California Western Law Review

Volume 26 | Number 1 Article 7

1989

# Elden v. Sheldon: Negligent Infliction of Emotional Distress and Loss of Consortium Denied to Unmarried Cohabitants

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# NOTES

## *Elden v. Sheldon*: Negligent Infliction of Emotional Distress and Loss of Consortium Denied to Unmarried Cohabitants

In *Elden v. Sheldon*,[1] the California Supreme Court resolved an issue that had divided the state's appellate courts, holding that an unmarried cohabitant cannot claim and recover damages for loss of consortium and negligent infliction of emotional distress. The decision of the court, while consistent with a majority of recent holdings advocating limitations on liability in this area, is a controversial one. Two recent California appellate decisions had allowed recovery to unmarried couples,[2] and seemed to indicate a growing acceptance by the courts of important relational interests outside of traditional marital relationships and blood kinship. Because the *Elden* decision constitutes a retreat from this position, and because the issues involved are likely to continue to be contested, the case is an example of common law at the crossroads, between the pressure to adapt to new social needs and the desire to preserve consistently applicable rules.

Part I of this Note presents the case and summarizes the majority and dissenting opinions. Part II considers prior law on negligent infliction of emotional distress and loss of consortium, and argues that the development of the law in these areas requires a reevaluation of the standards for recovery. Part III presents relevant policy concerns and reviews the assumptions of the majority opinion in terms of its demographic and sociological implications. Finally, the Note concludes that the majority's fear of overextending liability is misplaced, and that allowing the causes of action to unmarried cohabitants will serve, rather than impair, the

1. 46 Cal. 3d 267, 758 P.2d 982, 250 Cal. Rptr. 254 (1988).

2. Butcher v. Superior Court, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (Cal. Ct. App. 4th Dist. 1983): for loss of consortium; Ledger v. Tippitt, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (Cal. Ct. App. 2d Dist. 1985): for negligent infliction of emotional distress. Two cases that were on review by the Supreme Court, both dealing with loss of consortium for unmarried cohabitants, were returned to the appellate level for disposition consistent with Elden; *see* Lewis v. Hughes Helicopter, Inc., 193 Cal. App. 3d 569, 220 Cal. Rptr. 615 (Cal. Ct. App. 3d Dist. 1985) and Matuz v. Gerardin Corp., 204 Cal. App. 3d 128, 228 Cal. Rptr. 442 (Cal. Ct. App. 2d Dist. 1986).

goal of dealing with social realities in a just and equitable fashion.

## I. THE CASE

The plaintiff, Richard Elden, was cohabiting with Linda Eberling when they were involved in an automobile collision allegedly caused by defendant Robert Sheldon's negligence. Elden, a passenger in Eberling's car, was seriously injured; Eberling was thrown from the automobile and died a few hours later.[3] Elden sued Sheldon and the owner of the car Sheldon was driving, seeking damages for his own injuries, for negligent infliction of emotional distress as a result of witnessing the injury to his "de facto spouse," and for loss of consortium.[4] The defendants demurred to the last two causes of action on the grounds that Elden and Eberling were not legally married at the time of the accident. The trial court sustained the demurrer without leave to amend.[5] The Second District Court of Appeal upheld the judgment, finding that any decision to extend legal rights previously held only by married persons to unmarried cohabitants is best left to the legislature.[6] It called marriage "that fine bright line by which the strength of a relationship may be tested" and defined marriage as the only dependable means by which loss of consortium can be determined.[7] Similarly, the appellate court rejected the cause of action for negligent infliction of emotional distress on the grounds that a failure to clearly limit recovery to "close" relationships in the sense of legally cognizable ones would result in an indefinite extension of liability.[8] The California Supreme Court granted review of the case on April 25, 1985, and decided the case on August 18, 1988.

### *A. The Majority Opinion*

Justice Mosk, writing for the majority, first examined the cause of action for negligent infliction of emotional distress. The court relied on the landmark decision of *Dillon v. Legg*,[9] the case in which the California Supreme Court abandoned the earlier impact and zone of danger requirements. That decision, Justice Mosk noted, controlled here because the parties to the action had

3. *Elden*, 46 Cal. 3d at 269, 758 P.2d at 582, 250 Cal. Rptr. at 255.
4. *Id.* at 269, 758 P.2d at 583, 250 Cal. Rptr. at 255.
5. *Id.*
6. Elden v. Sheldon, 164 Cal. App. 3d 788, 791, 210 Cal. Rptr. 756 (Cal. Ct. App. 2d Dist. 1985).
7. *Id.* at 791, 210 Cal. Rptr. at 758.
8. *Id.* at 793, 210 Cal. Rptr. at 760.
9. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

framed the issue in terms of whether the plaintiff could recover under the guidelines contained in *Dillon*, which were designed to determine whether liability was reasonably foreseeable and to control a potentially limitless expansion of claims.[10] The *Dillon* requirements limit recovery to plaintiffs who: (1) are located near the scene of the accident, (2) experience emotional shock as the result of a sensory and contemporaneous observance of the accident, and (3) are closely related to the victim.[11]

The court noted that the *Dillon* guidelines have been applied flexibly with regard to physical proximity to the scene of the injury-causing event and the particular kind of sensory observance of the accident that is required.[12] However, subsequent cases have interpreted the "close relationship" guideline more strictly.[13] While courts have extended recovery for emotional distress to a spouse,[14] sibling,[15] or grandchild[16] of the victim, friends or more distant relatives have been denied.[17] The court disapproved the later extensions of recovery to a foster mother whose close relationship with the victim child was known to personnel at the defendant hospital[18] and an unmarried cohabitant who was twice frustrated in attempts to marry the decedent, had borne his child, and was economically dependent on him.[19]

The plaintiff argued that his emotional distress was foreseeable under the *Dillon* tests based on the marked increase in the number of unmarried cohabitants in recent years; therefore, he

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10. *Elden*, 46 Cal. 3d at 270, 758 P.2d at 583, 250 Cal. Rptr. at 255.

11. *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

12. *Elden*, 46 Cal. 3d at 270, 758 P.2d at 583, 250 Cal. Rptr. at 255; *see* particularly Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978), and Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969). In *Archibald*, the mother of a boy injured in an explosion stated a cause of action under Dillon; she did not see the accident occur, but arrived on the scene within moments. In *Nazaroff*, a mother heard a neighbor shout "It's Danny" from a swimming pool area and arrived as her child, who had drowned, was being pulled from the pool. The court determined that she could state the cause of action because the shout may have permitted her to mentally "reconstruct" the scene (giving her a "sensory and contemporaneous" experience of the event under *Dillon*). *But see* Frediani v. Haines, 197 Cal. App. 3d 523, 242 Cal. Rptr. 856 (1987); Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989), discussed *infra* at note 52.

13. *Id.* at 271, 758 P.2d at 584, 250 Cal. Rptr. at 256.

14. Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

15. Walker v. Clark Equip. Co., 320 N.W.2d 561 (Iowa 1982).

16. Genzer v. City of Mission, 666 S.W.2d 116 (Tex. Crim. App. 1983).

17. Trapp v. Schuyler Constr., 149 Cal. App. 3d 1140, 197 Cal. Rptr. 411 (1983): recovery denied to first cousins with relationship alleged to be analogous to that of siblings; Kately v. Wilkinson, 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983): recovery denied to plaintiff who was "best friends" with the victim and treated as a "filial" member of the plaintiff's family.

18. Mobaldi v. Regents of the Univ. of California, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

19. *Ledger*, 164 Cal. App. 3d 625, 210 Cal. Rptr. 815.

claimed, it was foreseeable that two persons in the same vehicle may be unmarried cohabitants with a relationship equivalent to that of a legally married couple.[20] The court accepted the factual premise of the plaintiff's argument, but concluded that an unmarried cohabitant's recovery was not acceptable.[21] It noted that *Dillon* recognized that policy considerations can bar a cause of action, even though the risk of harm was foreseeable, because social policy requires a limitation on the consequences of a negligent act.[22] The court then set out three policy reasons to justify its rejection of the plaintiff's claim.

First, the court emphasized the state's "strong interest in the marriage relationship."[23] It reasoned that spouses do and should receive special consideration from the state because of the solemn and binding nature of marriage as a civil contract, and because of the socially productive and individually fulfilling character of the marital relationship.[24] To the court, this policy was not based on anachronistic notions of morality. Rather, it rested upon the need for an institutional basis to define the fundamental rights and responsibilities in an organized society.[25] Additionally, formally married couples possess statutory responsibilities (in terms of property rights and the duty of support, for example) that unmarried couples have not undertaken.[26] Therefore, granting unmarried cohabitants the same rights and protections as married couples would impede the state's interest in promoting and protecting marriage.[27]

Second, the court determined that the allowance of a cause of action in these circumstances would impose a heavy burden on the courts.[28] If the standards used in appellate decisions that allowed the cause of action for unmarried cohabitants were used, they would invite problems of proof and inconsistent results.[29] These standards would also require a "massive intrusion" by the court into the private life of the partners, and would not provide a suffi-

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20. *Elden*, 46 Cal. 3d at 273, 758 P.2d at 585, 250 Cal. Rptr. at 257.
21. *Id.* at 273, 758 P.2d at 585, 250 Cal. Rptr. at 258.
22. *Id.* at 274, 758 P.2d at 585, 250 Cal. Rptr. at 258.
23. *Id.*
24. *Id.* at 275, 758 P.2d at 586, 250 Cal. Rptr. at 258-59, quoting Nieto v. City of Los Angeles, 138 Cal. App. 3d 464, 470-71, 188 Cal. Rptr. 31 (1982): case holding that the wrongful death statute does not unfairly discriminate against unmarried partners.
25. *Id.* at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 276, 758 P.2d at 587, 250 Cal. Rptr. at 259; e.g. Butcher v. Superior Court, *supra* note 2: whether the relationship was "stable and significant" as seen in evidence of its duration, whether the parties had a contract, etc.; *Mobaldi*, *supra note 18*: whether the emotional attachments of a family relationship existed between the parties.

ciently definite and predictable test to produce consistent results.[30]

Third, the court looked to the need to limit the number of persons to whom a negligent defendant owes a duty of care.[31] It declined to follow the rationale of cases allowing recovery to bystanders who had the functional and emotional equivalent of a nuclear family relationship with the injured person, stating that the need for a bright line in this area of the law was essential.[32] The court simply could not "draw a principled distinction between an unmarried cohabitant who claims to have a de facto relationship with his partner and de facto siblings, parents, grandparents or children" and noted that the extension of liability and possibility of multiplication of actions and damages would place an intolerable burden on society.[33]

The court then discussed the cause of action for loss of consortium, and similarly declined to extend it to unmarried cohabitants. It gave as reasons for its decision the intangible nature of the loss, the difficulty of measuring damages, and the possibility of an unreasonable increase in the number of persons who would be entitled to sue; therefore, the cause of action must be narrowly restricted.[34] The only decision in the state that permitted the right to recover for loss of consortium to unmarried couples, *Butcher v. Superior Court*[35] (provided that the couple's relationship was both "stable and significant" as demonstrated by objective evidence), had not been followed in subsequent decisions.[36] The court referred to the three policy reasons it discussed in terms of negligent infliction of emotional distress, finding them equally relevant to a denial of the cause of action for loss of consortium.[37] Lastly, the court asserted that its determination was not based on a value judgment concerning the morality of unmarried cohabitation relationships, pointing to its decision in *Marvin v. Marvin*[38] as evidence of its recognition of the growing social acceptance of such living arrangements.[39]

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30. *Id.* at 276, 758 P.2d at 587, 250 Cal. Rptr. at 260.

31. *Id.*

32. *Id.* at 277, 758 P.2d at 587, 250 Cal. Rptr. at 260; *Mobaldi, supra* at note 18; Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974), allowing child to sue where he witnessed a car striking his stepfather's mother, who had a close relationship with him.

33. *Id.*

34. *Id.* at 278, 758 P.2d at 589, 250 Cal. Rptr. at 261.

35. 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (4th Dist. 1982)

36. *Elden*, at 278, 758 P.2d at 589, 250 Cal. Rptr. at 262.

37. *Id.* at 278, 758 P.2d at 589, 250 Cal. Rptr. at 262.

38. *Id.*; Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976): case allowing unmarried cohabitants to enforce express or implied contracts relating to a division of property or support.

39. *Elden*, at 279, 758 P.2d at 590, 250 Cal. Rptr. at 262.

### B. The Dissenting Opinion

Justice Broussard disagreed sharply with the majority's conclusions, stating that "the convenience and certainty of a fool-proof bright line is not sufficient to justify denying recovery to an entire class of deserving plaintiffs on the arbitrary ground of marital status."[40] In terms of negligent infliction of emotional distress, he noted that the majority did not conclude that the plaintiff and victim were unrelated or distantly related, and that it did not dispute the proposition that the sheer number of unmarried cohabitants today made emotional trauma of this kind foreseeable.[41] To Justice Broussard, this should end the inquiry, as the closeness of the parties is relevant only to foreseeability.[42]

Justice Broussard then considered the policy rationales raised by the majority opinion. In his view, the state's interest in marriage is not harmed by granting relief to a person who is already injured. Instead, extending the cause of action to unmarried cohabitants would merely elevate them to a neutral status where each plaintiff would be permitted to prove on a case-by-case basis that his or her relationship is equivalent to that of a legal marriage and equally worthy of protection.[43]

Concerning the majority's argument on the burden to the courts of determining whether a relationship is equivalent to a marital one, Justice Broussard pointed to the ability of courts and juries to regularly make intelligent and sensitive determinations of this kind in assessing emotional loss. Therefore, assessing the stability and significance of a relationship should be no more burdensome, and the result can be determined with reference to objective factors, including the duration, degree of economic cooperation, and the sexual exclusivity of the relationship.[44] Nor would this assessment be an invasion of privacy, for the common sense reason that the unmarried plaintiff would have placed the quality and nature of his or her relationship at issue by choice.[45]

The issue of limiting liability also failed to convince Justice Broussard, who disfavored the majority's insistence on a bright-line rule that rests on definitional grounds rather than functional ones related to real loss.[46] The bright-line rule based on marriage, he noted, benefits only the tortfeasor who was fortunate enough to

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40. *Id.* at 280, 758 P.2d at 590, 250 Cal. Rptr. at 262.
41. *Id.* at 280-81, 758 P.2d at 591, 250 Cal. Rptr. at 263.
42. *Id.* at 280-81, 758 P.2d at 591, 250 Cal. Rptr. at 263.
43. *Id.*
44. *Id.* at 283, 758 P.2d at 593, 250 Cal. Rptr. at 265. These factors were outlined by the *Butcher* court; for further discussion, see page 186, *infra.*
45. *Id.* at 284, 758 P.2d at 593, 250 Cal. Rptr. at 265.
46. *Id.*

injure a cohabitor rather than a legal spouse; this acts against the goal of tort compensation in a way that the significance and stability standard of the *Butcher* case would not.[47]

Justice Broussard was equally dissatisfied with these policy rationales as applied to the loss of consortium action. The court's argument that precedent did not support extending liability was particularly inadequate, because the action of loss of consortium has evolved with a view to the common law's capacity to adjust to social realities.[48] As consortium today consists of relational interests including companionship, love, emotional support, and sexual relations, the marital status of the plaintiff does not bear on his or her standing to claim injury to these interests, and to maintain the bright-line rule is to abdicate the court's duty to expand and develop the common law.[49]

In summary, the majority and dissenting opinions reflect two trends in California law. The hesitance of the majority to extend recovery to unmarried cohabitants for *either* negligent infliction of emotional distress or loss of consortium may be attributable to the change in the composition of the court (Chief Justice Bird and Justices Grodin and Reynoso, viewed as the most liberal members of the court, were removed by the voters in November 1986). In earlier decisions—particularly *Dillon*—the California Supreme Court demonstrated a readiness to extend protection to new groups of individuals, regardless of the precedent in other jurisdictions.[50] However, the tests established in *Dillon* have proven difficult to apply logically and consistently.[51] Therefore, the innovative role of the California court seems to have been superseded by a trend toward restraint, perhaps in an attempt to assure easy applicability of the only *Dillon* requirement (the "close relationship" test) that has not been substantially eroded by subsequent decisions.[52]

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47. *Id.*

48. *Id.* at 285, 758 P.2d at 594, 250 Cal. Rptr. at 266.

49. *Id.* at 286, 758 P.2d at 594-95, 250 Cal. Rptr. at 266-67.

50. *See* Note, *Limiting the Cause of Action of Loss of Consortium*, 66 CALIF. L. REV. 430 (1978), at 441.

51. In Ochoa v. Superior Court, 39 Cal. 3d 159, 168, 703 P.2d 1, 216 Cal. Rptr. 661, 680 (1985), a case permitting a plaintiff mother recovery for negligent infliction of emotional distress even though the injury to her child was not "a brief and sudden occurrence viewed contemporaneously by the plaintiff," Chief Justice Bird (concurring and dissenting) noted that "confusion and inconsistency are the result of a strict construction of the *Dillon* guidelines" (p. 186), including the close relationship factor. *See id.* at 184-86, 703 P.2d at 18-20, 216 Cal. Rptr. at 679-80.

52. Recently, in Thing v. La Chusa, *supra* note 12, the California Supreme Court directly addressed the problematic nature of the *Dillon* tests. Justice Eagleson, writing for the majority, noted that "[t]he issue resolved in *Eldon* was too narrow to create that "bright line" for all NIED [negligent infliction of emotional distress] actions." 48 Cal. 3d

## II. Prior Law and Historical Development

### *A. Loss of Consortium*

As previously noted, the decision in *Butcher v. Superior Court* gave the California courts a new standard for evaluating loss of consortium claims—one based on the permanence and strength of the relationship, rather than its legal status.[53] That decision can be seen as the culmination of the development of the tort over the last two decades in California, and consequently, an examination of earlier case law is instructive here.

Historically, the loss of consortium action was available only to husbands.[54] The consortium action primarily afforded protection to the husband's proprietary interest in his wife's services, and was a logical extension of the early common law right of the master to sue for injuries suffered by his servant.[55] Over time, the basis for

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at 664. However, *Thing* provided the court with the opportunity to reexamine *Dillon* in detail. In *Thing*, the mother of a minor who was struck by an automobile brought an action for negligent infliction of emotional distress against the driver of the car. The mother was near the scene when the accident occurred, but did not see or hear it. Instead, she became aware of her son's injury when her daughter told her about the accident; she then rushed to the scene and saw her bloody and unconscious child lying in the street. The Supreme Court reversed the judgment of the appellate court, holding that the facts established that the mother was not present at the scene of the accident or aware of the injury when it occurred (the "sensory and contemporaneous observance" requirement), and, therefore, she was unable to establish a right to recover.

The court went on to criticize and to clarify the *Dillon* test (though not to overrule the case, as Justice Mosk noted in his dissent). It concluded that "a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of an 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 emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. . . . The merely negligent actor does not owe a duty the law will recognize to make monetary amends to all persons who may have suffered emotional distress on viewing or learning about the injurious consequence of his conduct." *Id.* at 667-68. Significantly, the court disapproved *Nazaroff* and *Archibald* to the extent they were inconsistent with this conclusion.

In a concurring opinion, Justice Kaufman called for a return to the zone of danger rule and the overruling of *Dillon* (based, like the majority opinion, on the difficulty of determining the stopping point for liability and the need for a clear, if arbitrary, standard for application by lower courts). *Id.* at 675-76. Justices Mosk and Broussard dissented, the former pointing out the majority opinion's "callous disregard for the doctrine of stare decisis," (*id.* at 681), the latter noting that "[t]he majority's strict requirement . . . is exactly the 'mechanical rule of thumb' that *Dillon* explicitly admonished us not to create. We should follow *Dillon* and its progeny and maintain the rational and traditional rule that reasonable foreseeability is the basis for determining liability." *Id.* at 685.

53. *See* discussion p. 179, *infra.*

54. Keeton, Prosser and Keeton on the Law of Torts § 125 (5th ed. 1984), p. 931.

55. *See, e.g.*, Guy v. Livesey (1619), Hyde v. Scyssor (1620); *see* Comment, *Who Should Recover for Loss of Consortium?*, 35 Me. L. Rev. 295 (1983), for an exhaustive history of the tort.

recovery in loss of consortium was extended to encompass damages from the loss of the husband's "relational interests" in his wife—everything from loss of general companionship and society to sexual relations.[56] As a result, the master-servant analogy became less and less tenable. However, the cause of action developed slowly; it was only in 1950 that a court finally allowed a wife to recover for loss of consortium based on a negligent injury to her husband.[57] In California, the cause of action for loss of consortium was limited to recovery for economic loss in cases from 1917 to 1955; in the latter year, an appellate court awarded compensation under the cause of action to a husband for the noneconomic damage to his marital relations.[58] In 1974, California Supreme Court recognition of the modern cause of action began with the case of *Rodriguez v. Bethlehem Steel Corp.*[59]

In *Rodriguez*, Richard and Mary Anne Rodriguez had been married for sixteen months when Richard suffered a severe work-related injury that left him paralyzed and in need of virtually twenty-four hour care.[60] Mary Anne experienced the psychological strains of supplying this care, of a restricted social and recreational life, and of the inability to have sexual relations or children with her husband.[61] The court held that each spouse had a cause of action for loss of consortium, reasoning that its decision was not a usurpation of legislative authority, but "a reaffirmation of our high responsibility to renew the common law of California when it is necessary and proper to do so."[62]

The court in *Rodriguez* dismissed policy arguments stated in earlier cases denying recovery,[63] including the fear that extending the cause of action to wives would encourage similar claims from children or parents, and therefore leave the court without a bright-line rule to follow.[64] It advocated instead the court's case-by-case analysis of claims, noting "[T]hat the law might be urged

56. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 388, 525 P.2d 669, 672, 115 Cal. Rptr. 765, 780 (1974).

57. Hitaffer v. Argonne, 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950), overruled on other grounds, Smither & Co., Inc. v. Coles, 212 F.2d 220 (D.C. Cir. 1957).

58. Gist v. French, 136 Cal. App. 2d 247, 288 P.2d 1033 (1955), cited in Note, *Loss of Consortium and Unmarried Cohabitors: An Examination of Tong v. Jocson*, 14 U.S.F. L. REV. 133 (1979).

59. 12 Cal. 2d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

60. *Id.* at 386, 525 P.2d at 670, 115 Cal. Rptr. at 766.

61. *Id.* at 386, 525 P.2d at 671, 115 Cal. Rptr. at 767.

62. *Id.* at 398, 525 P.2d at 679, 115 Cal. Rptr. at 775.

63. Deshotel v. Atchison, Topeka & Santa Fe Ry. Co., 50 Cal. 2d 664, 328 P.2d 449 (1958), denying a wife compensation; West v. San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960), denying a husband compensation.

64. *Rodriguez*, 12 Cal. 3d at 403, 525 P.2d at 682, 115 Cal. Rptr. at 778.

to move too far, in other words, is an unacceptable excuse for not moving at all."[65]

Subsequently, the California courts did face a series of attempts to expand the tort to a wider range of relationships. Traditionally, for example, a parent was not permitted recovery for the loss of a child's consortium.[66] In *Baxter v. Superior Court* (1977),[67] the California Supreme Court denied recovery to the parents of a minor who was permanently incapacitated after being given a general anaesthetic in preparation for surgery. Similarly, the court resisted an attempt to extend the tort to a child's loss of its parent's consortium in *Borer v. American Airlines* (1977),[68] in which nine children whose mother was seriously injured when a lighting fixture at an airport fell and struck her were refused a consortium action. The *Borer* court perceived significant differences between marital relations and the parent-child relationship (specifically, the sexual component) that, in its view, called for a limitation of the cause of action to the former type of relationship.[69] Looking at the policy concerns involved, it relied on the same considerations that the *Rodriguez* case had rejected, including the concern over increased numbers of potential plaintiffs.[70]

However, the *Borer* court did not base its holding on a view of consortium that was strictly defined by marital interests. Therefore, the decision has been seen as a tacit acknowledgement that the cause of action is intended to protect a broader relational

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65. *Id.* at 404, 525 P.2d at 676, 115 Cal. Rptr. at 779.

66. Keeton, *supra* note 54, p. 935; in some states, only the father could sue for loss of the child's consortium, *see* Keller v. City of St. Louis, 152 Mo. 596, 54 S.W. 438 (1899).

67. 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977). More recently, the parents of a child who suffered neurological damage during birth were denied recovery "for what is essentially the loss of filial consortium" in Martinez v. County of Los Angeles, 186 Cal. App. 3d 884, 894, 231 Cal. Rptr. 96, 103 (Cal. Ct. App. 2d Dist 1986). A concurring opinion, by Justice Johnson, stated: "Although the case for allowing recovery for loss of *parental* consortium may be somewhat more persuasive than the case for allowing recovery for loss of *filial* consortium, I regard either as far more compelling than the rationale supporting the existing cause of action for negligent infliction of emotional distress. The injuries the plaintiffs suffered are more substantive, more difficult to feign, and more readily quantified and compensated than the momentary shock of witnessing a horrible accident, or the insult of mistakenly being told one has a loathsome disease, or the like." *Id.* at 895, 231 Cal. Rptr. at 104.

68. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

69. *Id.* at 444, 563 P.2d at 863, 138 Cal. Rptr. at 304-05.

70. *Id.* at 448, 563 P.2d at 864, 138 Cal. Rptr. at 307. More recently, Nix v. Preformed Line Products Co., 170 Cal. App. 3d 975, 216 Cal. Rptr. 581 (Cal. Ct. App. 5th Dist. 1985), relied on *Borer* in denying recovery to children for the loss of parental consortium, but did so with some reluctance: "*Borer* . . . is a Supreme Court case, and we are bound by its decision. However, even though we must affirm the judgment of dismissal, the recent developments in other jurisdictions, plus the many discussions in criticism of the *Borer* result prompt us to point to the inconsistency in the law between husband and wife, and parent and child." *Id.* at 986, 216 Cal. Rptr. at 588.

interest.[71]

The California courts first dealt with the possible expansion of the cause of action to unmarried cohabitants in *Tong v. Jocson* (1977).[72] In *Tong*, the plaintiff and victim had begun living together approximately three months before the victim was injured in a car accident.[73] They married less than a month later, and the plaintiff then sued for loss of consortium. The court tersely denied the cause of action, holding that because the couple were unmarried at the time of the accident, they fell outside the narrow limits of the tort.[74] Another appellate decision, *Lieding v. Commercial Diving Center*,[75] similarly held that the cause of action does not extend to a married plaintiff who was engaged to the victim at the time of the accident, but did not marry the victim until a later date.[76]

Two federal court decisions did allow unmarried cohabitants the right to sue for loss of consortium; these holdings were frequently cited in subsequent California cases. In *Sutherland v. Auch Inter-Borough Transit*,[77] the plaintiff married the accident victim less than one month *after* the injury occurred. However, the court permitted recovery, noting the short amount of time between the accident and the marriage. The plaintiff's recovery was limited to the loss from the date of the marriage.[78] While the court failed to specifically address whether unmarried cohabitants could recover, the case still provided an important exception to the requirement of a legal marriage at the time of the injury.

In *Bulloch v. United States Diving Center*,[79] David and Edith Bulloch were married for over twenty years and had two children. They then divorced, but communicated regularly, had agreed to remarry before David was injured, and continued living as husband and wife when he returned home after hospitalization for his injuries.[80] The court allowed Edith's action for loss of consortium, pointing out that cohabiting couples represent a small percentage

71. *See* Comment, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest?*, 58 S. CAL. L. REV. 1467 (1985), at 1474.

72. 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (Cal. Ct. App. 1st Dist. 1977). The *Borer* court focused on the absence of the sexual element to distinguish parental consortium from spousal consortium.

73. *Id.* at 604, 142 Cal. Rptr. at 727.

74. *Id.* at 605, 142 Cal. Rptr. at 728; subsequent cases have tended to limit *Tong* to its facts, in view of the short time the couple had cohabitated; *see Butcher*, 139 Cal. App. 3d at 65, 188 Cal. Rptr. at 509.

75. 143 Cal. App. 3d 72, 191 Cal. Rptr. 559 (Cal. App. 2d Dist. 1983).

76. *Id.* at 73, 191 Cal. Rptr. at 560.

77. 366 F. Supp. 127 (E.D. Pa. 1973).

78. *Id.* at 134.

79. 487 F. Supp. 1078 (D. N.J. 1980).

80. *Id.* at 1081.

of all couples, and therefore if a line should be drawn to stop a substantial accretion of liability, children should be denied the claim rather than cohabiting partners.[81]

In *Butcher v. Superior Court* (1983),[82] a California court found the arguments of the *Bulloch* court strongly persuasive and allowed the cause of action to an unmarried partner. The defendant in Butcher struck and injured Paul Forte with his automobile. Cindy Forte, who had been living with Paul for eleven and a half years, sued for loss of consortium.[83] She had used Paul's surname since the relationship began; the couple had two children together, filed joint income tax returns, and maintained joint savings and checking accounts.[84] The *Butcher* court viewed the purpose of the cause of action as protection of the parties' relational interest, recognizing the shift in the theory of loss of consortium from a proprietary entitlement to compensation for damage to the continuing relationship of the parties.[85] Therefore, recovery was appropriate, provided the plaintiff could show the relationship was both stable and significant, and thus parallel to the marital relationship.[86] The *Butcher* court proposed that an examination of several relevant factors would help to determine whether the relationship in question met this standard, including (a) the duration of the relationship, (b) the existence of a mutual contract, (c) degree of economic cooperation and entanglement, (d) exclusivity of sexual relations, and (e) whether there is a "family" relationship with children.[87] The court found that the relationship between Cindy and Paul Forte met the standard, and consequently, that Cindy Forte could state the cause of action.[88]

The test used in *Butcher* was applied in 1984 in *Grant v. Avis Rent A Car System, Inc.*,[89] but the court found that the brevity of the unmarried couple's cohabitation before the injury-causing event made their relationship, as a matter of law, not stable or

81. *Id.* at 1086; however, *Bulloch* and *Sutherland* were subsequently repudiated in the relevant states. *See*: Leonardis v. Morton Chem. Co., 184 N.J. Super. 10, 445 A.2d 45 (1982); Childers v. Shannon, 183 N.J. Super. 591, 444 A.2d 1141 (1982); Rockwell v. Liston, 71 Pa. D. & C. 2d 756 (1975). The cases were criticized as poor predictions of the course of New Jersey and Pennsylvania law; *see Childers*, 444 A.2d at 1142. Nonetheless, California courts have repeatedly looked to the cases as persuasive authority; *see* Gonzalez v. Hudson, 200 Cal. App. 3d 45, 245 Cal. Rptr. 753 (Cal. Ct. App. 2d Dist. 1988), for a recent example.

82. 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (Cal. App. 4th Dist. 1983).

83. *Id.* at 58, 188 Cal. Rptr. at 505.

84. *Id.* at 60, 188 Cal. Rptr. at 505.

85. *Id.* at 61, 188 Cal. Rptr. at 505.

86. *Id.* at 70, 188 Cal. Rptr. at 512.

87. *Id.*

88. *Id.* at 71, 188 Cal. Rptr. at 512.

89. 158 Cal. App. 3d 813, 204 Cal. Rptr. at 869 (1984).

significant.[90]

However, the *Butcher* decision was not followed in *Ledger v. Tippitt*,[91] which denied the cause of action for loss of consortium.[92] The *Ledger* court, dealing with facts similar to those in *Butcher*, found the stable and significant standard unworkable and capable of nearly as many definitions as there are jurors to interpret it.[93]

Therefore, the state of the law of loss of consortium before *Elden* indicated that the courts, while cognizant of the particular status of the "de facto" spouse as compared to other kinds of relationships, have moved cautiously in this area. For this reason, the *Ledger* decision, which dealt with both loss of consortium and negligent infliction of emotional distress, suggested a way to resolve the issue by allowing unmarried cohabitants to recover for the latter tort, but not the former. However, the *Elden* court rejected this solution and chose to limit both causes of action.

### *B. Negligent Infliction of Emotional Distress*

Traditionally, courts were reluctant to allow recovery for mental distress.[94] While various decisions have attributed the denial of recovery to problems of objective proof of the emotional distress and the possibility of fraudulent claims,[95] the primary reason for rejection of the cause of action lies in an effort to prevent unlimited liability.[96] Recovery was initially confined to cases where the emotional distress was accompanied by a more demonstrable harm, and courts demanded an accompanying physical impact to the plaintiff, even if the contact was only a minor one.[97] The subsequent "zone of danger" rule adopted by the courts allowed plaintiffs relief for emotional distress if their personal safety was threatened, even if they managed by chance to escape physical harm.[98]

California courts followed this restriction and refused to permit the cause of action where the plaintiff was not in fear for his or her own safety, even where the emotional distress arose from wit-

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90. *Id.* at 818, 204 Cal. Rptr. at 872.
91. 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (Cal. Ct. App. 2d Dist. 1985).
92. The *Ledger* court did allow the plaintiff's cause of action for negligent infliction of emotional distress, as discussed *infra* at pp. 189.
93. *Id.* at 638.
94. Keeton, *supra* note 54, at 360.
95. Keeton, *supra* note 54, at 361.
96. *Elden*, at 274, 758 P.3d at 586, 250 Cal. Rptr. at 260.
97. *See, e.g.*, Zelinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961): *any* degree of physical impact, no matter how slight; Freedman v. Eastern Mass. Street Ry. Co., 299 Mass. 246, 12 N.E.2d 739 (1938): dust in the plaintiff's eye.
98. Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

nessing an injury to a close relative.[99] Only in 1968 did the California Supreme Court reject the impact and zone of danger rules in *Dillon v. Legg*.[100] In that case, the court upheld a cause of action for a mother's emotional distress when she personally witnessed the death of her daughter, who was run over by a negligent motorist. The mother herself viewed the incident from a position of safety. However, the court rejected earlier case law that denied recovery to bystanders because of the possibility of fraudulent and indefinable claims.[101] It opted, instead, for a policy of case-by-case resolution of claims, and the limiting tests that the plaintiff be close to the accident in time and place, and be a close relative of the victim.[102] The court did not, however, attempt to make a determination of whether liability would be imposed where some of the above factors were absent or of reduced weight when compared to the *Dillon* facts.[103]

California case law subsequent to *Dillon* interpreted the "close relationship" guideline expansively. In *Mobaldi v. Regents of the University of California* (1976), a foster mother held her foster son while hospital personnel injected the child with a drastically unsafe solution.[104] The child went into convulsions in her arms and suffered irreversible brain damage. The court concluded that the foster mother could state a cause of action.

The *Mobaldi* court looked to the facts that the foster mother had attempted to adopt the child, that the two held themselves out to the public as mother and child, and that they were treated and referred to as such by the medical personnel.[105] Consequently, the court reasoned that the relationship of foster mother and foster child was not distant, and "possessed all the incidents of parent and child, except those flowing as a matter of law."[106] Therefore, the emotional attachments of the family relationship, the court held, and not legal status, are those that are relevant to foreseeability.[107]

The court viewed the close relationship guideline more restrictively in *Drew v. Drake* (1980).[108] The plaintiff in *Drew* alleged that she had lived with her "de facto spouse" continuously for

99. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Reed v. Moore, 156 Cal. 2d 43, 319 P.2d 80 (1958).
100. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
101. *Id.* at 737, 441 P.2d at 918, 69 Cal. Rptr. at 77 (1968).
102. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
103. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.
104. 55 Cal. App. 3d 573, 127 Cal. Rptr. 720, 723.
105. *Id.* at 577, 127 Cal. Rptr. at 722.
106. *Id.* at 528, 127 Cal. Rptr. at 726.
107. *Id.* at 583, 127 Cal. Rptr. at 727.
108. 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (Cal. App. 1st Dist. 1980).

three years when he was killed in a vehicle collision caused by the negligence of the defendants.[109] She witnessed his death in the accident and sought recovery for her emotional distress. The court held that the close relationship standard encompassed neither friends, housemates, nor "persons standing in a 'meaningful relationship.' "[110] It distinguished *Mobaldi* on the grounds that the physicians in that case knew of the nature of the relationship between the plaintiff and the victim. Here, it concluded, there was no "family relationship" and no allegation that the defendants knew or should have foreseen any other kind of relationship between the plaintiff and the victim.[111] Similarly, appellate cases which followed limited reasonable foreseeability to parties related by law to the victim, and viewed *Mobaldi* as a lone exception to the acknowledged rule.[112]

However, it was clear that the method of defining a "close relationship" was by no means settled. A dissent by Justice Poché in *Drew* pointed out that the majority in that case had focussed on the lack of a *family* relationship between the parties, and had therefore rewritten the third *Dillon* guideline.[113] To Justice Poché, the possibility that a tortfeasor could foresee that his victim could have a close relationship with someone to whom she was not legally married, given the degree of cohabitation in modern California society, was neither unexpected nor remote.[114] Rather, he concluded, the majority appeared to have misinterpreted *Dillon*'s order to analyze each case in terms of what the ordinary person should have foreseen and to have based its holding on mere adherence to an older morality.[115]

The majority opinion in *Drew* failed to control in *Ledger v. Tippitt*,[116] where the Court of Appeals permitted the cause of action on similar facts. In *Ledger*, plaintiff Jennifer Ledger and Richard Arters had cohabitated for approximately two and one half years. They had a child together, and had twice been frustrated in attempts to marry.[117] Ledger witnessed the stabbing of Arters by the defendant, and he died in her arms. While the court, as previously noted, held that the plaintiff had no cause of action for loss of consortium, it upheld her claim for negligent infliction of emo-

109. *Id.*
110. *Id.* at 557, 168 Cal. Rptr. at 66.
111. *Id.*
112. *Id.* at 558, 168 Cal. Rptr. at 66.
113. *Id.*
114. *Id.*
115. *Id.* at 559, 168 Cal. Rptr. at 67.
116. 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985).
117. *Id.* at 631, 210 Cal. Rptr. at 816.

tional distress.[118] The court distinguished *Drew* on its facts,[119] holding that it was foreseeable as a matter of law that when the defendant stabbed Arters, the woman seated in the car a short distance away was likely a loved one who would suffer extreme emotional distress as a result.[120]

*Elden*, on the other hand, signals a return to the holding of *Drew* and the desire of the courts to fix a definitive line between those who may recover and those who may not. This conclusion seems even less appropriate when applied to negligent infliction of emotional distress. The foreseeability analysis used by the court should allow for recovery by unmarried couples, particularly in view of the broad class of persons allowed to recover for *intentional* infliction of emotional distress.[121]

## III. Policy Considerations and Evaluation

### *A. The State's Interest in Marriage*

Courts have generally required marriage as a prerequisite for the torts discussed here because it supplies a dependable means by which a relationship may be legally defined and by which its strength may be tested.[122] As the *Elden* majority noted, the binding nature of legal marriage as a civil contract presumably weeds out the unstable and impermanent relationships cohabitation encourages.[123] As the court in *Childers*, a New Jersey case denying the right to loss of consortium to unmarried cohabitants, stated, "Plaintiffs here were engaged to be married at the time of the accident; how long an engagement will support a claim? One month? One week? "Going steady?" . . . Presumably, when partners wish social and legal recognition of their relationship, they marry."[124]

Decisions of this type make the right to the cause of action dependent upon acceptance of the legal responsibilities of marriage.

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118. *Id.* at 646, 210 Cal. Rptr. at 828.

119. *Id.* at 647, 210 Cal. Rptr. at 827; Ledger's two attempts to marry Arters, her decision to bear his child, her economic dependence upon him, the "appalling facts relating to the sudden assault," and his death in her arms.

120. *Id.* at 646, 210 Cal. Rptr. at 827.

121. *Ledger*, at 640, 210 Cal. Rptr. at 822; the majority opinion explicitly compares the two torts, noting that, in intentional infliction of emotional distress cases, recovery has been allowed where the witness to the injury was *not* related to the actual victim. See pp. 640-42, 210 Cal. Rptr. at pp. 822-24.

122. *Childers*, 444 A.2d at 1142.

123. For a summary of four models of the role of premarital cohabitation and later marital quality, *see* Booth & Johnson, *Premarital Cohabitation and Marital Success*, 9 J. Fam. Issues 2, 255-72 (June 1988). The conclusions of the authors, however, are highly arguable, given the sampling technique used.

124. *Childers*, 444 A.2d at 1143.

As Justice Broussard's dissent points out, the *Elden* majority treats tort recovery as a benefit deriving from the marital compact, as if only married individuals have any real expectation that the law should recognize the value of their relationships and feelings.[125] This assumption, however, is increasingly unrealistic. The dramatic increase in cohabitation during the last two decades has been noted in many of the previously-discussed decisions, frequently in terms of statistical arguments based on census data.[126] It is also important to note that numerical assessments tend to underrepresent the phenomenon, because many persons who are not currently in a cohabitating relationship have previously cohabitated without marriage.[127]

Therefore, it is particularly necessary to examine the *Elden* court's reliance on the argument that particular social functions are served by marriage that cannot be served by a cohabital relationship, and the specific problems the approach poses.

First, the functional similarity of cohabital relationships and legal marriage has been noted repeatedly. The argument against further legal recognition of cohabital relationships categorizes cohabitation with a class of ephemeral relationships that lack emotional commitment and the economic and social responsibilities and permanence that legal marriage implies. However, given the high percentage of marriages that end in divorce and the fact that courts have made cohabital relationships increasingly difficult to terminate, the view of marriage as the sole stable domestic arrangement is open to question.[128]

Moreover, it has been noted that the "stable and significant" standard proposed by *Butcher* actually supports the policies that foster marriage, in that the case required a showing of marriage-like conduct to establish a relational interest deserving the protections afforded to the marital relationship.[129] On the other hand, the present rule sacrifices a fair appraisal of loss in a particular

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125. *Elden*, at 282, 758 P.2d at 591, 250 Cal. Rptr. at 264.

126. *See* particularly *Bulloch*, 487 F. Supp. 1078, at 1086.

127. *See* Thornton, *Cohabitation and Marriage in the 1980s*, DEMOGRAPHY (Nov. 1988).

128. Comment, *Loss of Consortium Claims by Unmarried Cohabitants: The Role of Private Self-Determination and Public Policy*, 57 IND. L.J. 605 (1982) [hereinafter *Private Self-Determination*], p. 615; as an interesting aside, *see* Liss, "Families and the Law," in M. SUSSMAN & S. STEINMETZ, EDS., HANDBOOK OF MARRIAGE AND THE FAMILY (1987), p. 790, which mentions that the consequences of *Marvin*-type decisions may be a decrease in cohabitation because it would carry all the legal aspects of marriage; *see also* ELLIOT, THE FAMILY: CHANGE OR CONTINUITY? (1986), at 178: "Paradoxically, alternative life-style ventures are rooted in ideas and beliefs which, in important respects, are continuous with conjugal family ideals."

129. Note, *An Unmarried Cohabitant Can Sue for Loss of Consortium if the Relationship is Both Stable and Significant*, 6 WHITTIER L. REV. 115, 133 (1984).

situation for consistency. As the *Bulloch* court noted, the *Elden* rule would allow recovery to a newly married couple on the basis of far less evidence of a strong relational interest, and deny it to a cohabiting couple of many years' standing.[130]

Second, the court's decision, as noted by Justice Broussard's dissent, has obvious ramifications for homosexual couples as well. As these cohabitants do not have the right to marry,[131] or the possibility of the court's applying strict scrutiny to marital status classifications,[132] a bright-line rule utterly precludes recovery. For example, in *Coon v. Joseph*,[133] a cause of action for negligent infliction of emotional distress was denied as a matter of law to a man who witnessed an attack on his homosexual partner, with whom he cohabitated and shared a stable and exclusive relationship.[134] The court implicitly classed this relationship with that of friends or housemates, which had never been considered as "close relationships" under *Dillon*, and saw the inclusion of intimate homosexual relationships within the *Dillon* standard as a danger to a clear limitation on tortfeasor liability.[135] However, as Justice White pointed out in his dissent, the majority's opinion would preclude homosexuals from ever recovering for emotional distress, no matter how stable and significant the relationship or how foreseeable such a relationship might be in contemporary society.[136]

Third, a rigid adherence to the traditional limitations of the causes of action ignores the responsibility of the courts to update the common law where it reflects anachronistic notions. The *Rodriguez* and *Butcher* courts both noted the special duties of the courts in relation to common law torts.[137] The *Rodriguez* court

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130. *Bulloch*, at 1087.

131. Cal. Civ. Code § 4100 (Deering 1984 & Supp. 1988): "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." The words "between a man and a woman" were added in a 1977 amendment to the statute.

132. *See* Note, *Marital Status Classifications Protecting Homosexual and Heterosexual Cohabitors*, 14 HASTINGS CONST. L.Q. 111 (1986); also Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985): strict scrutiny not applicable re statutes differentiating on basis of marriage, since class of unmarried persons is not suspect and the state has a legitimate interest in promoting marriage. Petitioners had sought eligibility for cohabitants for dental benefits as state employees' "family members," and alleged an equal protection violation because same-sex partners were necessarily excluded from enrollment. *See also* Comment, *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1584 (1989), at pp. 1620-23.

133. 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987).

134. *Id.* at 1272, 237 Cal. Rptr. at 874.

135. *Id.* at 1275, 237 Cal. Rptr. at 877.

136. *Id.* at 1284, 237 Cal. Rptr. at 883; *Coon*, however, was probably a poor test case for the principles involved, as the defendant's conduct probably would not have caused an ordinary person to foresee that a bystander would suffer any substantial distress; *see* White's dissent, *id.*

137. *Butcher*, 139 Cal. App. 2d at 70, 188 Cal. Rptr. at 512; *Rodriguez*, 12 Cal. 2d

was particularly eloquent with regard to the adaptability and energy of the common law tradition, pointing out "[t]hat vitality can flourish only so long as the courts remain alert to their obligation and opportunity to change the common law when reason and equity demand it."[138] The responsibility of the courts to unmarried individuals who have suffered real losses is not served by a mechanical application of the law, which denies the importance and foreseeability of these relationships. Instead, a flexible standard that would allow for a case-by-case evaluation would serve the goal of recognizing the value of a significant and stable relationship (whether between married or unmarried cohabitants), while still avoiding the extension of liability to remote claimants.

### *B. The Burden on the Courts*

The *Elden* majority expressed concern that the "stable and significant" test would excessively burden the courts, acting both as an intrusion on the privacy of the parties and as an indefinite and unpredictable standard.[139] As previously noted, Justice Broussard found this objection without foundation, in view of the capabilities of courts to make appropriate factual determinations in other subjective contexts and the obvious willingness of the plaintiffs to hold out their relationships for examination in cases of this type.[140]

An example of a situation in which precisely this sort of intrusion on privacy must occur arises in actions for loss of consortium where the plaintiff and victim had a common law marriage. Though California does not allow common law marriage creation, its courts recognize common law marriages validly created in states that do allow them.[141] As a result, if the plaintiff and victim were fortunate enough to cohabit or represent themselves to others as married in a state that permits common law marriage, the cause of action is permissible in California courts. It is inconsistent that the courts will assume that the requisite close relationship may exist in cases like these, while couples who have lived

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at 394, 525 P.2d at 676, 115 Cal. Rptr. at 772.

138. *Rodriguez*, 12 Cal. 2d at 394, 525 P.2d at 676, 115 Cal. Rptr. at 772.

139. *Elden*, 46 Cal. 3d at 276, 758 P.3d at 587, 250 Cal. Rptr. at 259-60.

140. *Id.* at 283, 758 P.2d at 593, 250 Cal. Rptr. at 264; *see infra* at notes 28-30 and accompanying text.

141. Etienne v. DKM Enterprises, 136 Cal. App. 3d 487, 188 Cal. Rptr. 321 (1982); Cal. Civ. Code § 4104. Common law marriage has been disfavored as a source of perjury and fraud, as its requirements were easily met (intent, with continuous cohabitation and public declaration that the parties are husband and wife). *See* Comment, *Private Self-Determination, supra* note 127, at 619-20. Tortfeasors can be protected from the collusion of claimed cohabitants by examination of detailed objective evidence, as in the *Butcher* tests.

continuously in California are unable to state the cause of action.

*Marvin v. Marvin*, and other cases recognizing the significance of nonmarital relationships, indicate that an examination of the conduct, agreement, or tacit understanding of the parties is feasible.[142] In *Marvin*, the California Supreme Court recognized the right of unmarried cohabitants to enforce express or implied contracts concerning the division of property or support.[143] The court looked to the fact that the couple had held themselves out as husband and wife, agreed to combine earnings, and that the plaintiff had given up her career to devote her full time to the defendant—evidence similar to that recommended by the *Butcher* court.[144] If the "reasonable expectations" of the parties can be evaluated by the courts in contractual terms, it is illogical to preclude a tort cause of action that requires no greater degree of invasiveness.[145]

### *C. Limitation on Liability*

The California court's insistence upon line-drawing implicitly assumes that social policy must at some point limit liability.[146] However, this poses the problem of where the division should take place. Justice Mosk, dissenting in *Borer*, felt that court had inappropriately denied recovery for loss of consortium to children, reasoning that the majority's emphasis on the sexual relationship between spouses as an important element of the cause of action was misplaced. Rather, he felt that "Justice, compassion, and respect for our humanitarian values requires that the "line" in this matter be drawn elsewhere."[147] In *Elden*, Justice Mosk's majority opinion clearly drew the line at unmarried cohabitants. While Mosk rejected concerns about a liability explosion with regard to recovery

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142. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr 815 (1976). More recent examples: *see* Whorton v. Dillingham, 202 Cal. App. 3d 447, 248 Cal. Rptr. 405 (1988); Taylor v. Fields, 178 Cal. App. 3d 653, 224 Cal. Rptr. 186 (1986). Both cases (the former involving a homosexual relationship with cohabitation, the latter a 42-year intimate relationship without cohabitation) indicate that courts clearly can decide which relationships are adequately stable and significant.

143. *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

144. *See infra* notes 141-42 and accompanying text.

145. The *Marvin* court also noted that there are many reasons why couples might choose to cohabit, and concluded that "the mere fact that a couple have not participated in a valid marriage ceremony cannot serve as a basis for a court's inference that the couple intend to keep their earnings and property separate and independent; the parties' intention can only be ascertained by a more searching inquiry into the nature of their relationship." *Id.* at 676, 557 P.2d at 117, 134 Cal. Rptr. at 826.

146. Meade, *Consortium Rights of the Unmarried: Time for a Reappraisal*, 15 FAM. L.Q. 223 (Fall 1981).

147. *Borer*, 19 Cal. 3d at 460, 563 P.2d at 871, 138 Cal. Rptr. at 315.

in parent-child situations,[148] he raised precisely those objections to the cause of action presented in *Elden*.

In this context, a demographic analysis is not only valuable, but necessary. Courts have tended to rely heavily upon statistical data as the basis for their arguments concerning extensions or limitations of liability.[149] Over the last twelve years (1977 to 1988), the number of unmarried cohabitants has almost tripled, increasing from 957,000 to 2,588,000 (see figure 1). However, the overall number of unmarried cohabitants remains quite modest. The highest *possible* number is approximately 2.6 million, which is still less than 5 out of 100 couples in the nation in 1988.[150] Additionally, the rate of increase in unmarried couples has slowed considerably in the 1980s. While the increase in these couples between 1970 and 1978 was 117%, the increase between 1980 and 1988 is only 63%. Therefore, the rapid increase in the number of unmarried cohabitants appears to be in the past.[151] As a result, allowing recovery would have little effect on the total number of possible claims, while recognizing the harm to these couples that occurred.

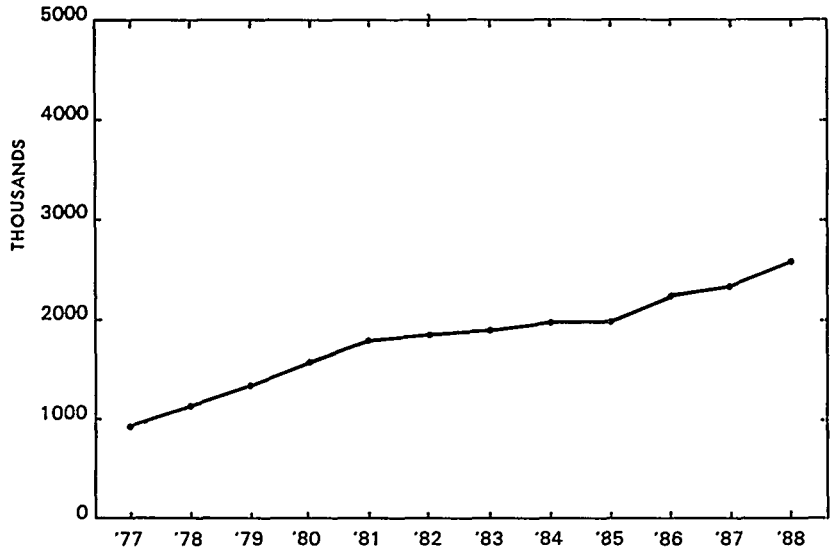
148. *Id.* at 456-57, 563 P.2d at 868-69, 138 Cal. Rptr. at 312. Justice Mosk relied on Bureau of Census data: "During the peak working years of ages 25 to 65, the proportion of all men who were married ranged between 77.8 percent and 89.7 percent. . . . The same source reveals that the proportion of families with several children is very low: as of 1974, 46 percent of the families in the United States had no minor children and an addition 19.2 percent had only 1 such child, making over 65 percent of the total; conversely, only 9.5 percent of families had 3 minor children, and the entire class of '4 or more' such children comprised a mere 7.4 percent." (*Id.* at 457, 563 P.2d at 868-69, 138 Cal. Rptr. at 312-13).

149. *See Marvin*, 18 Cal. 3d at 665, 557 P.2d at 109, 134 Cal. Rptr. at 818; *Bulloch*, 487 F. Supp. at 1086.

150. U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 432, *Households, Families, Marital Status, and Living Arrangements: March 1988* (Advance Report), U.S. Government Printing Office, Washington D.C., September 1988. The reason for uncertainty here lies in the fact that the Census Bureau does not differentiate adequately between unmarried individuals who are cohabitating in a stable and significant relationship and those in other living arrangements, such as roommates, tenants, employees, etc. An "unmarried couple" is defined as two persons of the opposite sex who share their living quarters.

151. *POSSLQ Rise Slows*, 15 POPULATION TODAY 1 (Jan. 1987).

FIGURE 1




SOURCE: U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 432, *Households, Families, Marital Status, and Living Arrangements: March 1988* (Advance Report), U.S. Government Printing Office, Washington, D.C., September 1988.

Table 5. Unmarried-Couple Households, by Presence of Children: 1970 to 1988.

A similar trend is illustrated in figure 2. In 1970, 71.6% of all U.S. households included a married couple; by 1988, only 56.7% did. Over the same time, the percentage of unmarried couple households increased from less than 1% in 1970 to 2.84% in 1988. Therefore, the actual number of households containing either a married or unmarried couple actually decreased over the past nineteen years, from 72.4% in 1970 to only 59.7% in 1988.[152]

152. *See* note 150; also U.S. Bureau of the Census, Current Population Reports, Series P-25, No. 1023, *U.S. Population Estimates and Components of Change* (Table 1, Estimates of the Components of Population Change: 1970 to 1987).

FIGURE 2

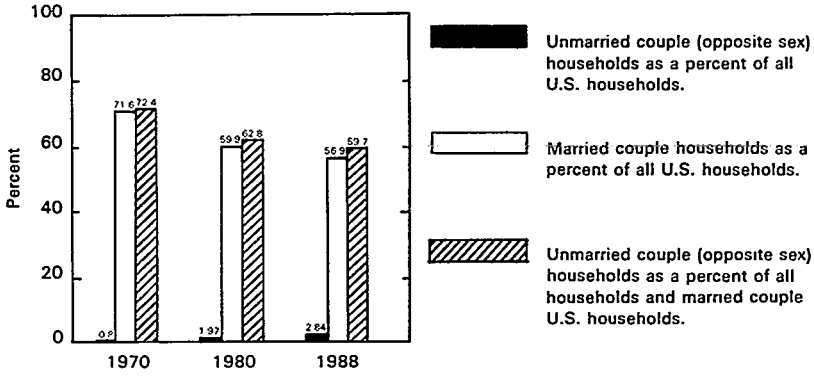
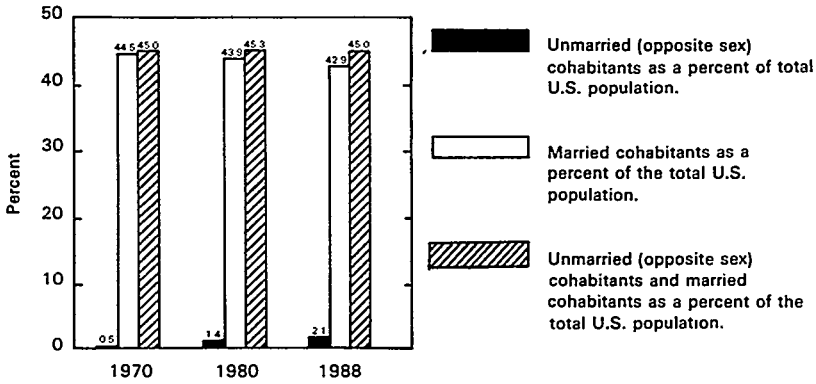



FIGURE 3




Lastly, figure 3 supplies an indication of the possibilities for an explosion of liability by showing the total percentage of the U.S. population that is living in either married or unmarried couple relationships. In 1970, 44.5% of all persons in the U.S. were currently either a "husband" or a "wife." By 1988, this figure had fallen to only 42.9%. During the same period, using the previously mentioned Census estimate, unmarried couples went from 0.5% of all U.S. residents in 1970 to 2.1% in 1988. When the "married" and "unmarried" couple figures are combined, the result shows that no change has occurred since 1970 (45.0% in both

1970 and 1988). Thus, the total number of possible claims that could be brought for loss of consortium by either a spouse or an unmarried cohabitant has actually remained unchanged over the last nineteen years. Even if recovery were to be extended to all unmarried cohabitants even if they could merely show that they were sharing living quarters, liability would not rise dramatically, if at all; and, of course, an application of the *Butcher* "stable and significant" tests would preclude recovery for those living in casual arrangements.

The statistical information indicates that the total number of individuals who might have a cause of action for loss of consortium has declined (relative to population) since 1970. The fears of the *Elden* court, then, concerning the extension of liability and its accompaniment by an intolerable burden on society are misplaced.

Beyond this argument, however, lies the real matter at issue—the purpose of tort compensation. As Justice Gilbert recognized in his dissent in *Ledger*:

> To deny recovery here because of the absence of a marriage certificate supplies a windfall to tortfeasors who may fortuitously injure the partner of an unmarried couple rather than a married one. The party who has suffered a real loss, such as Jennifer Ledger, goes uncompensated. . . . It is true that bright lines are helpful in fashioning rules that offer certainty and predictability in the law, but if these lines are too bright, they may blind us to reality and to a just result.[153]

As in any tort cause of action, the courts here are faced with making a determination of which party should bear the loss. Because the concern over potential double recovery that exists in the case of parent and child recovery does not apply to unmarried cohabitants, an absolute denial of the causes of action to these individuals is unwarranted; its consequence is to leave the injured party without recourse.

## CONCLUSION

This note has examined the decision of the California Supreme Court in *Elden* both in terms of the development of the torts of loss of consortium and negligent infliction of emotional distress, and in terms of the policy arguments adopted by the court. While both of the causes of action have been applied more and more flexibly with time, the *Elden* decision represents an attempt by the court to hold to a consistent bright line rule in at least one area. However, the court's rationales are unconvincing, and the rule ignores social realities. Extending the causes of action to unmarried

153. *Ledger*, 164 Cal. App. 3d at 650-51, 210 Cal. Rptr. at 829-30.

cohabitants will neither result in an explosion of liability nor defeat social policy goals. Rather, it will be indicative of the common law's ability to adapt to new familial arrangements and to allocate losses fairly.

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* The author wishes to acknowledge the assistance of Donald C. O'Hare in the preparation of the statistical material in this article.