Boston College Law Review

Volume 46
Issue 2 *Number 2*

Article 4

3-1-2005

Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions

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LIKE FAMILY: RIGHTS OF NONMARRIED COHABITATIONAL PARTNERS IN LOSS OF CONSORTIUM ACTIONS

Abstract: The organization of family life in American society has changed dramatically in recent decades. Changing societal morals and increases in divorce rates mean that fewer households are organized around the traditional nuclear family model. Courts have struggled to understand and classify these alternative family arrangements, and most have denied recovery in actions for loss of consortium by nonmarried cohabitants. This Note argues that changes in related areas of law and in the loss of consortium doctrine itself indicate that nonmarried cohabitants should be allowed to recover. Specifically, judicial understanding of the purpose of loss of consortium recovery has shifted, and nonmarried cohabitants have been allowed to recover in closely analogous actions such as negligent infliction of emotional distress. This Note proposes adoption of a standard similar to the one employed in negligent infliction of emotional distress actions. Such a standard provides a framework to determine whether damage to a relationship is severe enough to be compensable, while still providing adequate safeguards to prevent a wave of frivolous suits.

INTRODUCTION

Nonmarital cohabitation is a growing trend in American society and has increased rapidly in the past few decades.[1] Since 1977, the number of cohabitating couples has more than quadrupled.[2] This rapid increase in cohabitation and the corresponding decline in marriage rates have been described as two of the most significant social changes of our time.[3]

The increased incidence of nonmarital cohabitation represents a watershed demographic shift in how people organize their intimate and familial relations.[4] Indeed, cohabitational relationships account for 12% of all current unions and 31% of all unions for individuals

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[1] Lynne M. Casper & Philip N. Cohen, *How Does POSSLQ Measure Up? Historical Estimates of Cohabitation*, 37 DEMOGRAPHY 237, 239 (2000).

[2] *Id.*

[3] Joshua R. Goldstein & Catherine T. Kenney, *Marriage Delayed or Marriage Forgone? New Cohort Forecasts of First Marriage for U.S. Women*, 66 AM. SOC. REV. 506, 506 n.1 (2001).

[4] *See id.*

between the ages of nineteen and twenty-four.[5] The trend of cohabitation is remarkable not only for the number of couples engaging in such relationships, but also because of the percentage of people who participate in a cohabitational relationship at some point during their lives.[6] The percentage of women who have been involved in a heterosexual cohabitational relationship at some point in their lives rose from 33% in 1987 to 45% by 1995.[7] Therefore, nearly half of the population now engages in these relationships, which were once atypical and perceived by many as immoral.[8]

The law has not kept pace with changing attitudes toward nonmarital cohabitation.[9] Courts seem particularly hesitant to allow cohabitational partners to recover in tort actions, such as loss of consortium.[10] The loss of consortium claim allows spouses and other family members of a person who suffers a tortious injury to bring suit against the tortfeasor.[11] This action provides recovery for the damage to their relationship resulting from the injury to the direct victim.[12] Throughout most of American and English legal history, this action was only available to husbands.[13] But over the past fifty years, courts' understanding of loss

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[5] Larry L. Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and the Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 32 (2000). Cohabitation can serve several purposes based on the values and goals of the participants. *See generally* Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615 (1989); Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 920 (1991). Commonly, it is seen as a sort of "trial marriage" where individuals live together for a relatively short period of time as a test of compatibility before ultimately marrying. *See* Bumpass et al., *supra*, at 920. For others, cohabitation is a substitute for marriage. *See id.* Some cohabitating couples reject the gender roles that they perceive as being part and parcel of marriage, while others simply desire a less formal means of commitment. *See id.* at 921.

[6] *See* Bumpass & Lu, *supra* note 5, at 31.

[7] *Id.* at 32.

[8] *Id.*

[9] *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 585–86 (Cal. 1988); Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095, 1096 (Mass. 1987).

[10] *See Elden*, 758 P.2d at 586; *Feliciano*, 514 N.E.2d at 1096. *But see* Reep v. Comm'r of the Dep't of Employment & Training, 593 N.E.2d 1297, 1301 (Mass. 1992) (allowing nonmarried cohabitational partners the same rights as married spouses to unemployment insurance when they relocate with their partners).

[11] *See* Hitaffer v. Argonne Co., 183 F.2d 811, 813 (D.C. Cir. 1950) (allowing both spouses to recover); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 696 (Mass. 1980) (allowing children to recover); Montgomery v. Stephan, 101 N.W.2d 227, 231 (Mich. 1960) (discussing interests protected by loss of consortium actions); Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 782–83 (N.M. 1998) (allowing grandparents to recover).

[12] *Fernandez*, 968 P.2d at 782.

[13] *See Hitaffer*, 183 F.2d at 813.

of consortium has changed.[14] Consequently, courts have broadened the class of potential plaintiffs considerably.[15] Despite the recent willingness to consider the emotional harm suffered by plaintiffs other than spouses, the great majority of courts have clung to a bright-line no marriage/no recovery rule which has excluded nonmarried cohabitational partners.[16] Some argue that the rule limiting recovery only to married partners is arbitrary and leads to unjust results.[17]

Given the rise of nonmarital cohabitation, it is not difficult to envision scenarios where the bright-line no marriage/no recovery rule for loss of consortium creates potentially unjust results.[18] Consider a hypothetical set of neighbors, two heterosexual couples living next door to each other.[19] The individuals in Couple *A*, an unmarried man and woman, have been in a committed relationship for nearly a decade and purchased their house together nearly five years ago.[20] They are involved in every aspect of each other's lives, and a year ago, they adopted a child.[21] A second couple, Couple *B*, lives next door in a house owned by a woman who recently eloped after a two-month whirlwind romance.[22] Her new husband moved in a few weeks ago.[23] One day, as both men are walking across the street to check the mail, they are both struck by a negligent driver who sped through the neighborhood.[24] Both men were grievously injured, and have trouble carry-

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[14] *Id.* at 814; *Ferriter*, 413 N.E.2d at 696; *Fernandez*, 968 P.2d at 782.

[15] *See Hitaffer*, 183 F.2d at 813; *Ferriter*, 413 N.E.2d at 696; *Fernandez*, 968 P.2d at 782.

[16] *See, e.g.*, *Elden*, 758 P.2d at 588.

[17] *See* Lozoya v. Sanchez, 66 P.3d 948, 955 (N.M. 2003) (rejecting a bright-line test denying cohabitants the ability to recover).

[18] *Elden*, 758 P.2d at 582–83.

[19] The issue of recovery for nonmarital cohabitational partners has obvious application to homosexual as well as heterosexual partners. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003). Discussion of the tort rights of homosexual partners is beyond the scope of this Note. For discussion of this issue, see John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 Ky. L.J. 911, 949 (2001). Additionally, as states begin to address gay marriage and civil unions, homosexuals may be afforded protections similar to those of married heterosexual couples. *See Goodridge*, 798 N.E.2d at 949. It is worth noting, however, that judicial recognition of the nature and significance of the damaged relationships could play an important role in the debate over same-sex marriage. *See id.* at 955–58. Such recognition may serve to extend certain important rights, such as the ability to sue for loss of consortium, to homosexuals, thus lessening some of the pressure for legislatures to recognize same-sex marriage or to create alternatives such as civil unions. *See id.*

[20] *See, e.g.*, Butcher v. Superior Court, 188 Cal. Rptr. 503, 505 (Cal. Ct. App. 1983), *overruled by Elden*, 758 P.2d at 582–83 (describing the plaintiffs' similar living arrangement).

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See Elden*, 582 P.2d at 582–83.

ing on with daily life and relating to their partners.[25] There can be little doubt that the woman in Couple *A* suffers as much, if not more, emotional harm and damage to her long-standing relationship than the woman in Couple *B*, who had hardly begun to build a life with her new spouse.[26] But, the woman in Couple *B* would be allowed to recover for the emotional harm she suffered, while her neighbor would be turned away by the courts.[27] One can imagine other compelling scenarios in which the long-term partner of an injured individual suffers terrible emotional injuries but is denied recovery because the couple had not yet married or had chosen not to marry.[28]

This Note examines social and legal trends in order to determine whether the current understanding of loss of consortium actions is in step with social reality.[29] Part I explores the history of the loss of consortium action.[30] Specifically, it examines the altered understanding of the action in the marital context, current trends which have extended recovery to other family members, and the refusal of most courts to allow nonmarried cohabitational partners to recover.[31] Part II discusses the expansion of tort recovery for nonmarried cohabitational partners.[32] The related tort action for negligent infliction of emotional distress, which in several states has been found to include cohabitational partners, is explored as a useful model for extending recovery in loss of consortium actions.[33] A recent New Mexico case extending recovery in loss of consortium actions is also examined.[34] Finally, Part III argues that legal and social trends indicate that loss of consortium claims should be broadened to include nonmarried cohabitational partners and criticizes common policy reasons cited for denying recovery.[35]

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[25] *See id.*
[26] *See id.*
[27] *See id.*
[28] *See id.*
[29] *See infra* notes 223–234 and accompanying text.
[30] *See infra* notes 36–135 and accompanying text.
[31] *See infra* notes 36–135 and accompanying text.
[32] *See infra* notes 136–211 and accompanying text.
[33] *See infra* notes 141–178 and accompanying text.
[34] *See infra* notes 184–211 and accompanying text.
[35] *See infra* notes 212–313 and accompanying text.

I. The History of the Loss of Consortium Claim

A. *Origins of the Claim*

Over the past several decades, judicial interpretation of the loss of consortium claim has changed dramatically.[36] Courts have abandoned traditional property-based theories of recovery.[37] The modern understanding of the claim allows for damages based on harm to more intangible relational interests like love, affection, and companionship.[38] This evolution in the interests protected by the loss of consortium action enabled wives to recover when their husbands were injured and ultimately lead to an even broader expansion of the class of plaintiffs allowed to bring loss of consortium claims.[39]

Loss of consortium is an old but controversial cause of action.[40] The claim evolved from older common law loss of services actions.[41] These actions allowed a master to recover when a tortfeasor injured his servant, making the servant less able to perform duties.[42] The courts reasoned similarly that because husbands were entitled to services from their wives, a husband should be allowed to recover when injury to his wife made her less able to fulfill her duties.[43]

Upon marriage, men assumed property interests in their wives.[44] Wives lost all legal identity and in many respects became chattel belonging to their husbands.[45] Lack of education for women and tremendous societal pressure meant that subservience was socially in-

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[36] *See, e.g.*, Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir. 1950); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 696 (Mass. 1980); Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 782–83 (N.M. 1998).

[37] *Hitaffer*, 183 F.2d at 813; Montgomery v. Stephan, 101 N.W.2d 227, 229–31 (Mich. 1960).

[38] *Hitaffer*, 183 F.2d at 814; *Fernandez*, 968 P.2d at 782–83.

[39] *See Hitaffer*, 183 F.2d at 813; *Ferriter*, 413 N.E.2d at 696; *Fernandez*, 968 P.2d at 782–83.

[40] *See, e.g.*, West v. City of San Diego, 353 P.2d 929, 934 (Cal. 1960) (eliminating the traditional right of husbands to sue for loss of consortium on the ground that it was irrational and discriminatory to distinguish between husbands and wives, who were not allowed to recover). Later cases established the right of both husbands and wives to recover for loss of consortium. *See* Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 675 (Cal. 1974).

[41] *Montgomery*, 101 N.W.2d at 230; *see* Comment, *Extending Consortium Rights to Unmarried Cohabitants*, 129 U. Pa. L. Rev. 911, 914–15 (1981); Kelly M. Martin, Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interests?*, 58 S. Cal. L. Rev. 1467, 1468–69 (1985).

[42] Martin, *supra* note 41, at 1468–69.

[43] *See Montgomery*, 101 N.W.2d at 230.

[44] Comment, *supra* note 41, at 914–25.

[45] *See Montgomery*, 101 N.W.2d at 230.

grained, and courts ensured that it was also legally enforceable.[46] Women also lost all rights to their property upon marriage.[47] As Henrici de Bracton, a famous early English legal commentator, notes, a wife "has nothing which is not her husband's."[48] Inherent in this understanding of the marital relationship was the idea that a wife owed certain immutable duties to her husband, such as labor inside and outside the home, all tasks relating to housekeeping, sexual services, and all child-rearing responsibilities.[49] When his property interests in his wife were damaged, the husband had the right to sue for recovery.[50] Because women had no similar property-like interests in their husbands, they had no right to bring suit for loss of consortium.[51]

As time passed and societal values changed, courts recognized that loss of consortium claims encompassed not only material services from the wife, but also damage to less tangible aspects of the marital relationship like affection and companionship.[52] Over time, damage to the marriage relationship became the primary ground for recovery.[53] This shift in emphasis toward protecting the relational interests in the marriage, rather than protecting property interests in a wife, made exclusion of wives from loss of consortium claims logically unsound.[54] Courts were slow, however, to overturn the old common law doctrine.[55]

Not until the Court of Appeals for the District of Columbia decided the landmark case of *Hitaffer v. Argonne Co.* in 1950 did a court allow a wife to recover for loss of consortium for injuries to her husband.[56] Lucia Hitaffer brought an action for loss of consortium against her husband's employer, claiming the company's negligence caused his injury on the job that subsequently interfered with her relational interests in the marriage.[57] The court overruled a district court decision

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[46] *See id.*

[47] *See id.*

[48] 5 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 423 (Sir Travers Twiss ed., William S. Hein & Co. 1990) (1882).

[49] *See Montgomery*, 101 N.W.2d at 229–30.

[50] *Montgomery*, 101 N.W.2d at 230; Comment, *supra* note 41, at 915.

[51] *Hitaffer*, 183 F.2d at 813; *Montgomery*, 101 N.W.2d at 230.

[52] *See Hitaffer*, 183 F.2d at 814; Martin, *supra* note 41, at 1469.

[53] *See* Martin, *supra* note 41, at 1469.

[54] *Hitaffer*, 183 F.2d at 813.

[55] *See, e.g.*, *Rodriguez*, 525 P.2d at 675. The right of wives to sue for loss of consortium was first established in a federal case in 1950. *Hitaffer*, 183 F.2d at 813. But many states barred wives from suing well into the 1970s. *Rodriguez*, 525 P.2d at 675.

[56] 183 F.2d at 813.

[57] *Id.* at 812.

dismissing the suit for failure to state a cause of action.[58] The court found that aside from outmoded justifications behind most of the early common law decisions, it was "unable to disclose any substantial rationale on which we would be willing to predicate a denial of a wife's action for loss of *consortium*."[59]

Consortium thus came to encompass far more than the bare material services that originally provided the grounds for recovery.[60] The court reasoned that in addition to material services, love, affection, and sexual relations combined to form the basis for recovery in loss of consortium actions.[61] Under this idea of consortium, a wife has interests in the relationship that are identical to those of her husband, and thus, should be allowed to recover on an equal basis.[62] The ability of wives to recover for loss of consortium heralded the abandonment of the anachronistic idea that the action provided recovery for pecuniary losses in the form of services.[63] This shift established that loss of consortium actions protect the relational interests in the marriage.[64]

B. *Extension of Loss of Consortium Claims to Children and Other Family Members*

The recognition that consortium claims protect relational interests led several courts to extend recovery beyond spouses to include others who experience damage to their relationship when a person suffers a tortious injury.[65] Siblings, grandparents, and children of the direct victim have been allowed to recover in several states.[66] Although the reasoning underlying the expansion of the group of plaintiffs who can bring loss of consortium actions could logically transcend familial relationships, the majority of courts have continued to draw clear lines based on blood and legal relationships.[67]

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[58] *Id.*

[59] *Id.* at 813.

[60] *See id.* at 814.

[61] *Hitaffer*, 183 F.2d at 814.

[62] *See id.* at 818.

[63] *See id.* at 814.

[64] *See id.*

[65] *See, e.g.*, *Ferriter*, 413 N.E.2d at 696 (allowing child recovery); *Fernandez*, 968 P.2d at 782 (allowing grandparent recovery); Leavy v. Yates, 142 N.Y.S.2d 874, 876 (Sup. Ct. 1955) (allowing sibling recovery).

[66] *See, e.g.*, *Ferriter*, 413 N.E.2d at 696 (allowing child recovery); *Fernandez*, 968 P.2d at 782 (allowing grandparent recovery); *Leavy*, 142 N.Y.S.2d at 876 (allowing sibling recovery).

[67] *See Fernandez*, 968 P.2d at 784.

Several states have recognized that children can recover for loss of consortium when a parent suffers negligently caused injuries.[68] When the Supreme Judicial Court of Massachusetts decided *Ferriter v. Daniel O'Connell's & Sons, Inc.* in 1980, it became one of the first state courts to recognize that children have an independent claim for damage to their relationship when their parent sustains an injury.[69] Michael Ferriter was injured during the course of his employment when a two hundred pound load of lumber fell from a crane, striking him in the neck and head.[70] He was paralyzed from the neck down.[71] His wife and two children sued for loss of consortium.[72] The court reasoned that although the common law was silent on the issue of whether children had a protected right in the relationship with their parent, parents have long been entitled to recover when a tortfeasor injures their child, thus depriving them of the love and companionship that characterizes the parent-child relationship.[73] Because children generally enjoy the same rights to protection and to legal redress as other members of society, it was anomalous to hold that a parent could recover for damage to the parent-child relationship but a child could not.[74] Therefore, the court held that Mr. Ferriter's children should be allowed to state a claim for loss of consortium if they could show dependence on the injured parent.[75]

Later cases in Massachusetts further refined the doctrine of loss of parental consortium and addressed what made a child "dependent" for purposes of the action.[76] Dependence was not a matter of economic reliance.[77] Instead, it related to the child's reliance on the injured parent for management of their physical needs and for emotional guidance and support.[78] Thus, in extending the ability to sue for loss of consortium, courts explicitly relied on the emotional harm suffered by the child as a result of damage to the relationship with the

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[68] Villareal v. State Dep't of Transp., 774 P.2d 213, 216 (Ariz. 1989); Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa 1981); Guiliani v. Guiler, 951 S.W.2d 318, 323 (Ky. 1997); *Ferriter*, 413 N.E.2d at 696; Craft v. Hermes Consol., Inc., 797 P.2d 559, 560 (Wyo. 1990).

[69] 413 N.E.2d at 696.

[70] *Id.* at 691.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 694.

[74] *See Ferriter*, 413 N.E.2d at 696.

[75] *Id.*

[76] Barbosa v. Hopper Feeds, Inc., 537 N.E.2d 99, 104 (Mass. 1989); Glicklich v. Spievack, 542 N.E.2d 287, 292 (Mass. App. Ct. 1983).

[77] *Barbosa*, 537 N.E.2d at 104.

[78] *Id.*

parent, not on antiquated concepts of loss of services or support legally due to the child.[79]

Siblings and grandparents of an injured child have also been allowed to recover for damage to their relational interests.[80] In 1955, the New York Superior Court held in *Leavy v. Yates* that the twin of an eight-year-old boy killed in a car accident could sue for loss of his brother's "companionship, affection, and guidance."[81] Additionally, some states have held that grandparents can recover for loss of consortium when their grandchildren suffer negligently caused injuries.[82] For example, in 1998, in *Fernandez v. Walgreen Hastings Co.*, the New Mexico Supreme Court allowed recovery for a grandmother who served as a caretaker for her twenty-two-month-old granddaughter.[83] She watched helplessly as the child died from suffocation due to a wrongly filled prescription.[84] In allowing the grandmother to recover for loss of consortium, the court stated that her damages flowed from the close and unique emotional relationship with the victim, not her family title.[85] The extension of recovery to siblings and grandparents further indicates that the nature of the relationship shared by the victim and person seeking recovery, not the legal relationship of the parties or duties owed, is the key factor in determining who can recover.[86]

The recognition in earlier cases that loss of consortium should focus on damage to intangible interests like love, affection, and guidance made this expansion in who can recover possible.[87] Nonetheless, it appears that courts were motivated both by the nature of the injured relationship and by administrability concerns.[88] Courts may also have

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[79] *See id.*

[80] *See, e.g.*, *In re* Estate of Finley, 601 N.E.2d 699, 702 (Ill. 1992) (allowing sibling recovery); Louisville & N.R. Co. v. Whisenant, 58 So. 2d 908, 912 (Miss. 1952) (allowing sibling recovery); *Fernandez*, 968 P.2d at 782–83 (allowing grandparent recovery); *Leavy*, 142 N.Y.S.2d at 876 (allowing sibling recovery).

[81] 142 N.Y.S.2d at 876.

[82] *Fernandez*, 968 P.2d at 784; Anderson v. United States, 731 F. Supp. 391, 400 (D.N.D. 1990) (applying North Dakota law).

[83] 968 P.2d at 784.

[84] *Id.* at 776–77.

[85] *Id.* at 782–83. This very progressive view as to the nature of the relationship providing the basis for a claim for loss of consortium has recently led New Mexico to become the first state to recognize loss of consortium for nonmarried cohabitants who share a significant relational interest. See discussion of *Lozoya v. Sanchez*, 66 P.3d 948, 955 (N.M. 2003), *infra* notes 184–211 and accompanying text.

[86] *See Ferriter*, 413 N.E.2d at 696; *Fernandez*, 968 P.2d at 782–83.

[87] *See Hitaffer*, 183 F.2d at 814.

[88] *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988) (stating that the need for a bright-line rule was an important factor in the decision of the case).

accepted expansion of recovery to this class of potential plaintiffs because bright-line delineations based on blood and familial ties brought some clarity and limitations to an otherwise open-ended test.[89]

C. *Loss of Consortium Claims for Nonmarried Cohabitants*

Despite recent expansion of the class of persons able to recover for loss of consortium, courts have held with near unanimity that nonmarried cohabitational partners cannot recover for loss of consortium, regardless of the nature and significance of their relationship to the victim.[90] In denying recovery, courts often rely on a similar set of policy rationales, such as the interest in promoting marriage, the difficulty in administering a more open-ended rule, and the need to limit the consequences for negligent acts.[91] These rationales can be explored through discussion of an influential case, *Elden v. Sheldon*, decided by the California State Supreme Court in 1988.[92]

In *Elden*, the court decided that nonmarried cohabitants could not sue for loss of consortium.[93] Richard Elden was riding in a vehicle driven by his long-time cohabitational partner, Linda Eberling, when they were struck by a car negligently driven by Robert Sheldon.[94] Elden sustained serious personal injuries as a result of the accident.[95] Eberling was thrown from the car and died a few hours later from her injuries.[96] Elden brought suit against Sheldon for his own injuries.[97] He also brought actions for loss of consortium and for negligent infliction of emotional distress to a bystander stemming from witnessing the fatal injuries to his cohabitational partner.[98] He alleged in his complaint that he shared a stable and significant relationship with Eberling that was equivalent to the marital relationship.[99] A similar relationship was deemed sufficient to allow for recovery under a stan-

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[89] *See id.*

[90] *See, e.g.*, Trombley v. Starr-Wood Cardiac Group, PC, 3 P.3d 916, 923 (Alaska 2000); *Elden*, 758 P.2d at 586; Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095, 1096 (Mass. 1987).

[91] *See, e.g.*, *Trombley*, 3 P.3d at 923; *Elden*, 758 P.2d at 586; *Feliciano*, 514 N.E.2d at 1096.

[92] 758 P.2d at 582.

[93] *Id.* at 588–90 (overruling Butcher v. Superior Court, 188 Cal. Rptr. 503, 503 (Cal. Ct. App. 1983)).

[94] *Id.* at 582.

[95] *Id.*

[96] *Id.*

[97] *Elden*, 758 P.2d at 582–83.

[98] *Id.*

[99] *Id.* at 583.

dard developed in a lower court case, *Butcher v. Superior Court of Orange County*.[100]

The California Supreme Court overturned the *Butcher* standard and rejected Elden's claims for bystander negligent infliction of emotional distress and loss of consortium.[101] Although each claim has distinct elements, the court reasoned that both actions rose or fell based on whether Elden shared a sufficient relationship with Eberling to recover, and largely compressed the reasoning for both actions into a single discussion.[102] The court reasoned that although the two shared an emotional relationship, Elden's legal relationship to Eberling was insufficient to provide a basis for recovery.[103]

Like courts in other states, the *Elden* court was concerned about the foreseeability of harm to a person who was not the spouse of the direct victim.[104] Although conceding that rates of nonmarital cohabitation had indeed increased, and thus the possibility of a tort victim having a cohabitational partner was not entirely unexpected, the court held that a legal relationship between the two was required to meet the judicial definition of foreseeability.[105] Similarly, most other states have held that cohabitational partners could not recover for loss of consortium in large part because the relationships and resulting emotional harm were not foreseeable to the tortfeasor.[106] These courts reason that marriage, as opposed to cohabitation, is the oldest and most dominant pattern of establishing a familial relationship in our society.[107] Because the majority of people marry, a tortfeasor who injures an individual should also foresee collateral injuries to that person's spouse, children, and other family members.[108] In contrast, cohabitation is a comparatively new social development.[109] The court reasoned that because cohabitation occurs less frequently than traditional marriage, it is often harder to generalize about the emotional investment

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[100] 188 Cal. Rptr. at 505. In *Butcher*, Paul and Cindy Forte had lived together for nearly twelve years. *Id.* They financially supported one another, filed joint tax returns, and had joint savings and checking accounts. *Id.* They also had two children together. *Id.* The court held that their relationship was both stable and significant, and thus could provide grounds for recovery for loss of consortium. *Id.* at 512.

[101] *Elden*, 758 P.2d at 590.

[102] *See id.* at 589–90.

[103] *See id.* at 588–90.

[104] *See, e.g., Trombley*, 3 P.3d at 923; *Elden*, 758 P.2d at 588; *Feliciano*, 514 N.E.2d at 1096.

[105] *See Elden*, 758 P.2d at 588.

[106] *See, e.g., Trombley*, 3 P.3d at 923; *Elden*, 758 P.2d at 588; *Feliciano*, 514 N.E.2d at 1096.

[107] *Trombley*, 3 P.3d at 923; *Feliciano*, 514 N.E.2d at 1096.

[108] *See Elden*, 758 P.2d at 588; *Feliciano*, 514 N.E.2d at 1096.

[109] *See Elden*, 758 P.2d at 585–86.

in these relationships than in marital relationships.[110] Consequently, traditional tort principles requiring that tortfeasors only be held liable for the foreseeable consequences of their wrongful or negligent acts require that cohabitational partners be denied recovery.[111]

In addition to concerns about the foreseeability of emotional injury, the *Elden* court relied on several other policy justifications to prevent cohabitational partners from recovering for negligent infliction of emotional distress and loss of consortium.[112] Primarily, the court expressed concern about the impact on marriage, the administrability of a rule allowing recovery, and the need to limit liability for tortfeasors.[113]

First, the court noted that the state has a strong interest in the marriage relationship and can seek to promote it.[114] It observed that marriage is a socially productive institution.[115] Marriage promotes individual happiness and well-being, and also acts as an important building block of society, promoting stability and beneficial values.[116] The law affords it special protection for this reason.[117] Furthermore, marriage is a combination of legally defined benefits and accompanying burdens.[118] Only if a couple is willing to undertake the responsibilities entailed in the marital relationship should they be entitled to the corresponding benefits.[119] The court viewed the extension of the right to recover for negligent infliction of emotional distress and loss of consortium as undermining the important state interest in marriage.[120] If people are able to obtain benefits similar to those accompanying marriage without actually being married, the court reasoned that they would be less likely to enter into marriage, thus weakening this very important social institution.[121]

Second, the court discussed the difficulties inherent in administering a law that allowed recovery for nonmarried cohabitational partners.[122] Courts would need to inquire into the emotional attach-

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[110] *See id.* at 587–88.
[111] *Id.* at 588.
[112] *Id.* at 586–87.
[113] *Id.* at 586–88.
[114] *Elden*, 758 P.2d at 587.
[115] *Id.* at 586.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 587.
[119] *See Elden*, 758 P.2d at 587.
[120] *See id.* at 586.
[121] *See id.*
[122] *Id.* at 587.

ment of the victim and the plaintiff in order to determine if it was sufficiently parallel to a marital or other familial relationship to allow recovery.[123] Because such an inquiry would necessarily focus largely on intangible factors, it would be difficult to develop a uniform, objective standard that could be easily applied.[124] The court rejected the "stable and significant" standard articulated in the *Butcher* case.[125] In addition, in order to determine who was entitled to recover, courts would have to undertake an inquiry into matters like sexual fidelity, economic ties, and emotional commitment.[126] The court saw this as an undesirable intrusion into private life.[127]

Finally, in denying the plaintiff's claims, the *Elden* court discussed the need to limit potential liability for tortfeasors by not opening up a new, large class of potential plaintiffs.[128] The court acknowledged that compelling reasons exist for extending recovery, thereby giving legal recognition to close emotional relationships.[129] Such relationships may provide as much support and affection as familial relationships, and emotional harm resulting from injury to one's partner can be great.[130] Nevertheless, the court was motivated by the desire for a bright-line limitation.[131] Failure to enact such a limitation would result in an unreasonable extension of the scope of liability, which would have a negative impact on society as a whole.[132]

Elden represents the approach taken by the majority of state courts in denying recovery to nonmarried cohabitational partners.[133]

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[123] *Id.*

[124] *Elden*, 758 P.2d at 587.

[125] *See id.* at 589.

[126] *Id.* at 587.

[127] *Id.*

[128] *Id.* at 588.

[129] *Elden*, 758 P.2d at 588.

[130] *Id.*

[131] *Id.*

[132] *See id.* The holding in *Elden* took some by surprise, given the court's previous holding in *Marvin v. Marvin*. *See Elden*, 758 P.2d at 590 (citing Marvin v. Marvin, 557 P.2d 106, 106 (Cal. 1976)). In *Marvin*, the court held that a nonmarried cohabitational partner was entitled to payment in compensation for her services during the relationship and ongoing support after its termination in order to restart her career. 557 P.2d at 106. The court recognized contractual and equitable remedies available to cohabitational partners. *Id.* at 110. The court distinguished *Elden* from *Marvin* on the grounds that although parties are free to bind themselves contractually and forgo marriage, such arrangements cannot be binding on third parties and do not necessitate the same level of recognition by the state. *See Elden*, 758 P.2d at 590.

[133] *See Elden*, 758 P.2d at 585–86; *see also* Medley v. Strong, 558 N.E.2d 244, 246 (Ill. 1990); Gillespie-Linton v. Miles, 473 A.2d 947, 953 (Md. 1984); Severson v. Brookdale Hosp. Med. Ctr., 546 N.Y.S.2d 922, 923–24 (Sup. Ct. 1989).

Most courts that have addressed the issue rely on very similar policy rationales to justify denial of recovery.[134] Namely, they cite the legitimate state interest in marriage, administrability concerns, and the need to limit the consequences of tortious acts to those plaintiffs who are foreseeable.[135]

II. Expansion of Tort Rights for Cohabitational Partners

A. *A Parallel Tort: Negligent Infliction of Emotional Distress*

Nearly all courts have denied recovery to nonmarried cohabitants for loss of consortium, but a growing number of courts have been willing to allow recovery for negligent infliction of emotional distress.[136] These two tort actions are closely related and are very often brought at the same time.[137] Although associated with loss of consortium, recovery for negligent infliction of emotional distress is meant to compensate for the emotional shock caused when a person actually witnesses the injury of a loved one, not for the later harm to the relationship.[138] Despite the differences in what is compensated by each action, recovery in both actions is limited to those who have a close relationship to the direct victim.[139] Thus, the expansion in recent years of the class of people who can recover for negligent infliction of emotional distress may have important implications for loss of consortium actions.[140]

In 1993, in *Dunphy v. Gregor*, the Supreme Court of New Jersey handed down a landmark opinion on the issue of bystander recovery for negligent infliction of emotional distress.[141] The court allowed a woman to recover for emotional distress she suffered from witnessing the death of her fiancé and cohabitational partner.[142] Eileen Dunphy

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[134] *See, e.g.*, *Trombley*, 3 P.3d at 923; *Feliciano*, 514 N.E.2d at 1096.

[135] *See, e.g.*, *Trombley*, 3 P.3d at 923; *Feliciano*, 514 N.E.2d at 1096.

[136] *See, e.g.*, Richmond v. Shatford, No. CA 941249, 1995 WL 1146885, at *1, *3 (Mass. Super. Ct. Aug. 8, 1995); Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994).

[137] *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 582–83 (Cal. 1988). In fact, the court in *Elden v. Sheldon* relied on the same policy arguments to reject both the loss of consortium and negligent infliction of emotional distress claims. *Id.* at 589. The court dealt with loss of consortium separately only in a brief section of the opinion, seemingly for the purpose of expressly overruling *Butcher v. Superior Court of Orange County*. *Id.* at 589–90.

[138] *See Dunphy*, 642 A.2d at 374; Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 777 (N.M. 1998).

[139] *See Dunphy*, 642 A.2d at 374; *Fernandez*, 968 P.2d at 777.

[140] *See Elden*, 758 P.2d at 589–90.

[141] 642 A.2d at 380.

[142] *Id.*

and Michael Burwell became engaged in 1988 and began living together.[143] In September of 1990, the couple responded to a call for help from a friend who was stranded on a highway with a flat tire.[144] As Burwell changed the tire on the side of the road, he was struck by a car negligently driven by the defendant, James Gregor, and was dragged along the road for nearly 250 feet.[145] Dunphy, who had been standing just a few feet away, rushed to his side and attempted to wipe away the blood and dirt from his wounds.[146] He died in the hospital a few hours later.[147] Dunphy filed a claim for emotional distress she suffered as a result of seeing Burwell fatally injured.[148]

The court noted that the requirements for a bystander to recover for negligently inflicted emotional distress are the following: (1) death or serious injury of another caused by the defendant's negligence, (2) marital or intimate familial relationship between the plaintiff and the injured person, and (3) observation of the death or injury at the scene of the accident.[149] The relationship of the bystander to the direct victim is important because the presence of deep emotional ties, which usually accompany marital and family relationships, ensures that the distress suffered by the bystander is genuine and worthy of compensation.[150] But the court also emphasized that it is the presence of these emotional bonds that provides the basis for recovery, and that the legal status of the relationship should not be used as a proxy.[151]

The court found that intimate, familial-type relationships can exist outside traditional legal definitions of the family.[152] To determine whether such a relationship exists, the court considered a variety of factors, including its duration, degree of mutual dependence, extent of common contributions to life together, and the extent and quality

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[143] *Id.* at 373.

[144] *Id.*

[145] *Id.*

[146] *Dunphy*, 642 A.2d at 373.

[147] *Id.*

[148] *Id.* Dunphy did not file a claim for loss of consortium, so the court never reached the issue of whether her relationship with Burwell would also have satisfied the requirements for that cause of action. *Id.*

[149] *Dunphy*, 642 A.2d at 373. These requirements are derived from the California case of *Dillon v. Legg* and are widely followed in many states. *See* 441 P.2d 912, 914 (Cal. 1968); *see, e.g.*, Clohessy v. Bachelor, 675 A.2d 852, 855 (Conn. 1996); Zell v. Meek, 665 So. 2d 1048, 1051 (Fla. 1995); Roberts v. Bruns, 387 N.W.2d 140, 143 (Iowa 1986).

[150] *See Dunphy*, 642 A.2d at 374.

[151] *See id.* at 377.

[152] *See id.*

of shared experiences.[153] The court reasoned that people who enjoy this type of stable, enduring, familial-type relationship have a cognizable interest in the relationship and in the continued emotional support that they derive from it.[154] Thus, they should be entitled to recover when they witness an accident resulting in serious bodily harm or death of their cohabitational partner.[155] Based on the facts of the case, the court found that Eileen Dunphy shared this sort of close, familial-type relationship with her fiancé, Michael Burwell, and suffered severe emotional injuries upon witnessing his injury and subsequent death.[156] Therefore, it ruled that she should be allowed to state a claim for emotional distress even though she was not considered a legal family member.[157]

The New Jersey court criticized the California State Supreme Court's decision in *Elden v. Sheldon*, and rejected the creation of a bright-line rule.[158] The court stated that the creation of a rigid rule that allows all married couples to recover, but denies recovery to all nonmarried couples regardless of the significance of their relationship and depth of emotional injuries, is a perversion of the principles of tort law.[159] The court stated that tort law instead requires analysis of the duty owed, which turns on the particular facts of the situation at hand.[160] Further, the court reasoned that application of bright-line rules is administratively simple, but can lead to grossly unfair results.[161] The court noted that "to foreclose such a plaintiff from making a claim based upon emotional harm because her relationship with the injured person does not carry a particular label is to work a potential injustice, not only in this case but also in too many others."[162]

The New Jersey court similarly rejected several other rationales often given to deny cohabitants the right to recover for negligent infliction of emotional distress to a bystander.[163] First, the court reasoned that the increasing incidence of nonmarital cohabitation makes it foreseeable that victims of negligent acts could share close emo-

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[153] *Id.* at 378.
[154] *Id.* at 380.
[155] *Dunphy*, 642 A.2d at 380.
[156] *See id.* at 377.
[157] *Id.* at 380.
[158] *Id.* at 376.
[159] *See id.*
[160] *See Dunphy*, 642 A.2d at 376.
[161] *See id.* at 378.
[162] *Id.*
[163] *Id.* at 379.

tional ties with someone to whom they are not married.[164] Such a person could suffer severe emotional injuries as a result of witnessing the injury to a partner.[165] Liability for negligent acts depends on whether a duty is owed, and duty, in turn, depends on foreseeability.[166] Because a cohabitational relationship is foreseeable, a negligent actor owes a duty to the cohabitational partner and can be liable to such a partner for emotional injuries.[167]

Second, the *Dunphy* court noted that courts are adequately equipped to make determinations about the nature and quality of the relationship between cohabitational partners.[168] Similar determinations are required in loss of consortium cases, in which the court must assess the quality of a marital relationship in order to award appropriate damages.[169] Courts have proven that they are capable of such an inquiry and can assess "the realities, not simply the legalities, of relationships to assure that resulting emotional injury is genuine and deserving of compensation."[170]

Third, the court reasoned that an examination of the nature of the relationship would not require undue probing into the private details of the relationship.[171] Details of the relationship would need to be examined even if the couple were married, and such examination is no more problematic in the context of cohabitation than in the marital context.[172] Finally, the court rejected the notion that extending recovery to include cohabitational partners would somehow hurt the state's goal of promoting marriage.[173] Realistically, the decision to marry is not motivated by the ability to have standing to bring a tort action, and the extension of this cause of action would not otherwise change the preferential status granted to marriage under the law.[174]

In 1995, in *Richmond v. Shatford*, a Massachusetts Superior Court went even further than the New Jersey court's holding in *Dunphy*, finding that a woman who lived with, but who was not engaged to, her cohabitational partner could recover for the emotional distress she

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[164] *See id.* at 377.
[165] *Dunphy*, 642 A.2d at 377.
[166] *Id.* at 376.
[167] *Id.* at 380.
[168] *Id.* at 378.
[169] *Id.*
[170] *Dunphy*, 642 A.2d at 378.
[171] *Id.* at 378–79.
[172] *Id.* at 379.
[173] *Id.*
[174] *Id.*

suffered upon witnessing the injury to her partner when he was hit by a car.[175] Like the *Dunphy* court, the judge in *Richmond* reasoned that recovery for a bystander bringing a claim of negligent infliction of emotional distress is premised on a flexible understanding of reasonable foreseeability, not a bright-line no marriage/no recovery rule.[176] If a person has a close familial or similar relationship with the direct victim, it is reasonably foreseeable that the person will suffer emotional injury as a result of the negligent act.[177] The foreseeability of such an injury is only reinforced by the growing number of couples who engage in cohabitational relationships in modern society.[178]

Although courts have been nearly unanimous in denying cohabitational partners the right to recover for loss of consortium, several courts have allowed such recovery for negligent infliction of emotional distress, even in the face of similar policy concerns.[179] Both actions often arise from the same underlying facts, and both limit recovery to those who share a close familial-like relationship to the direct victim.[180] Therefore, the expansion of those who can bring negligent infliction of emotional distress claims may indicate that it is also time to revisit the question of who can recover in loss of consortium actions.[181]

B. *Extension of Loss of Consortium Actions to Nonmarried Cohabitants*

Although courts have by and large refused to recognize the right of nonmarried cohabitants to recover for loss of consortium, changes in the understanding of consortium, the increasing recognition of cohabitational relationships in parallel areas of tort law, and evolving social attitudes about such relationships indicate that courts may need to reconsider earlier decisions that denied recovery.[182] Recently, one

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[175] *Richmond*, 1995 WL 1146885, at *3.

[176] *Id.*

[177] *See id.*

[178] *See id.*

[179] *See id.* at *4. One scholar suggests that this somewhat logically inconsistent result is an attempt by courts to create a compromise position that would allow recovery to a partner who does indeed suffer emotional harm, but that would not give the relationship the same full legal recognition as marriage. Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1461 (2001)

[180] *See Dunphy*, 642 A.2d at 373–74; *Fernandez*, 968 P.2d at 777.

[181] *See Dunphy*, 642 A.2d at 373–74; *Fernandez*, 968 P.2d at 777.

[182] *See, e.g.*, *Richmond*, 1995 WL 1146885, at *3; *Dunphy*, 642 A.2d at 378; Lozoya v. Sanchez, 66 P.3d 948, 955 (N.M. 2003).

state supreme court has allowed a nonmarried cohabitational partner to recover for loss of consortium.[183]

In 2003, in *Lozoya v. Sanchez*, the New Mexico Supreme Court became the first state to recognize the right of a nonmarried cohabitant to recover for loss of consortium.[184] Sarah Lozoya brought a claim for loss of consortium stemming from the injuries sustained by Ubaldo Lozoya in a car accident caused by the defendant's negligence.[185] Sarah and Ubaldo had been together for over thirty years and had three children together.[186] They lived in a home they had jointly purchased, and filed joint tax returns, but were never formally married.[187] Sarah testified that after the accident Ubaldo became depressed and could not socialize or engage in other normal activities with her because he was plagued by constant pain.[188] The defendant moved to dismiss the claim on the grounds that Sarah could not state a claim for loss of consortium because she and Ubaldo were not married.[189]

The court held that claims for loss of consortium are not limited to married spouses.[190] The court noted that New Mexico was one of the last states to recognize a claim for spousal loss of consortium.[191] Unlike the evolution of this cause of action in other states, recognition in New Mexico was always premised on a determination of whether it was foreseeable that a particular plaintiff would suffer injury as a result of the actions of the tortfeasor, not on the legal relationship between the direct victim and the plaintiff.[192] If it is foreseeable that the person would sustain emotional injury due to the damage to their relationship, a duty of care is owed to that person.[193] Therefore, a nonmarried cohabitant may recover for loss of consortium due to the injuries sustained by the other partner from the negligent act.[194] Given recent societal trends indicating the increasing prevalence of cohabitation, it is foreseeable that a victim of a negli-

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[183] *Lozoya*, 66 P.3d at 951.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 952.

[187] *Id.* The court noted that although the plaintiff's relationship appears to satisfy the traditional requirements of common law marriage, such unions are not recognized in New Mexico. *Id.* at 956.

[188] *Lozoya*, 66 P.3d at 952.

[189] *Id.* at 950–51.

[190] *Id.* at 951.

[191] *Id.* at 953.

[192] *Id.* at 955.

[193] *See Lozoya*, 66 P.3d at 953–54.

[194] *Id.* at 951.

gent act could have a significant relationship with another person that does not fit within the traditional understanding of family.[195]

The New Mexico Supreme Court held that although a legal relationship between the plaintiff and direct victim indicates that close emotional ties are likely to be present, it does not form an independent basis for recovery.[196] The court reasoned that action for loss of consortium protects an individual's relational interests, not an individual's legal interests.[197] The basis for compensation is the harm to the plaintiff's ability to share the same kind of emotional connection with the person injured, rather than harm to other status-based rights inherent in marriage.[198] The court warned that using legal status as a substitute for an evaluation of the relationship between the parties leads to imprecise results.[199] It may include people who remain married despite leading totally separate lives, yet exclude people who have a significant relationship with another person and who suffer just as much as one experienced in a committed marital relationship.[200] A better approach focuses on determining whether the emotional harm is foreseeable, thus creating a duty of care.[201] The court also cited approvingly the New Jersey court's rejection of a bright-line rule in *Dunphy*.[202]

Like the *Dunphy* court, the New Mexico Supreme Court reasoned that judges and juries have frequently been called upon to assess the quality of relationships in order to determine compensation.[203] No particular difficulties are created by making this determination in the context of loss of consortium claims.[204] Further, the court rejected arguments that extending recovery for loss of consortium to nonmarried cohabitants will lead to a manipulation of the scheme of benefits and burdens that accompany marriage, or will otherwise damage the state interest in promoting marriage.[205] Sarah and Ubaldo had a long and caring relationship and showed a willingness to accept all of the essential responsibilities of marriage.[206] The court also again empha-

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[195] *See id.* at 957.
[196] *Id.* at 954.
[197] *Id.* at 955.
[198] *See Lozoya*, 66 P.3d at 955.
[199] *Id.*
[200] *Id.*
[201] *See id.* at 953.
[202] *Id.* at 955 (citing *Dunphy*, 642 A.2d at 374).
[203] *See Lozoya*, 66 P.3d at 955.
[204] *Id.*
[205] *See id.* at 956.
[206] *See id.* at 952.

sized that consortium does not depend on legal status.[207] Ability to bring the cause of action is not a benefit of marriage, but instead a method for compensating those who have suffered significant harm to their relational interests.[208]

After establishing that nonmarried partners can recover for loss of consortium, the court looked to the standard developed by the *Dunphy* court for measuring close familial relationships in the related action of negligent infliction of emotional distress.[209] In determining whether a sufficient relationship exists, the New Mexico Supreme Court considered the duration of the relationship, exclusivity, degree of mutual dependence, cohabitation, and the extent and nature of shared experiences.[210] Further, the court reasoned that although New Mexico does not give legal effect to common law marriage, a presumption in favor of recovery for loss of consortium arises when a couple can prove the traditional elements of common law marriage, that is, mutual consent or agreement to marry followed by mutual assumption of accompanying obligations.[211]

III. Denying Nonmarried Cohabitants the Right to Recover for Loss of Consortium Is out of Step with Societal Changes and Judicial Precedent in Other Areas of Tort Law

Many state courts last addressed the issue of cohabitant recovery for loss of consortium nearly two decades ago.[212] At that time, they faced a very different legal and social backdrop.[213] The social trend toward cohabitation was somewhat less marked and was of uncertain durability.[214] Similarly, the legal trends surrounding the cause of ac-

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[207] *Id.* at 956.

[208] *Lozoya*, 66 P.3d at 956.

[209] *Id.* at 955.

[210] *Id.* at 957.

[211] *Id.* at 956.

[212] *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 586 (Cal. 1988). The Supreme Judicial Court of Massachusetts recently revisited the issue of recovery for cohabitational partners and held that such claims should still be barred. Fitzsimmons v. Mini Coach of Boston, Inc., 799 N.E.2d 1256, 1257 (Mass. 2003). This decision, however, was handed down after the landmark decision of *Goodridge v. Department of Public Health*, which extended the right to marry to homosexual couples. 798 N.E.2d 941, 948 (Mass. 2003). Given this vast expansion in the right to marry, the court reasoned it is logical to deny rights to those who make an active choice not to marry. *See Fitzsimmons*, 799 N.E.2d at 1257.

[213] *See supra* notes 19, 65–89 and accompanying text.

[214] *See supra* note 19 and accompanying text.

tion were unclear.[215] First, although the majority of courts had already adopted the view that loss of consortium protected relational interests rather than property-based rights, they had yet to consider how far those interests extended.[216] Most had yet to decide whether others like children, siblings, and grandparents could recover.[217] Second, courts had not yet allowed nonmarried cohabitants to recover for negligent infliction of emotional distress.[218] This closely related tort also examines the nature of the relationship between the plaintiff and the direct victim and has important implications for loss of consortium actions.[219] Third, in denying recovery to nonmarried cohabitants, many courts expressed a variety of policy-based concerns.[220] Judges feared that allowing recovery would somehow damage the institution of marriage or open the floodgates to a wave of plaintiffs who shared only an insignificant relationship to the direct victim.[221] Time and the expansion of recovery to nonmarried persons in other torts has proven that most of these concerns are unwarranted or can be addressed through the creation of proper standards.[222]

A. *Changing Social Attitudes Favor Recognition of Nonmarital Cohabitation Relationships in Tort Law*

A review of demographic statistics and sociological literature confirms that nonmarital cohabitation has increased substantially in the past twenty years.[223] Although already a pronounced trend by the 1980s, it was still a fairly novel and somewhat controversial living arrangement.[224] There was a substantial increase in the number of women who had at some point engaged in a cohabitational relationship between 1987—around the time when many of the cohabitant

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[215] *See supra* notes 65, 76–79, 82–86 and accompanying text.

[216] *See supra* notes 56–64 and accompanying text.

[217] *See supra* notes 65–89 and accompanying text.

[218] *See* Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1993).

[219] *See id.* at 374.

[220] *See Elden*, 758 P.2d at 586–88; Feliciano v. Rosemar Silver Co., 514 N.E. 1095, 1096 (Mass. 1987).

[221] *See Elden*, 758 P.2d at 586–88; *Feliciano*, 514 N.E. at 1096.

[222] *See Dunphy*, 642 A.2d at 376; Lozoya v. Sanchez, 66 P.3d 948, 955–56 (N.M. 2003).

[223] *See supra* note 19 and accompanying text.

[224] *See supra* note 19 and accompanying text. In fact, the government only started estimating the number of cohabitating couples for vital statistic purposes in 1977, and even this was through indirect measurements. *See* Casper & Cohen, *supra* note 1, at 237. Direct measurements of cohabitation did not begin until 1995. *Id.* at 238.

loss of consortium cases were decided—and 1995.[225] Now nearly half of all adult American women between the ages of nineteen and forty-four cohabitate at some point during their lives.[226] Such a large increase in the number of people who participate in these relationships indicates that this once novel way of structuring relationships has become a normal, accepted practice.[227]

In addition to the sheer statistical growth of cohabitation, there has also been a change in social attitudes.[228] Once regarded as "living in sin," cohabitation is now considered by many to be a normal phase in relationships.[229] It is often a late stage of courtship or similarly serious phase for couples who do not ultimately marry.[230] These demographic and social changes represent a major shift in our society.[231] To a large extent, courts are struggling to bring legal doctrines in line with social reality.[232] Attempts to graft outmoded common law notions about relationships on to this new social reality have led to unfair and inconsistent results.[233] It is time that courts take notice of these fundamental changes by fashioning flexible standards that recognize the important role of cohabitational relationships in the lives of millions of Americans.[234]

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[225] *See* Bumpass & Lu, *supra* note 5, at 32. Between 1987 and 1995, the number of women who had participated in a cohabitational relationship jumped from 33% to 45%. *Id.*

[226] *Id.*

[227] *See id.*

[228] *See* Bumpass & Sweet, *supra* note 5, at 615–16.

[229] *See* Bumpass et al., *supra* note 5, at 920.

[230] *See id.* One very high profile example of the growing social acceptance of nonmarital cohabitation can be seen in the relationship between Prince Charles and Camilla Parker Bowles. *Prince Pays for Camilla's Bedroom to Be Furnished*, TIMES (London), June 27, 2003, http://www.timesonline.co.uk/article/0,,2-726982,00.html (last visited Mar. 15, 2005). When the Prince moved into his new residence at Clarence House, it was announced that Camilla Parker Bowles would also take a room in the Royal Household. *Id.* This announcement, which at one time would have provoked a firestorm of controversy, created only a minor stir among the British public. *Id.*

[231] *See* Goldstein & Kenney, *supra* note 3, at 507.

[232] *See, e.g.*, *Elden*, 758 P.2d at 586–88 (noting the increased prevalence of nonmarital cohabitation, but declining to extend recovery); Richmond v. Shatford, No. CA 941249, 1995 WL 1146885, at *3 (Mass. Super. Ct. Aug. 8, 1995) (holding that a nonmarital cohabitational relationship satisfied the familial or other relationship requirement needed to ground recovery); *Lozoya*, 66 P.3d at 957 (holding that the widespread acceptance of nonmarital cohabitation meant that emotional injuries to a cohabitational partner are not remote and unexpected).

[233] *See Elden*, 758 P.2d at 585–86.

[234] *See Dunphy*, 642 A.2d at 378.

B. *Changing Understandings of the Interests Protected by Loss of Consortium Actions and the Expansion of Individuals Allowed to Bring Claims Support Inclusion of Nonmarried Cohabitants as Potential Plaintiffs*

In addition to these substantial societal changes, there have been significant legal changes in the doctrine of loss of consortium.[235] The early common law roots of loss of consortium, grounded in concepts of property law, have been thoroughly discredited.[236] Recovery is no longer limited to husbands whose pecuniary interest in the services of their wives suffers damage,[237] nor is recovery predicated merely on status.[238] In extending recovery to wives, courts expressly stated that recovery instead covered harm to less tangible interests, like love, affection, and companionship.[239] This bundle of interests has been called "relational interests."[240] Once damage to relational interests became the basis for loss of consortium actions, recovery for a broader class of plaintiffs became possible.[241] Others who shared an important relationship with the direct victim, such as grandparents and children, were gradually allowed to bring this cause of action as well.[242] Extension of the right to recover to this group of individuals destroyed the argument that recovery was somehow tied to vestigial notions of the rights and status that flowed from traditional English marriage laws.[243] The emotional harm suffered, not the legal duties between the plaintiff and the victim, provides the basis for recovery.[244]

Based on this understanding of loss of consortium, nonmarried cohabitants should also be allowed to bring claims.[245] Increasing numbers of people choose to organize their intimate relations in this manner.[246] Cohabitants often have deep emotional ties to one another and frequently plan to marry in the future or have made a similar long-term commitment.[247] Because an action for loss of consortium is

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[235] *See supra* notes 52–55, 65–89 and accompanying text.

[236] *See* Hitaffer v. Argonne Co., 183 F.2d 811, 813 (D.C. Cir. 1950).

[237] *Id.*

[238] *Lozoya*, 66 P.3d at 954; Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 782 (N.M. 1998).

[239] *Hitaffer*, 183 F.2d at 814.

[240] *Lozoya*, 66 P.3d at 955; Martin, *supra* note 41, at 1469.

[241] *See supra* notes 68–75, 80–86 and accompanying text.

[242] *See supra* notes 68–75, 80–86 and accompanying text.

[243] *See Hitaffer*, 183 F.2d at 813; *Fernandez*, 968 P.2d at 782–83.

[244] *Lozoya*, 66 P.3d at 955.

[245] *See id.* at 951.

[246] *See supra* note 19 and accompanying text.

[247] *See* Bumpass & Sweet, *supra* note 5, at 615.

meant to compensate people when they suffer losses in important relationships due to tortious injury, it seems reasonable that cohabitants whose legitimate expectations are overturned by the negligent acts of a third party should be able to seek compensation for these losses.[248]

Courts should not be deterred by the fact that nonmarital cohabitation is not a legally recognized status.[249] Loss of consortium is no longer based in marital status and related to the duties that flow from that status.[250] In cases like *Fernandez v. Walgreens Hastings Co.*, the court focuses its analysis on the emotional ties between grandmother and the deceased granddaughter, rather than analyzing the legal relationship between them.[251] Courts should follow the trend created by cases that extend loss of consortium actions to siblings, grandparents, and children, and examine the emotional ties between the plaintiff and direct victim.[252]

C. *Expansion of Recovery in a Closely Parallel Tort Indicates That Nonmarried Cohabitants Should Also Be Able to Bring Claims for Loss of Consortium*

The significant doctrinal changes in the related tort of negligent infliction of emotional distress also signal that recovery for loss of consortium should be extended to nonmarried cohabitants.[253] In the period since most courts denied the loss of consortium claims, several landmark cases have extended recovery in this closely associated action to nonmarried cohabitants.[254] These cases bear directly on the issue of whether nonmarried cohabitants should be able to sue for loss of consortium.[255]

The tort of negligent infliction of emotional distress is analogous to loss of consortium.[256] Both allow a person other than the direct victim to recover for the emotional distress suffered due to the tortious act.[257] Both limit recovery to those who have a close relationship with the direct victim.[258] The main difference between the two actions is

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[248] *See Lozoya*, 66 P.3d at 955.
[249] *See id.*
[250] *Hitaffer*, 183 F.2d at 814; *Fernandez*, 968 P.2d at 782–83.
[251] *See* 968 P.2d at 782–83.
[252] *See supra* notes 68–89 and accompanying text.
[253] *See supra* notes 137–140, 152–153 and accompanying text.
[254] *See, e.g., Richmond*, 1995 WL 1146885, at *3; *Dunphy*, 642 A.2d at 376.
[255] *See supra* notes 137–139 and accompanying text.
[256] *See supra* notes 137–139 and accompanying text.
[257] *See Dunphy*, 642 A.2d at 374; *Fernandez*, 968 P.2d at 777.
[258] *See Dunphy*, 642 A.2d at 374; *Fernandez*, 968 P.2d at 777.

that the plaintiff actually needs to witness the tortious act to recover for negligent infliction of emotional distress.[259] This limitation on recovery, coupled with a relationship requirement, may make courts more willing to extend recovery in this tort because it provides an additional restriction on what some perceive as an open-ended test.[260] But this is an unpersuasive distinction between the two actions.[261] The requirement that a plaintiff actually witness the tortious injury is meant to limit the type of emotional harm that can ground recovery for emotional distress.[262] It is a distinct requirement, not a further check on the relationship requirement.[263] Its purpose is to ensure that the plaintiff genuinely suffered the type of intense emotional shock that is compensable under the cause of action, rather than just the normal anguish one experiences when a loved one is injured.[264] It is not meant, however, to limit the types of relationships that are legally sufficient to allow recovery.[265] Therefore, the relationship requirement in negligent infliction of emotional distress claims is a useful parallel for determining who can recover for loss of consortium.[266]

Several courts have found that nonmarried cohabitants often share close emotional relationships similar to those in more traditional family settings.[267] These relationships can be significant enough for the partner of the direct victim to suffer lasting emotional harm when the other is injured.[268] If this injury is foreseeable, principles of tort law require that the plaintiff be compensated for emotional harm.[269] The comparison between recovery in negligent infliction of emotional distress and loss of consortium is instructive because both look to the relationship between the plaintiff and the direct victim in order to determine whether the emotional injury is severe enough to permit

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[259] *See* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 697 (Mass. 1980); *supra* notes 136–140 and accompanying text.

[260] *See supra* notes 67–74, 80–86 and accompanying text.

[261] *See Lozoya*, 66 P.3d at 953; *Fernandez*, 968 P.2d at 782.

[262] *Fernandez*, 968 P.2d at 777.

[263] *See id.*

[264] *See id.*

[265] *See id.*

[266] *Lozoya*, 66 P.3d at 955 (citing *Dunphy*, 642 A.2d at 955).

[267] *See Richmond*, 1995 WL 1146885, at *3; *Dunphy*, 642 A.2d at 380.

[268] *Dunphy*, 642 A.2d at 380. Courts have developed useful and well-reasoned multifactor tests to examine the significance of the relationship between nonmarried cohabitants. *Id.* at 378. For example, New Jersey looks to the degree of mutual dependence, extent of common contributions to a joint life together, duration of relationship, extent and quality of shared experience, and the "manner in which they related to each other in attending to life's mundane requirements." *Id.*

[269] *See supra* notes 158–162 and accompanying text.

recovery.[270] It is logically inconsistent to hold that the cohabitational relationship is significant enough to meet the requirements of the first tort, but not the requirements of the closely related second tort.[271]

D. *Policy Concerns Advanced by Courts to Justify Denial of Recovery Are Surmountable*

In denying recovery for loss of consortium to cohabitational partners, most courts seem to be less moved by the principles and logic advanced in earlier cases, and instead, focus more on the potential fallout of allowing recovery.[272] These policy-based rationales fall into two broad categories.[273] The first relates to how the courts approach the concept of foreseeability and the need to limit consequences of negligent acts by creating bright-line categorizations.[274] The second category of concerns centers on more prudential concerns such as the potential harm to the institution of marriage, institutional competency of the courts, and fear of opening the floodgates to a tidal wave of new tort cases.[275]

1. Foreseeability and Bright-Line Categorizations

The most frequent concern expressed by courts in loss of consortium claims is that emotional harm to a cohabitant is somehow less foreseeable than to a spouse of the direct victim.[276] Therefore, they reason that it is unfair to hold a tortfeasor liable for these damages because there can be no duty to an unforeseeable plaintiff.[277] First, it is important to note that the doctrine of foreseeability in actions like this is something of a legal fiction.[278] For example, a tortfeasor who hits a woman crossing the street probably has no idea if she has a spouse, a long-term partner, or children.[279] Even if the actor did have this kind of knowledge, it is unlikely that it would influence the actor's behavior.[280] The actor would not try harder to swerve knowing

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[270] *See supra* notes 137–139 and accompanying text.
[271] *See* Regan, *supra* note 179, at 1461.
[272] *See Elden*, 758 P.2d at 586.
[273] *See supra* notes 104–111, 114–131 and accompanying text.
[274] *See supra* notes 104–111 and accompanying text.
[275] *See supra* notes 114–131 and accompanying text.
[276] *See Elden*, 758 P.2d at 586.
[277] *See id.*
[278] *See Dunphy*, 642 A.2d at 376; *Lozoya*, 66 P.3d at 953.
[279] *See Elden*, 758 P.2d at 582.
[280] *See id.*

that the woman is married and that there might be a higher damage award.[281] Second, demographic statistics show that the rate of nonmarital cohabitation has significantly increased since many of the most influential loss of consortium cases were decided.[282] Although courts might have doubted the prevalence of these relationships twenty years ago (and thus the foreseeablity of cohabitants as potential plaintiffs), this is no longer the case.[283]

Another key policy justification advanced by courts in denying recovery to nonmarried cohabitants is the need to circumscribe potential liability for tortfeasors by creating bright-line categorizations.[284] Courts have held that the flexible standards suggested by plaintiffs to assess the significance of a given relationship fail to provide sufficient certainty.[285] But as pointed out by the New Jersey State Supreme Court in *Dunphy v. Gregor*, tort law has another overriding goal to provide compensation to victims of tortious acts.[286] When courts resort to bright-line categorizations, they abandon their mandate to sort out which plaintiffs have real, cognizable injuries.[287] In the context of loss of consortium claims, bright-line categories can prevent those who suffer serious harm from receiving compensation.[288] Moreover, they provide a windfall to the tortfeasor who would otherwise have to pay for the harm caused.[289]

2. Prudential Concerns About Expansion of Recovery to Nonmarried Cohabitational Partners

Although concerns about foreseeability and the need to limit the liability of a tortfeasor dominate the reasoning of most opinions denying recovery, several other important policy considerations are consistently advanced.[290] First, courts fear that recognition of claims by nonmarried cohabitants will harm the state interest in promoting marriage.[291] Second, they express a fear that judges will not be able to

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[281] *See id.*

[282] *See supra* note 19 and accompanying text.

[283] *See supra* note 19 and accompanying text.

[284] *See, e.g., Elden*, 758 P.2d at 588; *Feliciano*, 514 N.E.2d at 1096.

[285] *See, e.g., Elden*, 758 P.2d at 588; *Feliciano*, 514 N.E.2d at 1096.

[286] *See* 642 A.2d. at 378.

[287] *See id.*

[288] *See id.*

[289] *See id.*

[290] *See Elden*, 758 P.2d at 586–88; *Feliciano*, 514 N.E.2d at 1096; *supra* notes 276–289 and accompanying text.

[291] *See, e.g., Elden*, 758 P.2d at 586–88; *Feliciano*, 514 N.E.2d at 1096.

fashion and juries will not be able to apply a reliable test to measure the significance of the relationship.[292] This in turn could spawn a flood of suits brought by people who are only peripherally connected to the direct victim.[293] Finally, some courts have expressed the concern that determinations of the significance of a relationship would involve inquires into highly private matters that should remain free from judicial scrutiny.[294]

Contrary to these concerns, allowing nonmarried cohabitants to recover will not harm the state's interest in promoting marriage.[295] It is highly unlikely that a couple will make such a momentous decision such as whether or not to marry based on the increased ability to recover in tort suits.[296] Couples will be more motivated by issues of love, personality, and long-term compatibility.[297] Also, although some critics claim that extending recovery to nonmarried cohabitants grants them rights without corresponding responsibilities, this is not the case for recovery in loss of consortium actions.[298] Providing compensation for loss of consortium is different than extending other benefits typically attendant to marriage like health insurance coverage and tax deductions.[299] Although those are truly benefits, or extras given to people solely because they choose to marry, damages awarded in a successful loss of consortium action are compensation for an actual injury suffered.[300] Further, the ability to recover cannot be obtained simply by marrying.[301] The injury has already occurred, and subsequent marriage cannot give retroactive standing.[302]

In addition, determining the significance of a relationship is not beyond the institutional competency of judges or juries.[303] The tests developed by the *Dunphy* and *Lozoya* courts provide useful frameworks on which to draw.[304] Both tests look to a mix of objective factors, such as the degree of financial dependence, length of relationship, and other less tangible factors that are still within the ability of a jury to

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[292] *See, e.g.*, *Elden*, 758 P.2d at 587.
[293] *See id.* at 587–88.
[294] *See id.* at 587.
[295] *See Lozoya*, 66 P.3d at 955.
[296] *See id.*
[297] *See id.*
[298] *Id.* at 956; Regan, *supra* note 179, at 1460.
[299] *See Lozoya*, 66 P.3d at 956; Regan, *supra* note 179, at 1460.
[300] *See Lozoya*, 66 P.3d at 956.
[301] *See id.*
[302] *See id.*
[303] *See id.* at 955 (citing *Dunphy*, 642 A.2d at 378).
[304] *See id.* at 957; *Dunphy*, 642 A.2d at 378.

determine based on common life experience.[305] Further, courts have proven that they are capable of making these sorts of inquires in other contexts.[306] The court must ask many of the same types of questions when a married person sues for loss of consortium in order to assess the quality of the relationship and the resulting harm to the marital relationship.[307] Additionally, time has shown that this more flexible approach will not open the floodgates to frivolous suits.[308] In the ten years since *Dunphy*, New Jersey courts have not been inundated with cases of individuals attempting to recover for trivial relational interests.[309] Nor has New Mexico experienced a surge in cases since *Lozoya* was decided.[310]

Finally, allowing nonmarried cohabitants to recover for loss of consortium by demonstrating the significance of their relationship and documenting the resulting harm will not represent an unwanted judicial intrusion into highly private matters.[311] It is important to remember that a plaintiff can choose whether or not to initiate a tort action.[312] A plaintiff with deep concerns regarding a court's inquiry into the plaintiff's private life would simply elect not to sue the tortfeasor.[313]

Conclusion

Nonmarried cohabitants should be allowed to bring loss of consortium claims when their relational interests are damaged by a tortious injury to their partner. Courts have abandoned the original construction of the loss of consortium doctrine which allowed recovery

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[305] *See Lozoya*, 66 P.3d at 957; *Dunphy*, 642 A.2d at 378.

[306] *Dunphy*, 642 A.2d at 378.

[307] *Id.*

[308] *See* S. Claire Swift, Note, *Bystander Liability After* Dunphy v. Gregor*: A Proposal for a New Definition of the Bystander*, 15 Rev. Litig. 579, 595 (1996) (discounting fear of unlimited tortfeasor liability).

[309] *See, e.g.*, *In re* Baby T., 734 A.2d 304, 314 (N.J. 1999); Gendek v. Poblete, 654 A.2d 970, 973 (N.J. 1995); Thalman v. Owens-Corning Fiberglas Corp., 676 A.2d 611, 614 (N.J. Super. Ct. App. Div. 1996).

[310] *See, e.g.*, Murphy v. Bitsoih, 320 F. Supp. 2d 1174, 1205 (D.N.M. 2004) (denying recovery to live-in girlfriend of victim because she did not meet the relational test set forth in *Lozoya*); Fitzjerrell v. City of Gallup *ex rel.* Gallup Police Dep't, 79 P.3d 836, 838 (N.M. Ct. App. 2003) (determining whether adult siblings of deceased can recover for loss of consortium). Since *Lozoya* was decided, only two reported cases have drawn on its reasoning to determine eligibility for loss of consortium recovery. *See Murphy*, 320 F. Supp. 2d at 1205; *Fitzjerrell*, 79 P.3d at 838.

[311] *See Dunphy*, 642 A.2d at 378.

[312] *See id.* at 373. Eileen Dunphy chose not to bring a loss of consortium claim, instead filing only a negligent infliction of emotional distress claim. *Id.*

[313] *See id.*

only for pecuniary damage to property-like interests in one's wife. The class of those allowed to bring claims for loss of consortium has gradually expanded to include wives, siblings, children, and grandparents. This expansion was made possible by the recognition that loss of consortium protects the emotional well-being that people derive from their relationships.

Similarly, nonmarried cohabitants have an interest in the emotional well-being that they derive from family-like relationships. Increasingly, people are turning to this once non-traditional form of organizing their intimate family relationships. Courts should take notice of this changing social reality and fashion fair, appropriate remedies to compensate cohabitants when they suffer harm to their relational interests.

The importance of the emotional ties between cohabitants has been recognized in a closely analogous context, the tort of negligent infliction of emotional distress. Courts have recognized that nonmarried cohabitants can suffer real and lasting emotional harm when they witness the negligent injury of their cohabitational partner. Both loss of consortium and negligent infliction of emotional distress limit recovery to those who have a close family or family-like relationship to the direct victim. Therefore, cases like *Dunphy v. Gregor*, which extend recovery to cohabitants, also provide a useful framework for courts to draw on in extending loss of consortium actions.

Finally, the policy concerns about extending loss of consortium actions raised by many courts are unwarranted. Expanding recovery to cohabitants will not unduly increase the liability of tortfeasors, nor damage the state interest in marriage. Moreover, it will not lead courts into unfamiliar territory in assessing the significance of cohabitational relationships. Allowing cohabitants to recover for loss of consortium will, however, avoid unjust situations, and allow those who suffer genuine emotional injuries to receive compensation.

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