Right of an Unmarried Cohabitant to an Action for Negligent Infliction of Emotional Distress in California, The

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The Right of an Unmarried Cohabitant to an Action for Negligent Infliction of Emotional Distress in California

One who negligently causes a disabling injury to an adult may also reasonably expect in our contemporary society that the injured person may be cohabiting with another without benefit of marriage.1

During the last two decades, American society has experienced social changes that have altered the traditional family unit.2 In particular, the number of people who choose to cohabit without the formality of marriage has increased dramatically.3 The California Legislature and judiciary have attempted to resolve the legal issues surrounding these relationships in the fields of housing,4 credit,5 family relations,6 and contracts7 by granting unmarried cohabitants the equivalent legal rights provided married couples.8 In California, however, a cause of action for negligent infliction of emotional distress has not been extended to unmarried cohabitants.

The main reason for denying unmarried cohabitants an action for negligent infliction of emotional distress is a judicial determination that a defendant's liability should be limited to foreseeable plaintiffs.9 A

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2. See infra notes 135-54 and accompanying text.
5. See CAL. GOV'T CODE § 23955(e).
9. See infra notes 67-101 and accompanying text. For purposes of this comment the term "emotional distress" or "mental distress" encompasses the following definition: [M]ental anguish: When connected with a physical injury, this term includes both the resultant mental sensation of pain and also the accompanying feelings of distress, fright, and anxiety. In other connections, and as a ground for divorce or for damages or an element of damages, it includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc. BLACK'S LAW DICTIONARY (5th ed. 1979).
bystander, who suffers emotional distress from observing another's physical injury by a negligent tortfeasor must share a sufficiently close relationship with the primary victim to come within the definition of a foreseeable plaintiff. The judicial requirement of a sufficiently close relationship between the bystander plaintiff and the primary victim has been held to be absent when the bystander is the housemate of the other injured party. On the other hand, the requirement of a sufficiently close relationship has been satisfied when the bystander plaintiff has proved the existence of a spousal or blood relationship with the primary victim. The California Supreme Court has yet to determine specifically whether unmarried cohabitants have a right to state a cause of action for negligent infliction of emotional distress. The possibility of judicial extension of the negligent infliction of emotional distress remedy to unmarried cohabitants, therefore, has not been foreclosed.

Recently, a California court of appeal recognized the right of an unmarried cohabitant to sue for loss of consortium when her housemate of eleven and one-half years was negligently injured by a motorist. Prior to that case, the right to state a cause of action for loss of consortium was limited to married couples. The court noted that many unmarried cohabi-

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10. This comment uses the terms “bystander” or “bystander plaintiff” to refer to a person who suffers emotional distress as a result of witnessing, or learning about, an injury to another.

11. This comment uses the term “primary victim” to refer to the person who is initially injured by the defendant’s tortious conduct.


13. This comment uses the term “housemate” or “unmarried cohabitant” to refer to a person, regardless of his or her sexual preference, who chooses to share a spousal relationship without the formality of a legally recognized marriage ceremony. Underlying motivations for adopting this lifestyle include (1) a desire to avoid the sex-stereotyped allocation of roles associated with marriage; (2) a belief that marriage is unnecessary or irrelevant if no children are involved; (3) a reluctance to enter a supposedly permanent marriage; (4) a bohemian philosophy; (5) a conscientious objection to state regulation of marriage; (6) a desire to avoid the possible expense and trauma of a divorce; (7) an indifferent outlook on legally sanctioned relationships; and (8) legal obstacles preventing marriage as in the case of same-sex marriages. See Meade, Consortium Rights of the Unmarried: Time for a Reappraisal, 15 FAM. L. Q. 223, 233 (1981-82).


17. Loss of consortium traditionally has been defined as the rights of a spouse to conjugal felicity. The elements of that felicity include love, companionship, affection, society, comfort, solace, sexual relations, and services. See Comment, supra note 8, at 135.


tants share a relationship which possesses every characteristic of the spousal relationship except formalization and thus, when one of the cohabitants is injured, the other partner is deserving of relief. The suffering of an unmarried cohabitant may be no less real in a cause of action for negligent infliction of emotional distress than in a cause of action for loss of consortium. In either case, one cohabitant suffers emotional trauma because of the serious injury or death of the other cohabitant.

Decisions that premise recovery for negligent infliction of emotional distress on the presence of a familial relationship between the bystander plaintiff and the primary victim may produce harsh results. This author will argue that the California judiciary should expand the definition of a "sufficiently close relationship" to include spousal-like cohabitation relationships, and thereby recognize a cause of action for negligent infliction of emotional distress for unmarried cohabitants. An overview of the tort of negligent infliction of emotional distress will be presented. This overview will include a discussion of social policy concerns which limit a plaintiff's right to relief, an analysis of the types of situations in which a defendant will be held liable for emotional distress, and the application of appropriate foreseeability standards to each of those situations. Arguments then will be presented for the extension of the negligent infliction of emotional distress action to unmarried cohabitants. An analysis of *Dillon v. Legg* and *Molien v. Kaiser Foundation Hospitals* will demonstrate that the California Supreme Court has not precluded unmarried cohabitants from maintaining an action for negligent infliction of emotional distress. An analogy then will be drawn between a plaintiff's cause of action for loss of consortium and an action for negligent infliction of emotional distress.

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21. *See infra* notes 199-203 and accompanying text.
23. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
24. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
distress. This comparison will show that social policy issues concerning the expansion of each cause of action to include unmarried cohabitants are similar. The discussion will continue with an analysis of the recent California appellate court decisions of Butcher v. Superior Court of Orange County\textsuperscript{25} and Hendrix v. General Motors Corp.\textsuperscript{26} These two decisions represent a split of authority over the rights of unmarried cohabitants to a claim for loss of consortium. A careful appraisal of the two cases will indicate that the debate over the scope of a defendant's duty presented in Butcher and Hendrix also exists in the field of negligent infliction of emotional distress. The author will conclude that the arguments in Butcher favoring the extension of a remedy for loss of consortium to unmarried cohabitants support the thesis that unmarried cohabitants should be able to recover for negligent infliction of emotional distress.

This comment also will propose that homosexual couples\textsuperscript{27} be included within the definitional framework of unmarried cohabitants. A couple's sexual preference does not preclude the couple from forming a sufficiently close relationship even though state legislatures refuse to recognize same-sex marriages.\textsuperscript{28} Homosexual couples who can prove a relationship equivalent to a spousal relationship should be able to maintain a cause of action for negligent infliction of emotional distress. The following section briefly will trace the development of the social policies and the law governing liability for negligent infliction of emotional distress.

**HISTORICAL BACKGROUND**

**A. Social Policy Concerns**

Courts grant recovery for mental distress when the injury to the plaintiff stems from a defendant's intentional or extremely reckless conduct.\textsuperscript{29} Recovery also is available in the form of parasitic damages when the defendant commits a tort such as battery, slander, or false imprisonment, which causes mental injury to the plaintiff.\textsuperscript{30} Courts, however, initially

\textsuperscript{25} 133 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983).

\textsuperscript{26} 146 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983).

\textsuperscript{27} "[H]omosexual: One, especially a male, whose desire for sexual relations is directed to a person of the same sex." BALLENTINE'S LAW DICTIONARY 566 (3d ed. 1969). "[H]omosexuality: atypical sexuality characterized by manifestations of sexual desire toward a member of one's own sex." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1085 (1976). The term "homosexual couple" or "homosexual cohabitants" as used in this comment will apply to persons of both sexes.

\textsuperscript{28} See infra note 255 and accompanying text.

\textsuperscript{29} See, e.g., State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); RESTATEMENT (SECOND) OF TORTS §46 comment (1965).

\textsuperscript{30} Rodrigues v. State, 472 P.2d 509, 519 (Hawaii 1970); see also RESTATEMENT (SECOND) OF TORTS §47 comment (1965).
were reluctant to recognize that individuals have a duty not to disrupt negligently the emotional tranquility of others.\textsuperscript{31}

Judicial reluctance to recognize the tort of negligent infliction of emotional distress was based on three main social policy concerns.\textsuperscript{32} First, courts were hesitant to grant relief for emotional distress because the injury seemed too speculative to be capable of measurement.\textsuperscript{33} Subsequent advancements in the field of psychology have sufficiently established that emotional distress is a real and measurable injury.\textsuperscript{34} Second, the judiciary was concerned that the courts would be flooded with fictitious claims if a remedy for negligent infliction of emotional distress were recognized.\textsuperscript{35} The floodgate theory prompted the third concern of exposing defendants to potentially unlimited liability.\textsuperscript{36} Subsequent court decisions have criticized the barring of all actions for negligent infliction of emotional distress out of the fear that some fraudulent claims might escape detection.\textsuperscript{37} The decisions of these courts hold that the interests of a meritorious claim should prevail over alleged administrative difficulties.\textsuperscript{38} To allay concerns about the scope of the defendant's duty, courts have formulated various tests by which the defendant's liability could be limited.\textsuperscript{39} California appears to have adopted two rules that define the scope of a defendant's duty for negligent infliction of emotional distress.\textsuperscript{40} To clarify the issues involved in the application of these rules, the situations in which a defendant will be liable for mental injury must be distinguished.\textsuperscript{41}

\textbf{B. Situations Creating an Action for Negligent Infliction of Emotional Distress}

A defendant's tortious conduct will give rise to a cause of action for negligent infliction of emotional distress in two types of situations. The first involves a situation in which the defendant's negligent conduct may subject other persons to a risk of physical harm. The persons subjected to or witnessing the physical harm consequently may suffer serious mental dis-

\begin{itemize}
\item \textsuperscript{31} See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS 327 (4th ed. 1971).
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id. at 329.
\item \textsuperscript{34} Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 933, 122 Cal. Rptr. 470, 481 (1975); PROSSER, supra note 31, at 328.
\item \textsuperscript{35} See id.
\item \textsuperscript{36} See Jarchow, 48 Cal. App. 3d at 934, 122 Cal. Rptr. at 482.
\item \textsuperscript{38} Dillon, 68 Cal. App. 3d at 736, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78. See generally PROSSER, supra note 31, at 327-28.
\item \textsuperscript{39} See infra notes 50-78 and accompanying text.
\item \textsuperscript{40} See infra notes 67-97 and accompanying text.
\end{itemize}
tress and accompanying physical injury. An example of this situation is a negligent motorist whose careless operation of an automobile places others in fear for their own safety or the safety of an accompanying family member.

A defendant also may be liable for negligent infliction of emotional distress when his conduct primarily creates a risk of causing mental harm. The plaintiff in this second situation is neither subjected to a threat of physical harm, nor a witness to another’s injury although physical symptoms may result from the mental harm inflicted by the defendant. This situation is exemplified by a physician’s negligent misdiagnosis of syphilis which causes the patient and his or her spouse to suspect each other’s infidelity and to suffer emotional distress as a result of the suspicions.

The distinction between physical risk and mental risk situations is important because the courts have applied different criteria in assessing the defendant’s liability depending upon the situation creating the harm. The following section will discuss the applicable laws for determining liability in a physical risk and a mental risk situation. In keeping with the focus of the comment, the discussion will be limited to a defendant’s duty to a plaintiff who has suffered emotional harm arising from witnessing or learning about an injury to another party.

C. Determining the Defendant’s Duty in a Physical Risk Situation

Traditionally, courts have been more reluctant to allow a plaintiff a remedy for emotional distress that arises out of a defendant’s tortious conduct toward another person than in situations in which the plaintiff alone is injured. Judicial concern over fictitious claims of emotional distress and unlimited liability is even greater when the plaintiff is not the primary victim of the defendant’s negligent conduct. To guarantee the genuineness of the plaintiff’s emotional distress claim, most courts require that the plaintiff prove the emotional harm was accompanied by, or produced, a physical illness or an injury. One of two standards of recov-

42. Physical injuries may result either from a force set in motion by the defendant or as a consequence of the mental distress. Id. at 293 n.17.
43. See, e.g., Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
45. See Comment, supra note 41, at 293.
47. Id.
ery is employed by a majority of jurisdictions: the impact rule\(^{49}\) or the zone of danger rule.\(^{50}\) California and a few other states have rejected both of these standards because the rules often produced anomalous results.\(^{51}\)

1. The Impact Rule

In claims of emotional distress resulting from physical harm to another person, the plaintiff typically is a bystander-witness to an accident. A minority of jurisdictions requires that the plaintiff not only prove the existence of a physical injury, but that the defendant’s negligent conduct caused a physical impact to the plaintiff.\(^{52}\) Courts adhering to this standard of recovery justify the rule on the theory that the plaintiff’s claim is more likely to be valid when impact occurs than when it does not.\(^{53}\) Critics of the impact rule assert that while the rule may be justified when a serious impact occurs, little guarantee of genuineness exists when the impact is insignificant.\(^{54}\) The majority of jurisdictions rejects the impact rule and adopts a standard of recovery that provides a remedy when the defendant


\(^{52}\) See supra note 49 and accompanying text.

\(^{53}\) PROSSER, supra note 31, at 331.

\(^{54}\) See supra note 48 and accompanying text.
subjects the plaintiff to a high risk of physical impact.  

2. The Zone of Danger Rule

The zone of danger rule expands the types of situations in which a plaintiff may recover for negligent infliction of emotional distress. According to this theory of recovery, a defendant is liable to those plaintiffs close enough in proximity to the defendant’s tortious conduct reasonably to fear injury, if those plaintiffs actually suffer some form of physical symptom from this fear. Courts adopting the zone of danger rule realize that the plaintiff’s emotional distress can result from a fear for his or her own personal safety as well as from a physical impact. The zone of danger rule, however, has led to harsh results. In Amaya v. Home Ice, Fuel and Supply Co., a mother witnessed a truck run over her child, but was denied recovery because, at the time of the accident, the mother was not in fear for her own life. Realizing that mental distress resulting from witnessing the injury of a close relative might be as valid as that occurring from fear for personal safety, the California Supreme Court rejected the zone of danger rule.

3. Dillon v. Legg

In Dillon v. Legg, the California Supreme Court extended the defendant’s liability beyond the limits established in the zone of danger rule. The Dillon plaintiff—mother suffered a physical injury resulting from the emotional trauma of witnessing the defendant negligently kill her daughter. Despite the mother’s physical injury, the trial court found the defendant not liable for the mother’s emotional distress because the woman was not in danger of physical harm at the time of the accident. In reversing the lower court, the California Supreme Court reasoned that both the impact rule and zone of danger rule established artificial standards for assessing a defendant’s liability. The salient point in determining the scope

55. See supra note 50 and accompanying text.
56. See infra notes 57-58 and accompanying text.
58. Id.
60. See id. at 298-302, 304-06, 379 P.2d at 514-16, 518-19, 29 Cal. Rptr. at 34-36, 38-39.
61. See Dillon, 68 Cal. 2d at 733, 441 P.2d at 915-16, 69 Cal. Rptr. at 75.
63. See infra notes 66-78 and accompanying text.
64. See Dillon at 732, 441 P.2d at 914, 69 Cal. Rptr. at 74.
65. See id. at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75.
66. See id. at 746-47, 441 P.2d at 925, 69 Cal. Rptr. at 84-85.
of a defendant’s duty of due care to others is the foreseeability of the risk of harm from the defendant’s negligent act.\textsuperscript{67} Reviewing the facts in Dillon, the court found that the defendant reasonably should have foreseen that an infant would be accompanied by a parent and that the parent would suffer emotional distress upon seeing the child killed.\textsuperscript{68}

In order to prevent the defendant from being exposed to unlimited liability to those persons who might suffer emotional and physical harm from observing the defendant’s tortious conduct, the California Supreme Court set forth guidelines to assist courts in determining the scope of the defendant’s liability.\textsuperscript{69} The Dillon court considered three factors relevant in determining whether the risk of emotional distress to a bystander plaintiff is foreseeable: (1) whether the plaintiff is located near the scene of the accident, (2) whether the plaintiff’s emotional distress manifested by a physical injury results from the sensory and contemporaneous observance of the accident, and (3) whether the plaintiff and the victim are closely related.\textsuperscript{70} The Dillon decision indicates that these guidelines are not to be applied rigidly.\textsuperscript{71} The court cautioned that future determinations of a defendant’s duty will have to be decided on a case-by-case basis.\textsuperscript{72} All the circumstances must be analyzed before a court can conclude what the ordinary person in a similar situation reasonably should have foreseen.\textsuperscript{73}

The criteria for determining a defendant’s liability under the Dillon rule apply to situations involving primarily a physical risk.\textsuperscript{74} A defendant who negligently subjects another to a threat of mental distress devoid of physical risk is held liable under a different standard.\textsuperscript{75} The following section will discuss the applicable laws for determining the scope of a defendant’s duty in a mental risk situation.

\textbf{D. Determining the Defendant’s Duty in a Mental Risk Situation}

Most courts deny recovery for emotional distress in situations in which the defendant’s conduct primarily creates a risk of causing mental harm because of the inherent difficulties in proving the validity of the claim.\textsuperscript{76} Courts have allowed recovery, however, for mental distress absent a phys-
ical injury when a telegram has been negligently transmitted or a corpse has been negligently handled. The uniquely tragic circumstances of each situation serve as a guarantee that the claim for emotional distress is valid without the proof of an accompanying physical injury.

In *Molien v. Kaiser Foundation Hospitals*, the California Supreme Court joined the few jurisdictions that have recognized an independent cause of action for negligent infliction of serious emotional distress absent the presence of a physical injury. The plaintiff husband in *Molien* brought an action against a hospital and a doctor, alleging negligent infliction of emotional distress after his wife had been misdiagnosed as having contracted syphilis. Mr. Molien alleged that his wife was instructed to inform him of the diagnosis so that he could undergo blood tests to ascertain whether he also had syphilis and was the source of his wife's purported infection. The incident led to marital discord and the initiation of dissolution proceedings. The trial court dismissed the cause of action for negligent infliction of emotional distress because the husband did not suffer a physical injury. He also was not present during his wife's examination and, therefore, did not come within the definition of a foreseeable bystander plaintiff according to *Dillon*. The California Supreme Court reversed the dismissal on the grounds that Mr. Molien was not a bystander plaintiff but a direct victim of the defendant's negligent conduct. An erroneous diagnosis of syphilis, the court reasoned, foreseeably would cause marital discord. Since the negligent conduct was directed at Mr. Molien as well as his wife, the doctor had a duty to use care in his diagnosis

77. *See* Western Union Tel. Co. v. Crumpton, 36 So. 517 (1903); Western Union Tel. Co. v. Redding, 129 So. 743 (1930).
80. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
82. *Molien*, 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832. The husband also alleged loss of consortium. The trial court dismissed plaintiff's action for negligent infliction of emotional distress but failed to dismiss the action for loss of consortium. The California Supreme Court considered this an oversight and amended the dismissal to apply to both causes of action. *Id.* at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.
83. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
84. *Id.* at 920, 616 P.2d at 815, 167 Cal. Rptr. at 833.
85. *See id.*
86. *See id.* at 921-23, 616 P.2d at 815-17, 167 Cal. Rptr. at 833-35.
87. *See id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.
88. *See id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
of the plaintiff's wife. 89

Application of the Dillon foreseeability guidelines, consequently, appears to limit a defendant's liability only to percipient witnesses in a physical risk situation after Molien. 90 In a mental risk situation, the court applies general principles of foreseeability to limit a defendant's liability. 91 The duty to refrain from the negligent infliction of emotional distress is breached when a reasonable person would be unable to cope with the serious mental stress engendered by the circumstances. 92 The standard of recovery under Molien is based on determinations (1) whether the defendant owes plaintiff a duty of due care because the plaintiff's injury reasonably was foreseeable to the defendant, (2) whether the plaintiff suffered serious emotional distress as a result of the defendant's tortious conduct, and (3) whether the plaintiff can produce evidence of a medically significant nature indicating serious emotional distress, or can establish "some guarantee of genuineness in the circumstances of the case." 93

As revealed in the above section, California is one of a few jurisdictions that recognize an independent cause of action for negligent infliction of emotional distress absent a physical injury. 94 According to Molien, the plaintiff will have to prove the defendant breached his duty by applying general rules of foreseeability. 95 In addition, the plaintiff will have to establish the presence of serious emotional distress by producing evidence of a significant medical nature or by proving the genuineness in the circumstances of the case. 96 The following section will analyze Dillon and Molien and conclude that unmarried cohabitants are not precluded from being considered foreseeable plaintiffs in either a physical risk or a mental risk situation.

EXTENDING THE SCOPE OF DEFENDANT'S DUTY TO UNMARRIED COHABITANTS

A. Dillon v. Legg: The Physical Risk Situation

As previously noted, a percipient witness to another's injury in a physical risk situation must come within the definition of a foreseeable plaintiff to recover for emotional distress. 97 Since the Molien decision did not over-

89. See id.
90. See id. at 921-23, 616 P.2d at 815-17, 167 Cal. Rptr. at 833-35.
91. See id. at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.
92. See id. at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38.
93. See Comment, supra note 41, at 300-01.
94. See supra note 81 and accompanying text.
95. See supra note 91 and accompanying text.
96. See Molien, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.
97. See supra notes 68-69 and accompanying text.
rule Dillon, a bystander plaintiff will have to prove the defendant’s duty of due care according to the Dillon foreseeability guidelines. The factors relevant in determining whether the risk of emotional distress to a bystander plaintiff is reasonably foreseeable are: (1) whether the plaintiff is located near the scene of the accident, (2) whether plaintiff’s emotional distress results from the sensory and contemporaneous observance of the accident, and (3) whether the plaintiff and the victim are closely related.

In addition, the plaintiff may also have to prove that the emotional distress resulted in a physical injury since Molien abolished the physical injury requirement only when the plaintiff was defined as a direct victim.

Implicit in the Dillon decision is the mandate of the court that the foreseeability guidelines be applied on a case-by-case basis. This language implies that the court wanted to avoid setting forth a rigid standard for determining a defendant’s duty to bystander plaintiffs. The court cautioned, however, that the defendant’s liability should not extend to the “remote and unexpected.” Recognizing that a liberal application of the Dillon factors would subject the defendant to unlimited liability, subsequent decisions by the California courts of appeal have granted recovery only when all three Dillon factors are present.

An unmarried cohabitant who witnesses the injury of his or her housemate, therefore, would have to comply with the three-pronged test set forth in Dillon. In particular, the cohabitant would have to prove the existence of a close relationship with the primary victim. One California court of appeal has refused to grant the Dillon close relationship status to cohabitants.

In Drew v. Drake, the plaintiff alleged that she suffered emotional distress upon observing her “de facto” spouse of three years killed in an automobile collision negligently caused by the defendant. The Drew court denied recovery on the grounds that the bystander plaintiff and pri-

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98. See supra note 90 and accompanying text.
99. See supra note 70 and accompanying text.
100. See supra, note 71-73 and accompanying text.
101. See supra note 70 and accompanying text.
102. Id.
103. Dillon, 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.
105. See supra note 70 and accompanying text.
107. Id.
108. Id. at 557, 168 Cal. Rptr. 65.
109. Id.
mary victim did not satisfy the close relationship requirement set forth in *Dillon*. Noting that spousal and parental relationships have been held to satisfy the *Dillon* guideline, *Drew* refused to provide relief to a plaintiff who did not share a familial bond with the primary victim. The court reasoned that allowing cohabitants to recover would be an unreasonable extension of the defendant’s scope of duty and contrary to the intent expressed in *Dillon*.

The *Drew* decision unnecessarily limits recovery to those bystander plaintiffs who share a spousal or blood relationship with the primary victim, despite the clear recommendation of the *Dillon* court that the criteria for establishing foreseeability be applied on a case-by-case basis. Depending upon the particular circumstances of each case, *Dillon* suggests that the foreseeability guidelines might be given different weight and even replaced with more relevant factors. Furthermore, *Dillon* does not precisely define the scope of a sufficiently close relationship. The decision indicates only that a bystander who has no relationship with the primary victim, or who has only a distant relationship with that party, will be unable to recover. The court, therefore, only precludes relief for mental injury to those bystanders who have not formed any real and significant emotional bond with the primary victim. This language allows for a degree of flexibility in determining the type of relationship which will satisfy the *Dillon* foreseeability close relationship guideline.

Another California appellate court has provided a more flexible interpretation of the close relationship guideline than that found in *Drew*. In *Mobaldi v. Regents of University of California*, a foster mother was allowed to recover for her emotional distress after observing the defendant negligently administer a fatal dose of glucose solution to her foster child. The court found that while the relationship of biological parent and child did not exist, the emotional bond between Mrs. Mobaldi and

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110. *Id.* at 557-58, 168 Cal. Rptr. at 65-66.


114. *See id.* at 557, 168 Cal. Rptr. at 66.

115. *See id.* at 558, 168 Cal. Rptr. at 66.


117. *See id.* at 741, 441 P.2d at 920, 69 Cal. Rptr. at 81.

118. *See id.*

119. *See id.*

120. *See id.*


123. *See id.* at 578, 127 Cal. Rptr. at 723.
her foster child possessed all the incidents of a parent-child relationship "except those flowing as a matter of law." Mobaldi further noted that the Dillon guidelines seemingly do not limit the scope of the close relationship requirement to one of blood, marriage, or adoption. A strong emotional attachment similar to a familial relationship could satisfy the Dillon guideline. Given the facts of Mobaldi, the court concluded that the child's foster parents more likely would suffer emotional trauma from observing the boy's injury and death than would the boy's biological parents who had abandoned him.

The extension of the defendant's duty of due care to persons who share a "family like" relationship with the primary victim does not contradict the foreseeability guideline of Dillon, as the Drew decision implies. The purpose of the close relationship guideline set forth in Dillon is to screen out insignificant or erroneous claims of emotional distress. A familial relationship is a means of guaranteeing that the distress claimed is real. As Mobaldi indicates, however, the emotional attachments of a family relationship, and not legal status, are the attachments that are relevant to foreseeability. Since Dillon has been held to encompass parental-like relationships, an argument may be made that the guidelines also should encompass spousal-like relationships.

An example of a spousal-like relationship is the relationship that is often found to exist between unmarried cohabitants. Particularly if the relationship has been long lasting, an unmarried cohabitant likely will suffer serious emotional distress from witnessing the injury or death of the other cohabitant. The dramatic increase in the number of couples choosing to cohabit certainly removes this type of relationship from what Dillon termed the remote and unexpected. In 1980, over 1,500,000 unmarried heterosexual couples shared a household. This represents a 200% increase since 1970. Many cohabitation arrangements closely resemble the traditional family unit.

124. See id. at 583, 127 Cal. Rptr. at 726-27.
125. See id. at 582, 127 Cal. Rptr. at 726.
126. See id.
127. See id.
129. See Dillon, 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.
130. See id.
131. Mobaldi, 55 Cal. App. 3d at 582, 127 Cal. Rptr. at 716-17.
132. See id.
134. See Dillon, 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.
135. See supra note 3 and accompanying text.
136. Id.
couples in 1980 had children living with them. The few studies that have been made concerning cohabitants indicate that these couples exhibit economic behavior generally associated with married persons.

Along with an increase in the number of couples choosing to cohabit, a marked increase has occurred in the rate of divorce in the United States. Since 1970 the divorce rate has climbed from 47 to 109 divorced persons per 1,000 married persons. Given these profound social changes during the last two decades, a narrow interpretation of the basic family unit would not reflect the realities of contemporary society.

In recognition of the changing family structure and increase in spousal-like cohabitation, the California Legislature and judiciary have reformed many laws that discriminated on the basis of marital status. Section 12955 of the California Government Code makes discrimination on the basis of race, color, religion, sex, national origin, ancestry, or marital status illegal. This code section was applied by the California court of appeal in Atkisson v. Kern County Housing Authority, which held that the statute prohibited unmarried, low-income housing tenants from being evicted for living with a person of the opposite sex. Section 12955 also prohibits financial institutions from using a person's marital status as a basis in evaluating a credit application. Furthermore, the California Legislature has repealed sections 269a and 269b of the California Penal Code, which made cohabitation and adultery misdemeanors.

In Marvin v. Marvin, the California Supreme Court recognized that contemporary social mores were changing radically and that unmarried cohabitants should have access to the legal system to settle their disputes. The Marvin court held that express contracts between unmarried cohabitants regarding property rights are enforceable. A basis for equitable relief in the absence of an express contract also was recognized by the court.

Legal recognition afforded unmarried cohabitants by the Legislature and the courts reflects the growing awareness and acceptance of alterna-

138. See id. at 1129.
139. See id. at 1139.
141. Id.
142. See supra notes 4-8 and accompanying text.
143. See supra note 4 and accompanying text.
145. See id. at 96, 130 Cal. Rptr. at 379.
146. See supra note 4 and accompanying text.
147. CAL. PENAL CODE §§269a-269b (repealed 1975).
149. Id. at 683-84, 557 P.2d at 122, 134 Cal. Rptr. at 831.
150. Id. at 665, 557 P.2d at 134, 134 Cal. Rptr. 819.
151. Id.
tive lifestyles by contemporary society. Certainly, the values underlying the interest of the state in marriage are important and universally favored. The conclusion that these values only will exist in a legally sanctioned marital framework, however, is doubtful given the rapid changes occurring in the family unit.

The foregoing analysis of Dillon has noted that one criterion for determining whether a bystander plaintiff is a foreseeable victim of defendant's negligent act is evidence of a sufficiently close relationship between the plaintiff and primary victim. Dillon allows courts flexibility in interpreting the scope of the close relationship standard. Considering the prevalence of spousal-like relationships and the resulting legal recognition of cohabitant's rights, this author proposes that the foreseeability guidelines of Dillon do not preclude unmarried cohabitants from a remedy for emotional distress in a physical risk situation.

The defendant also should be prevented from claiming an absence of duty to unmarried cohabitants when defendant's tortious conduct places the cohabitants primarily in fear of mental harm. In this instance, the defendant's duty will be determined by the foreseeability standards in Molien. The following section will discuss whether unmarried cohabitants are precluded from an emotional distress remedy in a mental risk situation.

B. Molien v. Kaiser Foundation Hospitals: The Mental Risk Situation

In Molien, the California Supreme Court held that a plaintiff can recover for serious emotional distress absent physical harm if the injury was reasonably foreseeable to the defendant and the plaintiff can prove serious emotional distress by the genuineness of the circumstances or by significant medical evidence. Extending the defendant's duty of due care to unmarried cohabitants may be accomplished more easily in a mental risk situation than one in which the risk of physical injury is paramount. In the physical risk situation, a plaintiff must have suffered a physical in-

152. See supra notes 142-51 and accompanying text.
153. See Marvin v. Marvin, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.
154. See supra note 70 and accompanying text.
155. See supra notes 134-41 and accompanying text.
156. See supra notes 134-39 and accompanying text.
157. See supra notes 142-51 and accompanying text.
158. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
159. See supra note 96 and accompanying text. Jurisdictions have differed over the scope of serious emotional distress. See Campbell v. Animal Quarantine Stations, 632 P.2d 1066 (Hawaii 1981) (allowing recovery for death of dog). But see Roman v. Carroll, 621 P.2d 307 (Ariz. 1980) (denying recovery for death of dog because the court held that the dog was personal property).
jury from the emotional distress and also satisfy the foreseeability factors of *Dillon* which include the existence of a substantial relational interest with the primary victim. The *Molien* standard of recovery, however, focuses more on whether the plaintiff actually suffers serious emotional distress rather than whether the injured plaintiff comes within an artificial definition of a foreseeable victim.

*Molien* adopts a reasonable person standard to determine the scope of the defendant's duty of due care. The jury must decide whether a reasonable person in the defendant's position would have foreseen the plaintiff's injury. Social policy concerns for limiting the defendant's liability, however, still must be considered by the court. In *Molien*, the plaintiff and his wife shared a physician-patient relationship with the defendant doctor. Similarly, a type of privity also existed between the plaintiffs and defendants in the telegraph and mortician cases. While *Molien* specifically does not require privity between the parties in order to find that a reasonable person would have foreseen the plaintiff's injury, this requirement would serve the purpose of protecting the defendant from unlimited liability.

The reasonable person standard also is applicable to plaintiff's burden of proving injury and causation. The genuineness of an emotional distress claim can be satisfied in two ways. First, the plaintiff can meet the burden of proving serious emotional injury by producing significant medical evidence verifying the existence of the injury. Second, the plaintiff may establish the genuineness of the claim by the special circumstances of the case. In evaluating the reasonableness of the plaintiff's reaction and the genuineness of the plaintiff's proof, the jury may grant relief if the jury finds that a reasonable person would be unable to cope sufficiently with the mental stress engendered by the circumstances of the case. Satisfying either method of proof should not pose an insurmountable task for an unmarried cohabitant who has been placed in a mental risk situation by a negligent tortfeasor, especially if the defendant holds a position of trust.

161. See supra note 70 and accompanying text.
162. See *Molien*, 27 Cal. 3d at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.
163. See id.
164. See id. at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.
165. See id.
166. See id. at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.
167. See id. at 919-20, 616 P.2d at 814-15, 167 Cal. Rptr. 832-33.
168. See supra note 78 and accompanying text.
169. See supra note 78 and accompanying text.
170. See Comment, supra note 41, at 307 n.107.
171. See *Molien*, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.
172. See id.
173. See id.
174. See id.
175. See id.
The plaintiff in *Molien*, who was perceived as a direct victim, recovered for emotional distress because of a foreseeable disruption of the marital relationship.\textsuperscript{176} Similarly, a physician, cognizant of a spousal-like relationship between the patient and another person, reasonably should foresee that a misdiagnosis of syphilis, cancer, or other grave illness would have a detrimental effect upon both cohabitants.\textsuperscript{177} Once the defendant's duty to the unmarried cohabitants is established, the direct victim plaintiff in this situation would have to prove the existence and reasonableness of the mental injury.\textsuperscript{178}

The previous discussion has demonstrated that neither the *Dillon* nor *Molien* standards of recovery preclude an unmarried cohabitant from stating a cause of action for negligent infliction of emotional distress when his or her housemate is injured. Increased social awareness, if not acceptance, of the growing number of couples who choose to cohabit supports the thesis that courts should not apply outmoded social policy concerns that deny unmarried cohabitants a remedy in either a physical or mental risk situation.\textsuperscript{179} The following section will detail the social policy concerns regarding the question of whether unmarried cohabitants should be granted the right to a negligent infliction of emotional distress claim. By way of analogy, the author will present two conflicting opinions on the issue of whether an unmarried cohabitant is entitled to an action for loss of consortium when his or her partner is seriously injured. The torts of negligent infliction of emotional distress and loss of consortium are, in many ways, similar. A final resolution of the legal conflicts created by the two cases will affect significantly the rights of unmarried cohabitants in the area of negligent infliction of emotional distress.\textsuperscript{180}

**LOSS OF CONSORTIUM AND NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS**

Loss of consortium and negligent infliction of emotional distress are similar causes of action because each provides the plaintiff with a means

\textsuperscript{176} See id. at 923, 616 P.2d at 816, 167 Cal. Rptr. at 825.


\textsuperscript{178} See supra notes 171-75 and accompanying text.

\textsuperscript{179} See supra notes 135-39 and accompanying text.

\textsuperscript{180} The two conflicting California appellate court cases are: Butcher v. Superior Court of Orange County, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983) and Hendrix v. General Motors Corporation, et al., 146 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983). The appellant in the *Hendrix* case filed an appeal after the adverse judgment. The California Supreme Court granted a hearing in October 1983, but subsequently dismissed the appeal on January 7, 1984, per stipulation after the parties in *Hendrix* agreed to an out-of-court settlement. A resolution of the issue of whether unmarried cohabitants have a right to a cause of action for loss of consortium, consequently, has been postponed.
of relief for serious emotional injury. The social policy arguments against extending either cause of action to unmarried cohabitants are similar. These arguments include the following: (1) the lack of precedent for extending the cause of action to unmarried couples, (2) the injury to the unmarried partner is too indirect, (3) the damages would be too speculative, (4) the cause of action would be extended to other classes of plaintiffs, and (5) public policy favors marriage. The following section will analyze a case which discredits these concerns and concludes that unmarried couples have a right to a loss of consortium action.

A. Butcher v. Superior Court of Orange County

A California appellate court in Butcher v. Superior Court of Orange County, recently held that none of the social policy concerns, as applied to a loss of consortium action, outweighed the need for the defendant to redress the wrong perpetrated against the plaintiff. In Butcher, the plaintiff’s cohabitant of eleven and one-half years was negligently struck by the defendant’s car and seriously injured. At the time of the accident, the unmarried couple had two children, filed joint income tax returns, and maintained joint savings and checking accounts. The couple referred to and acknowledged each other as husband and wife although no legal marriage ceremony had taken place. Upon learning that the plaintiffs were not legally married, the defendant moved for summary judgment on the claim for loss of consortium. The appellate court denied the defendant’s writ of mandate to compel the trial court to grant the motion for summary judgment.

The defendant argued that a claim for loss of consortium could not be stated by the plaintiff because the right to consortium is based on a legally valid marriage. Furthermore, social policy dictates against expanding the defendant’s liability to unmarried couples. Butcher acknowledged that social policy had limited recovery for loss of consortium to the legally married. The court, however, defined the tort of loss of consortium as an interference with the continuation of a relational interest and con-

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181. See supra notes 9, 17 and accompanying text.
182. See Butcher, 139 Cal. App. 3d at 62, 188 Cal. Rptr. at 506.
184. See id. at 62-70, 188 Cal. Rptr. at 506-12.
185. See id. at 59-60, 188 Cal. Rptr. at 504-05.
186. See id. at 60, 188 Cal. Rptr. at 505.
187. See id.
188. See id.
189. See id.
190. See id.
191. See id. at 62, 188 Cal. Rptr. at 506.
192. See id.
cluded that unmarried cohabitants also have a legitimate interest in the continuation of their relationship.193

In addressing the policy arguments against extending the tort remedy to unmarried couples, the court initially refuted the theory that no precedent existed for this action.194 The court noted that the common law is not a static body of laws, but is capable of adapting to changing times and issues.195 The basis for a cause of action for loss of consortium, therefore, had gradually changed from a proprietary entitlement vested in the husband to one of a relational interest shared equally by both spouses.196 This judicial reformation of the tort action reflected the changing perception of a woman's status in western society.197 After a review of relevant case law, the court concluded that no precedent existed that would prevent further judicial revisions of the tort action to reflect the changing needs of society.198

The second policy argument which stated that the spouse of the physically injured victim suffers too indirect or too remote an injury also was criticized in Butcher.199 This argument, the court noted, originally was advanced to prevent a wife's cause of action for loss of consortium and has been widely rejected by the courts.200 A severely disabling injury to one spouse may not destroy the marital relationship, but the relationship will invariably be altered in a tragic manner.201 The mental and emotional anguish caused by observing a spouse turned into a helpless invalid is neither an indirect nor a remote injury.202 Butcher reasoned that the suffering of an unmarried cohabitant in a similar situation may be no less real, direct, or foreseeable than that suffered by a spouse.203

The policy argument stating damages in a loss of consortium action were too speculative was considered meritless by Butcher.204 Advances in modern science provide sufficient evidence that a person, regardless of marital status, may become severely disabled, mentally as well as physically, upon the death or injury of a loved one.205 Modern science has also developed the ability to approximate the extent of mental suffering.206 On the basis of this information, courts and juries have been able to award

193. See id. at 67, 188 Cal. Rptr. at 510.
194. See id. at 62-65, 188 Cal. Rptr. at 506-09.
195. See id. at 62-64, 188 Cal. Rptr. at 506-07.
196. See id. at 61, 188 Cal. Rptr. at 505.
197. See id.
198. See id. at 66, 188 Cal. Rptr. at 509.
199. See id. at 67-68, 188 Cal. Rptr. at 509-10.
200. See id.
201. See id.
202. See id.
203. See id.
204. See id. at 68-69, 188 Cal. Rptr. at 511.
205. See id.
206. See id.
damages for pain and suffering as well as for other noneconomic losses.\textsuperscript{207}

The fourth policy issue concerned the fear that defendants would be exposed to unlimited liability if the tort remedy were extended beyond the marital relationship.\textsuperscript{208} Butcher argued that this fear was unwarranted.\textsuperscript{209} If the unmarried cohabitants could prove a relational interest similar to that shared by spouses, then the defendant would be liable only to the partner of the physically injured cohabitant.\textsuperscript{210}

The final argument involved the concern that if unmarried cohabitants were allowed loss of consortium, the interest of the state in fostering marriage, as evidenced in the workers' compensation and wrongful death statutes, would be undermined.\textsuperscript{211} Butcher noted that the right to recover under each of these laws is governed by statute while a cause of action for loss of consortium developed out of the common law.\textsuperscript{212} Since the California Legislature has chosen not to define or regulate consortium rights by statute,\textsuperscript{213} Butcher concluded that the mandates of both workers' compensation and wrongful death statutes are inapplicable to the cause of action for loss of consortium.\textsuperscript{214}

After holding that the social policy against extending the right to a cause of action for loss of consortium to unmarried cohabitants is no longer justified, Butcher provided a standard whereby cohabitation relationships could be evaluated to determine whether a remedy should be afforded.\textsuperscript{215} Butcher noted that nonmarital cohabitation arrangements are entered into for a variety of reasons and include relationships that range from casual affairs to relationships that endure longer than many marriages.\textsuperscript{216} Permitting all unmarried cohabitants to recover for loss of consortium, therefore, would pose severe problems in terms of limiting the defendant's liability.\textsuperscript{217} Thus, the Butcher court recommended that only unmarried cohabitants who can prove a stable and significant cohabitation arrangement be included within the definition of a foreseeable plain-
tiff in a loss of consortium action.218

The guidelines presented in Butcher for use in evaluating the stability and significance of a cohabitation arrangement include the following: (1) the existence of a mutual contract, (2) the degree of economic cooperation and entanglement, (3) the exclusivity of sexual relations, and (4) the existence of a "family relationship" with children.219

The preceding analysis of Butcher indicates that a person who negligently injures an adult may reasonably foresee in our contemporary society that the injured person may be cohabiting with another without the formality of marriage.220 Policy arguments favoring the limitation of a defendant's liability despite the foreseeable injury are no longer valid according to Butcher.221 Finally, the court presents criteria for evaluating cohabitation arrangements.222 Proof of these criteria enables the granting of relief to those couples who have provided evidence of a significantly close relationship.223 A contrary opinion regarding the right of unmarried cohabitants to a loss of consortium action will be analyzed in the following section.

B. Hendrix v. General Motors Corp. et al.

In Hendrix v. General Motors Corp. et al.,224 the plaintiffs, Lebron Mitchell and Sharon Hendrix, joined in a complaint against General Motors Corporation and Doten Pontiac for damages arising out of an automobile accident in which Mitchell was severely injured.225 Mitchell stated three causes of action for products liability and negligence; in the fourth cause of action, Hendrix alleged loss of consortium.226 Hendrix alleged that she was the prospective wife of the plaintiff and had been residing with Mitchell at the time of the accident.227 The defendants demurred to the fourth cause of action on the basis that a claim for loss of consortium cannot be maintained if the plaintiff is not married to the injured party.228 The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal against Hendrix, which was affirmed by the appellate court.229

218. See id.
219. See id.
220. See id. at 68, 188 Cal. Rptr. at 510.
221. See id. at 62-70, 188 Cal. Rptr. at 506-12.
222. See supra note 219 and accompanying text.
223. See Butcher, 139 Cal. App. 3d at 70, 188 Cal. Rptr. at 512.
225. See id. at 297-98, 193 Cal. Rptr. at 922-23.
226. See id. at 297, 193 Cal. Rptr. at 922-23.
227. See id. at 297, 193 Cal. Rptr. at 923.
228. See id.
229. See id. at 297-98, 193 Cal. Rptr. at 922-23.
Outlining in great detail the judicial and legislative support for the notion that marriage is the basic unit of social order, the Hendrix court reasoned that this public policy would be thwarted if unmarried cohabitants could gain marital legal rights without accepting the accompanying legal responsibilities.\(^\text{230}\) Hendrix sharply disagreed with the Butcher decision.\(^\text{231}\) In particular, the Hendrix court advocated that the judiciary not attempt to affect a change in public policy regarding the rights of cohabitants. Only the legislature, which is responsible to the electorate, should have the power to institute radical changes of this nature.\(^\text{232}\)

Another point of contention between the two decisions is the Hendrix appraisal of the Butcher criteria for establishing evidence of a stable and significant relationship.\(^\text{233}\) Hendrix labeled the criteria unworkable.\(^\text{234}\) While married couples could prove their relationship by documentary evidence, unmarried cohabitants would have to rely on more subjective evidence.\(^\text{235}\) Numerous standards and difficulties would arise, placing an unnecessary burden on the judicial system.\(^\text{236}\)

The two appellate court decisions of Butcher and Hendrix obviously are in sharp disagreement over the issue of whether to extend a remedy for loss of consortium to unmarried cohabitants.\(^\text{237}\) Butcher emphasizes the need for the plaintiff to be compensated for the defendant's negligent act, and holds that the plaintiff is a foreseeable victim who is owed a duty of due care.\(^\text{238}\) Hendrix defines the defendant's duty according to prevalent social policies, which the court refuses to override in order to provide a remedy for loss of consortium to unmarried cohabitants.\(^\text{239}\) The following section will discuss the applicability of the two decisions to an emotional distress action.

C. Application of Butcher and Hendrix to a Negligent Infliction of Emotional Distress Action

This author has indicated that a defendant in either a physical or mental risk situation owes a duty of care to all persons who foreseeably are endangered by his tortious conduct.\(^\text{240}\) As the Butcher court noted, the likelihood that an injured adult will be married is no less than the likeli-

\(^{230}\) See id. at 298-301, 193 Cal. Rptr. at 923-25.
\(^{231}\) See id. at 298, 193 Cal. Rptr. at 923.
\(^{232}\) See id. at 301, 193 Cal. Rptr. at 925.
\(^{233}\) See id. at 301-02, 193 Cal. Rptr. at 925-26.
\(^{234}\) See id.
\(^{235}\) See id. at 302, 193 Cal. Rptr. at 925.
\(^{236}\) See id. at 302, 193 Cal. Rptr. at 925-26.
\(^{237}\) See supra notes 183-236 and accompanying text.
\(^{238}\) See Butcher, 139 Cal. App. 3d at 67-68, 188 Cal. Rptr. at 510-11.
\(^{239}\) See Hendrix, 146 Cal. App. 3d at 299-300, 193 Cal. Rptr. at 924-25.
\(^{240}\) See supra notes 67-95 and accompanying text.
hood that a small child's mother personally will witness an injury to her offspring.\textsuperscript{241} By parity of reasoning, the defendant also reasonably may expect in our contemporary society that the injured adult may be an unmarried cohabitant and that his or her housemate will suffer emotional distress by witnessing the injury.

In a physical risk situation, the plaintiff must suffer a physical injury and satisfy the foreseeability guidelines of \textit{Dillon} which include the existence of a substantially close relationship with the primary victim.\textsuperscript{242} Courts that have interpreted \textit{Dillon} flexibly have allowed recovery for emotional distress suffered by a plaintiff who shares a "family-like" relationship with the primary victim.\textsuperscript{243} A plaintiff who is able to prove the existence of a stable and significant spousal-like relationship with the primary victim by use of the \textit{Butcher} criteria should also satisfy the \textit{Dillon} requirement of a substantially close relationship.

A close relational interest between the direct victim and other injured party is not specifically required in a mental risk situation.\textsuperscript{244} Evidence of a serious mental injury, however, would be substantiated by proof of a spousal-like relationship between the two injured parties.\textsuperscript{245} A defendant who is in privity with the cohabitants and knows of the spousal-like relationship should reasonably conclude that his negligent conduct could result in plaintiff's injury.\textsuperscript{246}

In either a physical risk or mental risk situation, the defendant's duty of due care is limited by social policy.\textsuperscript{247} The \textit{Hendrix} decision reflects the opinion of courts that are concerned with a possible flood of fictitious litigation and increasing administrative difficulties.\textsuperscript{248} If the task of providing unmarried cohabitants a remedy for loss of consortium were given to the legislature, as the \textit{Hendrix} decision suggests, the courts would be abdicating judicial responsibility. Both loss of consortium and negligent infliction of emotional distress actions are derived from common law.\textsuperscript{249} The judiciary, therefore, must use the traditions of common law to construct an appropriate standard of recovery.\textsuperscript{250}

Another concern expressed in \textit{Hendrix}\textsuperscript{251} is the need to foster the basic family unit. Granting a remedy to unmarried couples who suffer severe emotional distress in either a physical or mental risk situation will not un-

\textsuperscript{241} See \textit{Butcher}, 139 Cal. App. 3d at 67-68, 188 Cal. Rptr. at 510-11.
\textsuperscript{242} See supra note 70 and accompanying text.
\textsuperscript{243} See supra notes 121-27 and accompanying text.
\textsuperscript{244} See supra notes 161-63 and accompanying text.
\textsuperscript{245} See \textit{Butcher}, 139 Cal. App. 3d at 67-68, 188 Cal. Rptr. at 510-11.
\textsuperscript{246} See supra note 170 and accompanying text.
\textsuperscript{247} See \textit{Hendrix}, 146 Cal. App. 3d at 301, 193 Cal. Rptr. at 925.
\textsuperscript{248} See \textit{Butcher}, 139 Cal. App. 3d at 70, 188 Cal. Rptr. at 512.
\textsuperscript{249} See id.
\textsuperscript{250} See supra note 180 and accompanying text.
\textsuperscript{251} See \textit{Hendrix}, 146 Cal. App. 3d at 299-300, 193 Cal. Rptr. 923-25.

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dermine the interest of the state in fostering the traditional family unit. Clearly, the transitions taking place in western culture, as exemplified by the changes in family structure, reflect a moral and social revolution that will not be halted by a judiciary insistent on adhering to an older morality. Furthermore, unlike the tort of loss of consortium, which is founded on an interest in a marital relationship, the tort of negligent infliction of emotional distress merely requires that the injured parties share a substantially close relationship. Thus, the concern in Hendrix about the interest of the state in protecting marital rights is not as great in an action for negligent infliction of emotional distress as would be the case in an action for loss of consortium.

Despite the Hendrix decision, the rationale for extending a loss of consortium cause of action to unmarried cohabitants presented in Butcher may still be relied upon as support for extending to unmarried cohabitants the right to state a claim for negligent infliction of emotional distress. Dillon and Molien mandate that fears of administrative difficulties and fictitious claims should not shield a defendant from liability when a serious wrong has been committed. Unmarried cohabitants, whose alternative lifestyle serves the same basic function as a familial relationship, should not be denied legal redress as punishment for refusing to conform to traditional notions of morality or because the judiciary seeks to avoid administrative difficulties. A probable result of this conclusion is the legal recognition of a negligent infliction of emotional distress claim brought by an unmarried heterosexual cohabitant. A further extension of this theory would be to recognize the same cause of action brought by an unmarried homosexual cohabitant. The following section will present the application of the foreseeability tests of Dillon and Molien to the homosexual plaintiff in both a physical risk and mental risk situation.

APPLICATION TO HOMOSEXUAL COHABITANTS

The increasing political activism of the homosexual community has resulted in a growing awareness of the legal needs of that community by the judiciary and the legislatures. Traditional notions of the family unit

252. See Butcher, 139 Cal. App.3d at 68, 188 Cal. Rptr. at 510.
253. See id. at 60, 188 Cal. Rptr. at 505.
254. See Comment, supra note 177, at 201.
255. See Dillon, 68 Cal. 2d at 736-37, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78; Molien, 27 Cal. 3d at 925-30, 616 P.2d at 818-21, 167 Cal. Rptr. at 836-39.
256. See In re Reed, 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983) (holding mandatory registration of sex offenders convicted under misdemeanor disorderly conduct statute violated cruel and unusual punishment provision of California Constitution); Gay Law Student's Ass'n v. Pacific Telephone & Telegraph, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (holding that the California equal protection clause does not permit privately owned utilities or the state to arbitrarily discriminate against homosexuals re-
and lingering prejudice against homosexuals, however, have hampered legal reform in this area. Unlike heterosexual couples who may choose whether to marry, homosexual couples are denied the opportunity to marry legally by state law. Nevertheless, many of these couples form stable and significant cohabitation arrangements which serve the same function as a spousal relationship. This comment suggests that the arguments in favor of extending a cause of action for negligent infliction of emotional distress to unmarried heterosexual cohabitants also should be applicable to homosexual cohabitants in a physical risk or mental risk situation.

A. Recovery in a Physical Risk Situation

This author has argued that a spousal-like relationship should qualify as a close relationship under the Dillon guidelines. The Butcher court held that the increasing incidence of unmarried cohabitation in recent years also increased the chance that a percipient witness to an accident would be the "de facto" spouse of the primary victim and would suffer emotional distress as a result. Butcher dismissed the social policy arguments limiting the defendant's duty as no longer valid in contemporary society and outweighed by the need to redress a wrong suffered by the plaintiff.

The same logic could be applied to a physical risk situation involving a homosexual couple. In California, the number of homosexual couples openly living together in a spousal-like relationship has increased substantially in recent years. While recognition of the legal needs of homosexual couples has been tentative, some courts have granted homosexual couples rights in the area of family law.

Marvin v. Marvin, as previously noted, redefined the rights of unmar-
ried cohabitants with regard to financial interests in property. The decision did not necessarily limit these property rights to unmarried heterosexual couples. Following the Marvin lead, a subsequent San Diego superior court decision recognized the relationship of two lesbians as sufficiently legitimate to require one of the women to pay support to the other when the relationship ended. The trial judge based the holding on the fact that the two women participated in a Holy Union ceremony at the Metropolitan Community Church and had signed an agreement that one would take responsibility for the household and the other for financial support.

In addition to awarding community property rights to homosexuals, the courts are increasingly granting homosexual parents child custody. Custody more frequently is being given to the parent based on the person’s parenting abilities rather than on sexual orientation. Consistent with the more tolerant trend in attitudes toward homosexual couples, a Los Angeles superior court allowed an openly homosexual couple to adopt a child. Increased community and legal recognition of homosexual couples tends to support the theory that a homosexual cohabitant is a foreseeable bystander plaintiff in a physical risk situation.

Consequently, the judiciary should not bar a claim for negligent infliction of emotional distress by a homosexual couple able to prove the existence of a stable and significant relationship by applying the factors presented in Butcher. Since Molien does not specifically require a close relationship, recovery for negligent infliction of emotional distress may be more easily obtained for a homosexual cohabitant in a mental risk situation.

B. Recovery in a Mental Risk Situation

A medical misdiagnosis of syphilis could have a detrimental effect on most couples regardless of their marital status or sexual preference. As previously suggested, the Molien standard for recovery should not be confined to a situation in which the marital interests alone are jeopardized. A misdiagnosis of a serious or terminal disease might produce similar neg-

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264. See supra notes 148-51 and accompanying text.
265. Richardson v. Conley, California Superior Court (San Diego, June 6, 1978); see The Advocate, No. 245 at 12 (July 12, 1978).
266. See id.
267. See Rivera, supra note 257, at 883-904.
268. See id. at 903-04.
269. See The Advocate, No. 262 at 12 (March 8, 1979).
270. See supra notes 259-66 and accompanying text.
271. See supra note 219 and accompanying text.
272. See Comment, supra note 177, at 199.
273. See id. at 201.
ative repercussions between two persons sharing a close relationship.

A tragic misdiagnosis of Acquired Immune Deficiency Syndrome or the negligent treatment of a homosexual patient with this disease might cause foreseeable emotional distress in the patient's homosexual cohabitant. A physician who is aware that the patient shares a spousal-like relationship with another reasonably should conclude that a misdiagnosis or mistreatment of the often deadly syndrome would have a serious effect upon the patient and the patient's homosexual cohabitant. In the event of a negligent misdiagnosis or treatment, recovery for emotional distress by the patient as well as the patient's homosexual cohabitant, therefore, should be granted.

Social policy concerns regarding the exposure of the defendant to unlimited liability may relieve the defendant of a duty of due care even in this situation. Before the plaintiff's evidence of injury and causation is weighed by the jury, the court must determine whether social policies should preclude the plaintiff's right to a remedy. Despite an increasing tolerance toward homosexuals, the court may choose to limit a defendant's duty of due care for negligent infliction of emotional distress to those plaintiffs who share a more conventional relationship. A person's sexual preference, however, should not bar a meritorious claim for emotional distress. A homosexual plaintiff who is able to overcome the burden of proving serious emotional distress in a mental risk situation should be allowed to recover.

**CONCLUSION**

Unmarried cohabitants are seeking to gain rights in areas that traditionally have been reserved for married couples. This author has considered the possibility of extending the right to state a claim for negligent infliction of emotional distress to unmarried cohabitants who share a stable and significant relationship. An analysis of the tort revealed that a defendant owes a duty of care to those persons who are reasonably foreseeable victims of the defendant's tortious conduct. Thus, unmarried cohabitants must prove that they come within the definition of foreseeable plaintiffs in order to recover for emotional distress.

The standard for determining foreseeability is dependent upon the type

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277. See *supra* notes 67-96 and accompanying text.
of risk involved. In a physical risk situation, a plaintiff who suffers emotional distress from witnessing another's injury must prove that the mental distress resulted in physical harm. In addition, the plaintiff must satisfy the three-pronged foreseeability test formulated in Dillon. This test includes the requirement that the plaintiff share a substantially close relationship with the primary victim. A review of subsequent case law indicated that most courts have interpreted the close relationship requirement narrowly, granting recovery only when a spousal or blood relationship existed. Other courts have allowed recovery when evidence of a family-like relationship has been established. This comment concluded that spousal-like relationships also should satisfy the Dillon foreseeability test.

The Molien decision governs the scope of the defendant's duty of due care in a mental risk situation. This author noted that an unmarried cohabitant might be able to recover for mental injury in this situation because the plaintiff need not prove a physical injury nor a close relationship with the other victim. A defendant's duty, according to Molien, is determined by a reasonable person standard. Likewise, plaintiff's evidence of injury and causation is judged by a reasonable person standard.

In either a physical risk or mental risk situation, a plaintiff may be denied relief for negligent infliction of emotional distress if prevailing social policy limits the defendant's duty. An analysis of recent conflicting decisions affecting the rights of unmarried cohabitants to an action for loss of consortium revealed that one court has held that the social policy against extending this remedy to cohabitants is no longer valid. By analogy, this comment also concluded that similar social policy limitations should not preclude cohabitants from a remedy for negligent infliction of emotional distress.

The author further proposed that the right to a claim for negligent infliction of emotional distress be extended to homosexual cohabitants who share a significant and stable relationship. If the defendant owes a duty of due care to unmarried cohabitants, then the sexual preference of the

278. See supra note 45 and accompanying text.
279. See supra notes 97-100 and accompanying text.
280. See id.
281. See id.
282. See supra notes 107-20 and accompanying text.
283. See supra notes 121-32 and accompanying text.
284. See supra notes 90-96 and accompanying text.
285. See supra note 100 and accompanying text.
286. See supra notes 91-93 and accompanying text.
287. See id.
288. See PROSSER, supra note 31, at 328.
289. See supra note 221 and accompanying text.
290. See supra notes 239-54 and accompanying text.
291. See supra notes 255-75 and accompanying text.
couple should not determine the merit of the claim.

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