress, he would have also had to show that his relationship with Eberling was "stable and significant" under a test such as that set out in Butcher v. Superior Court, 139 Cal. App. 3d 58, 70, 188 Cal. Rptr. 503, 512 (1983). *See infra* notes 44-45 and accompanying text.

23. *Elden*, 46 Cal. 3d at 269, 758 P.2d at 582, 250 Cal. Rptr. at 254-55.

tion of emotional distress and loss of consortium.[24] The defendants demurred to the claim for negligent infliction of emotional distress because Elden and Eberling were not married and thus not "closely related" as required by *Dillon*.[25] The trial court dismissed the claim and Elden appealed.[26] The court of appeal affirmed, and Elden appealed to the California Supreme Court.

B. The Reasoning of the Majority and the Dissent

Contrary to the reasoning of the appellate court, the supreme court majority denied recovery not because Elden and Eberling were not closely related as required by *Dillon*, but because the court found three policies to be more important than allowing Elden's claim.[27] These policies required that even a foreseeable claim not be allowed.[28] The first policy the court cited was the "state['s] strong interest in the marriage relationship."[29] Noting California's interest in protecting marriage because of its importance to individuals and to society, the court concluded that "to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited."[30]

The second policy the court relied upon was the importance of not "impos[ing] a difficult burden on the courts."[31] If unmarried cohabitants were not barred from recovery as a matter of law, courts "would [be] require[d] . . . to inquire into the relationship of the partners" to see if the relationship in question was akin to a marriage relationship and thus merited recovery.[32] In addition to this burden in individual cases, the burden on the entire judicial system would increase as parties used the extension of recovery to unmarried cohabitants as precedent for recovery in other similar situations.[33]

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24. *Id.* at 269, 758 P.2d at 582-83, 250 Cal. Rptr. at 254-55.

25. *Id.* The defendants also demurred to the claim for loss of consortium, and the trial court dismissed the claim. For the supreme court's disposition of the loss of consortium issue see *supra* note 2. The parties settled the personal injury claim with Elden preserving his right to appeal from the dismissal of the two other claims. *Id.* at 269 n.1, 758 P.2d at 583 n.1, 250 Cal. Rptr. at 255 n.1.

26. *Id.* at 269, 758 P.2d at 583, 250 Cal. Rptr. at 255.

27. *Id.* at 274, 758 P.2d at 586, 250 Cal. Rptr. at 258.

28. *Id.*

29. *Id.* at 274-75, 758 P.2d at 586-87, 250 Cal. Rptr. at 258-59.

30. *Id.* at 274, 758 P.2d at 586, 250 Cal. Rptr. at 258.

31. *Id.* at 275, 758 P.2d at 586, 250 Cal. Rptr. at 259.

32. *Id.*

33. The court's concern that *Elden* lead to further extension of the tort of negligent

The third policy was the need to limit liability.[34] The court decided that this case, involving a de facto spouse, would be difficult to distinguish from cases involving "de facto siblings, parents, grandparents, or children."[35] Extension of liability to unmarried cohabitants would open the way for other de facto relationships which "would place an intolerable burden on society."[36]

On the other hand, Justice Broussard concluded in his dissent that the justifications were insufficient to deny recovery.[37] Justice Broussard could not see how marriage would be affected by allowing cohabitants to recover.[38] A housemate is not going to marry merely "in order to assure his or her legal standing in a future personal injury action should that person have the misfortune of witnessing the serious injury of his or her spouse."[39] In addition, "marriage would maintain its preferential status since marrieds are presumed to be 'closely related,' " while cohabitants would have to show "that their relationship is equivalent in all relevant respects to a good marriage . . . ."[40] Justice Broussard also noted that society is changing and the trend in California is to extend to cohabitants rights originally restricted to married persons.[41]

Justice Broussard pointed to two reasons why the court's reliance on judicial economy is misplaced. First, in a prior case, *Rodriguez v. Bethlehem Steel*,[42] the supreme court decided that "compensation should [not] be denied to all plaintiffs because of the difficulty of determining which plaintiffs are deserving and

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infliction of emotional distress is apparent in the court's discussion of the policy of limiting liability. *See infra* notes 34-36 and accompanying text.

34. *Elden*, 46 Cal. 3d at 276-77, 758 P.2d at 587-88, 250 Cal. Rptr. at 260.

35. *Id.* at 277, 758 P.2d at 588, 250 Cal. Rptr. at 260.

36. *Id.*

37. *Id.* at 279-80, 758 P.2d at 590, 250 Cal. Rptr. at 262 (Broussard, J., dissenting).

38. *Id.* at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting). The analysis in the dissent ignores any prospective effect *Elden* may have as precedent for future distinctions drawn between married persons and unmarried cohabitants by courts, the legislature, and even the general public. For a brief discussion of the effect courts have in changing society's view of unmarried cohabitation, see Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275 (courts play a subtle yet powerful role in molding the law and society's attitude).

39. *Elden*, 46 Cal. 3d at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

40. *Id.*

41. *Id.* at 282, 758 P.2d at 592, 250 Cal. Rptr. at 264 (Broussard, J., dissenting).

42. 12 Cal. 3d 382, 512 P.2d 669, 115 Cal. Rptr. 765 (1974).

how much they deserve."[43] Thus, even if deciding which cohabitants have strong relationships and which do not were difficult, the burden would not be a valid reason to reject the valid claims. Second, deciding which cohabitants should recover would not be overly difficult: the test created in *Butcher v. Superior Court*[44] would be manageable and would provide guidance for courts in making their determination.[45]

Justice Broussard decided that the majority's third policy, limiting liability, does not support preventing cohabitants from recovering for emotional harm. The court should limit liability based "on functional grounds that correspond with real loss," not on the possibility that the decision will lead to "an ever-expanding class of 'closely related' plaintiffs . . . ."[46]

III. ANALYSIS

The supreme court's reasoning in *Elden* required the court to reach two separate conclusions. The first was that emotional harm suffered by unmarried cohabitants is foreseeable under *Dillon*. If the court had not determined that Richard Elden's harm was foreseeable, the court's analysis would have ended, before reaching any policy issue, unless the court were to depart from *Dillon*. The second and more critical conclusion was that furthering the cited policies is more important than allowing the foreseeable cohabitant claims. The remainder of this casenote will discuss whether the court's conclusions are correct.

A. Foreseeability of Cohabitant Emotional Harm

Both the majority and the dissent in *Elden* found that cohabitant emotional harm is foreseeable. However, in deciding that the claims are foreseeable, each relied to some extent on the

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

44. 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983).

45. *Elden*, 46 Cal. 3d at 283, 758 P.2d at 593, 250 Cal. Rptr. at 265 (Broussard, J., dissenting). The *Butcher* test was designed to determine if a relationship between cohabitants approximated that of married couples. The test focuses on the relationship's "duration, whether the parties had a contract, the degree of economic cooperation, the exclusivity of sexual relationships, and whether the couple had children." *Id.* at 276, 758 P.2d at 587, 250 Cal. Rptr. at 259. Several courts have criticized the *Butcher* test finding it to be unworkable. *See, e.g.*, Weaver v. G.D. Searle & Co., 558 F. Supp. 720, 723 (N.D. Ala. 1983) ("test is so difficult as to be impossible in the real world of the practical").

46. *Elden*, 46 Cal. 3d at 284, 758 P.2d at 593, 250 Cal. Rptr. at 265-66 (Broussard, J., dissenting).

increased numbers of persons who live together without being married.[47] The majority's use of this reasoning appears in the following: "It may well be . . . that the number of such households has increased to the point that emotional trauma suffered by a partner in such an arrangement from injury to his companion cannot be characterized as 'unexpected or remote.' "[48] Using similar logic, the dissent concluded that "[g]iven the widespread reality and acceptance of unmarried cohabitation a reasonable person would not find the plaintiff's emotional trauma to be 'remote and unexpected.' "[49]

The argument that the increased incidence of cohabitation without marriage makes cohabitant claims more foreseeable under *Dillon* seems to be based on the following logic. First, the ultimate question under *Dillon* is whether the defendant should have foreseen harm to the emotionally injured plaintiff.[50] Second, since foreseeability is the question, whether cohabitant claims are foreseeable depends on if defendants could reasonably foresee that their negligence could cause an unmarried cohabitant to suffer emotional harm. Third, since the incidence of unmarried cohabitation has increased dramatically in recent years, cohabitants are now foreseeable as potential plaintiffs and should recover for their emotional distress.

Although at first glance this reasoning seems persuasive, the increased incidence of cohabitation has nothing to do with foreseeability under *Dillon*. *Dillon* does not ask courts to determine the likelihood of unmarried cohabitants being emotionally harmed. Instead, *Dillon* and its relational guideline ask: Are unmarried cohabitants closely related such that they have the kind of relationships in which one would reasonably expect that an injury to one viewed by the other would cause emotional distress to the viewer?[51] In order to decide if cohabitants are closely related, one must compare their relationship with one that satis-

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47. This argument has been used before to argue that unmarried cohabitant claims are foreseeable. *See Unmarried Cohabitant*, *supra* note 4, at 938 ("dramatic increase in the number of couples choosing to cohabit certainly removes this type of relationship from what *Dillon* termed the remote and unexpected").

48. Elden v. Sheldon, 46 Cal. 3d at 267, 273, 758 P.2d 582, 586, 250 Cal. Rptr. 254, 258 (1988).

49. *Id.* at 280, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

50. *See supra* notes 7-10 and accompanying text.

51. In the five California Court of Appeal decisions discussed in the Background, the courts all focused on whether cohabitants are closely related. *See supra* notes 11-21 and accompanying text.

fies the relational guideline and is similar to that of cohabitants, namely marriage.[52] The question becomes as follows: Is unmarried cohabitation sufficiently similar to marriage, or, on the other hand, does being married indicate that a couple's relationship will be stronger than it would be if the couple were not married? Both the majority[53] and the dissent[54] rejected the conclusion that being married guarantees a stronger relationship.[55] As a result, emotional harm suffered by unmarried cohabitants is foreseeable, not because cohabitants are foreseeable, but because they have, at least in some cases,[56] the kind of relationship in which an injury to one foreseeably will cause emotional harm to the other.

B. Do the Policies Outweigh Allowing the Foreseeable Claim?

After concluding that unmarried cohabitant claims are foreseeable, the *Elden* majority held that three policies outweigh allowing foreseeable cohabitant claims. The court justified allowing policies to override foreseeability, an approach it had never taken before, because "[a]lthough *Dillon* stresses foreseeability of the risk as the 'chief element in determining whether [the] defendant owes a duty to . . . [the] plaintiff,' it recognizes that policy considerations may dictate [that] a cause of action should not be sanctioned no matter how foreseeable the risk."[57]

Of the three policies cited by the majority, judicial economy and limiting liability have been, and are, justifications which "continue to foster judicial caution and doctrinal limitation on

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52. Married persons are presumed to be closely related. *Elden*, 46 Cal. 3d at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

53. *Id.* at 273, 758 P.2d at 585-86, 250 Cal. Rptr. at 257-58 ("There can be no doubt that . . . some of these couples are bound by emotional ties as strong as those that bind formally married partners . . . .").

54. *Id.* at 282, 758 P.2d at 591-92, 250 Cal. Rptr. at 264 (Broussard, J., dissenting) (the majority is incorrect in assuming that only marrieds are entitled to have a "legitimate expectation that the law [will] recognize the value of their relationships or the depth of their feelings").

55. The extent to which marriage affects the quality of a relationship is beyond the scope of this casenote.

56. Unmarried cohabitants would still have to prove in each case that their relationship was similar to a marriage relationship. *See supra* notes 40, 44-45 and accompanying text.

57. Elden v. Sheldon, 46 Cal. 3d 267, 274, 758 P.2d 582, 586, 250 Cal. Rptr. 254, 258 (1988) (citation omitted). The court states that "*Dillon* prefaces its discussion of foreseeability with the observation that foreseeability is of primary importance in determining whether a duty to the defendant should arise '[i]n the absence of "overriding policy considerations."'" *Id.* at 274 n.4, 758 P.2d at 586 n.4, 250 Cal. Rptr. at 258 n.4.

recovery for emotional distress."[58] Since *Elden* draws a bright line between marrieds and unmarrieds, it will prohibit some claims, thus limiting liability and increasing judicial economy. However, a problem with relying upon judicial economy and limiting liability is that these policies may be used to justify *any* decision which draws a bright line and proscribes some claims even if the decision be arbitrary.

The goal of tort law is not to disallow claims but to compensate victims.[59] This goal requires courts to rely upon judicial economy and limiting liability in only two circumstances: first, if the two policies act as support for another significant policy; second, if a particular decision will have profound effects on judicial economy and limiting liability such that they outweigh policies that favor recovery under the more traditional notions of foreseeability.[60] Using this reasoning, the first question becomes whether the other policy, fostering the marriage relationship, provides strong support for the decision in *Elden*. If it does not, judicial economy and limiting liability must provide more than ordinary support for the court's conclusion.

1. *The state's interest in marriage*

Both the majority[61] and the dissent[62] agreed that despite the significant increase in cohabitation, the state has a continued interest in protecting the marriage institution. Married persons "are granted significant rights and bear important responsibilities toward one another which are not shared by those who cohabit without marriage."[63] The supreme court has "acknowl-

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58. PROSSER & KEETON, *supra* note 6, § 54 at 360-61. The three concerns noted in PROSSER & KEETON which justify caution are avoiding recovery for (1) "trivial" claims, (2) "falsified or imagined" claims, and (3) claims that impose "disproportionate financial burdens" on defendants. *Id.* As solutions to these problems are reached, the policies of limiting liability and judicial economy will necessarily be furthered.

59. *See, e.g.*, PROSSER & KEETON, *supra* note 6, § 1 at 5-6 (tort law "is directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests generally . . . where the law considers that compensation is required").

60. Some would argue that since the test for recovery should be true foreseeability, judicial economy and limiting liability should never cut off foreseeable claims. *See supra* note 10.

61. Elden v. Sheldon, 46 Cal. 3d 267, 273 & n.3, 274-75, 758 P.2d 582, 585 & n.3, 586-87, 250 Cal. Rptr. 254, 257-58 & n.3, 258-59 (1988).

62. *Id.* at 281-82, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

63. *Id.* at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259. The court refers to legislative provisions which "govern[] the . . . entry into and termination of marriage and the prop-

edged that society benefits from the stability and structure provided by the institution of marriage."[64] However, in spite of the continued use of marriage as a basis for legal distinctions, the question is whether it is a valid basis for the distinction made in *Elden*.

Not every legal distinction that might be based on marriage would be warranted. A decision based on marriage should not unfairly burden unmarrieds and should significantly further the institution of marriage.[65] Often, competing policies may outweigh drawing distinctions between marrieds and unmarrieds. As one observer has noted, "[m]arriage cannot realistically be expected to take such priority that all competing interests must forever go unrecognized, even though the law continues to recognize marriage as the 'foundation of society.' "[66] In addition, extending recovery to cohabitants need not be viewed as a "result of deliberate antipathy toward marriage or family values," but as a result of the need to "advance important policy interests deserving legal protection, despite the conflict between those interests and the policy favoring formal family ties."[67]

Several policies support extending recovery for emotional harm to unmarried cohabitants. One of these is the "growing policy interest in tort law in compensating the victims of tortiously caused injuries."[68] Other policies that weigh in favor of recovery for unmarried cohabitants are the judicial system's interest in administering justice between innocent and negligent persons, and society's interest in encouraging reasonable conduct by placing accident costs on offenders.[69]

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erty rights which flow from that relationship, and the . . . various obligations on spouses, such as the duty of support." *Id.* (citations omitted).

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

65. As dissent in *Elden* notes, "[t]he trend in this state is toward *removing* legal distinctions based on marital status that serve only to burden the unmarried without advancing some corresponding societal interest." *Id.* at 282, 758 P.2d at 592, 250 Cal. Rptr. at 264 (Broussard, J., dissenting) (emphasis in original).

66. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 561 (1983).

67. *Id.* at 561. The dissent notes that the law has been extended to protect the "rights and obligations undertaken by unmarried cohabitants. And, the Legislature has granted unmarried cohabitants the equivalent legal rights provided marital couples in the fields of housing, credit and family relations." *Elden*, 46 Cal. 3d at 282, 758 P.2d at 592, 250 Cal. Rptr. at 264 (Broussard, J., dissenting) (citation omitted).

68. Hafen, *supra* note 66, at 562-63.

69. For an excellent discussion of these policies in the context of full recovery for emotional distress, see Bell, *supra* note 10; for a contrasting view, see Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell*, 36 U. FLA. L. REV.

Against these interests, one must balance the policies that will be furthered by limiting recovery to married persons. The problem is that the way in which *Elden* furthers the marriage institution is unclear. The majority simply decided that "to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited."[70] The dissent concluded that the court's decision does not further marriage because the decision will not encourage cohabitating persons to marry, and because "[m]arriage would maintain its preferential status since married persons are presumed to be 'closely related' for the purposes of *Dillon*."[71]

In addition to this lack of support for marriage, *Elden* may in fact detract from the marriage institution. Since *Elden* does not significantly foster marriage, the decision may provide ammunition for those who argue that legal distinctions should never be based on marriage—for them, *Elden* will be another example of purposeless discrimination against unmarried cohabitants.

In short, *Elden* does not further California's interest in the marriage institution, and the decision deprives unmarried cohabitants of a remedy for their emotional distress. Because the state's interest in marriage is not a justification for the result in *Elden*, judicial economy and limiting liability must provide more than ordinary support for the result.[72]

2. *Limiting liability*

Limiting liability has been a major concern in restricting recovery for emotional distress.[73] The *Elden* majority noted that "[e]very 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."[74] The court believed that the line it drew effectively limits liability by

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414 (1984).

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

71. *Id.* 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting); *see supra* notes 39-41 and accompanying text.

72. Since limiting liability and judicial economy usually support any decision that denies some claims, any decision that relies on these policies should have a substantial effect on them. *See supra* text accompanying notes 58-60.

73. *See supra* note 58 and accompanying text.

74. Elden v. Sheldon, 46 Cal. 3d 267, 276, 758 P.2d 582, 588, 250 Cal. Rptr. 254, 260 (1988) (citing Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969)).

disallowing recovery based on de facto relational interests. If the line were not drawn and recovery were allowed, courts would not be able to "draw a principled distinction between an unmarried cohabitant who claims to have a de facto marriage relationship with his partner and de facto siblings, parents, grandparents or children."[75]

There are at least three reasons why the fear of unlimited liability is not a sufficient basis for the court to prohibit recovery by de facto spouses. The first, and the most important, is that *Elden* will prevent persons from recovering for what would otherwise be valid claims. Not only will unmarried cohabitants be unable to recover for their emotional harm, but other persons who suffer emotional harm because of injury to a de facto relation will not have a remedy. One example of a claim that might not be allowed after *Elden* arose in *Mobaldi v. Regents of University of California*.[76] In *Mobaldi*, the court found that a foster mother, who suffered emotional harm because of a serious injury to her foster son, was sufficiently related to satisfy the *Dillon* relational guideline.[77] The foster parents in *Mobaldi* had treated the boy as their own, caused him to be baptized in their church and christened with their name, and attempted to adopt him.[78] The court concluded that "[t]he emotional attachments of the family relationship and not legal status are those which are relevant to foreseeability."[79] In contrast, the *Elden* majority, bothered by future uncertainty, would have courts focus on the legal relationships and thereby excluded foreseeable and valid claims.

The second reason that fear of unlimited liability does not justify the distinction in *Elden* is because courts, if required, probably can distinguish between de facto marriages and other de facto relationships. If the court focuses on whether the relationship between the claimant and the harmed loved one was foreseeable, the court will not find "the principled distinction" it is seeking.[80] However, if the court focuses on whether the plain-

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75. *Elden*, 46 Cal. 3d at 277, 758 P.2d at 588, 250 Cal. Rptr. at 260.

76. 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976). The court in *Elden* "disapprove[d] the . . . language in *Mobaldi* . . . insofar as [it is] inconsistent with [*Elden*'s] conclusion." Elden v. Sheldon, 46 Cal. 3d 267, 277, 758 P.2d 582, 588, 250 Cal. 254, 260 (1988).

77. *Mobaldi*, 55 Ca. App. 3d at 582-83, 127 Cal. Rptr. at 726-27.

78. *Id.* at 576-77, 127 Cal. Rptr. at 722.

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

80. *See supra* text accompanying note 75.

tiff's *injury* was foreseeable,[81] distinctions between, for example, de facto siblings and de facto spouses, are possible since the commitment and depth of feeling between de facto spouses is arguably stronger.[82]

The third reason unlimited liability does not justify the line drawn in *Elden* is because the number of de facto claims which would be brought would probably be very few. According to one commentator, even if courts allowed all foreseeable claims for emotional harm, the number actually raised would be far fewer than the deluge courts expect.[83] Moreover, since parties that raise de facto claims would have the burden of proving that their relationship was especially strong, most would evaluate their claim in order to ensure that there is a basis for the claim.

3. *Judicial economy*

The next question is whether the judicial economy created by *Elden*'s bright line justifies the holding. The burden the court wanted to remove from trial courts was that of deciding whether cohabitational relationships are "stable and significant."[84] As noted above, the dissent concluded that judicial economy does not justify the majority's conclusion because deciding whether cohabitants are closely related would not be unnecessarily difficult and because the supreme court had previously held that difficulty of deciding which claimants should recover and which should not does not justify precluding the valid claims.[85]

Another reason judicial economy does not support the court's decision is that *Elden* may add complexity to negligent infliction of emotional distress. The additional complexity may result from *Elden*'s deviation from the usual *Dillon* approach.[86] While the majority approved *Dillon*'s focus on foreseeability—it added another step to the analysis—policy can outweigh foresee-

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81. *See supra* notes 47-56 and accompanying text.

82. For a case which denied recovery to a de facto sibling, see Kately v. Wilkenson, 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983).

83. Bell, *supra* note 10, at 364-67. Bell also notes that the number would be even fewer than all foreseeable claims because parties would only bring claims that have a value greater than the cost of bringing suit would be made. Bell, *Reply to a Generous Critic*, 36 U. FLA. L. REV. 437, 442-45 (1984).

84. Elden v. Sheldon, 46 Cal. 3d 267, 275-76, 758 P.2d 582, 587, 250 Cal. Rptr. 254, 261-62 (1988).

85. *See supra* notes 42-45 and accompanying text.

86. See *supra* notes 5-10 and accompanying text for a discussion of *Dillon*.

ability.[87] After *Elden*, California courts will not only have to decide how the *Dillon* guidelines apply to a case,[88] they will also have to determine if there are policies which require denying a claim which would otherwise satisfy *Dillon*. In essence, *Elden* created a potential claims killer that may arise at some unknown point to deny a claim.

One could argue that this additional complexity is minimal because courts will only decide that policy outweighs a foreseeable claim in exceptional cases. Cases like *Elden*, which rely on the policy of favoring marriage, are probably rare. However, the issue may arise more frequently than one would suspect because the policies of limiting liability and increasing judicial economy will almost always weigh in favor of finding that policy outweighs allowing foreseeable claims.[89] With those two policies always on the side of excluding claims, a court inclined to disallow a claim will need little more to justify drawing a bright line.[90] Thus, *Elden* adds an additional step to the negligent infliction analysis which will complicate courts' decisions and which may have unpredictably wide effects.

IV. CONCLUSION

The California Supreme Court concluded in *Elden v. Sheldon* that emotional distress of unmarried cohabitants is foreseeable under *Dillon*. However, the court held that fostering the marriage relationship, limiting liability, and increasing judicial economy justified not allowing unmarried cohabitants to recover for their emotional distress. A more careful examination reveals that the policies do not sufficiently support the decision. In addition, *Elden* does little to further the policies and may have complicated the tort of negligent infliction of emotional distress by adding an additional step to the *Dillon* analysis.

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87. *See supra*, notes 47-56 and accompanying text.

88. Note that courts have experienced difficulty in applying the *Dillon* guidelines. *See supra*, note 10.

89. *See supra* notes 58-60 and accompanying text.

90. In Thing v. La Chusa, 48 Cal. 3d 664, 771 P.2d 814, 257 Cal. Rptr. 865 (1989), discussed above in footnotes 8 and 10, the supreme court used *Elden*'s reliance on the policies of increasing judicial economy and limiting liability to outweigh foreseeability to justify the even "broader" bright line the court draws in *Thing*. *Id.* at 664, 771 P.2d at 827, 257 Cal. Rptr. at 878 (footnotes omitted).