COMMENT

WHO KNOWS WHERE THE LOVE GROWS?: UNMARRIED COHABITANTS AND BYSTANDER RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

INTRODUCTION

Modern cases involving the negligent infliction of emotional distress ("NIED") tend to follow a pattern: the plaintiff and the victim are out together, perhaps enjoying a drive, when a defendant, who more likely than not has negligently operated a vehicle, seriously injures or kills the victim.[1] The physically uninjured plaintiff, by virtue of witnessing the injury and/or death, suffers very real and traumatizing emotional harm and attempts to recover for such harm in a suit against the defendant. The question for the court then is whether the plaintiff can prove that his emotional harm is indeed serious enough to warrant recovery.

This Comment examines the tests that courts have used to analyze such claims, particularly focusing on one class of plaintiffs whose claims rarely succeed: unmarried cohabitants. Part I summarizes the history of bystander recovery for NIED and analyzes the modern test for bystander recovery. Part II extends this analysis by discussing the third prong of that test—the relationship between the bystander and the victim—and its treatment by American courts, especially with respect to unmarried cohabitants. Part III continues the analysis of the third factor by examining whether the relationship that many courts require serves the purposes that recognition of claims for NIED was intended to serve. The Comment concludes with the suggestion that, if recognition of NIED as a cause of action is to have real meaning, the relationships that satisfy the test for bystander recovery must be both expanded and tailored to allow recovery by all deserving plaintiffs.

1. *See, e.g.*, Elden v. Sheldon, 758 P.2d 582 (Cal. 1988); Biercevicz v. Liberty Mut. Ins. Co., 865 A.2d 1267 (Conn. Super. Ct. 2004); State *ex rel.* Dep't of Transp. v. Hill, 963 P.2d 480 (Nev. 1998). Certainly there are other fact patterns as well, such as the one in *Milberger v. KBHL, LLC*, 486 F. Supp. 2d 1156 (D. Haw. 2007), in which the plaintiff alleged emotional harm resulting from witnessing her fiancé's unfortunate encounter with a wave.

I. A BRIEF HISTORY: RECOVERY FOR EMOTIONAL DISTRESS AND *DILLON V. LEGG*

Claims for emotional distress have long been recognized by American courts,[2] but historically, in order to recover, plaintiffs had to demonstrate that such distress arose as a result of and in conjunction with physical injury.[3] Courts required proof of physical harm as a prerequisite to a claim for emotional harm for several reasons: (1) concern about the potential flood of litigation resulting from the recognition of stand-alone emotional harm as a cognizable injury,[4] (2) the desire to limit the liability of minimally culpable defendants, especially given the fact that one act can affect a great number of people emotionally,[5] (3) the belief that a certain amount of emotional harm is an unavoidable consequence of living in society and that individuals should be capable of coping with such harm,[6] (4) the fact that the "measure of damages to be adopted would be so indefinite and so indefinable,"[7] and (5) concern over the lack of objective verification of emotional distress and the resulting potential for fraudulent claims.[8] In recognition of these concerns,

2. *See, e.g.*, Pa. Co. v. White, 242 F. 437, 439–41 (6th Cir. 1917); Stuart v. W. Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885).

3. *See, e.g.*, W. Union Tel. Co. v. Hall, 287 F. 297, 301–02 (4th Cir. 1923); *White*, 242 F. at 439–40; Kester v. W. Union Tel. Co., 55 F. 603, 603–04 (C.C.N.D. Ohio 1893); Connell v. W. Union Tel. Co., 22 S.W. 345, 346–50 (Mo. 1893); Connelly v. W. Union Tel. Co., 40 S.E. 618, 619–24 (Va. 1902). Not all courts required physical harm in order for a plaintiff to recover for emotional distress. *See, e.g.*, W. Union Tel. Co. v. Henderson, 7 So. 419, 422–23 (Ala. 1890); Reese v. W. Union Tel. Co., 24 N.E. 163, 165–66 (Ind. 1890).

4. *See, e.g.*, *Kester*, 55 F. at 604.

5. *See, e.g.*, Rowan v. W. Union Tel. Co., 149 F. 550, 553 (C.C.N.D. Iowa 1907) (pointing to the large number of individuals affected by the defendant's failure to timely deliver a telegram, which caused these individuals to miss a family member's burial); Clohessy v. Bachelor, 675 A.2d 852, 862 (Conn. 1996) ("[I]t would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends." (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 366 (5th ed. 1984))); Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 1 (1992) (stating that "the desire to ensure that a defendant's liability for negligence is not disproportionate to his or her fault" is a rationale for limiting claims for emotional distress).

6. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814, 828–29 (Cal. 1989); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 8 scope note (Tentative Draft No. 5, 2007).

7. *Kester*, 55 F. at 604.

8. *See, e.g.*, *Hall*, 287 F. at 302 ("The fundamental reason for refusing compensatory damages for mental suffering, unaccompanied by physical injury and physical suffering, is that mental suffering in and of itself is of too uncertain a nature to afford a reasonable basis for the ascertainment of compensation."); Payton v. Abbott Labs, 437 N.E.2d 171, 175 (Mass. 1982) ("The most common justification for denying recovery for emotional distress in

the *Restatement (Second) of Torts* did not recognize claims for stand-alone emotional harm.[9]

Over time, concerns about fairness and increasing societal acceptance of the seriousness of emotional harm led many courts to reject physical harm as a required component of a cognizable claim for emotional distress.[10] Still troubled by many of the same concerns, however,[11] courts limited recovery to *direct* victims of negligent conduct and adopted the "impact"[12] and later the "zone-of-danger"[13] rules to identify those plaintiffs to whom negligent defendants owed a duty of care.[14] Under these rules, in order to recover for emotional distress, the plaintiff had to be a bystander who either suffered physical impact or injury (however minor) leading to emotional harm or was within the zone of danger caused by the defendant's negligent act, the idea being that the plaintiff had to be in fear of his *own* safety in order to recover for emotional distress.[15]

Despite the fact that the impact and zone-of-danger rules increased the possibility of recovery for emotional injury, courts were still confronted with cases in which these rules were unworkable, namely, in cases brought by bystanders who witnessed the physical injury of another but were themselves unhurt and out of danger's way. The California Supreme Court recognized this limitation in the seminal case *Dillon v. Legg* and consequently ruled that, under limited circumstances, such bystanders could recover for

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negligence cases absent physical harm is that that rule is necessary to prevent fraud and vexatious lawsuits."). The *Payton* court also noted that self-deception on the part of emotionally vulnerable plaintiffs could lead to unjustified recovery in emotional-distress cases: "A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. If such a plaintiff's testimony is believed, and there is no requirement of objective corroboration of the emotional distress alleged, a defendant would be held liable unjustifiably." *Id.*

9. *See* RESTATEMENT (SECOND) OF TORTS § 436A (1965).

10. *See* Dennis G. Bassi, Note, *It's All Relative: A Graphical Reasoning Model for Liberalizing Recovery for Negligent Infliction of Emotional Distress Beyond the Immediate Family*, 30 VAL. U. L. REV. 913, 920–23 (1996).

11. *See* Davies, *supra* note 5, at 3; Keith J. Wenk, Comment, *Negligent Infliction of Emotional Distress: Liberalizing Recovery Beyond the Zone of Danger Rule*, 60 CHI.-KENT L. REV. 735, 737–39 (1984).

12. *See, e.g.*, Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688, 697 (E.D. Ark. 1959); McGee v. Vanover, 147 S.W. 742, 744–45 (Ky. 1912). The impact rule originated in England with *Victorian Rys. Comm'rs v. Coultas*, (1888) 13 App. Cas. 222 (P.C.) (appeal taken from Vict.). *See* Wenk, *supra* note 11, at 737 & n.10.

13. *See, e.g.*, City of Mobile v. Taylor, 938 So. 2d 407, 410 (Ala. Civ. App. 2005); Falzone v. Busch, 214 A.2d 12, 16–17 (N.J. 1965). The zone-of-danger rule also originated in England, this time with *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141 (1924). *See* Wenk, *supra* note 11, at 739.

14. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. a (Tentative Draft No. 5, 2007).

15. Wenk, *supra* note 11, at 735–36.

emotional harm absent actual or threatened physical impact.[16]

In *Dillon*, the plaintiff-mother witnessed her daughter's fatal injury when the daughter was struck by a vehicle driven by the negligent defendant.[17] The mother brought suit to recover for the emotional distress she experienced from seeing the accident.[18] The court acknowledged the incongruity that resulted "from the . . . requirement [under the zone-of-danger rule] that a plaintiff cannot recover for emotional trauma in witnessing the death of a child . . . unless she also feared for her own safety because she was actually within the zone of physical impact."[19] In recognition of this inconsistency, the court rejected the traditional reasons for denying recovery for stand-alone emotional harm[20] and applied the traditional negligence test of foreseeability for determining liability.[21] In analyzing whether emotional injury to the plaintiff-mother was reasonably foreseeable, the court established a three-factor test, considering (1) the plaintiff's proximity to the scene of the accident, (2) the extent to which the plaintiff perceived the accident contemporaneously with its occurrence, and (3) the closeness of the relationship between the plaintiff and the victim.[22] Acknowledging that "when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock,"[23] the court found that the mother could indeed state a claim for NIED.[24]

The *Dillon* rule has been widely accepted and is reflected in the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*: an "actor who negligently causes serious bodily injury to a third person is subject to liability for serious emotional disturbance thereby caused to a person who . . . perceives the event contemporaneously, and . . . is a close family member of the person suffering the bodily injury."[25] The *Restatement (Third)* reflects the

16. *See* Dillon v. Legg, 441 P.2d 912, 915–16, 921, 924–25 (Cal. 1968).

17. *Id.* at 914.

18. *Id.*

19. *Id.* at 915.

20. *See id.* at 917–19, 921–25. The court noted that the reluctance to permit claims for emotional distress "emanates from the twin fears that courts will be flooded with an onslaught of (1) fraudulent and (2) indefinable claims," and the court "point[ed] out why . . . neither fear [is] justified." *Id.* at 917.

21. *See id.* at 919–21.

22. *Id.* at 920.

23. *Id.* at 921 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 353 (3d ed. 1964)).

24. *Id*. at 921, 925.

25. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 (Tentative Draft No. 5, 2007). Section 47 of the *Restatement (Third)* consolidates and supersedes section 436A (addressing the negligent infliction of emotional distress) and sections 312, 313, and 436 (addressing the negligent infliction of bodily harm through the infliction of emotional harm) of the *Restatement (Second)*. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. a (Tentative Draft No. 5, 2007); *see also*

modern trend of adopting the *Dillon* rule and expanding recovery for NIED to bystanders who suffer serious emotional harm upon witnessing another's injury, rather than limiting recovery to those who suffer such emotional harm in conjunction with the threat of physical harm to themselves.[26]

II. THE *DILLON V. LEGG* LEGACY: IT'S ALL RELATIVE

Despite the fact that the *Dillon* rule (or some variation thereof) has been accepted in most jurisdictions,[27] there is little consensus about the factual circumstances that satisfy its three-factor test.[28] Perhaps the debate centers most on the third factor—the closeness of the relationship between the plaintiff and the victim.

In the years following the decision in *Dillon*, courts in California permitted emotional-distress claims from a variety of plaintiffs, some of whom were related to the victims, but some of whom were not.[29] In 1988, however, twenty years after *Dillon* was decided, the

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RESTATEMENT (SECOND) OF TORTS §§ 312–13, 436–36A (1965).

26. *See, e.g.*, Clohessy v. Bachelor, 675 A.2d 852, 860–62 (Conn. 1996); Gammon v. Osteopathic Hosp. of Me., Inc., 534 A.2d 1282, 1283–85 (Me. 1987); Dziokonski v. Babineau, 380 N.E.2d 1295, 1302–03 (Mass. 1978); Gates v. Richardson, 719 P.2d 193, 198, 200–01 (Wyo. 1986).

27. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 reporters' note cmt. a (Tentative Draft No. 5, 2007); *supra* notes 25–26 and accompanying text. Twenty-nine jurisdictions follow *Dillon* or a modification thereof. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 reporters' note cmt. a (Tentative Draft No. 5, 2007). Ten jurisdictions use the "zone-of-danger" test; four follow the "impact" rule; and the rest deny recovery altogether, have uncertain law, have yet to consider the issue, or use an entirely different approach to imposing liability. *Id.*

28. For the first factor (proximity to the accident), compare *Kelley v. Kokua Sales & Supply, Ltd.*, 532 P.2d 673, 676 (Haw. 1975), denying bystander recovery to a California father for his emotional distress and subsequent death upon learning of the deaths of his daughter and granddaughter, both of whom resided in Hawaii, with *Masaki v. General Motors Corp.*, 780 P.2d 566, 576 (Haw. 1989), permitting recovery for parents who, though not present at the accident, lived on the same island as the victim-son and "witnessed the consequences of the accident." For the second factor (contemporaneous perception), compare *Neff v. Lasso*, 555 A.2d 1304, 1313–14 (Pa. Super. Ct. 1989), holding that the plaintiff's aural perception of her spouse's fatal accident was sufficient to satisfy the contemporaneous-perception requirement, with *O'Cain v. Harvey Freeman & Sons, Inc.*, 603 So. 2d 824, 829–30 (Miss. 1991), holding that the plaintiff's aural perception of her roommate's sexual assault was insufficient to satisfy the contemporaneous-perception requirement. For the third factor (the relationship between the plaintiff and the victim), compare *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988), denying recovery for unmarried cohabitants, with *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994), granting recovery for unmarried cohabitants.

29. *See, e.g.*, Krouse v. Graham, 562 P.2d 1022, 1031 (Cal. 1977) (permitting an emotional-distress claim by victim's spouse); Kriventsov v. San Rafael Taxicabs, Inc., 229 Cal. Rptr. 768, 770 (Ct. App. 1986) (permitting an emotional-distress claim by victim's uncle); Ledger v. Tippitt, 210 Cal. Rptr. 814, 827–28 (Ct. App. 1985) (permitting an emotional-distress claim by victim's

California Supreme Court overruled many of those cases, concluding that the class of potential plaintiffs who can recover as bystanders for NIED in California is rather narrow. The court held in *Elden v. Sheldon* that the only relationships that satisfy the close-relationship requirement of the *Dillon* test are those between close blood relatives and spouses.[30] One year later, in *Thing v. La Chusa*, the court reiterated this holding, stating 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."[31] Many American jurisdictions have followed California's example by limiting the relationships that show a sufficiently close bond between the plaintiff and the victim to warrant recovery for the emotional distress resulting from witnessing the victim's accident.[32]

Among the class of plaintiffs whom this limitation has excluded, unmarried cohabitants[33] have been especially affected[34] given that, as the *Elden* court itself points out,

> it cannot be denied that in some cases . . . relationships [between unmarried cohabitants] offer as much affection, support and solace as is provided by immediate family members, and that the emotional trauma suffered as a result of injury to a person in such a relationship may be as devastating as that suffered by a member of the immediate family.[35]

Those courts that have limited the *Dillon* rule to exclude unmarried cohabitants have set forth several arguments for their restrictions. Justice Garibaldi of the New Jersey Supreme Court, for example, argued that excluding unmarried cohabitants from the realm of potential plaintiffs conforms to societal expectations regarding the preferential treatment of spouses and is less likely to lead to confusion, given that spouses receive preferential treatment in many other contexts (such as intestacy, alimony, and loss of

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fiancée); Mobaldi v. Bd. of Regents, 127 Cal. Rptr. 720, 726–27 (Ct. App. 1976) (permitting an emotional-distress claim by victim's foster mother).

30. *See Elden*, 758 P.2d at 584–88.

31. Thing v. La Chusa, 771 P.2d 814, 829 n. 10 (Cal. 1989).

32. *See, e.g.*, Milberger v. KBHL, LLC, 486 F. Supp. 2d 1156, 1166–67 (D. Haw. 2007); Biercevicz v. Liberty Mut. Ins. Co., 865 A.2d 1267, 1272 (Conn. Super. Ct. 2004); Smith v. Toney, 862 N.E.2d 656, 660–62 (Ind. 2007); Grotts v. Zahner, 989 P.2d 415, 416 (Nev. 1999).

33. This Comment, like *Smith v. Toney*, uses the term "unmarried cohabitants" to include both unmarried cohabitants and engaged couples living separately. *See Toney*, 862 N.E.2d at 660 n.1.

34. Courts have seen a plethora of NIED and other claims (such as loss of consortium) from unmarried cohabitants. *See, e.g.*, *Milberger*, 486 F. Supp. 2d 1156; *Elden*, 758 P.2d 582; *Ledger*, 210 Cal. Rptr. 814; *Toney*, 862 N.E.2d 656; *Zahner*, 989 P.2d 415; Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994); Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003).

35. *Elden*, 758 P.2d at 588.

consortium).[36]

In *Elden v. Sheldon*, the California Supreme Court gave three reasons for limiting recovery: (1) the state's strong interest in marriage;[37] (2) the fact that acceptance of claims of NIED by unrelated individuals would impose a "difficult burden on the courts," which would find it necessary to intrude into the private lives of the plaintiff and the victim in order to determine whether the relationship was "stable and significant" and characterized by "sexual fidelity;"[38] and (3) the need to "limit the number of persons to whom a negligent defendant owes a duty of care."[39] The *Elden* court's rationales have been reiterated by other courts that have drawn a bright-line rule for recovery.[40]

In addition to these justifications, many courts admittedly fear an inundation of litigation if they permit those beyond the victim's immediate family to sue for NIED,[41] and they fret over the possibility of fraudulent claims.[42] These courts recognize that establishing a bright-line rule is often arbitrary, but they cite public policy as a mitigating factor: "[A] certain degree of arbitrariness is necessary in setting the outer limits of tort liability in general and in setting the outer limits of liability in the field of emotional distress in particular."[43]

36. *Dunphy*, 642 A.2d at 382–83 (Garibaldi, J., dissenting).

37. *Elden*, 758 P.2d at 586 ("[T]he 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."); *id.* at 587 ("The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.'" (quoting Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983))).

38. *Id.* at 587. The "stable and significant" standard had previously been set forth in *Butcher v. Superior Court*, 188 Cal. Rptr. 503, 512 (Ct. App. 1983).

39. *Elden*, 758 P.2d at 588 ("The need to draw a bright line in this area of the law is essential . . . .").

40. *See, e.g.*, Milberger v. KBHL, LLC, 486 F. Supp. 2d 1156, 1166–67 (D. Haw. 2007); Smith v. Toney, 862 N.E.2d 656, 660–62 (Ind. 2007).

41. *See, e.g.*, *Milberger*, 486 F. Supp. 2d at 1167; *Toney*, 862 N.E.2d at 662.

42. In her dissent in *Dunphy*, for example, Justice Garibaldi argues that bystander recovery should not be extended to unmarried cohabitants because if the victim did not survive the accident, the plaintiff would have a significant advantage over the defendant in proving the quality and strength of the relationship, given that only the plaintiff (and not the victim) would be able to testify to the quality of the relationship. Dunphy v. Gregor, 642 A.2d 372, 383 (N.J. 1994) (Garibaldi, J., dissenting). Others have argued that such fraud is equally likely in marital relationships and that juries are well suited for the task of detecting and dismissing it. *See infra* notes 53–55 and accompanying text.

43. *Dunphy*, 642 A.2d at 381 (Garibaldi, J., dissenting); *see also Toney*, 862 N.E.2d at 662.

III. DEBUNKING THE RATIONALES FOR A BRIGHT-LINE RULE: AN ARGUMENT FOR ALLOWING RECOVERY BY UNMARRIED COHABITANTS

In contrast to *Elden* and its progeny, many courts and commentators recognize that the rigid requirement of a marital or consanguineous relationship does not serve the interests that the doctrine of bystander recovery attempts to protect. In the landmark case *Dunphy v. Gregor*, the New Jersey Supreme Court adopted a foreseeability test, establishing that the legal status of the relationship between the plaintiff and the victim is not the conclusive determination of whether the victim and the plaintiff share a sufficiently deep emotional bond to ensure that the plaintiff's distress is worthy of compensation.[44] The court noted that while spousal and familial relationships are often indicative of such a relationship, "it is the presence of . . . emotional bonds that provides the basis for recovery, and . . . the legal status of the relationship should not be used as a proxy."[45] The court therefore recognized that close, intimate relationships may exist outside of the legally recognized family and set forth several factors for determining their presence:

> the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, . . . "[membership in] the same household, [the parties'] emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements."[46]

Applying these factors, the court concluded that the plaintiff, who had witnessed her fiancé's fatal injury and subsequent death, should be permitted to state a claim for NIED despite the lack of a legally recognized familial relationship. The court concluded that unmarried cohabitants may have "[a]n intimate familial relationship that is stable, enduring, substantial, . . . mutually supportive [and] cemented by strong emotional bonds," such that when "one witnesses, in close and direct proximity, an accident

44. *See Dunphy*, 642 A.2d at 376–77, 380. It is worth noting that American courts are not the only ones to address the issue of the relationships necessary to meet the elements of a claim for bystander recovery. British courts have likewise considered the issue and have concluded quite convincingly that the special-relationship factor should not be limited to marital and consanguineous relationships. *See, e.g.*, Alcock v. Chief Constable of S. Yorkshire Police, [1992] 1 A.C. 310, 397–98, 403–04, 413–16, 422 (H.L. 1991) (appeal taken from Eng.).

45. Alisha M. Carlile, Note, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391, 405 (2005); *see Dunphy*, 642 A.2d at 377–78, 380.

46. *Dunphy*, 642 A.2d at 378 (quoting Dunphy v. Gregor, 617 A.2d 1248, 1255 (N.J. Super. Ct. App. Div. 1992)).

resulting in the wrongful death or grievous bodily injury of [the other], the infliction of that severe emotional injury may be the basis of recovery against the wrongdoer."[47]

Courts in other jurisdictions have come to similar conclusions, allowing engaged couples[48] and unmarried cohabitants[49] to state claims for NIED. In *Graves v. Estabrook*, for example, the New Hampshire Supreme Court permitted a claim for NIED by a woman who witnessed her fiancé's fatal motorcycle accident; the court declined to follow the *Elden* rule, instead adopting, as did the *Dunphy* court, a foreseeability test.[50]

These courts easily dismiss concerns about fraud and the flood of litigation that might ensue from expanding bystander recovery.[51] Moreover, they rightly reject the policy reasons given in *Elden* for using a bright-line rule to limit recovery for NIED to those in legally recognized families. For example, the *Graves* court took issue with *Elden*'s second rationale for denying recovery to unmarried cohabitants—"the potential invasion into an unmarried plaintiff's privacy required to prove a close relationship."[52] The *Graves* court argued not only that juries assess the "quality of interpersonal relationships" with competence and regularity,[53] but also that a "searching inquiry [into the personal lives of the plaintiff and the victim] is the plaintiff's choice and should not be the basis for limiting liability."[54] Similarly, the *Dunphy* court also noted that *Elden*'s second rationale lacks merit, pointing out that an alleged tortfeasor defending a claim of NIED has a right to submit the relationship of married parties to the same sort of inquiries:

> Irrespective of the label placed upon a particular relationship, it is a jury question whether the inter-personal bonds upon which the cause of action is based actually exist. A defendant should always have the right, even in the case of a parent and child or a husband and wife, to test the operative facts upon which the claim is based irrespective of the *de jure* relationship.[55]

Courts have also rejected *Elden*'s third argument—that a

47. *Id.* at 380.

48. *See, e.g.*, Yovino v. Big Bubba's BBQ, LLC, 896 A.2d 161, 167 (Conn. Super. Ct. 2006); Graves v. Estabrook, 818 A.2d 1255, 1261–62 (N.H. 2003).

49. *See, e.g.*, Richmond v. Shatford, No. CA 941249, 1995 WL 1146885, at *3–4 (Mass. Super. Ct. Aug. 8, 1995); *Graves*, 818 A.2d at 1261–62.

50. *See Graves*, 818 A.2d at 1258–62. For a heartwrenching account of the emotional strife suffered by the plaintiff-fiancée in *Graves*, see Roy A. Duddy, *A Fiancée's Emotional Ordeal*, TRIAL, Feb. 2004, at 36.

51. *See, e.g.*, *Dunphy*, 642 A.2d at 378–80.

52. *Graves*, 818 A.2d at 1259.

53. *Id.* at 1260 (quoting *Dunphy*, 642 A.2d at 378).

54. *Id.*

55. *Dunphy*, 642 A.2d at 378 (quoting Dunphy v. Gregor, 617 A.2d 1248, 1254 (N.J. Super. Ct. App. Div. 1992)).

bright-line rule is necessary "to limit the number of persons to whom a negligent defendant owes a duty of care."[56] The *Graves* court, for instance, noted that rejecting a bright-line rule "does not place an intolerable burden upon society or [an] unfair burden upon a negligent defendant. Rather, it allows recovery for an eminently foreseeable class of plaintiffs."[57] In fact, a bright-line rule such as that adopted in *Elden* is not only underinclusive ("arbitrarily den[ying] court access to [unmarried and unrelated individuals] with valid claims that they could prove if permitted to do so"[58]) but overinclusive as well ("permit[ting] recovery when the suffering accompanies a legal or biological link between bystander and victim, regardless of whether the relationship between the two is estranged, alienated, or in some other way removed"[59]). Thus, assuming that there is a need, as the *Elden* court argued, to limit "the unreasonable extension of the scope of liability of a negligent actor"[60] and therefore the number of people to whom the defendant owes a duty, the best way to achieve this goal is not to draw a line that per se excludes unmarried cohabitants with valid claims and presumptively includes spouses whose emotional harm is minimal. Instead, courts should require that each individual claiming emotional distress demonstrate that his relationship with the victim is sufficiently close and meaningful to warrant recovery. This requirement would prevent claims not only by "every bystander shocked at the accident, and every distant relative of the person

56. Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988). At least one court has argued that, although the *Elden* court may well have seen the need to reduce the flood of litigation in which it found itself submerged, restricting the relationships that qualified a plaintiff to bring a claim for NIED was a misguided attempt to meet that need. *See Dunphy*, 642 A.2d at 375. In *Dunphy*, the court argued that the reason the California courts had seen a huge increase in the number of cases after *Dillon* rejected the zone-of-danger rule was the California courts' liberal application of the first two *Dillon* factors (the plaintiff's proximity to the scene of the accident and the extent to which the plaintiff witnessed the accident contemporaneously with its occurrence), not that plaintiffs were bringing frivolous lawsuits, claiming emotional distress where none could have existed. *See id.* The *Dunphy* court explained:

> After *Dillon*, California courts had expanded nearly all the boundaries of liability set out in the several prongs of the *Dillon* analysis. See, *e.g.*, *Ochoa v. Superior Court*, [703 P.2d 1 (Cal. 1985)] (permitting recovery even though injury-producing event was not sudden or accidental); *Molien v. Kaiser Foundation Hospitals*, [616 P.2d 813 (Cal. 1980)] (eliminating "sudden occurrence element" for "direct victim" plaintiffs); *Krouse v. Graham*, [562 P.2d 1022 (Cal. 1977)] (ruling that plaintiff need not visually perceive third-party injury to recover); *Nazaroff v. Superior Court*, [145 Cal. Rptr. 657 (Ct. App. 1978)] (broadening concept of contemporaneous observation).

Id.

57. *Graves*, 818 A.2d at 1261.

58. Bassi, *supra* note 10, at 917.

59. *Id.*

60. *Elden*, 758 P.2d at 588.

injured, as well as his friends,"[61] but also by a married couple who has known each other for only a few weeks.[62] Moreover, a fact-intensive inquiry would eliminate the arbitrariness for which the doctrine of bystander recovery is now known.[63]

Though the *Elden* court's second and third rationales for limiting bystander recovery to formally married spouses have been soundly criticized by courts and commentators, it is the court's first rationale—the state's "strong interest in the marriage relationship"[64]—that has been the most vigorously attacked and that comes under the most criticism in this Comment. The *Graves* court, for example, noted that the "court in *Elden* apparently relied upon the dubious assumption that the possibility of recovery in tort litigation is an incentive to marry," and noted the implausibility of the notion that an unmarried couple otherwise disinclined to marry would choose to do so simply to ensure recovery in the event that, in the future, either witnessed a tortiously inflicted, serious personal injury to the other.[65] Indeed, the dissent in *Elden* even recognized that such a justification is flawed, particularly for same-sex cohabitants for whom marriage is foreclosed: "Clearly the state's interest in marriage is not advanced by precluding recovery to couples who could not in any case choose marriage."[66]

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61. *Id.* (quoting PROSSER, *supra* note 23, § 55, at 353–54). Whether witnessing a ghastly injury to an unknown victim could ever constitute a cognizable claim for NIED is beyond the scope of this Comment, but consider the following incident:

> In 1995, in New York City, as a man held the door of an elevator for an exiting woman on the second floor, a second woman caught her foot. As the man moved to free her, the elevator suddenly lurched upward with its doors still open. The movement decapitated the man, ejecting his body onto the hallway floor while the elevator continued up to the ninth floor with other passengers and the decapitated man's head—with his Walkman earphones still attached.

MARC A. FRANKLIN, ROBERT L. RABIN, & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES 293 (8th ed. 2006) (citing the facts of Pizarro v. 421 Port Assocs., 739 N.Y.S.2d 152 (App. Div. 2002), in which the court held that a fellow passenger had no claim because she was not closely related to the decapitated victim).

62. *See Graves*, 818 A.2d at 1261. *See also* State *ex rel.* Dep't of Transp. v. Hill, 963 P.2d 480, 483 (Nev. 1998) (plurality opinion) ("[A] rule that would deny recovery to a plaintiff who 'merely because of happenstance' witnesses the death or injury to his fiancée in an accident which occurs on the way to the wedding ceremony, yet permits recovery if an accident occurs on the couple's way to the wedding reception, is fallacious.").

63. *See, e.g.*, Smith v. Toney, 862 N.E.2d 656, 662 (Ind. 2007) ("[The plaintiff] is correct in contending that limiting 'bystander' recovery to spouses is somewhat arbitrary. But 'a certain degree of arbitrariness is necessary in setting the outer limits of tort liability in general and in setting the outer limits of liability in the field of emotional distress in particular.'" (quoting Dunphy v. Gregor, 642 A.2d 372, 381 (N.J. 1994) (Garibaldi, J., dissenting))).

64. *Elden*, 758 P.2d at 586.

65. *Graves*, 818 A.2d at 1260.

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

Not only is this argument flawed because people ordinarily do not marry in order to be eligible for recovery in tort, but it is also contradictory, given that the rule it upholds itself undercuts the sanctity of marriage. Implying that all that a couple need have done to permit one partner to recover for the emotional distress experienced upon witnessing the injury or death of the other is marry does no more than announce to the world that marriage is a mere formality and that one may enter into such a state lightly. Perhaps very few couples enter marriage with such a notion in mind, but the fact remains that couching recovery for emotional distress in terms of marriage undermines the very institution that *Elden* and similar cases claim to be protecting.

In support of its argument that the state's interest in marriage would be furthered by a rule excluding unmarried cohabitants from bystander recovery, the court in *Elden* stated that "[f]ormally married couples . . . bear important responsibilities toward one another which are not shared by those who cohabit without marriage," and that it could not see "a convincing reason why cohabiting unmarried couples, who do not bear such legal obligations toward one another, should be permitted to recover for injuries to their partners to the same extent as those who undertake these responsibilities."[67] This "responsibilities" argument is incongruous. The court assumed not only that unmarried couples do not bear responsibilities toward one another (ostensibly because, given the lack of a legally recognized tie, they may desert one another more readily) but also that recovering in tort for serious and perhaps permanent emotional harm is a benefit to which they should not be entitled. But tort recovery is not a benefit; it is compensation for the harm caused by the shock of directly observing a loved one's serious injury,[68] and an individual who is harmed in such a way due to another's negligence is entitled to recovery, regardless of the responsibilities that he bears to others. The rationale for allowing claims for NIED lies not in the responsibilities that the victim and the plaintiff bear toward one another, but in the emotional attachment between them that accounts for the harm.[69]

In addition to citing married couples' responsibilities toward one another, the court in *Elden* also invoked married couples' rights as a rationale for denying recovery to unmarried cohabitants. In making

67. *Id.* at 587 (majority opinion).

68. *See Toney*, 862 N.E.2d at 663.

69. Moreover, permitting recovery for NIED to unmarried cohabitants may well discourage the shirking of responsibility that *Elden* forecasted. Professor Grace Blumberg argues that "[i]t is socially prudent to encourage fiancés and cohabitants to remain with the injured victims of tortfeasors. Denying them loss of consortium recovery on the ground that they were not legally bound to the injured person would seem to sanction and encourage abandonment of the injured." Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1139 n.80 (1981).

this argument, the *Elden* court stated that "[f]ormally married couples are granted significant rights [for example, the property rights resulting from the marriage relationship] . . . which are not shared by those who cohabit without marriage," and that, again, it could not see "a convincing reason why cohabiting unmarried couples, who do not bear such legal obligations toward one another, should be permitted to recover for injuries to their partners" to the same extent as those who formally agree to be bound by such rights.[70] In so stating, the court contended that because married couples, albeit impliedly, agree, by entering into the marriage relationship, to enjoy such rights as intestate succession and tenancy by the entirety, they should also enjoy the right to recover for the emotional distress that one may experience upon witnessing the death or serious injury of the other, whereas unmarried couples, who are not granted such property rights, should likewise not be granted the right to bystander recovery. This myopic argument is no longer tenable under California law, given the groundbreaking steps that California has taken to recognize the validity and importance of relationships between unmarried cohabitants in other contexts.[71] Indeed, the citizens of California, as represented by their elected legislators, have disagreed with the California Supreme Court—the California legislature has overruled *Elden*: "Domestic partners shall be entitled to recover damages for negligent infliction of emotional distress to the same extent that spouses are entitled to do so under California law."[72]

Perhaps the *Elden* court could have made a better argument, as did Justice Garibaldi of the New Jersey Supreme Court,[73] by contending that bystander recovery for unmarried cohabitants ought to be precluded simply in order to be consistent with other areas of the law (rather than contending that the right to intestate succession necessarily implies a right to bystander recovery). For instance, as the *Elden* court pointed out, married persons often receive preferential treatment in property law.[74] Unfortunately for the court, however, this argument would also have been fallacious. The reasons for granting spouses special property rights do not align with the reasons for granting spouses the right to recover for NIED. In large part, the law grants special privileges to married people not

70. *Elden*, 758 P.2d at 587.

71. *See* CAL. FAM. CODE § 297.5 (Deering 2006 & Supp. 2009) (providing for registered domestic partnerships in California). Other states have enacted similar laws. *See, e.g.*, N.H. REV. STAT. ANN. § 457-A:1 (LexisNexis Supp. 2008) (recognizing civil unions); VT. STAT. ANN. tit. 15, § 1202 (2002) (explaining the requirements for establishing a civil union).

72. CAL. CIV. CODE § 1714.01 (Deering 2005). However, "domestic partners" is defined such that, if the partners are of opposite sexes, one of the partners must be at least sixty-two years old. There is no similar requirement for homosexual couples. *See* CAL. FAM. CODE § 297(b) (Deering 2006).

73. *See supra* note 36 and accompanying text.

74. *See Elden*, 758 P.2d at 587.

because marriage is preferable to unmarried cohabitation,[75] but because the law presumes that when people marry, they generally wish to arrange their property in a given way—and that if they wish otherwise, they can arrange their affairs accordingly. Thus if a husband dies without making a will devising his property to his wife, the law presumes that he would have done so if he had thought of it and therefore allows her to inherit a significant percentage, if not all, of his property by intestate succession. Moreover, though unmarried cohabitants are not afforded this right, they can—and often do—contract for the same outcome. Though it may well be that marriage provides "an institutional basis for defining the fundamental relational rights . . . of persons in organized society,"[76] the law does not prevent unmarried cohabitants from arranging for the same privileges in regard to property that married persons enjoy.

This rationale does not translate into tort recovery. The law does not allow bystander recovery because it infers that if a husband dies in front of his wife, he would want her to recover for the resulting emotional distress. Recovery for emotional distress is permitted as compensation for the shock and emotional harm that one experiences upon witnessing the grievous bodily injury or wrongful death of a loved one;[77] it is not permitted because it is what the couple would have wanted if they could have arranged for it. In other words, recovering for the emotional distress that follows witnessing a loved one's accident or death is different from other rules affecting unmarried cohabitants. Such accidents are just that—accidents—and they do not allow for the planning that is possible in other areas of the law in which unmarried cohabitants do not receive the same treatment as their married counterparts. If a cohabitant's partner dies, most intestacy laws reject the cohabitant's claim,[78] and this policy is understandable. If the cohabitants were in the sort of committed relationship worthy of inheritance rights, they had, by necessity, a sufficient amount of time to plan for the desired property distribution. Indeed, California and Vermont have policies that reflect such a view—they allow for unmarried cohabitants to take by intestacy if the parties had registered as domestic partners.[79]

In the realm of bystander recovery, there is no time for planning

75. The *Elden* court in fact stated that its bright-line rule was not based on old-fashioned notions of morality, implying that its reliance on the law's preferential treatment of married persons in the area of property rights was likewise not based on archaic ideals. *See id.*

76. *Id.* (quoting Laws v. Griep, 332 N.W. 2d 339, 341 (Iowa 1983)).

77. *See* Smith v. Toney, 862 N.E.2d 656, 663 (Ind. 2007).

78. *See* EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 33 (7th ed. 2006).

79. CAL. FAM. CODE § 297.5(c) (Deering 2006); VT. STAT. ANN. tit. 15, § 1204(e)(1) (2002).

one's affairs.[80] The policy governing bystander recovery should not be modeled on a policy with planning as its rationale.[81] Instead, it should reflect the reason for which it was first recognized—that emotional harm resulting from the shock of witnessing a loved one's injury or death is a real, cognizable injury deserving of recovery. The most effective way to do this is to allow unmarried cohabitants the opportunity to meet the burden of showing that their relationship was so deep and lasting that the harm they suffered was serious and worthy of recovery. The legal status of the parties should be a factor in the consideration (creating, for married persons, a rebuttable presumption of closeness)—not the test.

CONCLUSION

In an attempt to limit liability for emotional harm, most jurisdictions have found themselves with rules for bystander recovery that are at best inconsistent and at worst prejudicial toward those who either have not taken or cannot take the necessary steps to establish the kind of legal relationship necessary for recovery. Emotional ties, however, know no legal bounds, and if courts wish, as they claim, to allow recovery for the negligent infliction of emotional distress because emotional distress is, of itself, a cognizable harm, they must reach beyond the traditional symbols of emotional bonds—marriage and family—and permit those who claim emotional harm a chance to prove their distress before a jury of their peers. Without such an approach, courts limit recovery for cognizable injury to those holding a marriage license, unjustifiably preventing deserved recovery by those who have not or cannot enter into that most sacred union.

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80. Indeed, some courts have limited recovery to accidents that are sudden. *See, e.g.*, Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1229–30 (D. Mass. 1986).

81. In recognition of this fact, California allows tort recovery in areas other than emotional distress by registered domestic partners, but not unregistered partners. *See* CAL. FAM. CODE § 297.5(a)–(c) (Deering 2006); *see also* Holguin v. Flores, 18 Cal. Rptr. 3d 749, 753–55 (Ct. App. 2004) (refusing a wrongful-death claim by an unmarried male cohabitant on the death of his female partner, and thereby limiting the then-existing "domestic partners" language in CAL. CIV. PROC. CODE § 377.60 (Deering Supp. 2002) (which established who may file wrongful-death claims) to *registered* domestic partners). (The statute at issue in *Holguin* was later amended to incorporate the holding in *Holguin*. *See* CAL. CIV. PROC. CODE § 377.60(f) (Deering Supp. 2009).) Vermont also allows recovery by registered domestic partners. VT. STAT. ANN. tit. 15, § 1204(e)(2) (2002).

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