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LOSS OF CONSORTIUM: MOVING PAST ANACHRONISM TOWARDS A NEW STANDARD

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INTRODUCTION

Consortium refers to the “conceptualistic unity” of relational benefits that one is entitled to receive from another with whom one is in a relationship, which include companionship, cooperation, affection, aid, financial support, and (in the case of romantic relationships) sexual relations.\(^1\) A common law claim for the loss of consortium allows the spouse of the person who directly suffers a tortious injury to bring suit against the tortfeasor for damages caused to the relationship by the primary injury.

The loss of consortium action was originally rooted in the husband’s historically recognized quasi-property interest in his wife.\(^2\) Because the marriage contract entitled a husband to receive services from his wife as a matter of law but did not entitle the wife to receive services from her husband, the reasoning of the time went, loss of consortium claims were historically only available to husbands.\(^3\) Today, however, the courts have abandoned such outdated thinking, and shifted the emphasis of loss of consortium away from the loss of material services historically associated with a marriage contract to the loss of relational interests that arise organically in committed relationships, including “elements of love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse’s physical assistance in

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\(^2\) *Id.* at 889.

\(^3\) *Id.*
operating and maintaining the family home.” As such, today, both husbands and wives can bring loss of consortium claims.

Notwithstanding the initial evolution of the loss of consortium action, by denying unmarried couples that are in serious and committed relationships the right to sue for loss of consortium, courts today are making the same mistake historical courts made: they are arbitrarily holding on to a set of outdated assumed premises about marriage and committed relationships, and employing a line of jurisprudence that leads to absurd conclusions, and fails to comport to present day realities. In every state except New Mexico, the general rule is that if two people are not married at the time of the injury, the aggrieved partner cannot bring an action for loss of consortium: no marriage/no cause of action. Although the marriage requirement provides the courts with a neat, bright line test for determining who can, or cannot, bring a loss of consortium claim, the test is inherently flawed. Rather than basing the determination of legal standing on the relational interests that the loss of consortium claim is intended to compensate for in the first place, the current test arbitrarily makes marriage the sufficient condition for allowing a loss of consortium claim. But how effectively, if the purpose of the action is to compensate for relational benefits, does such a test accomplish its purpose? Ironically, although courts have recognized that non-married couples can, and do, have substantial relationships that intertwine the lives of the parties to the same extent that marriage does, courts have, in the same breath,

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5 Sostock v. Reiss, 415 N.E.2d 1094, 1098 (Ill. App. 1980). Some states have allowed other family members to bring loss of consortium claims by statute. For purposes of this paper, however, statutory expansions of the claim are not considered.
consistently denied these couples the right to sue for loss of consortium because they were not technically married at the time of the injury;\(^6\) and here lies the rub.

Contrary to the prevailing jurisprudence on the issue, reason would suggest that, if the whole point of the action is to compensate for the loss of the relational interests contained in the consortium, then the determination should be made substantively, on the basis of the facts and the nature of the relationship, rather than on the basis of technical line drawing. In other words, the question that should be asked is not whether two people are married, but whether the relationship was of such a nature and quality so as to create a consortium, which as a result of another party’s negligence, was in fact lost or damaged. The first part of the question is a question of law for the judge; the latter part is a question of fact to be left to the jury.

If the law is going to be equitably applied, then an updated approach to loss of consortium claims is needed. Indeed, rethinking the loss of consortium action is especially salient today because American society is ever more engaged in a social dialogue over its very understanding of marriage and family, including the legal implications associated with the evolution of this understanding.\(^7\) The issue is particularly relevant to same-sex couples who are denied the right to bring a loss of consortium action. In many cases, these couples have long, committed, substantive relationships, and would have been married or in a civil union but for the fact that they were legally denied the option. Observation shows that, in contemporary society, marriages are not necessarily substantive enough to give rise to consortium, while at the same time showing that many non-married couples have relationships that are as committed and

\(^6\) See e.g. Id.; Monroe v. Trinity Hospital-Advocate, 345 N.E.2d 1002 (Ill. App. 2003).

significant as any marriage.\textsuperscript{8} As our social understanding of family relationships evolves, so to must the legal system’s understanding. Therefore, as has happened many times before, with respect to many different areas of law, it is time to rethink the loss of consortium claim from the ground up, and develop a more substantive method of adjudication that is based in fact and reasoning, rather than arbitrary categorizations that no longer comport with the socio-temporal context in which the laws are applied. The purpose of this Comment is to do just that.

Before proceeding, it will be helpful to provide some examples that illustrate the deficiencies in the current standard.

\textit{A. Scenario One}

A man and a woman have been engaged for a year, living together for two years, and in an exclusive intimate relationship for five years. They have planned their wedding for October, and have booked the reception hall, sent out invitations, bought the dress, and so forth. Two weeks before the wedding, the groom is injured in a car accident with a drunk driver, and paralyzed from the waist down. After months of recovery, the bride finally weds her now wheelchair-bound groom. The husband sues for negligence, and the wife brings a claim for loss of consortium. The court dismisses the wife’s claim because, at the time of the accident, the

\textsuperscript{8} As Barbara Cox points out:

less than thirty percent of all Americans live in nuclear families. Instead, more and more individuals are living together as unmarried heterosexual couples, gay or lesbian couples, or as other family groups such as communes or several person households. These individuals are forming alternative families. They are not challenging the family as a valid life choice; they are challenging the current conception of what a family’s composition must be.

\textit{Id.} at 96.
couple was not married. “You should have had the wedding sooner,” the court opines. If reason is to mean anything, it must mean that judicial decisions should not depend on random and arbitrary circumstances, which is precisely the case here. It is absurd to think that, two weeks before the wedding, the couple does not have a consortium, or that the fiancée was somehow a less foreseeable plaintiff, but that the day after the wedding these conditions become satisfied. There is absolutely no difference in either the quality of the couple’s relationship, or the foreseeability of the fiancé as a potential plaintiff two weeks before the wedding, yet the claim would be denied under the current test for no other reason than because the groom had the dumb luck of getting into an accident two weeks too soon.⁹

B. Scenario Two

A man goes to Las Vegas for a vacation. While out on the town one night, the man has too much to drink and legally marries a showgirl he met at a Vegas nightclub with Elvis serving as his best man. While walking around the next day trying to figure out how he will annul the marriage, the man is injured by a statue at Caesar’s Palace that falls on him because it was negligently installed. While the man is in the hospital, his new wife comes to visit him, as does his personal injury lawyer. The lawyer advises the man that, since the two were married at the time of the accident, the new wife can bring a claim for loss of consortium. The suit is filed and the court allows the claim, leaving it up to the jury to decide if the wife can recover, and for how much. After the suit settles, the marriage is annulled. The conclusion here seems illogical as well, not because the claim was allowed, but because claims by those who are in relationships that are more significant and committed than the relationship here are not. In this case, the jury

⁹ Sostock, 415 N.E.2d at 1098.
might not award damages for loss of consortium, but this does not explain why this claim was allowed to proceed when claims that would probably succeed on the merits are not.

C. Scenario Three

A same-sex couple had been living together in a monogamous, committed relationship for twenty years. The state the couple lived in did not allow for civil unions, nor did it recognize same-sex marriage; and so the couple had a private ceremony ten years into their relationship in which they exchanged vows and rings in front of their friends and families. The two were known as a couple, had adopted and raised a child together, owned property together, had powers of attorney, had named each other as primary beneficiaries in their respective wills, shared in household expenses and chores, and spent most nights together enjoying each other’s companionship. They were life partners in every manner. A few years ago, one of the partners was mistakenly diagnosed with ovarian cancer, when in fact she had a different form of cancer. Two doctors misdiagnosed the cancer, and as a result of the doctors’ negligence, the partner died. In the years during which the sick partner was fighting her cancer, the surviving partner had cared for the sick partner—bathing her, feeding her, helping her go to the bathroom—and had cut back to a part-time work schedule to do so. A year before the partner died, the state enacted a law recognizing civil unions, and the couple was legally joined under the new law. After the partner died, her estate brought negligence claims, and the surviving partner brought a loss of consortium claim. The court dismissed the claim on the grounds that, since at the time the negligence occurred the two were not in a civil union or married, no cause of action existed: “You can’t marry into a tort” the court holds. Here, the absurdity of the current rule is especially pronounced. Not only did the couple exhibit all of the substantive qualities that we recognize in
the best marriages, but in this case, the couple could not have been married or joined in a civil union at the time the negligence occurred because the option was not available to them. Indeed, here, the restriction on the couple’s union was repudiated by the state’s new civil union law, and as soon as the option was available, the couple did enter into a civil union. If, as some argue, it would be unjust to allow unmarried persons to bring loss of consortium claims because it would be granting the party the benefit of marriage without imposing any of the burdens on them, then it is unquestionably unjust to dismiss, on technical grounds, the substantive claims of someone who bears all the burdens of marriage without receiving any of the legal benefits; and all the more so when one considers that, but for a repudiated law banning it, the two probably would have been married or in a civil union at the time the negligence occurred.

These examples illustrate a few salient points that are relevant to the remainder of this Comment. First, it is clear that the current test produces absurd and inequitable outcomes. Second, recognizing the relational nature that gives rise to consortium is not as difficult as many courts have contended—is there any doubt that the same-sex couple did have such a relationship while the man and his showgirl did not? Third, these examples illustrate that the relational interests that can be lost arise from the substance and quality of the relationship, and not from its technical distinction; and inasmuch as the loss of consortium claim is intended to compensate for the loss of these interests, it follows that the inquiry should be based on the nature of the relationship rather than its technical categorization. Finally, the examples illustrate that allowing, or disallowing, a claim for loss of consortium has no bearing whatsoever on promoting marriage. People do not get married so that they can sue in tort—they get married for a variety of other reasons, some less meritorious than others. As such, the state’s interest in promoting marriage is not implicated in the loss of consortium question.
Notwithstanding the forgoing, and despite the clear deficiencies in the current test, the current test does offer a precise way to determine who can, or cannot, bring a loss of consortium claim as a matter of law. It would be just as problematic to argue that the loss of consortium claim should be open to anyone who can make a reasonable argument for the loss of relational benefits. What is needed, therefore, is a test that (1) produces more logical and equitable outcomes, and (2) is adequately precise so as to be practically applicable and in the interests of judicial efficiency. The purpose of this Comment is to suggest such a test.

The Comment proceeds as follows. First, an examination of the historical development of the loss of consortium action is presented, and the current standard, which most courts employ today, is discussed. The Comment then establishes the bases and justifications for departing from the current standard. And finally, a new standard and test are proposed and applied to additional scenarios.

II. BACKGROUND

A. The Development and State of the Law

In *Dini v. Naiditch*, the Illinois Supreme Court described the historical origins of the loss of consortium claim:

> Since the husband was entitled to his wife's services in the home, as he was to those of any servant in his employ, if he lost those services through the acts of another, that person had to respond in damages. He had a right of action for injury to her grounded on the theory that she was his servant. However, should the husband be injured, the wife, being a legal nonentity could bring no action. ¹⁰

The *Dini* Court went on to observe that, curiously, despite “the obvious changes in the social, economic and legal status of married women during the ensuing centuries,”

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¹⁰ 170 N.E.2d 881, 889 (Ill. 1960).
courts had continued to deny wives the right to sue for loss of consortium until the 1950s.\textsuperscript{11}

By the 1950s, however, courts—responding entirely to the changing socio-temporal understanding of marriage itself—could no longer deny the flaw in the logic of denying wives the right to bring a claim for loss of consortium, and a shift in the state of the law took place.

\textit{Hitaffer v. Argonne Co.} was the first case to extend the loss of consortium action to wives.\textsuperscript{12} \textit{Hitaffer} shifted the basis of the loss of consortium claim from the loss of the material elements of service provided for in historical marital contracts, to the loss of substantive relational benefits—including companionship, cooperation, affection, aid, financial support, and sexual relations—which together form the “conceptualistic unity” of consortium.\textsuperscript{13} \textit{Hitaffer} not only recognized the inequity of denying wives the right to sue for loss of consortium, it recognized that the claim was about the substantive loss of relational benefits, and not a matter of contractual rights associated with the marital contract.\textsuperscript{14} Other courts followed, and before long, the understanding and standard established in \textit{Hitaffer} were universally accepted.

But since the 1950’s evolution of the loss of consortium claim, the law has failed to evolve any further; courts have almost universally declined to extend loss of consortium claims to unmarried couples, despite recognizing that non-married couples can, and do, have relationships that are as significant and committed as any marriage. Indeed, a review of any

\textsuperscript{11} Id.


\textsuperscript{13} Id. at 814.

\textsuperscript{14} Id.
number of cases reveals that there is not only resistance to expanding the claim, but outright hostility to it.

*Sutherland v. Auch Inter-Borough Transit Co.,*\(^{15}\) and *Bulloch v. United States*\(^{16}\) were two notable cases in which federal district courts allowed non-married plaintiffs to bring loss of consortium claims. However, both opinions have been expressly rejected and sharply criticized as having misinterpreted state law.\(^{17}\) In *Butcher v. Superior Court*, the California Court of Appeals allowed an unmarried partner to bring a claim for loss of consortium, reasoning that, in many cases, “the relationship of unmarried cohabitants possesses every characteristic of the spousal relationship except formalization.”\(^{18}\)

Observing that (1) “cohabitation arrangements may be of many kinds, ranging from a ‘one-night stand’ to and including relationships which have endured as long as or longer than most marriages,”\(^{19}\) and (2) allowing “all cohabitants to recover would pose severe practical problems in terms of limiting liability,”\(^{20}\) the *Butcher* Court proposed the following standard:

> One standard which may be used to evaluate the cohabitation relationship is that the relationship must be both stable and significant. If the plaintiff

\(^{15}\) 366 F. Supp. 127 (E.D. Pa. 1973) (unmarried male allowed to sue for loss of consortium when fiancee was injured one month before their marriage, although damages only allowed from date of marriage).

\(^{16}\) 487 F. Supp. 1078 (D.N.J. 1980) (divorced woman allowed to sue for loss of consortium when ex-husband injured before marriage but after decision to remarry.).


\(^{18}\) 188 Cal.Rptr. 503, 511 (Ct. App. 1983).

\(^{19}\) *Id.* at 512.

\(^{20}\) *Id.*
can show that the relationship meets both of these criteria, then he or she will have demonstrated the parallel to the marital relationship which will enable the court to find the elements of consortium and the damage to the relational interest.\footnote{Id.}

*Butcher*, however, was overruled by *Elden v. Sheldon*.\footnote{758 P.2d 582 (Cal. 1988).} Citing “the state's interest in promoting the responsibilities of marriage and the difficulty of assessing the emotional, sexual and financial relationship of cohabiting parties to determine whether their arrangement was the equivalent of a marriage,”\footnote{Id. at 590.} and arguing that “the difficulty of measuring damages, and the possibility of an unreasonable increase in the number of persons who would be entitled to sue for the loss of a loved one,”\footnote{Id. at 589.} the *Elden* Court concluded that “the right to recover for loss of consortium is founded on the relationship of marriage, and absent such a relationship the right does not exist.”\footnote{Id.} As was illustrated above, and as shall be further shown, however, the assumed premises upon which the *Elden* Court based its logic simply do not hold, notwithstanding the fact that most courts apply the same line of reasoning in denying non-married couples the right to sue for loss of consortium.

Generally, the main reasons given for denying non-married couples the right to sue for loss of consortium are (1) that no duty arises if the parties are not married,\footnote{Id. at 589.} (2) that extending the cause of action to unmarried couples would create an inconsistent and unmanageable

\begin{itemize}
\item \footnote{Id.}
\item \footnote{758 P.2d 582 (Cal. 1988).}
\item \footnote{Id. at 590.}
\item \footnote{Id. at 589.}
\item \footnote{Id.}
\item \footnote{Id.}
\end{itemize}
standard, and (3) that extending the claim would open the proverbial flood gates of litigation. These justifications were examined by the Supreme Court of New Mexico in Lozoya v. Sanchez, a case in which a couple, who was unmarried at the time of the injury, was ultimately allowed to bring a loss of consortium claim.

B. Lozoya: A New Standard Suggested

In Lozoya, a couple had lived in a domestic partnership: they had “been together” for over thirty years, had three children together, carried the same last name, and filed joint tax returns, although they were not married. The claims arose out of two car accidents that occurred only ten months apart. Although the couple was not married at the time of the first accident, they had married prior to the second accident. Employing the no marriage/no cause of action rule, the appellate court allowed the loss of consortium claim against the defendant in the second accident, but did not allow the claim against the defendant in the first accident. The Supreme Court of New Mexico reversed and remanded with respect to the defendant in the first accident, allowing for the loss of consortium claim even though the Lozoyas were not married at the time.

28 Elden, 758 P.2d 582, 589 (Cal. 1988).
29 Lozoya, 66 P.3d at 954.
30 Id. at 952.
31 Id. at 951.
32 Id. at 950.
33 Id.
The court first turned to an analysis of the duty rule in New Mexico, and observed that “in New Mexico, negligence encompasses the concepts of foreseeability of harm to the person injured and of a duty of care toward that person,” pointing out that “duty and foreseeability have [long] been closely integrated concepts in tort law.” The court thus reaffirmed the well-settled foreseeability test as appropriate to the loss of consortium claim and the determination of whether a legal duty arises.

The court also noted, however, that the foreseeability rule was not absolute, and that there may be public policy reasons for not imposing a duty of care toward a foreseeable plaintiff. The court thus turned to determining whether such a policy interest existed, and considered five arguments against imposing a duty on a tortfeasor that would allow unmarried couples to bring a loss of consortium action: (1) that a legal relationship has always been a limiting factor, even for grandparents, in determining who should be able to recover; (2) that the legal status of the parties serves to provide courts with clear guidance as to who should recover; (3) that it would be inequitable to allow a cohabitant to reap the benefits of a legal marriage without being required to assume the burdens of marriage; (4) that to extend the cause of action in this case would be the equivalent of recognizing common law marriage; and (5) that extending the cause of action would lead to an unworkable standard with many unanswered questions. The Lozoya court’s analysis of the above listed policy arguments is of particular importance for two reasons: (i) these same arguments are almost universally used by courts and defendants to deny loss of

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34 Id. at 953.

35 Id.

36 Id.

37 Id. at 954.
consortium claims, and (ii) the court’s analysis thoroughly examines, and invalidates, each argument.

In responding to the arguments against allowing the claims, the court first observed that “perhaps the most significant reason that many courts allow only spouses to make a loss of consortium claim” is that “limiting the field of potential claimants to those with a legal relationship to the victim would serve as a convenient and easily applied line-drawing mechanism for courts.”38 Citing the defendant’s brief, the court noted the widely assumed presumption and fear that, if the cause of action was extended to unmarried persons, “one would also envision that the injured person has cousins, co-workers, drinking buddies and softball team members who may lose his society, companionship and guidance. For that matter, the dead or injured person may have been having an affair with his married neighbor, who also may suffer a loss of consortium.”39 Although acknowledging the concern of creating additional litigation, the court stressed that “ease of administration . . . does not necessarily further the interests of justice.”40 The determining factor, the court held, is the purpose behind the law itself.41

The court reasoned that since the purpose of the loss of consortium action is “to recover for damage to a relational interest, not a legal interest,”42 using “legal status as a proxy for a significant enough relational interest is not the most precise way to determine to whom a duty is owed,” and that such a test “necessarily excludes many persons whose loss of a significant

38 Id. at 954–5.
39 Id. at 955.
40 Id.
41 Id.
42 Id.
relational interest may be just as devastating as the loss of a legal spouse.” 43 Although the court was quick to stress that “the State has a continuing interest in protecting the legal interest of marriage,” the court concluded that the state interest argument fails because “allowing an unmarried partner to recover for loss of consortium neither advances nor retracts from that interest,” 44 a conclusion that observation and common sense tell us is true. Indeed, it seems absurd to claim that two people would get married so that, if down the road one of them was injured, the other could sue for loss of consortium. Such a consideration does not enter the calculus of the decision to get married, and therefore, the availability of the claim almost never encourages nor dissuades people from marrying, nor does it bear on the state’s interest in promoting marriage.

Next, in responding to the argument that the marriage requirement rule provides an easy line-drawing mechanism, the court compared the loss of consortium claim to a claim for negligent infliction of emotional distress, another tort action where third parties are allowed a cause of action derivatively for the primary injuries caused another person. 45 The court concluded that, because courts and juries are more than able to deal with the realities, “not simply the legalities,” of interpersonal relationships, the loss of consortium claim should not be based on “a hastily-drawn ‘bright line’ distinction between married and unmarried persons but in the ‘sedulous application’ of the principles of tort law.” 46 The court therefore held that, although the marriage requirement provides a convenient line-drawing mechanism, a relationship

43 Id.
44 Id.
45 Id.
46 Id.
giving rise to a cause of action could just as effectively be found as a matter of law by looking to
the facts of the case.\(^\text{47}\) According to the court: “although imposition of a duty is a legal question
for the court, oftentimes it is dependent on a factual determination, which we entrust to the jury.
It is appropriate that the finder of fact be allowed to determine, with proper guidance from the
court, whether a plaintiff had a sufficient enough relational interest with the victim of a tort to
recover for loss of consortium.”\(^\text{48}\)

Continuing this line of reasoning, the court rejected the argument that it would be
inequitable to allow a cohabitant to reap the benefits of a legal marriage without being required
to assume the burdens of marriage, on the grounds that this argument misunderstands the loss of
consortium claim.\(^\text{49}\) The court again stressed that the loss of consortium claim “is not a benefit
of marriage” but “a method of compensation for one who has suffered the loss of a significant
relational interest that neither creates nor detracts legal status or interests.”\(^\text{50}\) As such, the court
concluded, the legal benefits and burdens of marriage have no bearing on the question.\(^\text{51}\) In other
words, although the legal status of marriage has been used by the courts to determine who may
bring a loss of consortium claim, in actuality, the modern loss of consortium claim has nothing to
do with the legal aspects of marriage, and everything to do with compensating for the loss of
relational benefits. Using marriage as a proxy, therefore, simply does not comport to the legal
purpose of the action.

\(^{47}\) \text{Id.}

\(^{48}\) \text{Id.}

\(^{49}\) \text{Id. at 956.}

\(^{50}\) \text{Id.}

\(^{51}\) \text{Id.}
On the same grounds, the court held that, since the loss of consortium claim does not extend any of the benefits and responsibilities of marriage, allowing the claim could in no way be seen as recognizing common-law marriage.\textsuperscript{52}

Finally, the court addressed the argument that expanding the loss of consortium cause of action would open the flood-gates of litigation and create an unworkable standard.\textsuperscript{53} To address this concern, the court laid out specific guidance and a basis for determining whether a particular plaintiff should be allowed to bring a loss of consortium claim. First, the court held that the claimant “must prove an ‘intimate familial relationship’ with the victim in order to recover for loss of consortium.”\textsuperscript{54} Although this could include “persons engaged to be married and living together,” the court stressed that “not everyone who is engaged to be married, living together, or assuming the roles of husband and wife (common law or not) will be entitled to recover.”\textsuperscript{55} According to the court, the determination must be made on whether the claimant can prove “a close familial relationship with the victim.”\textsuperscript{56}

To establish a close familial relationship, the court held, courts may look to several factors, including: (1) the duration of the relationship, (ii) the degree of mutual dependence, (iii) the extent of common contributions to a life together, (iv) the extent and quality of shared experience, (v) whether the plaintiff and the injured person were members of the same household, (vi) their emotional reliance on each other, the particulars of their day to day

\textsuperscript{52}Id.

\textsuperscript{53}Id. at 957.

\textsuperscript{54}Id.

\textsuperscript{55}Id.

\textsuperscript{56}Id.
relationship, and (vii) the manner in which they related to each other in attending to life’s “mundane requirements.” 57 The court also held that “a presumption should arise in favor of a close familial relationship when the claimant can prove . . . mutual consent to be married followed by a mutual assumption of marital rights, duties or obligations.” 58 Thus, under Lozoya, a couple that would meet the test for common law marriage would have a claim for loss of consortium in New Mexico, even though New Mexico does not recognize common law marriage. The court also imposed two additional and significant limits on expanding the claim:

First, a person can only have an intimate familial relationship with one other person at any one time. That is to say, if a person is married to a different person than the victim of the tort, the claim will be barred. In the case of claims by unmarried cohabitants, the relationship between the claimant and the victim must be demonstrated to be committed and exclusive. Second, the burden of proving that an intimate familial relationship existed will be on the claimant, with a presumption that this exists if the parties were engaged, married, or met the general test for common law marriage. 59

C. The Significance and Problems of Lozoya

Lozoya stands for at least three important propositions: (1) that the duty rule imposed by the no marriage/no cause of action test should be replaced with the well established and prevalent foreseeability rule, (2) that the loss of consortium claim is about compensation for damage to a relational interest and has nothing to do with the legal interests and covenants of marriage, and (3) that the claim should be expanded to anyone who can prove a close familial relationship with the primary victim, so long as the familial relationship is committed and exclusive.

57 Id.
58 Id.
59 Id. at 958.
Despite the cogency of the court’s opinion in *Lozoya*, other states have not followed suit. In addition to a stubborn loyalty to precedent, this is likely because the test created in *Lozoya* is neither adequately precise, nor adequately restrictive, notwithstanding the important improvements it makes to the majority standard.

Although it is true that the NEID claim allows those with “intimate familial relationships” to bring claims, and while it is also true that some states have enacted statutes allowing non-spousal family members to bring loss of consortium claims in special circumstances, the common law history of the loss of consortium claim has never contemplated extending the claim to cohabiting friends or extended family members who demonstrate an intimate familial relationship; and under *Lozoya*, such claims could potentially be brought in, despite the court’s restrictions and focus on quasi-marital relationships.\(^60\) Summarily, because of the “baggage” associated with the term “intimate familial relationship,” and specifically its more expansive use in other areas of law, the *Lozoya* standard is not adequately restrictive.

The lineage of the common law loss of consortium claim has always recognized that the relationships giving rise to the cause of action are unions in which two people come together to build a single life on a romantic, or amorous foundation. This is a vital distinction. We do not typically think of a primary party’s grandparents, friends, and other such close associations – even if these relations cohabitate and entangle their lives -- as pursuing a unified life with the primary party in the same way we think of a life partner as doing so. In other words, the “intimacy” shared between a committed and amorously involved couple is different than the sort

\(^{60}\) Some states allow family members to bring loss of consortium claims, but these claims are created by statute and not the courts. The distinction is important because the courts have never themselves expanded the claim to non-spouses absent legislative mandate.
of “intimacy” found in other relationships, even though the two forms of intimacy may be of equally substantial weight. Nonetheless, the categorical difference remains. The loss of consortium claim, unlike the NEID claim, has always been intended to compensate for the unique relational interests that are specifically found in committed amorous relationships, and not those interests associated with other intimate familial relationships. While it is true that we may not be able to explicitly articulate what these interests are, the fact remains that the distinct nature of such relationships, and the interests therein contained, are readily recognizable as such, and easily distinguishable, as will be shown below. Therefore, substantively determining what relationships qualify as giving rise to consortium is not as difficult as courts such as the Elder court claim. No reasonable person, for example, would confuse the relationship a man has with his wife or same-sex partner with the relationship a brother and sister have, irrespective of whether the brother and sister cohabitate and lead entangled lives. In any event, since the distinction lies at the heart of the loss of consortium claim, and the use of marriage as a proxy, any expansion of the claim must explicitly include such a limitation.

This is a salient distinction that Lozoya’s “intimate familial relationships” test does not explicitly recognize, notwithstanding the court’s additional guidance. Lozoya’s use of the “intimate familial relationship” language – which is tainted by the NEID claim – and Lozoya’s failure to explicitly recognize the relational distinction leaves the field of potential plaintiffs too wide open, fueling the courts’ “flood-gate” fear. As such, Lozoya is more easily dismissed by other courts. Whereas it might make sense to allow those who can prove “intimate familial relationships” to bring NEID claims, the same test does not make sense in loss of consortium claims because the loss of consortium claim has always been intended to compensate for a specific type of “intimate” relationship, and not all “intimate” relationships.
In sum, since the relationships of a sister, brother, grandparent, or best friend, no matter how close or intimate, do not have the same sort of unity we recognize life partners as having, and since this unity is at the essence of the loss of consortium action, its preservation is warranted. The Lozoya test is not optimal because it is built on the NEID standard, fails to explicitly recognize the distinction, and fails to expressly limit loss of consortium claims to the unique relational interests associated with life partner relationships. But this is not to say that the problems with the Lozoya standard imply salvation for the majority approach, which itself is an illogical anachronism based on outdated views and arbitrary categorizations. Rather, the implication of the preceding discussion is that an all-together new standard is needed. Such a standard must improve on the Lozoya standard by maintaining the relational distinction and providing a practically applicable framework, while also improving on the existing standard by addressing the loss of consortium claim on substantive, rather than technical grounds.

D. Dini and the Foundations for Departure

Before presenting the proposed new loss of consortium standard, it will be helpful to examine Dini v. Naiditch, an Illinois Supreme Court case. Dini is of particular importance to this Comment because the case (1) articulately traces the history of the loss of consortium action, (2) marks a turn in Illinois law and establishes the contemporary understanding of the loss of consortium claim in Illinois, and, perhaps most importantly, (3) emphatically states the court’s position that, when the law results in an “illogical anachronism, originating in a vastly different social order, and pock-marked by judicial refinements, it should not be perpetuated in the name

of stare decisis.”62 The Dini opinion is especially salient because, in reading it, one could easily conclude that the opinion was written to address the problem which is the topic of this paper. Additionally, the court’s powerful language unmistakably establishes the foundation for departing from a historically rooted standard when that standard no longer comports to social experience, particularly with respect to the question of duty as a function of technical legal categorizations - precisely the question at issue with respect to the current loss of consortium standard.63

In its analysis on the issues of a landlord’s duty to firemen, and on allowing wives to bring loss of consortium claims, the Dini court explicitly recognized its own duty to abandon precedent and make a new rule when the governing law no longer makes logical sense.64 The case also demonstrates the court’s willingness to create a duty where one had not previously existed if reason, social reality, and justice so require. Dini therefore provides the appropriate foundation and framework for departing from the current loss of consortium standard because the situation we today find ourselves in is almost identical to the situation the Dini court found itself in. As was the case in Dini, we are today, once again, presented with a situation in which the law

62 Id. at 885.

63 Because of Dini’s salience, specifically with respect to the court’s exact language, I have included larger portions of the opinion than is typical. These inclusions are appropriate in this paper because the Illinois Supreme Court, whose authority is much greater than mine, makes the point as poetically as it can be made; and therefore, not including the court’s language would be foolish.

64 Id.
governing loss of consortium “is highly illogical.” As such, the time has come, as was the case in 
*Dini*, to overhaul it.

In *Dini*, two firemen had responded to a fire at a building owned by the defendant landlord.\(^{65}\) While the two firemen were inside the building fighting the fire, a stairway collapsed under them and “fell into a heap at the first floor level.”\(^{66}\) One of the firemen was buried in the burning debris and died as a result, while the other suffered third degree burns all over his body.\(^{67}\) The burns caused permanent disfigurement and the loss of motion and flexion in the fireman’s arms and legs. The surviving injured fireman, the estate of a deceased fireman, and both firemen’s wives, respectively, brought negligence, wrongful death, and loss of consortium claims against a landlord for the negligent maintenance of a building.\(^{68}\)

Although the defendant’s property was negligently maintained and violated a host of ordinances, the lower court entered judgment as a matter of law for the defendant landlord notwithstanding the verdict “on the ground that there was no basis of liability, since the fire ordinances violated by defendants were not enacted for the benefit of firemen.”\(^{69}\) The lower court also entered summary judgment dismissing the complaint of the firemen’s wives “on the ground that a wife has no cause of action for loss of consortium resulting from the negligent injury of her husband.”\(^{70}\) In reversing and remanding on both issues, the Illinois Supreme Court

\(^{65}\) *Id.* at 882–2.

\(^{66}\) *Id.*

\(^{67}\) *Id.*

\(^{68}\) *Id.*

\(^{69}\) *Id.* at 884.

\(^{70}\) *Id.*
addressed two questions: “whether landowners and operators are liable to city firemen for the negligent maintenance of their premises in violation of certain fire ordinances; and secondly, whether a wife is entitled to damages for loss of consortium due to the negligent injury of her husband.”\(^{71}\)

The court began its analysis by pointing out the importance of socio-temporal context with respect to understanding and applying a law, observing that the law of the time, which categorized firemen as licensees, “was part and parcel of a social system in which the landowners were the backbone, and that it was inevitable that in such a legal climate supreme importance would be attached to proprietary interests.”\(^{72}\) The Court also observed that “the history of the law on the subject of landowners and ‘licensees’ shows a tendency to whittle away a rule which no longer conforms to public opinion,” such that “to avoid extending what has been deemed a harsh rule, [some] courts have held that firemen were entitled to be warned of hidden dangers or unusual hazards known to the landowner or occupant.”\(^{73}\) But despite the history of the law on the issue, the Court made an emphatic departure, reasoning as follows:

In reviewing the law on this issue, we note further that this legal fiction that firemen are licensees to whom no duty of reasonable care is owed is without any logical foundation. It is highly illogical to say that a fireman who enters the premises quite independently of either invitation or consent cannot be an invitee because there has been no invitation, but can be a licensee even though there has been no permission. The lack of logic is even more patent when we realize that the courts have not applied the term "licensee" to other types of public employees required to come on another's premises in the performance of their duties, and to whom the duty of reasonable care is owed. . . . Consequently, it is our opinion that since the common-law rule labeling firemen as licensees is but an illogical anachronism, originating in a vastly different social order, and pock-

\(^{71}\) Id. at 882.

\(^{72}\) Id. at 884.

\(^{73}\) Id.
marked by judicial refinements, it should not be perpetuated in the name of “stare decisis.” That doctrine does not confine our courts to the “Calf Path,” nor to any rule currently enjoying a numerical superiority of adherents. “Stare decisis” ought not to be the excuse for decision where reason is lacking.\footnote{Id. at 885.}

In the above passage, the court makes three important points. First, that a legal construct with no logical foundation in observation or experience, despite its long persistence, should not be maintained in the name of “stare decisis,” but abandoned for a new rule that has a basis in reason, and which comports to experience and the changing times. Second, that a comparative lack of consistency in the courts’ reasoning serves to highlight the lack of a logical foundation for the rule, and provides a basis for changing it. And thirdly, that a rule should serve to further the underlying purpose for which it was created such that, if the rule seizes to execute this purpose, the court has a duty to abandon it.

The \textit{Dini} court thus replaced the existing no duty rule with respect to landlords and firefighters, a product of a technical historical legal distinction, with the more logical and well established reasonable care standard, a duty rule that conformed to both the times, and the duty standard more generally used by the court,\footnote{Id.} holding “that an action should lie against a landowner for failure to exercise reasonable care in the maintenance of his property resulting in the injury or death of a fireman rightfully on the premises, fighting the fire at a place where he might reasonably be expected to be.”\footnote{Id. at 886.}
The court next turned to its analysis of the plaintiff wives’ claims for loss of consortium. The court first described the history of the loss of consortium action, and pointed out that the reasoning behind denying a wife’s claim for loss of consortium was rooted in an outdated socio-temporal understanding of marriage and gender roles that no longer applied. After pointing to the decision in Hitaffer, the court opined that “one perceives that the adherence to the old rule was based on a compulsion to follow precedent rather than upon a deep conviction of the wisdom or applicability of the rule.” The court therefore turned to the reasons advanced for adherence to the old rule, and to pointing out why each reason was defective.

First, the court addressed the argument that “a wife’s injury is too remote and indirect to warrant protection,” quickly dismissing this argument by pointing out that the “injury to the same interest of the husband has never been regarded too remote or indirect when the husband sues for his reciprocal loss.” Therefore, the court concluded, it would be inconsistent to argue that a wife’s injury is too remote but a husband’s is not.

Next, the court addressed the argument that, allowing a wife to sue for loss of consortium would create “double recovery for the same injury, since the husband could recover in his action for his diminished ability to support his family.” But the court rejected this argument by pointing out that the “argument emphasizes only one element of consortium -- the loss of support.” The court reasoned that since consortium includes, “in addition to material services,

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77 Id. at 888–9.
78 Id. at 890.
79 Id. at 890–1.
80 Id. at 891.
81 Id.
elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity,” the wife’s claims are not “merely [for] loss of support, but for other elements as well.” 82 Therefore, the court concluded that it is not really a matter of double recovery since the damages claimed by the wife are different than those claimed by the husband. Indeed, the court went so far as to opine that “the ‘double recovery’ bogey is merely a convenient cliche for denying the wife’s action for loss of consortium.” 83

Next, the court addressed the argument that “since the wife has no right to her husband’s services, she can have no action for loss of consortium, for the law does not allow recovery for sentimental services.” 84 The court reasoned that this argument mistakenly places the emphasis “on the material aspect of consortium and the arbitrary separation of the various elements of consortium,” and rejected the notion that “the concept of consortium is capable of dismemberment into material services and sentimental services,” calling the argument a “theoretician’s boast.” 85 The court therefore concluded that “the denial of the wife’s action cannot logically be predicated on her inability to allege a loss of services according to medieval pleading practices.” 86

Finally, the court addressed the argument that, even if one were to recognize the common-law rule denying the wife an action for loss of consortium as inadequate, the decision to

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82 Id.
83 Id.
84 Id.
85 Id.
86 Id.
create the cause of action is best left to the legislature.\textsuperscript{87} The court disagreed on very simple grounds:

Inasmuch as the obstacles to the wife’s action were ‘judge invented,’ there is no conceivable reason why they cannot be judge destroyed. We find no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the 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. On the contrary. . . we do indeed have a 'charge to keep' but that charge is not to ‘perpetuate error,’ or to allow our reasoning or conscience to decay, or to turn deaf ears to new light and new life.”\textsuperscript{88}

The court’s language in the preceding paragraph is especially powerful relative to the issue at hand. In this passage, the court not only reminds us that judge-made law can be judge altered, but goes so far as to point out that courts have a duty to alter judge-made law when the perpetuation of that law gives rise to error and absurdity in the light of “present day realities.” Indeed, as Justice Holmes famously observed “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”\textsuperscript{89} The Dini court thus concluded:

[W]e must agree with those jurists and critics who find that the reasons advanced in the cases for denying the wife's right of action for loss of consortium are without substance, and apparently have been added to support a predetermined conclusion dictated by history and the fear of extending liability. Obviously the historical milieu in which the rule originated has been completely changed. Today a wife is no longer her husband's chattel, but stands as his equal in the eyes of the law. Therefore, precedents predicated on a medieval society are out of harmony with the conditions of modern society, and cannot in good conscience be deemed determinative. As Justice Cardozo aptly stated: "Social, political and legal reforms have changed the relations between the sexes and put woman and man upon a plane of equality. Decisions founded upon the assumption of a by-gone inequality are unrelated to present-day realities, and ought not to be permitted to prescribe a rule of life." . . . This approach, moreover, is in accord

\textsuperscript{87} Id. at 892.

\textsuperscript{88} Id.

\textsuperscript{89} Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457 (1897).
with the entire movement of the law toward protecting familial interests, and recognizing the changing obligations of its members.\textsuperscript{90}

We are today faced with a situation that is almost entirely analogous to the situation the \textit{Dini} court faced, and therefore, \textit{Dini} provides the appropriate framework under which to proceed. In \textit{Dini}, the duty rule with respect to firemen and landlords was abandoned because it was the product of technical line-drawing that resulted in seemingly arbitrary exclusions which no longer produced outcomes that were in line with the times.

The same is true with respect to the loss of consortium duty rule; it is a rule that is based on technical line-drawing that results in arbitrary exclusions and produces seemingly absurd results which do not comport with the times. If, as the courts have held, the \textit{raison d'etre} of the loss of consortium claim is to compensate for the loss of relational benefits associated with committed relationships, then the logical thing to do is to look to the nature of the relationship itself to determine if a consortium existed such that it could have been damaged. Using the legal status of marriage as a proxy for the existence of consortium is like drafting a player into the NBA because he is tall without ever checking to see if he can make a basket -- observation confirms that it is simply a poor heuristic. Indeed, as the court in \textit{Lozoya} pointed out, using the legal status of marriage as a proxy does not advance either the purpose of the claim or the interests of justice because “the use of legal status necessarily excludes many persons whose loss of a significant relational interest may be just as devastating as the loss of a legal spouse.”\textsuperscript{91}

It is patently inconsistent to recognize, as many courts have, that non-married couples can have relationships that are substantively analogous to marriage, and then turn around and deny

\textsuperscript{90} \textit{Dini}, 170 N.E.2d 881, 892 (Ill. 1960)(internal citation omitted).

\textsuperscript{91} \textit{Lozoya}, 66 P.3d at 955.
these couples the right to recover for the damage done to their relationship. It seems just as illogical to deny someone the claim because his/her partner had the dumb luck to get injured a week before the wedding. The inconsistency is even more pronounced when one observes that, both the courts and state legislatures have recognized the rights of non-married couples to make a life as a family by upholding their rights to adopt children, cohabit, and so on. If non-married couples are entitled familial rights in other areas, despite being legally married, and are in all other respects similarly situated, then it is inconsistent to maintain the legal distinction as a legitimate basis for denying a loss of consortium claim without somehow distinguishing why the different standard in merited in the loss of consortium context. The courts have failed to make such a distinction, except to repeatedly stress the policy against opening the flood gates of litigation. Adherence to the current standard is, therefore, unfounded.

III. Analysis

A. The Context of Departure: The Historical Milieu and Present Day Reality

In addition to the logical deficiency of the current standard, the realities of present day society, and specifically the evolving understanding of the family, are perhaps the most significant reason to abandon the old loss of consortium standard. As Barbara Cox points out:

Alternative families possess the same attributes as traditional families. They provide the same benefits to both individuals and society that traditional families provide because they are the same as traditional families in every way except actual composition. In the same manner as traditional families, alternative families provide nurturance, stability and continuity for their children and encourage their family members to work for and invest themselves in the ongoing existence of their family relationship. For exactly the reasons that traditional families receive protections and
benefits from society -- because it is for the good of both individuals and society to encourage the permanence and stability of these relationships -- alternative families also need society's support and encouragement. Because they provide the same benefits to society, they deserve the same protections and benefits from society. Simple equity and justice require this equivalent treatment.\textsuperscript{92}

Statistical data also supports the conclusion that times have changed and require a new loss of consortium standard. According to the U.S. Census Bureau, in 2010, there were 7,529,000 households comprised of unmarried partners, representing 12,240,000 identified unmarried partners.\textsuperscript{93} This was up from 3,822,000 households comprised of unmarried partners in 2000 – a doubling.\textsuperscript{94} Indeed, the number of cohabiting unmarried partners increased tenfold between 1960 and 2000.\textsuperscript{95} Additionally, 41% of first births by unmarried women are born to cohabiting partners.\textsuperscript{96}

Furthermore, alternative families are increasingly being recognized by courts, employers, unions, insurance companies, municipalities and organizations as having an equal claim to the traditional family's legal protections and societal benefits.\textsuperscript{97} At least 9,390 employers in the U.S. offer domestic partner health benefits for their employees.\textsuperscript{98} Of these, 95% offer the benefits to

\textsuperscript{92} Cox, \textit{supra} note 7, at 102.

\textsuperscript{93} Census Time Series on Unmarried Partners, Table UC-1 \textit{available at} www.census.gov/population/www/socdemo/hh-fam.html.

\textsuperscript{94} \textit{Id}.

\textsuperscript{95} \textsc{U.S. Census Bureau}, \textsc{America’s Families and Living Arrangements}. (2000).


\textsuperscript{97} \textit{Id}.

both same-sex and different-sex partners, and more than 25% of Americans work for an employer that offers domestic partner benefits. 

The hard data is also reflected in public opinion, and its changing attitude towards, and understanding of, the family. According to a 1995 Harris poll, 90% of people believed society “should value all types of families.” And according to a 2008 Gallup poll, 57% of Americans consider an unmarried couple who have lived together for five years just as committed in their relationship as a married couple who have lived together for the same time.

What is clear from the discussion thus far is that, as in Dini, we are in a time when “the entire movement of the law toward protecting familial interests” is moving towards recognizing the evolving social understanding of marriage and family and “the changing obligations of its members.” Indeed, as in Dini, “the historical milieu” in which the rule denying non-married partners the right to bring a loss of consortium claim “originated has been completely changed.” Fifty years ago, laws existed that made it illegal for a black man to marry a white woman, for two gay men to live as a gay couple, and for non-married couples to cohabitate. Today, these laws have not only been legally invalidated, but society itself has come to recognize

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99 Id.


101 STEPHANIE COONTZ. THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES (2007).


104 Id.
their inequity. As of the writing of this paper, Delaware, Hawaii, Illinois, New Jersey, and Rhode Island have passed civil unions laws. California, Oregon, Washington, Maine, Nevada, and Wisconsin have passed domestic partnership laws. And Connecticut, Iowa, Massachusetts, New Hampshire, Maryland, and Vermont have legalized same-sex marriage. It can hardly be denied that social understanding is evolving to ever more recognize the various forms in which legitimate and socially beneficial partnerships can come together – and if the legal system is going to be adequate to the task with which it is charged, it must comport the common law to this evolving social reality.

It follows that, as in Dini, since the current loss of consortium standard was “judge invented,” “there [is] no conceivable reason why [it cannot] be judge destroyed.”105 Indeed the court in Dini observed that one of the court’s “essential functions” is to “re-evaluat[e] common-law concepts in the light of present day realities,” especially when “adherence to the old rule [is] based on a compulsion to follow precedent rather than upon a deep conviction of the wisdom or applicability of the rule.”106 And it is this same duty that should compel today’s courts to overthrow the arbitrary, but prevailing, loss of consortium rule, and replace it with a new rule that allows, or disallows, the claim on the substantive merits of the relationship and case. A continuing failure to do so by the courts implies only that the courts are suffering from an abundance of either laziness or cowardice. I now turn to proposing such a test.

105 Id.

106 Id. at 890.
B. A New Standard

To recap, we have said that the major objections raised to allowing unmarried partners to bring loss of consortium claims are (1) that no duty arises if the parties are not married,\textsuperscript{107} (2) that extending the cause of action to unmarried couples would create an inconsistent and unmanageable standard,\textsuperscript{108} and (3) that extending the claim would open the proverbial flood gates of litigation.\textsuperscript{109} We have also said that what is needed is a standard that is adequately restrictive, but which focuses the determination of who can, or cannot, bring a loss of consortium claim on substantive grounds, rather than technical line drawing.

It is logical to begin with the purpose of the loss of consortium claim: to compensate for the loss of relational benefits two people receive from one another when they are in a particular type of intimate relationship, specifically marital or quasi-marital relationships. The justification for allowing loss of consortium claims in such cases, and the basis for the presumption of validity with respect to marriages in the current test, is that parties in such relationships have come together in an effort to form a single life, rather than leading separate lives that overlap in areas. In so doing, the logic goes, these couples create a consortium which includes certain relational benefits that could potentially be damaged by a third party. The threshold question, therefore, is whether such a relationship existed such that the purported benefits of the consortium could be lost in the first place. Indeed, the current test attempts to answer this exact question, but does so poorly by simply using marriage as a proxy. What is needed, therefore, is a standard that answers this threshold question, as a matter of law, on substantive grounds. In other

\textsuperscript{107} Id.

\textsuperscript{108} Lozoya, 66 P.3d 948, 954 (N.M. 2003).

\textsuperscript{109} Elden, 758 P.2d 582, 589 (Cal. 1988).
words, standing should be based on the determination of whether the nature of the relationship was such that it created a consortium of the sort described in this Comment so as to make each partner a foreseeable plaintiff. If, as a matter of law, a reasonable person could not find that the parties had a relationship that created a consortium, then obviously no benefits could be lost, and there would be no need to submit the matter to a jury. If a reasonable person could find that the relationship was such that it could give rise to a consortium, then the matter should be submitted to the jury. But developing such a standard is not entirely straightforward.

One problem with developing a new standard is that many aspects of the subject matter are not prone to concrete description or measurement. What exactly is meant, for example, by “conceptualistic unity”? How does one know if a consortium exists such that the benefits it provides can be lost? It is not as if we have a consortium detector. And indeed, this problem is one of the reasons the current standard is appealing to the courts. But despite our inability to precisely define, in concrete terms, the various tacit elements of relationships and consortium, such elements and relationships are readily recognizable in our social dealings. Nonetheless, it is not enough, if we are to have a practically applicable standard, to simply say “I know it when I see it.” Nor can we delve into philosophical and overly subjective discussions on the ontological status of consortium. What is needed, with respect to these tacit elements, then, is an objective standard that nonetheless accommodates the not entirely articulable aspects of consortium, while also taking account of the many concrete and tangible factors that could evidence a relationship of the requisite unity.

Having considered the many demands of a new standard, I now propose the following new test:
In determining whether a party has standing to sue for loss of consortium, the court should ask if, as a matter of law, a reasonable person could find that a mutually amorous and exclusive relationship existed, which, by its nature, substantively entangled the lives of the individual parties to such a degree so as to unite them in a single conceptualistic unity. To make the determination, the court will look to the totality of circumstances, and to the following factors: (i) the length of the relationship, (ii) the public perception of the relationship, (iii) the existence of children, biological or adopted, and the manner in which the parties attend to the needs and raising of the children, (iv) sexual intimacy between the parties, (v) living arrangements, (vi) the degree to which the partners provide and care for one another through the various demands of life, (vii) the degree to which the future plans of each respective party contemplate and make accommodation for the other and the relationship, (viii) the degree to which the couple’s economic affairs and legal rights are entangled, and (ix) the ease or difficulty with which the relationship could be disentangled. Additionally, the burden to prove that the requisite relationship existed should be on the plaintiff. Let us now examine the test more closely.

The first part of the test requires that the relationship be mutually amorous and exclusive. This requirement would immediately bar certain family members (e.g. siblings, parents) and friends from being able to bring loss of consortium claims. Since, as we have said, loss of consortium is intended to compensate for the loss of relational interests found in a specific sort of “intimate” relationship, it only makes sense to restrict the action to those relationships which are romantic, rather than filial or fraternal, in nature. But the test requires more.

Even if the relationship is mutually amorous and exclusive, it must have adequate substance and quality so as to entangle the lives of the partners into a single unity. But what the
heck does that mean? In general terms, it means that the relationship must have some “meat on its bones,” so to speak. The relationship must display characteristics which evidence that the parties are joint venturers on a single life path, rather than separate passengers who are enjoying the conversation on the same bus until their stop comes. Therefore, even if two parties are exclusively and madly in love, they would not be able to bring a loss of consortium claim under the new standard if the evidence fails to further show that their lives had become adequately interdependent, or entangled, to satisfy the requisite level of unity. But this description, although providing us with some level of understanding, is too vague to be practically applied. Therefore, to be adequately precise, we now examine each of the factors proposed under the new standard to assess whether they can be subjected to objective determination.

The first five factors – (i) the length of the relationship, (ii) the public perception of the relationship, (iii) the existence of children, (iv) the degree of sexual intimacy between the parties, and (v) the living arrangements – are largely self-evident, and provide circumstantial evidence as to the existence, or nonexistence, of the tacit relational benefits of the consortium. To clarify, we are not here attempting to make findings of fact, but to determine if, on the face of the pleadings and as a matter of law, a reasonable person could find that a consortium existed.

First, the longer the relationship has lasted, the more substantial it has arguably become, although this is not necessarily the case. Second, public perception is important because it more or less objectively helps affirm the relational status and involvement of the parties. If the lives of the parties were indeed unified, this would inevitably manifest itself in public life. Affidavits from third-parties would be one way to illustrate this element. Thirdly, the existence of children, and the manner in which the parties raise the children, further serve to evidence the unity and entanglement of the parties’ lives (this will become more explicit in an example below). Do the
pair live separately and have joint custody or are they living together and raising the child in the context of a familial unit? Fourthly, although having sex is not a universal component of intimate romantic relationships, some level of sexual intimacy or physical affection arguably is. While there are many legitimate reasons why a couple may not be having intercourse, it is highly improbable that two parties, involved in the sort of relationship the proposed standard requires, would not have exchanged kisses, embraces, or other forms of physical affection in the ordinary course of their relationship. Finally, the parties’ living arrangements, although not dispositive, also evidence that the lives of the parties have become entangled and unified. It is important to point out that this factor requires an examination of the living arrangements generally, and not just the cohabitation. In other words, it is not the cohabitation itself that is telling, but the manner in which the parties dwell together that matters. Mere roommates, for example, cohabitate, but lead largely separate lives and certainly would not qualify under the new test, while wholly unified couples that would qualify may be living separately for work or school purposes. It is only logical, therefore, to require a broader examination and understanding of the living arrangements.

The final four factors – (vi) the degree to which the partners provide and care for one another through the various demands of life, (vii) the degree to which the future plans of each respective party contemplate and make accommodation for the relationship, (viii) the degree to which the couple’s economic affairs and legal rights are entangled, and (ix) the ease or difficulty with which the relationship could be disentangled – require more explanation.

The sixth factor, the degree to which the partners provide and care for one another through the various demands of life, refers to the tangible contributions, material and otherwise, made to the relationship by each party. The factor focuses specifically on the interdependence of
the parties, and the degree to which mutual contribution has taken place as a habitual norm in the ordinary course, or standard mode, of the relationship. Such contributions include financial contributions, contributions to household chores and tasks, contributions of time and work to the relationship, contributions to the furtherance of joint plans and projects, and contributions to the furtherance of the other’s goals, plans, and aspirations. To be clear, this factor does not ask about emotional support, but about concrete contributions such as time, money, work, and so on. The contributions may be substantial, or of the “I’ll wash, you dry sort;” but, in any event, the more evidence there is that mutual contribution is the habitual norm of the relationship, the more likely the relationship will evidence the requisite unity.

The seventh factor is the degree to which the future plans of each respective party contemplate and make accommodation for the other and the relationship. This factor takes into account a broad range of future considerations, from career goals and retirement, to plans on having children. These considerations can be pled either on the basis of tangible evidence with respect to future plans (e.g. we have planned the wedding), or on the basis of the parties’ testimony. If two parties have discussed and made future plans—whatever they may be—such that they have accounted for the relationship as a central factor, then it is more likely that the parties have developed the sort of life partnership required by the proposed standard. It would be telling as to the lack of unity if, for example, a couple had never discussed their long term plans, or only discussed them hypothetically, as couples sometimes do. When two people are in the sort of relationship we are here trying to describe, they will generally discuss the future with each other, and try to make joint plans to accommodate that future. The determining factor is behavioral, not merely verbal accommodation for the future of the relationship: have they taken
demonstrable steps that show an accommodation of the relationship as central to future planning?

The eighth factor, the degree to which the couple’s economic affairs and legal rights are entangled, is more obvious. Do the parties have joint financial accounts? Do they jointly own property? Do life insurance policies, pensions, or other benefits exist that name the other as beneficiary? Is there a healthcare or other power of attorney between the parties? Such tangible factors strongly support an inference, positive or negative, on the question of entanglement and unity. In contemporary society, legal and economic considerations comprise a significant portion of our daily lives. It is therefore unlikely, if the parties are involved in the sort of relationship required by the proposed standard, that the economic and legal affairs of each will not contemplate the other and the relationship. The more the economic and legal affairs of the parties are entangled, the more likely it will be that the relationship meets the requisite degree of unity.

The last factor, the ease or difficulty with which the relationship could be disentangled, depends, in part, on criteria examined in other factors. The reasoning behind this factor, in an over-simplified explanation, is that the more unified the relationship, the harder it will be to undo. In other words, if the parties, individually or mutually, can walk away at any time with very little transaction costs (monetary, time, “headache,” etc), then the relationship was not likely entangled and unified so as to satisfy the standard. For example, if the parties have children together, own property together, have signed powers of attorney, and so on, the transaction costs of walking away from the relationship will be very high, and imply that the relationship was adequately unified. Common sense affirms that a relationship which is easily terminated cannot be regarded as central to the lives of the parties; and if the relationship was not of such a nature, it cannot be seen as the sort of unity required by the proposed standard.
The proposed test satisfies both the previously described conditions for a new standard, and the test of logic: it bases the determination on the substantive merits of the case while requiring concrete substantiation and adequate limitation with respect to standing. However, to properly determine if the test is practically applicable, it must be applied to specific facts.

IV. IMPACT: CASES IN POINT REVISITED

To try out the new test, let us first revisit the scenarios presented in the introduction of this Comment.

In the first scenario—involving the engaged couple—the loss of consortium action would be allowed; and indeed this outcome makes logical sense. The two had been together for five years, had lived together as a couple for two years, took the relationship into account in their daily affairs, and planned their wedding; future planning which substantively evidences the unified nature of the relationship. Had this been a situation in which the wedding was planned a month after the couple had met, the outcome may have been different. But in this scenario, there is ample concrete evidence to support finding that a reasonable person could conclude that the requisite consortium existed.

In the case of the second scenario—involving the Vegas vacationer and his showgirl bride—the action would not be allowed. Although the two were married at the time of the accident, no reasonable person would conclude that a consortium was created in less than twenty-four hours during a drunken stupor. As such, since there clearly could not have been any consortium, there could be no loss of the benefits associated with consortium, and the action should not be allowed, notwithstanding the fact that the two were technically married.
The final scenario—involving the same sex couple—presents the archetypal example of why a new standard is needed, and how the proposed new standard produces equitable results. In this scenario, the relationship displayed every characteristic of a unified life, and no reasonable person would conclude otherwise. Under the new standard, the loss of consortium claim would be allowed; a result that makes logical and equitable sense.

Although the new standard produces seemingly logical and equitable results when applied to our previous scenarios, these outcomes seem somewhat obvious. It is appropriate, therefore, to test the standard against some more questionable, or “grey area” facts to determine if the standard is indeed workable.

1. Scenario One

A and B have been friends for several years, and purchased a house as joint tenants three years ago. They have lived together in the house since. They split household expenses, for which they share a “living expenses” bank account, but otherwise maintain separate bank accounts, credit cards, and other accounts. While A and B consider the house “theirs,” A and B have separate bedrooms. Also, A and B have occasionally had sex, usually after a night out drinking. When asked if they are a couple by mutual friends, to whom it seems that A and B have romantic feelings for each other, A and B change the subject without answering, or respond “it’s complicated.” In their daily lives, although A and B spend a good deal of time together, each typically makes plans without checking in with the other. Additionally, A and B have never discussed a mutual future together, although they have a contract in place which governs what would happen to the house if something happened to one of them. While biking to work one day, A gets hit by a drunk driver. In addition to being hospitalized for two weeks, A has to stay in bed for three months recovering, during which time B takes care of the household expenses, and
tends to B’s various needs. To make things interesting, let’s assume that neither A nor B have
dated anyone since they moved in together. To make things more interesting, let’s also assume
that, due to the shock of the accident, A and B later openly confess their love to each other and
decide that they want to “be together.” Would B be allowed to sue for loss of consortium under
the proposed standard?

Under the new standard, as is currently the case, the question of standing would revolve
around A and B’s relationship at the time of the accident. First, we examine whether the
relationship was mutually amorous and exclusive. Here, A and B seem to have had romantic
feeling for each other, and these feelings were visible, if not obvious, to A and B’s mutual
friends. Also, A and B have had sex, and had not dated any third parties in the previous three
years – although, importantly, A and B were not prevented from dating or having sex with
others. But is this the sort of mutual amorousness and exclusivity commonly recognized in the
sort of “life-partner” relationships we have been describing? Probably not, especially since A and
B did not present themselves as “a couple,” and had no pact of monogamy. If A and B had
understood their own relationship to be of the sort required by the proposed standard, there
would not have been any doubt to the people who knew A and B that the two were an item
because A and B would have held themselves out as such. Additionally, the fact that A and B
made explicit the status of their relationship after the accident implies that the relationship prior
to the accident was ambiguous, and therefore, not the sort of relationship the test requires.
Nonetheless, a strict constructionist could conclude that A and B were indeed mutually amorous
and exclusive. But the test requires more. What was the substance and quality of A and B’s
relationship? They clearly were more than mere roommates. Yet they maintained separate
bedrooms in their living arrangements, and, although A and B spent a good deal of time together,
they made plans in largely unilateral fashion. Generally, when one’s life is entangled with another’s, one takes the other into account when making plans and conducting his daily affairs, which was not the norm of the relationship here. Also, A and B had independent economic lives for all intensive purposes. Although they split household expenses, shared a bank account, and owned a piece of real estate, all of these were related to the single transaction of jointly purchasing the house, which does not comprise a significant nominal portion of one’s overall economic affairs (it may be a significant financial portion, but in terms of number of transactions it represents a single transaction). This factor, therefore, favors finding against the requisite level of unity. Additionally, with the exception of the contract governing the disposition of the real estate, A and B had not made any future plans accounting for the relationship, nor had they made any significant contributions beyond those that close friends and roommates would make. Finally, with the exception of the disposition of the real estate, which entails minimal transaction costs, either A or B could have easily decided to pick up and move to France without any significant fuss, which is to say that there was no substantive entanglement of their lives. These factors also favor finding against the requisite level of unity. Therefore, in this case, although there are elements which make the consideration more grey than black and white, an evaluation of the totality of circumstances leads to the unambiguous conclusion that, at the time of the accident, A and B’s relationship did not have the requisite level of unity. Therefore, the claims should not be allowed.

2. Scenario 2

A and B have been married for 12 years, but separated for the last 2 years or so. A and B live in separate residences, but own the “family residence” as tenants in the entirety, which is
how the ownership was arranged when the couple originally purchased the house many years prior. A and B also have two children, who live with A but spend every weekend with B. Both A and B are employed, and do not financially support each other, with the exception of sharing expenses related to the house or the children. A and B have remained married because they ultimately decided that separation was more convenient than divorce at the time, especially since remaining married afforded each economic benefits (e.g. health insurance, pensions benefits, etc.). A and B have a cordial relationship, and talk once or twice every few weeks, mostly about matters having to do with the children and various related financial issues. One day, while A is shopping, she slips and falls because the local grocery store had failed to clean up a spill in the isle. Unfortunately for A, she hits her head, causing internal swelling, which the doctors missed when A was examined after the fall. A eventually has an aneurism and goes into a coma. What of B’s loss of consortium claims?

First, was the relationship mutually amorous and exclusive at the time of the accident? Here, although A and B were married, they had been separated for two years at the time of the accident. Therefore, although the relationship remained exclusive, whether or not it remained amorous is debatable. However, inasmuch as A and B were still married, and since neither A nor B had developed a dating relationship with a third party (which would change things), we can accept the presumption that the relationship was mutually amorous and exclusive. The question of whether A and B would have accepted the other dating a third party would be telling, and one the courts could use to further inform the analysis, but we do not have that information here. We next turn to the second part of the test. Here, although A and B have been together for over a decade, they have been separated for two years, which is a significant period of time, and a strong indication that the relationship had substantively ended some time before the accident.
Next, although A and B have children together, and even though A and B coordinate affairs regarding the children, the children are predominantly raised independently by each parent in the ordinary course. This factor, therefore, slightly favors finding against consortium. Next, A and B do not seem to share any sort of sexual or other intimacy, and therefore, this factor favors finding against consortium. Also, A and B intentionally live apart, which also favors finding against consortium. Next, A and B do not seem to contribute to the relationship as a habitual norm. If anything, A and B contribute only insofar as they have a mutual economic interest in a particular matter. Otherwise, each seems to live in a largely unilateral fashion. Therefore, this factor favors finding against consortium. With respect to the seventh factor - A and B’s future plans at the time of the accident indicate that their relationship was over - certainly they were not aiming the trajectory of their lives to accommodate the relationship as a central factor, although perhaps they were accounting for it tangentially. Perhaps if A and B had been seeking couple’s therapy in an attempt to reunite, there would be more of a basis for supporting a finding of consortium. But this is not the case here. This factor, therefore, also favors finding against consortium. Next, the couple’s economic affairs and legal rights clearly show a high level of entanglement, and inasmuch as the couple is still married, disentanglement would have significant transaction costs. Having been married for 12 years, and because the couple have children, it is likely that there are benefit plans or other economic affairs that centrally involve the other. Also, they own a home as tenants in the entirety, and co-own the rest of the marital property. Finally, since the two are still married, each has significant legal rights with respect to the other. Therefore, factors eight and nine favor finding for consortium.

Having gone through the test, and looking at the totality of circumstances, the conclusion seems clear that, at the time of the accident, the two were not involved in the sort of relationship
which gives rise to consortium benefits, even though certain factors favor finding otherwise. As such, those benefits could not have been lost due to the third party’s negligence. That A and B previously had such a relationship, or that they may one day again have such a relationship is of no matter; the determination must depend on the nature of the relationship at the time of the injury. Therefore, under the proposed standard, B would not be allowed to sue for loss of consortium.

3. Characteristics of the Proposed Standard

The preceding scenarios illustrate a few important points with respect to the proposed standard. First, the proposed standard still favors legal marriage to a degree, because several factors will necessarily come out in favor of finding for consortium as a simple function of the marital structure. Second, the proposed standard allows the determination of standing to be based on substantive grounds, rather than technical line drawing, which produces more equitable and efficient outcomes. Thirdly, the new standard is adequately restrictive. By placing the burden to produce tangible grounds establishing consortium on the plaintiff, and limiting potential loss of consortium claims to marital and quasi-marital relationships, the proposed standard gives the court an effective mechanism to deny frivolous suits and keep the flood gates of litigation closed. Finally, the test provides a workable standard that is practically applicable, and allows the judge to make an objective determination based on the presented facts of the pleadings. In sum, therefore, the proposed standard meets the demands we have previously identified.
V. CONCLUSION

The current loss of consortium standard is a relic of a no longer applicable social understanding that produces absurd results and fails to pass logical examination. Fortuitously, inasmuch as the standard was judge invented, it can now be judge destroyed in favor of a new standard that produces logical and equitable results, and that comports with the realities of present day society.

This Comment has shown that the arguments typically raised against adopting a new test do not hold, and a new standard has been presented which is adequately restrictive, practically applicable, and based on substantive reasoning rather than arbitrary line drawing. In addition to these benefits, the new standard is likely to produce more economically efficient results. By allowing a judge to determine, at the outset, whether a loss of consortium claim, irrespective of marital status, has any chance of succeeding on the merits, claims will be restricted only to legitimate claims. As such, costs will be more efficiently allocated to those parties that did indeed damage a requisitely substantial relationship, and those payoffs will inure to the damaged parties.

Although relationships giving rise to consortium have many inarticulable aspects, they can nonetheless be determined to have existed on objective grounds. Indeed, the courts are expert in dealing with such tacit subjects – the law is riddled with them. And, as has been shown, the proposed standard enables the court to deal with the totality of a relationship – its explicit and tacit dimensions – on objective grounds.

There is no excuse for perpetuating the current loss of consortium standard any further. Courts should move towards a new standard that produces logical and equitable results, and that
deals with the realities of present day society. The test proposed in this Comment offers such a standard.