Comments

Losing the Nuptials in Loss of Consortium: Correcting California’s Common Law Claim

By Gary Johnston, Jr.*

Were we to rule upon precedent alone, were stability the only reason for our being, we would have no trouble [denying loss of consortium to a wife]. We would simply tell the woman to begone, and to take her shattered husband with her . . . . In so doing we would have vast support from the dusty books. But dust the decision would remain in our mouths through the years ahead, a reproach to law and conscience alike. Our oath is do justice, not to perpetuate error.¹

Mr. Mooney lost control of his sport-utility vehicle as he approached the intersection of Mission Street and Twenty-First Street in San Francisco. Three cars were stopped at the intersection, each with its own couple inside. Kurt and Goldie, in the left lane, were a committed couple who had been together and monogamous for eight years and were not planning on marrying. Barbra and James, in the middle lane, were a committed married couple who had been married for two years. Stanford and Marcus, in the right lane, were a committed gay couple who had been together and monogamous for five years and do not plan on registering as domestic partners. Mr. Mooney has a brief moment of swerving one way or the other, but he will crash into one of the vehicles at the intersection and injure one person in whichever car he hits. Which couple will it be?

In California, Mr. Mooney would be in the best position, legally and thus financially, if he were to crash into Kurt and Goldie or Stan-

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ford and Marcus. Why? If Mr. Mooney were to crash into either of the unmarried couples, the uninjured companion would be prevented from claiming loss of consortium despite the fact that one member of the couple could be physically injured and incapable of providing sexual relations, companionship, and conjugal support. Were Mr. Mooney to crash into Barbra and James, the married couple, the uninjured spouse would be able to bring a claim for his or her loss of conjugal support.

As odd or unfair as this incongruity may seem, this situation is the current reality in California. In Part I, this Comment will discuss loss of consortium in general and the tort’s specific developments with respect to California. Part II will introduce New Mexico’s abolishment of the requirement of marriage for recovery and will discuss why California must rework its requirements for a loss of consortium claim in order to conform to prevailing societal interests.

I. Development of the Loss of Consortium Claim

A. History and Definition

Loss of consortium as a cause of action is a relatively recent development in state tort law. Due to its modern history and its continually changing standard, many legal practitioners know little about this amorphous cause of action, its origin, or its complexities. Arguably, the problem of loss of consortium in the United States arose primarily from the inability of courts to define what the term meant in a modern society and their attempts to reconcile the tort with the history of the claim at common law. No exacting definition of loss of consortium has ever been commonly accepted by all state jurisdictions. Despite its fluid definition, loss of consortium flows from conduct of a tortfeasor that creates one mate’s physical injury resulting in some intangible loss to the other mate. Today, loss of consortium is the cause of action whereby an uninjured spouse may seek compensation for intangible loss sustained as a result of his or her spouse’s injury, including the lost support, services, love, companionship, comfort, af-

2. California, for example, did not allow loss of consortium as a cause of action in any form until 1960. See West v. City of San Diego, 353 P.2d 929 (Cal. 1960).
4. Id. at 180.
fection, society, sexual relations, moral support, and deprivation of a spouse’s physical help with housework.6

Historically, only a husband could claim the right to loss of consortium based on a proprietary interest—namely, injury to his property.7 At the time, courts considered a wife the property of her husband and her injury an economic detriment to him.8 A gradual shift, primarily during the 1970s, occurred when courts began allowing wives to bring loss of consortium claims. This shift transformed the interest at stake from a proprietary and economic interest to a relational interest, where the relationship between the adult couple was what was most important.9 Courts realized that the loss of intangible benefits, such as emotional support, solace, and sexual relations, should be permitted to be claimed by both husband and wife.10

Tort principles allowed much flexibility when state courts dealt with loss of consortium, primarily because “the cause of action for loss of consortium is judge-made law.”11 When no statute could be found to guide the court, it looked to the principles of common law to extend the right or to deny its extension.12 In extending the right for wives to recover, one court stated that such “obstacles to the wife’s action were judge-created and they are herewith judge-destroyed.”13 The United States Supreme Court also recognized long ago that the common law was adaptable; its “flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.”14

Most state legislatures have remained relatively passive with this cause of action, leaving the courts to regulate the claim as common law.15 Many courts did not wait for legislatures to act, nor could they

7. See Osborne, supra note 3, at 183–84.
8. Id.
rely upon antiquated common law standards that denied the wife recovery.

We find no wisdom in abdicating to the legislature our essential function of re-evaluating common law concepts in light of present day realities. Nor do we find judicial sagacity in continually looking backward and parroting the words and analyses of other courts so as to embalm for posterity the legal concepts of the past.16

Thus, many courts extended the wife’s right to recover for loss of consortium through common law.17

B. History of California’s Loss of Consortium Claim

In California, loss of consortium remains a common law claim.18 In 1960, the California Supreme Court first decided that the state would recognize a husband’s claim for loss of consortium.19 Fourteen years later, the California Supreme Court in Rodriguez v. Bethlehem Steel Corporation20 altered its common law understanding of the loss of consortium claim by including a wife’s recovery.21 The court justified its shift by discussing the nationwide trend of allowing women to recover.22 It explained that the change in common law and in society overall required the court to use reason and equity to alter the loss of consortium claim to conform to society’s understanding of a woman’s role and her equal status.23 The Rodriguez court24 impliedly relied on

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21. Id. at 675.

22. Id. at 673–75.

23. Id. at 675–79.

24. Id.
the reasoning of a previous Florida Supreme Court decision, which stated:

[S]ome may contend that we are failing to remain blindly loyal to the doctrine of stare decisis. However, we must recognize that the law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times.

The Rodriguez court reasoned that a wife's claim was not too difficult to assume, given the fact that an injured person could easily be married and, therefore, that his or her spouse would "be adversely affected by that injury." Furthermore, according to the court, the detriment that a wife would encounter from an injured husband demands compensation that could easily be resolved by a jury. The court brushed aside the arguments of overextending liability by stating that the requirement of a close relationship would preclude undeserving individuals from recovery. It also laid down a procedural rule that squelched the argument that a wife could receive compensation for something that the injured husband could also claim by stating that jury instructions, directing award deductions or requiring a joiner of the husband's claims, would prevent such double recovery.

The progressive ruling in Rodriguez, along with its clearly articulated reasons for allowing an extension for a loss of consortium claim, caused many plaintiffs to also attempt to bring loss of consortium claims for extramarital relationships. But in 1977 the California Supreme Court ruled that loss of consortium should be "narrowly circumscribed," reasoning that "somewhere a line must be drawn." It held that a parent could not claim loss of consortium for the injury of a child and that a child could not claim loss of consortium for the injury of a parent. With that decision, the California Supreme Court began to draw a line in the sand.

In 1983 a California appellate court in Butcher v. Superior Court ruled that a relationship between a man and a woman, who were un-

25. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).
26. Id. at 133.
28. Id. at 681–82.
29. Id. at 682–83.
30. Id. at 683–85.
32. Id. at 862.
33. Id. at 865.
married but thought they were married under the common law, evinced such a strong and stable relationship that the woman should recover for loss of consortium.\textsuperscript{35} The appellate court allowed for recovery because it found that the cause of action was not based on legal marriage but rather on "an interference with the continuation of the relational interest" shared between two committed individuals.\textsuperscript{36} The court viewed the common law "as an ever-changing malleable body of law distinguished by its ability to adapt to changing times and issues" which allowed it to extend the right to unmarried, strong, and stable couples.\textsuperscript{37} Losses to companionship, sexual relations, love, and emotional support are, according to the court, just as real to a committed yet legally unmarried couple as they are to a committed married couple.\textsuperscript{38}

The court denied that extending the claim would create unending liability because the requirement of sexual relations would preclude close relationships like sisters, fathers, friends, in-laws, and colleagues from claiming loss of consortium.\textsuperscript{39} The court would also consider the duration of the relationship, if the individuals had any mutual contracts, the degree of economic cooperation, if children were involved, and the couple's sexual exclusiveness.\textsuperscript{40} In essence, the court made the standard one of committed cohabitation. Cohabitants in California were defined as unrelated individuals who exhibited strong relationship factors, such as sexual relations, while living in the same quarters, sharing incomes and expenses, jointly using the property, and exhibiting a relationship of extended length and continuity.\textsuperscript{41} With \textit{Butcher}, only committed cohabitants could recover for loss of consortium, not just anyone and not just any cohabitant.\textsuperscript{42}

In allowing loss of consortium claims for unmarried cohabitants, the court, albeit impliedly, relied upon a functional rather than formal definition of a relationship. The functional idea of a relationship focuses on the quality of the relationship between the individuals and recognizes that a relationship may operate as a family regardless of the

\textsuperscript{35} Id.
\textsuperscript{36} Id. at 506.
\textsuperscript{37} Id. at 507.
\textsuperscript{38} Id. at 510–11.
\textsuperscript{39} Id. at 511.
\textsuperscript{40} Id. at 512.
\textsuperscript{42} Butcher, 188 Cal. Rptr. at 512.
title bequeathed to it.\textsuperscript{43} When the family is viewed as the pillar and foundation of culture, as the stable provider of emotional and financial support, as the educator of children, and as the setting for procreative activity, it becomes clear that the functional “essence” of a family is found beyond the traditionally and narrowly confined formal definition of family.\textsuperscript{44} Functional families and relationships, though not legally sanctioned or necessarily protected, may be considered equivalent to that of a traditional nuclear family.\textsuperscript{45} Those involved in functional relationships experience the same emotions and fulfill the same human needs as those who participate in formally defined families.\textsuperscript{46} Though this may appear to be a recent definition for family, the California Supreme Court has recognized both formal and functional family definitions since 1921. For example, while determining the purpose of an insurance clause concerning the family, it stated that the family “may be a particular group of people related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household.”\textsuperscript{47}

C. \textit{Elden v. Sheldon}:\textsuperscript{48} California’s Current Loss of Consortium Law

The shift in loss of consortium claims from proprietary interest to relational interest was lauded by most courts as conforming to the current paradigms and social advancements of the 1960s and 1970s.\textsuperscript{49} In California, during the mid-1980s, unmarried cohabitants had persuasive authority allowing them to claim loss of consortium.\textsuperscript{50} California at that time was the only state, through judicial action, to allow an unmarried cohabitant to claim loss of consortium. During the 1980s there were also two federal cases allowing unmarried persons to re-

\begin{itemize}
\item \textsuperscript{44} Comment, \textit{Extending Consortium Rights to Unmarried Cohabitants}, 129 U. Pa. L. Rev. 911, 926 (1981).
\item \textsuperscript{46} See Raisty, supra note 43, at 2662.
\item \textsuperscript{47} Moore Shipbuilding Corp. v. Indus. Accident Comm’n, 196 P. 257, 259 (Cal. 1921) (emphasis added). It is essential not to be pedantic over Moore being an insurance case and not a loss of consortium case; instead, note that, even in the 1920s, the courts were willing to see the family as something more than what is “traditional.”
\item \textsuperscript{48} 758 P.2d 582 (Cal. 1988).
\item \textsuperscript{49} See cases cited supra note 17.
\item \textsuperscript{50} See Butcher v. Superior Court, 188 Cal. Rptr. 503 (Cal. Ct. App. 1983), overruled by Elden v. Sheldon, 758 P.2d 582 (Cal. 1988).
\end{itemize}
cover, 51 but in both instances the federal judge incorrectly postulated what the state law would have allowed. Thus, the federal decisions were invalidated by subsequent state court decisions. 52 Therefore, California led the advancement for recovery in the 1980s. With the progression of cohabitant recovery, 53 an implicit fear grew regarding the increased litigation and the growing numbers of frivolous plaintiffs attempting to recover for loss of consortium. This concern evidenced itself in the California Supreme Court's ruling against Richard Elden's action. 54

In the winter of 1982, passenger Richard Elden and driver Linda Ebeling were in a car accident caused by the negligent conduct of Robert Sheldon. 55 Richard sustained serious injuries, and Linda, Richard's longtime live-in girlfriend, was launched from the wreckage and died shortly thereafter. 56 At the time of the accident, Richard and Linda were cohabiting and not married. 57 During the ensuing litigation, Richard argued, inter alia, that he should be able to claim loss of consortium under the Butcher analysis because his and Linda's relationship exhibited stable and significant characteristics that paralleled that of a married couple. 58

After dismissing Richard's claim for negligent infliction of emotional distress, 59 the California Supreme Court analyzed Richard's loss of consortium claim. 60 The court overruled Butcher, 61 holding that "the right to recover for loss of consortium is founded on the relation-

51. See Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980) (interpreting New Jersey law to include a claim of loss of consortium for unmarried cohabitants); Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127 (E.D. Pa. 1973) (interpreting Pennsylvania law to include a claim of loss of consortium to a husband even though he married the injured woman after she sustained her injury).

52. See Childers v. Shannon, 444 A.2d 1141 (N.J. Super. Ct. Law Div. 1982) (declining to follow prior federal interpretation of New Jersey common law allowing loss of consortium to be claimed by unmarried cohabitants); Rockwell v. Liston, 71 Pa. D. & C.2d 756 (Ct. Com. Pl. 1975) (declining to follow prior federal interpretation of Pennsylvania common law by holding that a wife had no cause of action for loss of consortium where the injury to her husband occurred during the engagement, one month prior to the marriage).

53. See generally Butcher, 188 Cal. Rptr. 503.

54. See infra text accompanying notes 57, 58, 60–65.


56. Id.

57. Id.

58. Id.

59. Id. at 588.

60. Id. at 588–90.

61. Butcher was the 1983 California appellate case that allowed recovery to an unmarried cohabitant. See supra text accompanying notes 34–42.
ship of marriage, and absent such a relationship the right does not exist.” It asserted that the claim was limited and closely circumscribed due to its “intangible nature,” and due to “the difficulty of measuring [its] damages.” The court was particularly cautious of overextending liability or, as the court phrased it, “the possibility of an unreasonable increase in the number of persons who would be entitled to sue for the loss.” Moreover, the court reasoned that the loss of consortium claim explicitly excluded unmarried cohabitants due to the absence of authority to support otherwise, as well as “the state’s interest in promoting the responsibilities of marriage and the difficulty of [evaluating] the emotional, sexual and financial commitment of cohabiting parties to determine whether [it] was the equivalent of a marriage.” The court dismissed Richard’s loss of consortium cause of action and emphasized that morality played no role in its decision.

In summary, the court used a five part analysis to deny recovery. It denied recovery because: (1) loss of consortium dealt with the intangible; (2) it was difficult to measure such intangibles; (3) it could overextend liability to undeserving plaintiffs; (4) there was a state interest in promoting the responsibilities of marriage; and (5) the court would have difficulty delving into the personal private lives of cohabitating plaintiffs to see if their relationship was stable and significant.

Beyond circumscribing loss of consortium claims, Elden essentially defined relationships in California. In denying Richard Elden an action for loss of consortium, the court maintained a formalistic view of relationships rather than Butcher’s functional approach. For loss of consortium, “marriage is the only relationship . . . that can give way to recovery.” Factors such as commitment levels and duration carry no weight in the formal relationship analysis, leaving only formal ties such as marriage, blood relation, and adoptive relationships. For California and other states, Elden solidified the formalistic approach to

62. Elden, 758 P.2d at 589.
63. Id.
64. Id.
65. Id.
66. Id. at 590.
67. Id. at 589-90.
68. See Raisty, supra note 43, at 2659.
69. Id.
70. Id.
71. Id.
relationships as the accepted way of dealing with torts that require a specific relationship before one may recover. Prior to Elden the California courts seemed to favor a more formal approach to defining relationships for tort purposes, but it was the Elden court that finally nailed the tort door shut to functional definitions of relationships in California. For example, in 1983 the California Supreme Court refused unemployment benefits to a cohabitating couple by emphasizing the need for courts to draw arbitrary lines and yet keep privacy intrusions to a minimum—without direct reference to a formal approach. Likewise, in 1987, a California appellate court denied a stable and committed homosexual couple recovery for negligent infliction of emotional distress without explicitly recognizing its formalistic reasoning for prohibiting recovery. Elden finally pulled together all these principles, solidifying the formal definition of relationships as the standard for relationship-dependent torts, even though California had, in years past, granted cohabitants many benefits in other areas.

II. Eliminating California's Marriage Requirement

The crucial aspect that makes loss of consortium such a troublesome and odious cause of action lies in the fact that the "social evolution of the family has outpaced the legal evolution." Society has permitted a wealth of knowledge about emotional injuries, but the law in such areas remains stagnant. The courts should change the common law to conform to current societal interests and understanding. In California, there is a maxim that "[w]hen the reason of a rule


ceases, so should the rule itself.” This is precisely what occurred in the 1960s and 1970s, when the courts began to recognize a woman’s claim for loss of consortium. “So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the meed of justice for married women.” As the courts opened recovery to wives, precedent was not a guiding factor for them. The courts’ concern was “not with the family of the middle ages, with its tyrannies and abuses, but with the family of today.” If the court looked to the family of the 1960s to extend the right of recovery to the wife, why should the California court not look to how society defines the current family in order to extend the right of recovery to those committed couples that experience loss from the tortious conduct that injured one partner? “Whenever an old rule is found unsuited to present conditions . . . it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice.” Blind adherence to outdated mandates merely perpetuates and engenders harsh and unjust results.

A. Lozoya v. Sanchez: New Mexico’s Novel Approach

In March 2003, New Mexico held that its old rule of loss of consortium was unsuited to present conditions and merely perpetuated harsh results. Ubaldo and Osbaldo Lozoya, father and son, were involved in a car accident in 1999. They were stopped at an intersection when another car driven by Diego Sanchez hit them from behind. As a result of this accident and another accident ten months later, Ubaldos’s previous back problems were aggravated and enhanced. At the time of the first accident, Ubaldos lived in a domestic partnership with Sara Lozoya, but the two were not married. They had lived together for thirty years, had three children together, lived in a home they purchased together, and even shared a common last name.

78. CAL. CIV. CODE § 3510 (West 1997).
79. Bernhardt v. Perry, 208 S.W. 462, 470 (Mo. 1918) (Bond, C.J., dissenting).
82. See Hicks v. New Mexico, 544 P.2d 1153, 1156 (N.M. 1975).
83. 66 P.3d 948 (N.M. 2003).
84. See id.
85. Id. at 951.
86. Id.
87. Id. at 951–52.
88. Id.
name.\textsuperscript{89} Prior to the first car accident, Ubaldo and Sara had a “happy relationship” that involved going out dancing, visiting friends, sharing intimacies, and making life decisions together.\textsuperscript{90} After the accident, in addition to his physical injuries, Ubaldo’s demeanor “changed dramatically;” Ubaldo became depressed, rarely leaving his bed.\textsuperscript{91} This affected his relationship with Sara; they no longer socialized and their sexual intimacies diminished.\textsuperscript{92} At the trial level, the court dismissed Sara Lozoya’s loss of consortium claim because she and Ubaldo were not legally married at the time of the accident and therefore lacked standing to bring such a claim.\textsuperscript{93}

On appeal, the negligent defendant-respondent, Diego Sanchez, relied on Elden and made five rebuttals to Lozoya’s appeal: (1) a legal status has always been a limiting factor for loss of consortium; (2) the legal status of the parties serves to provide the courts with clear guidance as to who should recover; (3) it would be unfair to allow a co-habitant to recover a benefit of marriage without assuming the burdens that go with marriage; (4) extending the cause of action would institute a common law marriage; and, finally, (5) extending the cause of action to unmarried couples would lead to an unworkable standard.\textsuperscript{94}

The New Mexico Supreme Court refuted Sanchez’s first argument by reasoning that the legal status is only concerned with establishing a close familial relationship, which the claim is protecting, and not the legal status itself.\textsuperscript{95} Implicitly, the court emphasized that the marriage requirement was merely a means of line-drawing. In essence, limiting recovery to married couples was done by the courts for simplicity’s sake and not because the legal status confers some sort of right or benefit upon the individual: “A person brings this claim to recover for damage to a relational interest, not a legal interest.”\textsuperscript{96} The court denied the second “line-drawing” argument as well, remarking that “[e]ase of administration . . . does not necessarily further the interests of justice.”\textsuperscript{97} Besides, a court may clearly rely on the sound judgment of a jury to assess the quality of interpersonal relationships,

\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 954.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 955 (emphasis in original).
\textsuperscript{97} \textit{Id.}
and a court is competent enough to assure that the resulting emotional injury is real and is in need of compensation. The court disagreed with Elden’s reasoning that rejecting claims by cohabitants promoted marriage by adding:

[T]he State has a continuing interest in protecting the legal interest of marriage. . . . Allowing an unmarried partner to recover for loss of consortium neither advances nor retracts from that interest. It is doubtful that anyone would choose to marry simply because they would not be allowed to bring a future loss of consortium claim otherwise.

The court rejected the third “benefit of marriage” argument by reasoning that the loss of consortium claim is not a benefit of marriage but is instead a method of compensation for those who have suffered a loss to a “significant relational interest.” Upon rejecting the fourth “common law marriage” argument, the court emphasized that although common law marriages were not recognized within the state, that sort of evidence, such as mutual agreement and assumption of duty to one another, would be “highly probative” in deciding the closeness of the relationship between the injured partner and the claimant. The court then rejected Sanchez’s fifth and final “unworkable standard” argument. The court emphasized that it is foreseeable, given the growing number of cohabitants in society, that an injured person might not be married but might have a significant other who would experience loss based on their partner’s injury.

The court reasoned that a standard allowing cohabitant recovery for loss of consortium could be workable when that standard balances such factors as duration and dependence, common contributions to mutual living, the extent and quality of shared experience, whether or not the individuals were members of the same household, the emotional reliance on each other, and day-to-day interactions in mundane situations. Notably, even if the couple was legally married at the time of the injury these factors would have to be considered in order for a jury to properly assess damages.

98. Id.
99. Id. (footnote omitted).
100. Id. at 956.
101. Id. at 956–57.
102. Id. at 957–58.
103. Id. at 957.
104. Id. (citation omitted).
105. Id.
Additionally, the court suggested additional requirements in order to alleviate the fears emphasized in Elden. First, a person may only have one intimate familial relationship at any given time for the purpose of loss of consortium. Second, for unmarried couples, their relationship must be committed and exclusive. Finally, for engaged, married, or common law married couples, commitment is presumed.

B. California Should Adopt New Mexico's Approach

It shocks the conscience when there is not a "better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." The problems of Elden begin to manifest when one looks at society. California and the United States in general are altering—and in fact were altering even prior to the Elden decision—their definitions of family, relationships, and those interests that they believe deserve protection. With the increasing growth of nontraditional households, the term "family" has become blurred and so too have the rights for recovery of things such as loss of consortium.

1. A Changing Californian Society

In recent decades, California has dramatically altered its law regarding many aspects concerning relationships, both married and unmarried. Not long ago, a California statute, repealed in 1973, recognized the husband as the head of the household, with sole authority to choose the place and mode of the family's living. Another statute recognized the husband as the manager of community property until it too was repealed in 1992. A California statute recognizing the husband as having the primary legal responsibility for child support was also repealed in 1980. Even in the criminal sector interests have changed. Marital rape was not penalized in California until

106. Id. at 958.
107. Id.
108. Id.
112. See id. § 5105 (repealed 1992).
113. See id. § 196 (repealed 1992).
legislators changed the code in 1979.\textsuperscript{114} These statutory changes illustrate that, as society has changed, so too have California’s laws.

During this time of statutory change, unmarried couples, including homosexual ones, gained increasing recognition as well. Courts began to realize that a state’s interest in marriage did not imply a “corresponding policy against nonmarital relationships,” and that California should not stigmatize committed unmarried couples who make reasonable decisions of sound judgment.\textsuperscript{115} In 1976, for example, unmarried cohabitants were granted the ability to aggregate their earnings and property in mutual agreements.\textsuperscript{116} Allowing such progressive reforms toward unmarried cohabitants corresponded to population trends reflecting a growing number of American citizens living and coupling outside the confines of a traditionally recognized marriage.

Statistics reveal that there are a growing number of cohabiting (unmarried and living together) opposite-sex couples in the United States, ballooning from 523,000 in 1970 to 1.6 million in 1980, to 2.9 million in 1990, and to 4.2 million in 1998.\textsuperscript{117} Furthermore, of those who do marry, nearly one-half result in divorce.\textsuperscript{118} Perhaps this growing rise in cohabitating couples and divorce reflects the growing realization that “many marriages lack the mutual support, companionship, and like benefits that a loss of consortium claim purports to protect.”\textsuperscript{119} Regardless of the reason, marriage no longer plays as central a role in society as it did years ago, and, as a result, new forms of family and marriage-alternatives have been formed.

Cohabitation is one type of marriage-alternative. One recent study has shown another marriage-alternative where “growing numbers of same-sex couples are using public, wedding-like rituals to solemnize and celebrate their intimate commitments . . . .”\textsuperscript{120} The growing affirmation of such marriage-alternatives also reflects a shift

\textsuperscript{114} See \textsc{Cal. Penal Code} § 262 (West 1999); People v. Hillard, 260 Cal. Rptr. 625, 627 (Cal. Ct. App. 1989) (recognizing that the statute was designed to remove the marital exemption from the crime of rape).


\textsuperscript{116} Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976).

\textsuperscript{117} See Ann Laquer Estin, \textit{Ordinary Cohabitation}, 76 \textsc{Notre Dame L. Rev.} 1381, 1384 (2001) (footnote omitted).

\textsuperscript{118} See Richardson, \textit{supra} note 110, at 118.


in the social understanding of what benefits the community as a whole. California's interest in a marriage is the relationship between the couple, not the marriage license itself. Marriage is sanctimonious, not because there is a document affixed with the seal of the county recorder, but rather because that type of relationship encourages and oftentimes succeeds at promoting stability among citizens, both adult and child, and maintains a continuous social transmission from generation to generation. A state should "maximize its interest in protecting the relationships it views as the bedrock of society by allowing recovery for loss of consortium to cohabitants."\textsuperscript{121}

Furthermore, as California incorporated heterosexual unmarried couples into its legal framework, it began to accept that homosexual couples could also possess characteristics that benefit society, analogous to a married couple. In 1987, a joint task force of California senators and state assemblypersons recognized that "greater recognition is being given to gay or lesbian life partners for what they are: family relationships."\textsuperscript{122} The task force determined that these homosexual households "serve the same family functions as other family forms."\textsuperscript{123} In 1988, a California appellate court ruled that custody rights could not be denied to a parent based on sexual preference alone.\textsuperscript{124} "The unconventional lifestyle of one parent, or the opposing moral positions of the parties," did not present the court with "an adequate basis for restricting visitation rights."\textsuperscript{125} In 1991, a California appellate court held that under the California Constitution, homosexuals were entitled to equal protection under the law.\textsuperscript{126}

Statutorily as well, homosexuals gained more legal recognition in roles equivalent to marital recognition. For example, the California Legislature approved the progressive standard of allowing domestic partners the ability to adopt the other partner's children.\textsuperscript{127} At the municipal level, Berkeley, Laguna Beach, Los Angeles, San Francisco, Santa Cruz, West Hollywood, Alameda County, and San Mateo County have all enacted domestic partnership ordinances allowing for regis-


\textsuperscript{123} \textit{Id.} at 35.


\textsuperscript{125} \textit{Id.} at 291.


\textsuperscript{127} \textit{Cal. Fam. Code} § 9000(b) (West Supp. 2003).
tration and a multitude of rights and benefits. Additionally, many companies including Levi Strauss, Ben and Jerry’s, MCA, Greenpeace, Lotus, Planned Parenthood, AAA, and the American Psychological Association have extended their benefit or membership plans to include domestic partners. Most recently, California Governor Arnold Schwarzenegger signed a law into effect to amend and add a new section to the family code. The relevant portion of the act allows registered domestic partners the “same rights, protections, and benefits” as well as stating that they should “be subject to the same responsibilities . . . as are granted to and imposed upon spouses.”

Californian society has clearly developed beyond the considerations cited in Elden. This changed society has created a judicial conundrum concerning loss of consortium that cannot be resolved under the Elden approach. California faced the same problem in 1974 when a wife attempted to recover for loss of consortium. The society of 1974 had developed beyond the court’s original considerations. A wife was no longer considered the property of her husband and her injuries were real. She, in society’s eye, was real. The court, accordingly, allowed recovery. Now, California sits in a similar predicament. Society has changed. Committed couples are increasingly recognized as legitimate societal units. They experience real injury regardless of a marriage license. Further, homosexual couples can be just as committed as married couples. Registering as a domestic partner or getting a legal license for marriage means nothing in the realm

128. See Richardson, supra note 110, 122 (citing Craig A. Bowman & Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 COLUM. L. REV. 1164, 1188–90 (1992)).

129. See Richardson, supra note 110, 123–24.


131. Id. Though this act has been signed into law, there is confusion as to its implementation and how it relates to California’s definition of marriage. CAL. FAM. CODE § 308.5 (West Supp. 2003) (stating that as of March 8, 2000 “[o]nly marriage between a man or a woman is valid and recognized in California”). Regardless of CAL. FAM. CODE § 297.5, California would still preclude loss of consortium recovery from committed, unmarried straight couples and committed, unregistered homosexual couples. This would occur because, with Elden still requiring marriage and with this new law requiring domestic registration to claim a tort dependent on marriage, unmarried heterosexual couples and unregistered homosexual couples would have no right to recovery. Though a growing number of cities have issued same sex marriage licenses, the proceeding backlash and their forcible cessation along with the confusion of this new law tend to show that even those homosexuals with registration status may not be able to recover. Therefore, the requirement itself must be changed.


134. See id. at 686.
of consortium. In society's eye, these couples are real. Their injuries, too, are real—yet the law prohibits their recovery.

2. A Changing Supreme Court

Societal shifts appear to reach beyond just California. One commentator on the subject suggests that laws prohibiting recovery for loss of consortium for unmarried cohabitants and homosexual couples could lie in the fact that the United States Supreme Court had "not yet recognized a constitutionally-protected freedom to form intimate associations beyond the traditional relationships." The United States Supreme Court destroyed this premise in June 2003. Texas police officers arrested Tyron Garner and John Geddes Lawrence in response to a reported weapons disturbance. The two were not arrested for weapons violations, but rather for engaging in private consensual sex acts, in violation of a Texas sodomy statute. The Supreme Court overturned the convictions by overruling prior case law and invalidating the sodomy statute. The critical aspect of this case, as it relates to the topic of relational torts, is found in the Court's dicta. It reasoned that homosexuals have the liberty to express themselves in personal bonds of intimate conduct with one another. Homosexuals have autonomy to make intimate and personal choices, central to dignity and liberty. The Court came to these conclusions to conform to "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.

All too often the ability to recover for loss of consortium is misconstrued as a reward for marriage. Only married couples, some argue, should recover for loss of consortium as a reward for actually committing to the other partner and taking up the "adult responsibility" of marriage. This has never been a consideration courts have taken seriously. There is something deeper at the heart of the

137. Id. at 563.
138. Id. at 578.
139. See id. at 566–68.
140. Id. at 574.
141. Id. at 572. It should be noted that history and tradition were helpful but ultimately not conclusive in the Court's inquiry.
142. Diego Sanchez attempted this argument in a New Mexico case. See Lozoya v. Sanchez, 66 P.3d 948, 956 (N.M. 2003).
143. See id. at 956.
claim: the relationship. It may be argued that Lawrence v. Texas is only significant because it prohibits the criminalization of sodomy by states. But it also stands for something else: in order to prohibit such criminalization, the United States Supreme Court recognized that adults are free to create personal and intimate consensual relationships with minimal government interference. Both decriminalizing sodomy and recognizing adult intimacy point to more fundamental aspects of honoring relationships between two consenting adults. Therefore, the loss of consortium claim is not a reward at all but rather a recognition of the right to form intimate relationships by compensating the individual whose relationship is injured by the tortious conduct of another.

A tort claim purporting to protect the underlying relational interest should thereby extend to all couples, whether married or not. This argument receives additional support in California, where unmarried people may freely cohabitate and the right to privacy encompasses the right to choose the people with whom one lives. If one has the right to openly create and maintain the relationship, why should courts continue to distinguish relationships in relational tort claims?

3. The Morality Issue with Loss of Consortium

Yet with all these social changes, only New Mexico allows an unmarried cohabitant to maintain a loss of consortium claim. Furthermore, not a single state has allowed the cause of action to proceed by a same-sex partner. In California, "delineating the extent of a tortfeasor's responsibility . . . [requires courts to] locate the line between liability and non-liability at some point, a decision which is essentially political." Since the line-drawing feature is one of policy, politics, and morality, many quickly and rashly assume that determinations to exclude non-traditional couples are primarily based on the moral criticisms of courts. With nothing more, it would almost seem plausible to argue that the courts do not recognize unmarried heterosexual couples because they are "living in sin" or beyond the tradi-

144. Id.
145. Lawrence, 539 U.S. at 578.
146. Id. at 567–68.
tional mores of society. Furthermore, given the nature and religious structure of a certain segment of American society, courts are even more likely not to recognize homosexual couples.

But such is not the situation for Californian loss of consortium jurisprudence. Although morality and politics, whether wisely or un-wisely, may at times be used in adjudication of common law claims, the moral and political lines of reasoning proffered by the California court in choosing to extend or deny recovery to wives, parents, children, and cohabitants have been relatively limited. The California courts have circumscribed themselves to certain restricted lines of reasoning. When extending recovery to wives, the court pointed to changing social roles and the need to be equitable. The court looked to the easy determination of compensation by juries, the need to prevent limitless liability, and the safeguards implemented through jury instructions. The court has always considered as the basis for denying recovery the overextending of liability and the need to tightly curtail the claim, as based on the difficulty of assessing emotional, sexual, and financial commitment. Nowhere in these cases will one find moral condemnation of particular relationships stated as a reason for denying the extension of the claim. In fact, in Elden the California Supreme Court specifically stated that such moral condemnation played no role in its reasoning and consideration in denying cohabitant recovery: "[O]ur determination here is not based on a value judgment regarding the morality of unmarried cohabitation relationships." In other areas of cohabitant recognition, the California Supreme Court followed similar reasoning:

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.

152. See id. at 680–85.
154. Elden, 758 P.2d at 590.
Since moral condemnation has not been expounded as legal reasoning for extending or denying recovery in loss of consortium claims, and since the courts refuse to make moral judgments against marriage-alternatives, supporters of a limited loss of consortium claims need not worry about a judge importing her own values through the extension of the claim. This is because the courts have limited themselves to a relatively formal structure of considerations, none of which include moral disapproval of unmarried or homosexual couples. The morality involved in condemning such relationships should, therefore, not play a role in determining whether or not a legal requirement for marriage is valid.

4. Why Marriage Is an Arbitrary Line

The arbitrary line that has been drawn in allowing marriage to be the only deciding factor for bringing suit fails to compensate for the actual interest at stake in loss of consortium claims. Few would disagree that Sara Lozoya should recover for her loss. Her relationship was akin to a thirty-year marriage, but it was not a per se marriage in the eyes of the law, so loss of consortium claims must be protecting something more than marriage. Similarly, a gay couple may have a thirty-year relationship, but still fail to recover for an identical action in California. This circumstance is unequal and in dire need of revision. The line at marriage is hastily drawn.\textsuperscript{156} A relational interest does not solely flow from a marriage license—it flows from commitment.

Nonmarital unions may possess the attributes of a marriage and, if committed, may be just as vital to society, if not more vital, as compared to an abusive or unwanted marriage. Married couples, just like all other unmarried couples, exist in a gamut of differing levels of emotional commitment. Even \textit{Lozoya} failed to recognize this spectrum when it reasoned that evidence of a marriage or an engagement would create a presumption of commitment.\textsuperscript{157} A married, uncommitted couple would have the possibility of recovering a consortium claim while a committed, unmarried couple would never even be given the opportunity. This is a perversion of justice and a perversion of what loss of consortium is all about—the real, loss of a relational interest. The standard should be evaluated on a case-by-case determination of commitment. Likewise, marriage is not harmed if unmarried heterosexual or homosexual couples recover. To argue that such recovery

\textsuperscript{157} See Lozoya v. Sanchez, 66 P.3d 948, 958 (N.M. 2003).
would harm the institution of marriage is counterintuitive. People do not get married in order to secure the elements to bring a claim for loss of consortium; so perhaps there is a post facto protection of some social “good” that is occurring with this tort. Even with such protection, could it not be argued that adult coupling in almost any instance of commitment is a social “good” deserving of recovery?

To say that allowing a member of an unmarried couple to recover would create a great intrusion into private lives is also counterintuitive. That individual decides to bring the claim. If he is willing to bring the claim, he is willing to undergo a peek into his and his partner’s private life. This intrusion also occurs with married couples. Moreover, regardless of the label given to the relationship, the jury will always have to determine damage awards based on the personal interactions in each individual claim, married or unmarried. In doing so, the jury concerns itself with the dynamics of the relationship to determine what exactly must be compensated. The court in *Elden* failed to recognize the true competency of the jury. Juries are intelligent; it is “not beyond the jury’s ken” to assess relationships and to adequately compensate for real emotional injury. The California Supreme Court has long recognized the jury’s capabilities to do so. Although compensation for personal injury is “[o]ne of the most difficult tasks imposed upon a jury,” the court maintained “faith in the ability of the jury to exercise sound judgment in fixing compensation.” In the assessment of a loss of consortium claim “breaks no new ground.” To allow only married couples to recover based on evidence of a marriage license would allow a tortfeasor to execute harm upon non-licensed couples without any responsibility, which clearly is inconsistent with tort principles. Imagine if Diego Sanchez had no obligation to compensate Sara Lozoya for her loss.

“The responsibility of the legal system is to recognize today’s social context.” California has a responsibility to its citizens to provide

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158. See *Dunphy*, 642 A.2d at 378–79.
159. *Id.* at 378.
164. *Simmerman*, *supra* note 119, at 541.
recovery for loss of consortium to committed, stable couples, regardless of their marital or domestic partnership status.

5. A Californian Solution

California needs a workable solution for loss of consortium in this changed society. The California Supreme Court refuses to accept unworkable standards that "will clog our trial courts with unnecessary hearings, discourage the settlement of legitimate claims, and severely strain the resources of the parties and the trial and appellate courts of this state." But California will have a workable standard if it recognizes society's view of relationships and follows New Mexico's considerations of duration, dependence, mutual living in the same household, shared experience, emotional reliance, and day-to-day interactions in ordinary living situations. California should also apply New Mexico's limit of one intimate relationship at a time. With such a standard, the court could continue to protect those individuals, who after many years of companionship, have been injured, while still precluding those romantics who claim commitment after only a few weeks of courtship or dating.

California's standard should deviate from New Mexico's standard of presuming commitment for married couples. The California standard must allow loss of consortium recovery only to committed couples, both homosexual and heterosexual, whether married or unmarried. It should not assume that a marriage license or registration presumes commitment. The court should, on a case-by-case basis, look to the factors of *Loyoza* to determine if the relationship, whether married or unmarried, resembles what the cause of action is attempting to remedy. Such a standard would certainly prohibit the overextension of liability in allowing children, parents, close roommates, and other relatives or friends from recovery. To completely prohibit such an overextension, the court could add a requirement for some degree of sexual intimacy.

This combination of factors produces an appropriate response to California's problem. Flexibility and fairness should guide the courts when extending loss of consortium to marriage alternatives. It is conceded that there is a functional compulsion for human beings to bond

168. See *id.* at 958.
together as intimate couples to share life’s joys and its burdens. It is also conceded that with this compulsion and union there are benefits and responsibilities. The loss of consortium claim and its extension to wives revealed that it was a benefit to the significant and mature bonding of a relationship. If a couple has chosen to take on the responsibilities of bonding together as a living unit, why then should the court deny them a benefit?

Further, this proposed case-by-case standard would not clog the court system because the consortium claim is typically attached to the suit of the injured partner and that suit would nonetheless require the attention of the court. Nor would liability be overextended: the above guidelines create an easily identifiable “discrete class of potential plaintiffs” and California jury instructions are already specifically given to prevent double recovery in loss of consortium claims. Under this approach, not just anyone may claim a loss of consortium—only those individuals with a real relational interest within a committed and stable relationship as determined on a case-by-case basis. From there, the jury may determine the degree of the couple's commitment, and how much, if any, the compensation for the loss of consortium should be.

Conclusion

California is a progressive state that at one point led the way in tort development and reformation, but has now grown sluggish. Justice Mosk once recognized the California Supreme Court as a court willing to take new and liberal positions in the area of tort law: “[If a] crowd is marching in the wrong direction, we have not heretofore hesitated to break ranks. . . . I need not list the many instances in which this court has initiated new trends in the law of personal torts . . . to previously neglected classes of accident victims.” It is time that California recognize the changed societal expectations of family and relationships and adopt a contemporary standard for loss of consortium claims that looks to the relationship between the two individuals and


not the official stamp of approval that the couple may have received at some time in the past.

"As our society has progressed, the term 'loss of consortium' has been redefined to recognize and meet current social and judicial realities."\textsuperscript{173} It was redefined to include wives. Now the time has come for it to include committed, unmarried heterosexual and homosexual couples. Unfortunately, couples with similarly situated levels of commitment and codependence are not treated similarly in the California court system. Such differences ignore the fact that deep relational interests are not dependent on official documents. It ignores that the loss of consortium claim protects relationships that sustain real injury. When a court denies this recovery to an unmarried heterosexual or homosexual couple, it clearly states that the unmarried couple is not worthy of recognition and that their relationship is not part of the societal interest. \textit{Lozoya} serves as an excellent guidepost for loss of consortium recovery that would ensure that only individuals in committed relationships, who are appropriately harmed, are allowed to recover.

California can simply no longer rely on \textit{Elden}. \textit{Elden} should be replaced with a standard that allows all committed couples to recover. Such "fundamental questions . . . await a better answer than that we do as our fathers have done."\textsuperscript{174}

\textsuperscript{173} Osborne, \textit{supra} note 3, at 179.
\textsuperscript{174} Holmes, \textit{supra} note 109, at 470.