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Cover Page Footnote
Professor of Law, Widener University School of Law; Lecturer, Yale University School of Public Health. This Article grew out of a presentation at the Lavender Law Conference (October 17-19, 2003) at Fordham University School of Law. The presentation was part of a panel entitled "Civil Justice? The Tort System's Treatment of LGBT Persons." Thanks to Larry Levine for inviting me to participate on the panel, and to Kenny Levine (no relation) for his excellent research assistance.

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*John G. Culhane**

INTRODUCTION

Conferences convening to discuss matters of legal interest to a particular group are important occasions for gathering information, updating an audience on relevant developments, and sharing recent experiences. More specifically, the Lavender Law conference that spawned this Article also afforded legal academics, judges, and practitioners a chance to speak across the fence to neighbors with whom we too often have little contact. Such opportunities are especially enriching for those of us who write and think from a more theoretical point of view about the law; we learn of the real-world effects of our issues, not only for the lesbian/gay/bisexual/transgendered ("LGBT") community but for others that the legal regime often discounts. As someone who has an interest in both tort law and the rights of same-sex couples, I find these connections particularly helpful.

I first became interested in wrongful death laws because of their unjust effect on surviving members of same-sex couples. I quickly came to realize, however, that these statutes contain deeper flaws that make them ill-suited to their task of compensating those who suffer loss from the death of their "supporter," to use the most general term. Thus, this Article criticizes wrongful death laws on both of these levels simultaneously. In short, the statutes fail those in same-sex relationships, as well as many others who suffer the kind of losses for which the statutes were meant to compensate. The following preliminary words to ground the discussion of wrongful death may be helpful.

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While the law favors actions for personal injury and property damage, tort claims based on injuries to relational interests are only grudgingly recognized. For understandable reasons, courts have been reluctant to extend recovery to parties beyond the person physically injured, even though these second-order harms are real enough. Thus, for example, claims for negligently inflicted emotional distress may be based on physical injury to another person, but only under carefully circumscribed circumstances.[1] Similarly, one who suffers a relational loss—labeled a "loss of consortium"—because of a physical injury to another may have a claim against the tortfeasor, though courts have strictly limited these claims as well. Legal spouses are among those most likely to recover for these types of claims.[2] Children and parents can recover in some states, but not in others.[3] Little movement has been made towards expanding claims to include unmarried couples, including same-sex couples.[4] It also follows that friends, business associates, and sports teammates are unable to recover for their loss of consortium when another suffers personal injury.

To list these categories of potential plaintiffs is to underscore the reason for judicial reluctance in allowing recovery for these relational harms. To permit recovery for injuries to relations would extend the compass of liability outward from the primary victim, an expansion which would be limited only by the practicalities of litigation: a distant acquaintance would likely suffer little loss, and therefore neither she nor her attorney (working in a contingency-fee universe) would likely pursue the case. Nonetheless, one can easily imagine a large class of potential plaintiffs in any particular

1. Typically, the plaintiff must be closely related to the primary victim, and must have had a contemporaneous sensory awareness of the injury to that victim. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814, 820 (Cal. 1989). Emotional distress claims differ from loss of consortium claims in that one might suffer emotional distress from witnessing the injury to a complete stranger. But unless one is fearful for one's own safety, courts have uniformly required a close relationship between the physically injured victim and the emotional distress plaintiff. DAMAGES IN TORT ACTIONS § 5.03(2)(g) (2004) (citing Dillon v. Legg, 441 P.2d 912 (Cal. 1968)). Loss of consortium claims, in contrast, are based on the harm to the relationship itself. *See, e.g.*, Whittlesey v. Miller, 572 S.W.2d 665, 666 (Tex. 1978).

2. For a concise explanation of the evolving justification for loss of spousal consortium claims, see DAN B. DOBBS, THE LAW OF TORTS 841-43 (2001).

3. *Id.* at 842.

4. *Id.* In *Dunphy v. Gregor*, 642 A.2d 372, 379 (N.J. 1994), the New Jersey Supreme Court became the first state high court to recognize a claim by an unmarried cohabitant for the negligent infliction of emotional distress. This case no longer stands alone, however. *See* discussion *infra* notes 97-105 and accompanying text. Even more significantly, the New Mexico Supreme Court recently became the first to hold that unmarried intimates could even bring loss of consortium claims. Lozoya v. Sanchez, 66 P.3d 948, 951 (N.M. 2003). For a more in-depth discussion of this case, see *infra* notes 106-08 and accompanying text.

case involving relational harms, and courts have established bright line ramparts to dissuade all but a tight core of closely related persons from suing. There has even been some movement to abolish the consortium tort entirely.[5]

But if the loss of consortium tort is to be recognized at all, what lines are reasonable? In attempting to fix the outer boundaries of liability, courts have sometimes looked to wrongful death laws. Such laws, passed in every state during the nineteenth century,[6] establish strict categories of those eligible to recover. As would be expected of laws that pre-date today's evolving definitions and constructions of "family," the laws generally limit recovery to close blood relations, which include the nuclear family, and perhaps grandparents and grandchildren, and those related by marriage.[7] As the following discussion shows, these laws have become problematic, as they do not reliably tie recovery to real loss.

Awards in wrongful death actions provide financial assistance to those who, because of the death of another at the hands of a party who was negligent or worse, have suffered a loss of economic support. For reasons of historical accident,[8] wrongful death law is statutory. The laws in every state define the class of eligible beneficiaries.[9] In this respect, the statutes achieve results similar to those that courts reach in emotional distress and loss of consortium cases.

Elsewhere, I have explored at length the laws of emotional distress and loss of consortium as they apply to same-sex relationships.[10] I have suggested that, despite the statutory impediments, progress on the law of wrongful death seems more promising than any evolution of thought on the

5. The tort was done away with in Britain, the nation of its birth. Administration of Justice Act 1982, ch. 53, § 2 (1982) (Eng.). New Mexico rejected loss of consortium in the 1985 case *Tondre v. Thurmond-Hollis-Thurmond, Inc.*, 706 P.2d 156, 157 (N.M. 1985), but resurrected it in 1994 in *Romero v. Byers*, 872 P.2d 840, 844 (N.M. 1994). New Mexico is now arguably the nation's most progressive state in this area of the law. *See infra* Part II.B.2 for a discussion of developments in New Mexico.

6. Wrongful death statutes were needed to address an anomaly in the common law: while personal injury was a compensable event, death was not. Any tort that the victim would have been able to bring was extinguished by the victim's death (or the death of the tortfeasor, for that matter), and the survivors had no independent claim for their own loss arising from the death of one who supported them. *See* DOBBS, *supra* note 2, at 803. "There has never been any good explanation for all these rules." *Id.*

7. *See infra* notes 15-16 and accompanying text.

8. Legislation was needed because of the intransigence of the common law. *See* DOBBS, *supra* note 2, at 803.

9. *Id.* at 813-15.

10. John G. Culhane, *A 'Clanging Silence': Same-Sex Couples and Tort Law*, 89 KY. L.J. 911 (2000-2001) (hereinafter Culhane, *Clanging Silence*).

common law front. Recent developments have begun to bear out this prediction. In a few states, wrongful death laws have advanced to provide recovery to some same-sex couples. In New York, a significant case was decided in a manner that avoids the strictures of the State's wrongful death laws. In contrast, a "clanging silence" persists in the area of same-sex couples and the common law torts of loss of consortium and negligent infliction of emotional harm.

This Article begins with a discussion of the suffocating restrictions on the class of eligible beneficiaries under most wrongful death statutes, and then considers recent legislative and judicial initiatives that have begun to change these laws to reflect reality. The Article goes on to analyze the Victim Compensation Fund, passed in response to the tragic events of September 11, 2001, as a powerful example of the ability of legislative and regulatory rules to define eligibility for flexible recovery. The approach used by the Fund ties compensation to real loss, rather than to status.[11]

Next, the Article discusses recent legislative and judicial developments involving the torts of negligent infliction of emotional distress and loss of consortium. This analysis emphasizes the point that courts and legislatures are increasingly willing to recognize the reality of people's relationships, even when those relationships do not enjoy the approbation uniquely accorded to marriage. I conclude by offering a few observations that might provide some explanation for the curious absence of same-sex couples from the decisional law.

I. WRONGFUL DEATH LAW: PROBLEMS AND SOLUTIONS

In most states, a statutory gap exists between the loss for which wrongful death compensates and eligibility to recover for that loss. This gap affects surviving members of same-sex couples in an obvious way, but affects many other kinds of relationships as well.

Recovery under wrongful death statutes in most states compensates for the pecuniary loss caused by the primary victim's death. Such loss is based on the support that the deceased had provided, and would have been expected to continue providing the survivor, had the defendant's negligence not prematurely ended the relationship.[12] A state's statute may also permit compensation for something like emotional injury or loss of

11. *See infra* Part I.C for further analysis.

12. *See* DAMAGES IN TORT ACTIONS, *supra* note 1, § 22.03; *see also* ALASKA STAT. § 09.55.580(c)(1) (Michie 2004); DEL. CODE ANN. tit. 10, § 3724(d)(1) (2004) (permitting recovery for pecuniary loss resulting from wrongful death).

consortium.[13] For simplicity's sake, this Article will focus on the pecuniary loss issue.[14]

Who is likely to suffer such loss? The statutes generally provide a reasonable "guess list" that probably works in most cases: spouses, children, and, sometimes, parents and siblings.[15] Some also allow recovery for anyone else entitled to take under the state's law of intestacy, but sometimes only if one of the "primary" beneficiaries, namely spouses and children, does not exist.[16]

The problem with such laws should be obvious enough, as a few examples will illustrate. What if the decedent was supporting a parent in a jurisdiction that does not allow recovery for parents? Or what about a housekeeper whose long service to her employer was rewarded with regular financial and other gifts that the housekeeper relied upon? With special relevance to our discussion, what about an unmarried partner—of the same or the opposite sex—who is not on the "list" of eligible beneficiaries, even though he or she was, in fact, the *sole* dependent of the decedent? In most states, none of these people even have standing to seek recovery.[17] Thus, courts never reach the question of whether they have suffered a loss that would otherwise be compensable.

Note that the result is no different where the survivor is the sole beneficiary under the decedent's will. In that case, the party in question would get all of the assets of the decedent's estate, but *none* of the expected

13. The statutes compensate for loss of consortium only after death. For losses occurring before death (or where death is not caused by the negligent conduct), the common law applies. *See, e.g.*, Wilson v. Iowa Power & Light Co., 280 N.W.2d 372, 373 (Iowa 1979).

14. In many cases, if not most, the pecuniary losses will far outstrip the emotional losses (at least from the point of view of dollars recoverable in a lawsuit). As I have argued elsewhere, this devastating financial loss, combined with the simple fact that the wrongful death suit is often the only vehicle for recovering for any loss at all, explains why suits by surviving members of same-sex couples are more common than other suits claiming relational injuries (loss of consortium or negligent infliction of emotional distress). In the latter cases, the primary lawsuit for personal injury has a much greater value than the derivative claims based on the relationship, so attorneys and their clients may be fearful of jeopardizing the more valuable claim by putting the same-sex relationship before the jury. The fact that there have been claims by unmarried opposite-sex couples—but virtually none by same-sex couples—indirectly supports the point. *See* Culhane, *Clanging Silence*, *supra* note 10, at 974-79.

15. *E.g.*, DEL. CODE ANN. tit. 10, § 3724(a).

16. *E.g.*, CAL. CIV. PROC. CODE § 377.60(a) (West 2004).

17. Typically, the personal representative of the decedent's estate is charged under the statute with bringing the claim, but *recovery* is limited to those specific classes mentioned in the text. *See, e.g.*, PA. R. CIV. P. No. 2202 (West 2004); VT. STAT. ANN. tit. 14, § 1492(a)-(c) (2003).

future support that is the corpus of a wrongful death recovery.

Clearly, the statutes are out of step with social reality. The question then becomes: What is the best solution? Several state statutes, as well as the Victim Compensation Fund, have advanced beyond the archaic assumption that actual loss mirrors legal or biological status.[18] Even in the absence of a modern statute, there has been some judicial movement in the direction of recognizing real loss. The best example of such forward thinking can be found in *Langan v. St. Vincent's Hospital*, a recent New York decision.[19] These statutory and judicial developments merit discussion.

A. Statutory Advances in Wrongful Death Law

Michigan is one of the few states attempting to tie recovery to loss by allowing recovery to those entitled to take under a will, assuming they can prove actual loss.[20] Michigan, like most states, also grants standing to close relatives, even if they were not named in the will.[21] Of course, the correlation between loss and standing to recover for that loss is not complete, even in Michigan. For example, absent a will, an unmarried partner who was financially dependent on the decedent would not have a

18. *See infra* Part I.A for further discussion.

19. 765 N.Y.S.2d 411, 414 (Sup. Ct. 2003) (recognizing Vermont civil unions of a same-sex couple for purposes of New York wrongful death statute so long as it did not offend public policy).

20. MICH. COMP. LAWS ANN. § 600.2922(1)-(3)(c) (West 2004). The Michigan statute provides, in relevant part:

> (1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . .
>
> (2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person . . . .
>
> (3) [T]he person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:
>
> (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
>
> (b) The children of the deceased's spouse.
>
> (c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law . . . .

Id.

21. *Id.* at (3)(a).

claim. But at least the "will option" provides an alternative to no recovery at all. This alternative could be used by same-sex couples, who in any event should protect themselves to the extent they can.[22] Thus, the Michigan statute moves strongly towards the goal of compensation for real loss. The statute also reinforces a message that should by now be a mantra to gay persons, whether they are in intimate relationships or not: protect yourself through a will.[23]

In important respects, the Michigan law is preferable to laws that include "formal" same-sex couples among their classes of eligible beneficiaries. Such laws do challenge the assumptions about relationships that underlie wrongful death laws, but only by adding one more narrowly defined category to the class of eligible beneficiaries. Thus, a statute like California's, that allows recovery to a surviving domestic partner, leaves behind many other kinds of "non-traditional" families.[24] California law was amended in 2001 to add domestic partners to the list of eligible

22. Of course, many unmarried couples (whether of the same or opposite sex) lack the wherewithal to execute the planning documents necessary to protect themselves through such instruments as wills, living wills, and powers of attorney. Marriage can take care of some of these problems (at least in the average case) by creating default assumptions. But this option does not answer the question whether marriage should be necessary for the creation of such assumptions, nor does it address in any way the problems faced by many same-sex couples, who are deprived of the option of marrying.

23. The Michigan statute also has another interesting wrinkle that might be relevant to a same-sex couple. In the same subsection of the statute that grants recovery to devisees under a will, recovery is expressly withheld from "those whose relationship with the decedent violated Michigan law . . . ." *Id.* at (3)(c). In the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003), a same-sex couple's intimate relationship could not be said to violate the law. What about a putative same-sex marriage (since such unions are prohibited under Michigan's Defense of Marriage Act)? It would seem that since the couple cannot get married, their relationship would not be marriage, and therefore would not violate Michigan law. The availability of civil unions in Vermont and (especially) of marriage in Canada might complicate the issue.

24. The California law was amended in 2001 to include "domestic partners" in the class of those eligible to recover for wrongful death. The relevant language is as follows:

> A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:
>
> (a) The decedent's surviving spouse, *domestic partner*, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the person, including the surviving spouse or *domestic partner*, who would be entitled to the property of the decedent by intestate succession.

CAL. CIV. PROC. CODE § 377.60 (West 2004) (emphasis added to highlight 2001 amendments). Domestic partnership registration is limited to same-sex couples and to opposite-sex couples where one member of the couple is at least sixty-two years of age. CAL. FAM. CODE § 297(b)(5)(A)-(B) (West 2004). Of course, a couple must register as a domestic partnership in order to gain these benefits.

beneficiaries. As is the case with much legislation, this amendment was passed in response to political pressure created by an incident that gathered a great deal of attention.

In early 2001, Diane Whipple was mauled to death by a dog under circumstances of pet owner misconduct so serious that the couple who owned the dog faced criminal charges.[25] Under the wrongful death law as written, it seemed that her surviving same-sex partner, who was not a spouse under a strict reading of the law, would not be entitled to pursue a claim against the dog owners. Yet the decedent's mother did have a claim, even though her actual financial loss was insignificant compared to that of the surviving partner, Sharon Smith.[26] Surprisingly, Smith's case survived

25. For an account of the tragic circumstances of Diane Whipple's death, see John Gallagher, *Looking for Meaning in Tragedy,* ADVOCATE, *at* http://findarticles.com/p/articles/mi_m1589/is_2001_April_24/ai_73308457 (Apr. 24, 2001). Marjorie Knoller and Robert Noel, the couple charged in connection with Whipple's death, were both convicted of involuntary manslaughter and sentenced to four years in prison. *Knoller Gets Maximum Manslaughter Sentence,* DATA LOUNGE, *at* http://www.datalounge.com/datalounge/news/record.html?record=20068 (July 16, 2002). The jury also found Knoller, who was controlling the dogs at the time of the attack, guilty of second-degree murder. The judge, however, threw out that finding, citing a lack of evidence to support such a conviction. Knoller and Noel have both since been paroled after receiving time off for good behavior, and both are appealing their convictions. Moreover, the California Attorney General's office is appealing the dismissal of Knoller's second murder conviction. *Woman Convicted in Dog-Mauling Death is Freed*, ASSOCIATED PRESS, Jan. 2, 2004, *available at* http://www.cnn.com/2004/LAW/01/02/dog.attack.ap/. On April 11, 2003, the appellant, the People of the State of California, submitted its opening appellate brief to the California Court of Appeals, First District. The issues being contended by the state are:

> A. The effect of the trial court's ruling in this case was to independently assess the evidence and find it contrary to the verdict.
>
> B. The trial court applied a legally erroneous standard in assessing implied malice.
>
> C. The trial court's reassessment of Knoller's credibility on the issue of subjective knowledge was contrary to the law and evidence.
>
> D. The trial court erroneously relied on the relative culpability of the two defendants in setting aside Knoller's second-degree murder conviction.

Appellant's Opening Brief at 44, California v. Knoller, No. A099366 (Cal. Ct. App. Apr. 11, 2003), *available at* http://news.findlaw.com/hdocs/docs/sfdogattack/caknoller41103cabrf.pdf (last visited Dec. 4, 2004). As of April 7, 2004, both sides had submitted briefs, and as of December 1, 2004, the case was on the conference list. *The People v. Knoller: Docket Entries*, California Appellate Courts Case Information, *at* http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=1&doc_id=51437&div=2 (last visited Dec. 4, 2004).

26. At least a strict reading of the statute would not have permitted recovery. But the trial court allowed the case to proceed even under the former law. Smith v. Knoller, No. 319532 (Cal. Super. Ct.Aug. 9, 2001). The court reasoned that the statute, if read to exclude plaintiff, would create an insurmountable burden to her recovery (because there was no way

a motion to dismiss despite the statute's apparently clear directive.[27] In reaching its decision, the trial court noted that while Smith and Whipple could have entered into various legally enforceable agreements to protect their financial and personal interests, there was no way to avoid the strictures of the wrongful death law. Thus, the court declined to read the statute to create an "insurmountable obstacle" to recovery. Such an obstacle, the opinion noted, was at odds with the purpose behind the wrongful death statute, which is "to provide compensation for the loss . . . resulting from decedent's death . . . . [P]laintiff's sexuality has no relation to the nature of the wrong allegedly inflicted upon her and denying recovery would be a windfall for the tortfeasor."[28]

The change to the California law solved the wrongful death problem for those same-sex couples registered as domestic partners, and has the virtue of placing same-sex relationships on the same footing as opposite-sex ones, at least in this one relatively narrow area of the law. Note, too, that the statute was amended just one year after California voters approved a proposition that defined marriage as existing between a man and a woman—a Defense of Marriage Act through the California initiative process.[29] And in fact the opponents of the domestic partner legislation leaned heavily on that initiative, ultimately to no avail. This willingness to work around the Defense of Marriage initiative illustrates that people are

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to contract around the prohibition against recovery), and held that the statute had to be interpreted to allow surviving members of same-sex couples to recover (upon a sufficient factual showing) to save it from unconstitutionality as a violation of equal protection. *Id. slip op.* at 3-4.

27. *Smith*, No. 319532.

28. *Id. slip op.* at 3-4. In recognizing that wrongful death law should not penalize a party who is unable to protect him or herself, the court developed a line of argument that traces back to *Levy v. Louisiana*, 391 U.S. 68 (1968), in which the Supreme Court declared unconstitutional laws that discriminated against out-of-wedlock children in actions to recover for a relative's death. In so holding, the Court articulated rationales that closely parallel those invoked by the *Smith* court, including the "intimate, familial relationship," the wrong suffered, the unfairness of denying rights for a status beyond the individual's control, and the prospect of a windfall to the tortfeasor. *Id.* at 71-72. In sum, the Court found that the classification had "no relation to the nature of the wrong" suffered. *Id.* at 72.

29. The national legislation called the Defense of Marriage Act was enacted in 1996, and both defines marriage as the union of one man and one woman for federal purposes and expressly permits states to refuse to recognize same-sex marriages performed in other states. Defense of Marriage Act, codified at 1 U.S.C. § 7 (2004), 28 U.S.C. § 1738C (2004). Since that time, most states, including California, have enacted so-called "mini-DOMA's" that purport to deny recognition to same-sex marriages performed in other states. For an up-to-date compilation of these laws, see http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=20716&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66 (last visited Jan. 31, 2005).

more comfortable conferring the benefits of marriage than the marriage label itself.

The legislation, however, only helps those same-sex couples who register as domestic partners. In fact, the new law does not even help most unmarried opposite-sex couples, who are not eligible for domestic partner status unless one member of the couple is over the age of 62.[30] Accordingly, the law has simply added one group to the list of eligible beneficiaries without addressing the broader problem of tying recovery to actual loss.[31] To those in Sharon Smith's situation, though, the California law is good enough.

A New Jersey plaintiff, by contrast, would likely find that the domestic partnership law in that state would be of no help at all. While same-sex couples may register as domestic partners, the very limited "plate" of rights offered does not include tort claims based on the injury to or destruction of relationships.[32] The exclusion seems at odds with at least two related justifications for enacting the law offered by the legislature. First, there are "a significant number of individuals . . . who . . . live together in important personal, emotional and economic committed relationships with another individual."[33] Second, these "familial relationships, which are known as domestic partnerships, assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants."[34] If surviving members of same-sex relationships are not permitted to recover for wrongful death, the odds are greatly increased that the state will have to become involved in the survivor's support, thereby undermining the rationale that supported enacting the domestic relationship law in the first place. Inasmuch as the state may need to step in to provide the support that should properly be charged to a negligent (or even more culpable) party, the legislature's failure to include the right to sue for wrongful death under the benefits afforded domestic partnerships is indeed puzzling.

While New Jersey's law does not do enough,[35] Vermont law solves the

30. CAL. FAM. CODE § 297(b)(6)(B) (West 2004).

31. For the sake of completeness, I should note that the California law also allows certain other dependents to recover. CAL. CIV. PROC. CODE § 377.60(b) (West 2004). This provision is a less comprehensive alternative to Michigan's approach.

32. N.J. STAT. ANN. § 26:8A-2 (West 2004).

33. *Id.* at (a).

34. *Id.* at (b).

35. An interesting question would arise if a New Jersey couple that had been civilly united in Vermont attempted to bring a wrongful death suit for an accident that occurred in New Jersey. New Jersey's domestic partnership law states that it will recognize equivalent

problems of wrongful death, as well as many other legal deprivations typically suffered by same-sex couples, by throwing the protective blanket of civil union status over same-sex couples who choose to enter into that relationship.[36] A civil union is a marriage—insofar as the state but not the federal government is concerned—in all but name.[37] The statute creating the institution of civil unions explicitly lists the right to sue in wrongful death among those now enjoyed by same-sex couples,[38] but the inclusion of that and all specific rights is superfluous since the statute explicitly confers "all" of the benefits of marriage on same-sex couples.[39]

By responding to the specific issue of recognition of same-sex partnerships before them, the Vermont legislators naturally had no occasion to take up the broader question under discussion here: how to craft wrongful death laws in a way that reflects real loss. Legislative reforms in California and Vermont have benefited no one but same-sex couples. Michigan's remains the better approach.

B. Judicial Advances in Wrongful Death Law

Despite the status-based impediments to suit that remain in almost every state, a few surviving members of same-sex couples have nonetheless

statuses from other states, including civil unions. But it seems unlikely that a New Jersey court would interpret that provision to mean that the couple would be entitled to all of the rights that such status confers on Vermont residents. Since New Jersey does not include the right to sue for wrongful death under its domestic partnership status, the surviving member of the couple would probably not be able to claim that his Vermont civil union entitles him to greater rights than those enjoyed by those who registered for domestic partnership status in New Jersey. A court might use principles of full faith and credit, or comity, to grant the more expansive Vermont rights though. *See* Langan v. St. Vincent's Hosp., 765 N.Y.S.2d 411 (Sup. Ct. 2003).

36. The civil union was a compromise hewn from a decision by the Vermont Supreme Court in *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999), in which the court held that the state could not, under the state constitution, deprive same-sex couples the benefits of marriage, but left to the legislature the issue of how best to confer those benefits. Faced with this directive, the legislature cobbled together an altogether new entity, the civil union, which confers all of the benefits of marriage, but withholds the label. For a criticism of this outcome that takes its inspiration from Justice Johnson's partial concurrence urging that full marriage rights be conferred on same-sex couples, see John G. Culhane, *A Tale of Two Concurrences: Same-Sex Marriage and Products Liability*, 7 WM. & MARY J. WOMEN & L. 447 (2001). The legislative and executive goings-on that led to the establishment of the civil union law are masterfully and sympathetically described in DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004).

37. VT. STAT. ANN. tit. 15, § 1201 (2003).

38. § 1204(e)(2). The civil union statute also lists the right to file claims for loss of consortium and emotional distress among the benefits. *Id.* These provisions are discussed further in Part II, *infra*.

39. § 1204(a).

brought claims for wrongful death. Given the apparently unambiguous language of most statutes, these claims are surprising in two respects: first, it is surprising that they have been brought at all; and second, at least three of these have survived motions to dismiss. The reason for bringing them is quite likely necessity. Where a surviving same-sex partner was in the kind of committed, long-term, and financially interdependent relationship that would have meant substantial financial (and likely emotional) support to the survivor, a wrongful death suit may present the only prospect of continued financial health. The following discussion of relevant cases[40] reveals the explanation for plaintiffs' ability to survive dispositive motions.

The most recent, and well-publicized case is *Langan v. St. Vincent's Hospital.*[41] In this case, a trial judge in New York State recognized a civil union entered into by two New York residents in Vermont. More specifically, the judge recognized the union for the limited purpose of allowing the survivor's wrongful death claim to proceed under New York's Estates, Powers, and Trusts Law.[42]

In *Langan,* Neal Spicehandler died, allegedly as the result of medical malpractice, and his surviving partner, John Langan, brought suit against St. Vincent's Hospital for wrongful death.[43] The New York wrongful death statute, like the majority of laws, restricts recovery to named classes of beneficiaries, including spouses but not unmarried partners.[44] The court, however, permitted Langan's case to proceed despite this apparent infirmity.

The court used a great number of tools in constructing its decision. First, Justice Dunne emphasized that Langan and Spicehandler were, in every way possible, a couple. They had been together for fifteen years, had jointly bought a house, were completely financially and legally intertwined through wills and life insurance policies, and had traveled to Vermont and entered into a civil union, which evinced their desire to confirm their status as a couple to the extent legally possible.[45] The court also pointed to the willingness of New York courts to read certain laws expansively to give legal standing to the surviving member of same-sex couples in other areas,

40. Two of the three cases alluded to in the text are discussed herein. The third, *Smith v. Knoller*, No. 319532 (Cal. Super. Ct.Aug. 9, 2001), was discussed in connection with the California statute, *supra* notes 24-28 and accompanying text.

41. 765 N.Y.S.2d 411 (Sup. Ct. 2003).

42. *Id.* at 422.

43. *Id.* at 412.

44. N.Y. EST. POWERS & TRUSTS LAW § 5-4.4(a) (McKinney 2004).

45. *Langan*, 765 N.Y.S.2d at 412-13.

including accession to rent-controlled apartments,[46] and the willingness of the New York legislature (which is fairly progressive on same-sex issues) to grant rights in such diverse areas as adoption,[47] discrimination,[48] and eligibility for certain state-conferred death benefits.[49]

The court also stressed the importance of recognizing a sister state's laws, including Vermont's civil union law.[50] This formed the critical piece of the opinion, even though the court limited its holding to the wrongful death context, and said it was not expressing an opinion more generally about the status of the couple as married or not.[51]

Finally, and with special relevance to this discussion, the court also discussed the purpose of the wrongful death laws; in short, the court wanted to find a way to achieve the statute's purpose even if its specific language seemed to prohibit doing so.[52] Justice Dunne believed that this task had special urgency because of the potential equal protection problem that a contrary finding would create:[53]

> There is a compelling reason to construe the [law] to include a Vermont spouse under the fundamental tenet of construction that a statute ought normally to be saved by construing it in accord with constitutional requirements . . . . [I]t is impossible to justify, under equal protection principles, withholding . . . recognition from a union which meets all the requirements of a marriage in New York but for the sexual orientation of its partners.[54]

Langan is a progressive decision that nonetheless leaves several questions unanswered. May surviving members of same-sex couples have standing under wrongful death laws even if they do not go to Vermont to engage in a civil union, or perhaps to Massachusetts to get married?[55] Will

46. *Id.* at 415 (citing Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989)).

47. *Id.* at 416 (citing Matter of Jacob, 660 N.E.2d 397 (N.Y. 1995)).

48. *Id.* (citing N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney 2004); N.Y. EXEC. LAW § 291(1)-(2) (McKinney 2004)).

49. *Id.* (citing NEW YORK CITY, N.Y., LOCAL LAW No. 24 Int. 114-A (2002)).

50. *Id.* at 418.

51. *Id.* at 422.

52. *Id.* at 419-21.

53. This approach was suggested by Judge Rosenberger in his dissent in *Raum v. Restaurant Associates, Inc.*, 675 N.Y.S.2d 343, 345 (App. Div. 1998) (Rosenberger, J., dissenting).

54. *Langan*, 765 N.Y.S.2d at 420-21 (internal quotation omitted).

55. *See* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (requiring state to grant marriage licenses to same-sex couples). Same-sex marriage is now legal in Massachusetts. But because of an archaic statute enacted to prevent interracial couples married in another state from having their marriages recognized in Massachusetts, marriage

New Jersey's much less comprehensive domestic partnership suffice?[56] If so, is this result sound, or advisable? Will *Langan* be overturned on appeal?[57]

Evidence that "civil union" or equivalent status is not essential to recovery in wrongful death can be found in the earlier case of *Solomon v. District of Columbia*,[58] in which a trial judge declared that a surviving same-sex partner should be considered "next of kin," thereby qualifying for

licenses have thus far been given only to Massachusetts residents, with a few contested exceptions. *See* Pam Belluck, *Eight Diverse Gay Couples Join to Fight Massachusetts*, N.Y. TIMES, June, 18, 2004, at A22 (chronicling effort by Govenor Mitt Romney to prevent out-of-state same-sex couples from marrying in Massachusetts, and temporary defiance of that order by several towns). Getting married in Canada, where there is no residency requirement for marriage, is another option. Courts in Ontario, Quebec, and British Columbia have held that denying marriage to same-sex couples is a violation of their rights and is "unjustified discrimination." A good account of the decisions from these courts can be found on the Canadian website of Equal Marriage for Same-Sex Couples. *Status of Legal Challenges: Equal Marriage Arrives in Canada!* (Equal Marriage for Same-Sex Couples, Ontario, Canada), *available at* http://www.samesexmarriage.ca/legal/index.html#canada (last visited Dec. 2, 2004). Moreover, the Canadian federal government has sent a draft bill—one that would change the definition of marriage to include same-sex marriages—to the Supreme Court of Canada for its opinion concerning the constitutionality of such a bill. *Id.*

56. Unlike Vermont's civil union law, or Canada's marriage laws, most legal statuses available to same-sex couples require that the couple be resident in the state in which the status is sought. *See, e.g.*, N.J. STAT. ANN. § 26:8A-4 (West 2004) (defining having a common residence). But difficult issues could still arise in tort. For example, if a couple registered as domestic partners and residents in New Jersey were involved in an automobile accident in New York, New York law might well apply to the tort claim. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (listing factors for determining significance: the law of the state with the most significant relationship to the occurrence and the parties; the location of the wrongful conduct and the injury; and the residence of the parties). In such a case would domestic partnership also be regarded as a spousal relationship for purposes of wrongful death law?

57. St. Vincent's Hospital is currently appealing the decision of the Nassau County Supreme Court that allowed Langan to bring a wrongful death suit against the hospital for the death of his partner Neal Spicehandler. Doug Windsor, *Appeals Court Asked to Reject Bid to End Gay Wrongful Suit*, **365Gay.com Newscenter**, *at* http://www.365gay.com/newscon04/01/012004partnerSuit.htm (Jan. 20, 2004) (last visited Dec. 2, 2004). The hospital is asking the Appeals Court to dismiss the suit on the grounds that same-sex couples are not legally recognized in New York. *Id.* Oral arguments were heard on June 22, 2004, and, as of this writing, the case was in the hands of a four-judge panel. Michael Weissenstein, *Court Weighs Appeal in Same-Sex Union Case*, TIMES UNION, June 23, 2004, at B3, *available at* http://www.timesunion.com/AspStories/story.asp?category=STATE&storyID=260000&BCCode=&newsdate=6/23/2004 (last visited July 5, 2004). As of February 15, 2005, no decision had been reached on this appeal.

58. 21 Fam. L. Rep. (BNA) 1305, 1326 (D.C. Super. Ct. 1995).

recovery under the wrongful death law.[59] In that case, a lesbian couple had two children who clearly qualified as wrongful death plaintiffs. The court recognized the absurdity that would have resulted from recognizing the children, but not the dependent partner, as wrongful death plaintiffs: "It is clear that the two children are eligible to receive remedy . . . . Since [plaintiff] also relied on [the decedent] for support and maintenance, logic dictates that she is also entitled to remedies . . . ."[60] The court can be faulted for a questionable reading of the intestacy laws on which eligibility for wrongful death recovery depends,[61] but the problem-solving impulse is easy to understand. Had the surviving spouse not been permitted to recover, the children would likely have suffered because the money "earmarked" for the plaintiff could have benefited the entire family unit.

Once recognized by law, same-sex marriage would eliminate the difficulty of gaining recovery for wrongful death for couples who choose to marry. As the foregoing discussion illustrates, however, the problems with wrongful death law are broader. These laws must be amended, perhaps along the lines of the approach taken by Michigan. Although not every case of loss will be covered (because not everyone has a will), at least parties will have the means of protecting themselves through careful estate planning. The best approach would be to grant standing to any party who can make a preliminary showing of the kind of loss for which wrongful death laws are intended to compensate.

C. Beyond Tort: The Victim Compensation Fund

The Victim Compensation Fund ("VCF"), created in response to the horrific events of September 11, 2001, was probably a one-time-only response to a national tragedy.[62] The Fund bears similarity to state wrongful death law, in that many of the Fund's payments went to surviving family members of those killed by the terrorist attacks of that day.[63]

59. *Id.*; 21 Fam. L. Rep. (BNA) 1305, 1316 (D.C. Super. Ct., No. 94-2709, Apr. 26, 1995).

60. (Author, Title?)1994 LESBIAN/GAY L. NOTES 83 (quoting *Solomon*, No. 94-2709 (D.C. Super. Ct. 1995)). *Id.* The decision is only summarized in the BNA Family Law Reporter. Quoted language is taken from the 1995 LESBIAN/GAY L. NOTES 83.

61. *See* D.C. CODE ANN. § 19-301-316 (2003); *see also* Lewis v. Lewis, 708 A.2d 249, 251-52 (D.C. 1998).

62. For an extensive discussion of the Victim Compensation Fund and the challenge it presents to commonly understood notions of justice, see John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027 (2003).

63. 2884 eligible families filed death claims with the Fund. David W. Chen, *Man Behind Sept. 11 Fund Describes Effort as a Success, With Reservations*, N.Y. TIMES, Jan. 1,

Further, as with the statutory wrongful death tort, most of the payments were for economic loss.[64] The comparison is inexact, however, because the Fund also awarded payments for the victims' pain and suffering.[65] In that regard, the Fund was an amalgam of tort law (under survival statutes that preserve tort claims, including pain and suffering damages, for the estate after the victim's death) and a limited compensation system (because the Special Master, Kenneth Feinberg, established flat payments for non-economic loss to the victim, and to the bereft spouse and family members). Nonetheless, with respect to the hard economic damages that were at the core of compensation, the Fund exhibited a welcome flexibility both in its drafting and especially in its implementation. Feinberg's commitment to awarding payments based on real loss could inform state legislative initiatives to change wrongful death laws to reflect changed societal truths about family, relationship, and loss.

For those killed on September 11, the VCF and its implementing Final Rule establish that eligibility for compensation vests in the decedent's personal representative as determined by state law.[66] Although many wrongful death statutes contemplate the personal representatives bringing suit,[67] the amount actually *recovered* in such a suit is limited as described earlier: typically, only those in certain narrowly defined relationships have standing to recover.[68] The Fund, in contrast, is open-ended about who is entitled to recover for the economic loss. Although the statute could have been interpreted to mean that only the personal representative would be entitled to recover, Feinberg used his discretion in permitting recovery to

2004, at B1. As to non-economic loss, the regulations passed pursuant to the Fund establish a presumption of a $250,000 loss for each decedent plus an additional $100,000 for the decedent's spouse and each of the decedent's dependents. 28 C.F.R. § 104.44 (2004). As to economic loss, the regulations mandate a consideration of loss of future earnings or cost of replacement services, medical expense losses, and losses due to burial costs. 28 C.F.R. § 104.43.

64. The difference between the minimum amount of recovery for non-economic loss ($250,000) and the average total award paid out to victims' families ($2,082,035) can be attributed to economic loss. *See* 28 C.F.R. § 104.44; September 11th Victim Compensation Fund of 2001, Table I: General Award Statistics, *at* http://www.usdoj.gov/victimcompensation/payments_deceased.html (last updated Dec. 3, 2004).

65. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230, § 402(7) (2005).

66. *Id.* at § 405 (c)(2)(C) (personal representative brings claim on behalf of estate). Final Rule, 28 C.F.R. Part 104, § 104.4 (state law applies).

67. *E.g.*, FLA. STAT. ANN. § 768.20 (West 2004); PA. R. CIV. P. No. 2202(a) (West 2004); VT. STAT. ANN. tit. 14, § 1492(a) (2003) (all mandating that action be brought by decedent's personal representative).

68. *See supra* Part I.

follow actual loss.[69] This flexible approach meant that many of those who would otherwise be left out of wrongful death recovery—including but not limited to unmarried, intimate partners (same or opposite-sex)—did in fact recover, even where they would not been entitled to similar recovery as wrongful death beneficiaries under state law.[70] New York State, home to most of the victims, made the point even more clearly by passing legislation that specifically permitted surviving members of same-sex couples to recover for the events of September 11.[71]

It is risky to draw conclusions from the approach taken by Congress in setting up the Fund. Nonetheless, the Fund represents an advance over even the Michigan law described earlier because Feinberg allowed recovery to be tied to loss; those receiving compensation were not even required to be named under a will.[72]

One can hope that the charitable impulse that prompted the broad definition of eligible beneficiaries under the Fund will herald a true revolution in wrongful death law and not a one-time-only accommodation.

II. LESSONS FROM ADVANCES IN OTHER RELATIONAL TORTS

Just as the statutory and decisional law of wrongful death has begun to advance towards conferring benefits upon surviving members of same-sex couples, so too have courts permitted broader recovery for negligently

69. *See infra* note 70.

70. *September 11th Fund Awards Compensation to Same-Sex Surviving Partner*, GLAD: EQUAL JUSTICE UNDER LAW, *at* http://www.glad.org/News_Room/press75-5-6-04.html (May 6, 2004). For example, the Fund compensated Nancy Walsh of New Hampshire for losses associated with the death of her partner, Carol Flyzik, in the September 11 attacks. *Id.*

71. September 11th Victims and Families Relief Act, 2002 N.Y. Laws 73 (amending the worker's compensation law, the estates, powers and trusts law, and the surrogate's court Procedure Act in order to assist victims of the September 11 terrorist attacks and their families). The New York legislature was explicit about its desire to assist surviving members of same-sex couples with compensation under the Fund. The provision setting forth legislative intent reads as follows:

> [T]hat domestic partners of victims of the terrorist attacks are eligible for distributions from the federal victim compensation fund, and the requirements for awards under the New York State World Trade Center Relief Fund and other existing state laws, regulations, and executive orders should guide the federal special master in determining awards and ensuring that the distribution plan compensates such domestic partners for the losses they sustained.

2002 N.Y. Laws 73, § 1. For a comprehensive discussion of the substantial changes to the New York law wrought by the events of September 11, see John O. Enright, Comment, *New York's Post-September 11, 2001 Recognition of Same-Sex Relationships: A Victory Suggestive of Future Change*, 72 FORDHAM L. REV. 2823, 2854-62 (2004).

72. *See supra* note 70 and accompanying text.

inflicted emotional distress and loss of consortium claims. In the legislative arena, same-sex couples in a few states have benefited from statutorily protected status. Though courts have also moved towards a more flexible approach, thus far only opposite-sex couples have profited from these decisions. This brief section discusses both legislative and judicial changes to the law, and argues that the differences between the two do have a plausible explanation. Moreover, because of the close connection between wrongful death and the "living" relational torts, progress with respect to one nourishes the other.

A. Legislative Changes in the Law of Harm to Relational Interests

Because of the inherent elasticity of claims based on harms to "family relations," state legislators have generally left issues concerning the permissible reach of such actions to the judiciary, whose institutional design is better suited to dealing with nuance. Thus, legislative contributions to the development of the tort have been limited to recognizing formal equality between similarly situated couples.

More specifically, only those states that have moved strongly in the direction of recognizing the legal equality of same and opposite-sex couples have extended gay couples the right to recover for harm to relations. Even then, recognition depends on the couple's willingness to enter into the marriage-like institution available in that state. Thus, Vermont's civil union law lists the rights to recover for loss of consortium and for negligently inflicted emotional harm among the full panoply of rights accorded parties to a civil union. In Massachusetts, where same-sex marriage is now legal, all of the rights attendant to that status—including tort rights—are presumably available to *all* married couples.[73]

In states that have taken smaller steps towards equality, the results have

73. There is currently a movement within the Massachusetts legislature to amend the state's constitution to prohibit same-sex marriage. At the state level, the amendment would need to be passed by two consecutive sessions of the legislature, and then approved by a simple majority of the voters. MASS. CONST., art. XLVIII. This means that such an amendment could not take effect until 2006, at the earliest. In March 2004, the legislature did pass an amendment that, if ultimately approved, would permit civil unions to same-sex couples, but exclude such couples from marriage. *See* W. James Antle III, *Bay-State Barometer*, NAT'L REV. ONLINE, Apr. 13, 2004, *at* http://www.nationalreview.com/comment/antle_200404130908.asp (discussing view that the amendment is designed to fail by substituting civil unions, with all of the legal incidents of marriage, for marriage; compromise will not please either proponents or opponents of same-sex marriage).

been mixed. In the wake of the horrific death of Diane Whipple and in light of the hurdles her partner faced in her effort to recover for wrongful death,[74] California provided those same-sex couples who were registered as domestic partners with the right to sue for the harm to their relationships; claims for wrongful death, loss of consortium, and emotional harm caused by injury to another are now possible.[75] Thus, tort rights were granted because consideration of the Whipple incident drove enactment of the statute.

In Hawaii, as mentioned previously, reciprocal beneficiary status includes the right to sue for wrongful death. Perhaps surprisingly, the statute does not expressly grant parties to a reciprocal beneficiary relationship the right to sue for loss of consortium or emotional distress for injury to their partners. One explanation for this difference might be that wrongful death has historically been a matter for the legislature, whereas the other relational torts are typically dealt with in the courts. Thus, a court might look to a plaintiff's status as a reciprocal beneficiary and determine that common law tort rights are therefore available.[76]

In all of the states discussed, if same-sex couples gain tort rights at all, it is only by equaling or approximating the status of heterosexual couples. The legislatures have left the more factually difficult issue of how to determine eligibility for recovery *beyond* formal legal and blood relations to the courts. Recently, a few courts have ruled in the direction of greater flexibility.

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74. *See supra* notes 25-28 and accompanying text.

75. *See generally* CAL. FAM. CODE § 297.5(a)-(c) (West 2004) (providing registered domestic partners with certain rights, protections, and benefits granted to spouses). More specifically, standing to sue for wrongful death is granted to registered domestic partners by CAL. CIV. PROC. CODE § 377.60(a) (West 2004), and standing to sue for negligently inflicted emotional distress is granted to registered domestic partners by CAL. CIV. CODE § 1714.01(a) (West 2004).

76. One case strongly suggests that the court will regard reciprocal beneficiary status as equivalent to spousal status in torts based on injuries to relations. *Guth v. Freeland*, 28 P.3d 982 (Haw. 2001), required the court to interpret a statute prohibiting suits for emotional distress based on damage to property. In holding that the law did not apply to claims for mishandling of a corpse, the court had this to say about standing to sue in such cases: "We define 'immediate family members' as the decedent's surviving spouse, reciprocal beneficiary, children, parents, siblings, or any other person who in fact occupies an equivalent status." *Id.* at 990 (citing wrongful death statute). Although emotional distress arising from mishandling of corpses has been treated as a *sui generis* category of law, *see* DOBBS, *supra* note 2, at 825, 836-37, it seems reasonable to surmise that the court will regard reciprocal beneficiaries as spousal equivalents in both "run of the mill" emotional distress cases and in loss of consortium cases.

B. Judicial Developments in Loss of Consortium and Emotional Distress

Both loss of consortium and negligent infliction of emotional distress have long, tortured histories that have been explained elsewhere[77] and need not be revisited at length here. Today, these torts purport to compensate plaintiffs for the loss that is tied in some part to a relationship between the plaintiff and the physically injured party. A loss of consortium claim is based on the relationship itself, and allows recovery for the loss of society and, where appropriate, sexual relations.[78] A claim for negligently inflicted emotional distress uses the relationship as a central requirement for recovery when the plaintiff was not in fear for his or her own safety.[79]

With the contemporary bases of these torts thus stated, it is perhaps surprising that courts have been extremely reluctant to grant standing to plaintiffs who do not fall into certain formal, narrowly defined categories of relationships to the physically injured party. The following observations refer to recent developments in each tort, noting that courts have, at long last, begun to move away from strict status-based standing requirements. I also offer a brief explanation for the dearth of case law concerning same-sex couples.

1. Negligent Infliction of Emotional Distress

Because of the early common law's aversion to claims not anchored in physical harm, recovery for emotional distress was at one time limited to those who had suffered a physical impact (however slight) from the defendant's negligence.[80] For more than a century, however, recovery has been expanding. First, those who were within the so-called "zone of danger"—those who feared for their own safety—could recover even absent harm to themselves.[81] The logic for this expansion is evident; one

77. For a discussion of these histories see Culhane, *Clanging Silence*, *supra* note 10 at 943-48 (negligent infliction of emotional distress), 949-53 (loss of consortium).

78. The most widely recognized claims for loss of consortium involve spouses; some states permit recovery for the loss of a child's consortium, while a few allow a child to recover for loss of parental consortium. *See* DOBBS, *supra* note 2, at 842. In the parent-child context, the emphasis is on the loss of society and companionship. The discussion in the text concerns the spousal consortium claim.

79. *See supra* note 1 and accompanying text.

80. *See* Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688, 697-98 (E.D. Ark. 1959).

81. Conso. Rail Corp. v. Gottshall, 512 U.S. 532, 554 (1994) (surveying various tests for recovery and settling on the "zone of danger" test as most consistent with the underlying goals of the Federal Employers' Liability Act).

close enough to the scene of an accident to experience fear of being injured is especially likely to have suffered emotional distress.[82] The distinction between slight impact and proximity was unmasked as administrative convenience that did not correspond to likely loss. Virtually all states now permit recovery for emotional distress for those within the zone of danger.[83]

The more recent movement of the law in this area has been more controversial, and its adoption has been less than universal. Beginning with the iconic case of *Dillon v. Legg*,[84] some courts have begun to permit those who simply witness injury to another to recover for their emotional harm. But extending the tort in this way could lead to almost limitless liability. As a chilling example, all of those who witnessed, even on television, the events of September 11, 2001, could potentially have a claim against any actor deemed to have acted negligently, such as those responsible for airport security. To avert this possibility, courts have placed strict limits on the class of plaintiffs eligible to sue. The two nearly universal requirements are that the plaintiff have a contemporaneous sensory awareness of the injury-causing event,[85] and that the plaintiff and the physically injured party stand in close relation to each other.[86] This last requirement has proven both vexatious to courts and disappointing to many who have suffered emotional injury.

As originally conceived by the California Supreme Court in *Dillon*, "close relationship" was a factor relevant to the foreseeability of emotional distress.[87] The court emphasized that foreseeability was a flexible concept, and that it could not predict the development of the case law relevant to this criterion.[88] Because of this deliberate imprecision, lower courts in California gyrated about for more than two decades in a quixotic effort to define "close relationship."[89] With rare exceptions,[90] recovery was limited

82. *Id.* at 547 (observing that "a near miss may be as frightening as a direct hit").

83. Dale Joseph Gilsinger, *Recovery Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in the Zone of* Danger, 89 A.L.R.5th 255 (2004).

84. 441 P.2d 912 (Cal. 1968).

85. *Id.* at 920.

86. *Id.*

87. *Id.* at 920-21.

88. *Id.* at 921 (stating that "reasonable foreseeability . . . contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen").

89. *See, e.g.*, Kriventsov v. San Rafael Taxicabs, Inc., 229 Cal. Rptr. 768 (Ct. App. 1986) (finding close relationship between uncle and nephew); Mobaldi v. Regents of Univ. of Cal., 127 Cal. Rptr. 720, 722 (Ct. App. 1976) (finding close relationship between foster

to those in close legal or blood relationships with the primary victim, and the California Supreme Court ultimately retreated from the flexible approach it had championed in *Dillon*. In 1988, the court held that unmarried cohabitants were not eligible to bring emotional distress claims, the strength of their relationship notwithstanding.[91] The following year, the court more comprehensively rejected "foreseeability factors" in favor of bright line rules. Under the court's new close relationships requirements, recovery would normally be limited to only parents, siblings, children, grandparents, and other relatives living in the same household.[92]

No doubt daunted by the difficulty of assessing the "closeness" of relationships absent some marker of legality or consanguinity, most courts have followed this type of rote approach.[93] A few courts, however, have begun to take a different approach. The New Jersey Supreme Court ushered in this more searching analysis of "close relationship." In *Dunphy v. Gregor,*[94] this progressive court rejected "a hastily-drawn 'bright line' distinction between married and unmarried persons"[95] in favor of a more flexible approach that examined the strength and quality of the relationship.[96] This movement away from status, while still a minority trend,[97] gathered a bit of steam in *Graves v. Estabrook*, a recent New Hampshire case.[98] The plaintiff's fiancé had died a particularly grisly death, allegedly because of the defendant's negligence, and she had witnessed the gruesome spectacle.[99] Building from *Dunphy*, the *Graves* court rejected the defendant's effort to disqualify Ms. Graves by tying standing to marital status.[100] Instead, it honored the foreseeability

parent and foster child). *But see* Trapp v. Schuyler Constr., 197 Cal. Rptr. 411, 412 (Ct. App. 1983) (finding cousins not closely related).

90. *See, e.g.*, Ledger v. Tippitt, 210 Cal. Rptr. 814, 826 (Ct. App. 1985) (allowing unmarried cohabitants standing in a negligent infliction of emotional distress claim).

91. Elden v. Sheldon, 758 P.2d 582, 585-86 (Cal. 1988).

92. Thing v. LaChusa, 771 P.2d 814, 829 n.10 (Cal. 1989).

93. *See, e.g.*, Kallstrom v. United States, 43 P.3d 162, 165 (Alaska 2002) (limiting close relationships to blood relationships); Grotts v. Zahner, 989 P.2d 415, 416 (Nev. 1999) (limiting close relationships to those established by blood or marriage).

94. 642 A.2d 372 (N.J. 1994).

95. *Id.* at 376.

96. *Id.* at 377-78.

97. *See generally* Dale Joseph Gilsinger, *Relationship Between Victim and Plaintiff—Witness as Affecting Right to Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff is Not Member of Victim's Immediate Family*, 98 A.L.R.5th 609 (2004).

98. 818 A.2d 1255 (N.H. 2003).

99. *Id.* at 1257.

100. *Id.* at 1258-59.

requirement that California and other states have largely abandoned: "[f]oreseeability accounts for factual nuances, while a bright line rule is at odds with foreseeability."[101] The *Graves* court echoed *Dunphy*'s impatience with the arguments that recognizing such claims would devalue the institution of marriage or involve the courts in a messy examination of the quality of the relationships.[102]

Judicial expansiveness in this area of the law is promising in several related ways. First, it bespeaks a movement away from status that could be helpful to those who either choose or are forced to exist in relationships that do not enjoy state sanction. Same-sex couples appear to have the strongest argument because they are precluded from marriage. Second, to the extent that courts may move more swiftly than legislatures, these developments could augur change in the statutory law of wrongful death. As we have already observed, a few courts have not even waited for legislative change to the wrongful death laws before protecting the interests and expectations of same-sex survivors.

2. *Loss of Consortium*

New York, New Jersey, New Hampshire—the most progressive cases discussed thus far are, aptly, from one of these "new" states. New Mexico completes the "new" state sweep, as that state's supreme court recently became the first such court to allow a loss of consortium claim by an unmarried cohabitant. In *Lozoya v. Sanchez*,[103] a unanimous court noted that the tort is based on the injury to the relation, not to a legal interest: "[t]o use the 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."[104] Further, the court noted that basing recovery on 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."[105]

The developments in New Mexico over the past decade reveal the evolutionary capacity of the common law. Until 1994, the State was alone in not recognizing loss of consortium at all. In *Romero v. Byers*,[106] the court recognized that a notion of duty tethered to foreseeability argued

101. *Id.* at 1261.
102. *Id.* at 1260.
103. 66 P.3d 948 (N.M. 2003).
104. *Id.* at 955.
105. *Id.*
106. 872 P.2d 840 (N.M. 1994).

powerfully for loss of consortium claims.[107] Then, in 1998, the court expanded loss of consortium beyond the nuclear family, permitting a claim by certain grandparents for injuries to their grandchildren.[108] *Lozoya* continued this expansion.[109]

Given the court's willingness to tie legal standing to real loss experienced by actual couples, it seems likely that same-sex couples would find a receptive audience for loss of consortium (and possibly emotional distress) claims in New Mexico, and perhaps in the other "new" states. It might therefore seem surprising that no appellate decision on loss of consortium, and only one on negligent infliction of emotional harm,[110] has been reported. This state of affairs might seem especially puzzling in light of the claims for wrongful death discussed earlier, where even the apparent statutory bar has neither kept same-sex survivors from suing, nor universally resulted in dismissal by courts.

The apparent paradox can likely be explained by the realities of litigation. The potential recovery in a wrongful death suit may be quite substantial, and necessary for the surviving spouse to function economically. Therefore, the only impediment to suit is the admittedly daunting challenge of finding a court sufficiently sympathetic to read the wrongful death statute expansively.

Emotional distress and particularly loss of consortium claims, by contrast, are usually quite minor,[111] particularly when compared with the often substantial physical injury claims from which they derive. Given the danger that a jury may regard a same-sex couple unsympathetically, both potential plaintiffs and their attorneys may be loathe to jeopardize the "big ticket" personal injury claim to pursue a smaller and perilous claim for injury to the relation. Nonetheless, the increasing acceptance of gay couples, combined with sympathetic treatment of such couples by a number of courts in a host of contexts, may make such a claim for emotional distress or loss of consortium likely in the not-to-distant future. The first

107. *Id.* at 843-44. Not all cases involving foreseeable risk, however, lead to a determination that the defendant owes the plaintiff a legal duty. In *Torres v. State*, 894 P.2d 386, 389-90 (N.M. 1995), the court stated that a finding of duty based on foreseeability could be overcome by strong countervailing public policy considerations. For a discussion of how different courts have addressed the issue of duty, see Culhane, *Clanging Silence*, *supra* note 10, at 981-94.

108. Fernandez v. Walgreen Hastings Co., 968 P.2d 774 (N.M. 1998).

109. Lozoya v. Sanchez, 66 P.3d 948, 957 (N.M. 2003).

110. Coon v. Joseph, 237 Cal. Rptr. 873 (Ct. App. 1987) (denying recovery); *see* Culhane, *Clanging Silence, supra* note 10, at 963-66, for an in-depth analysis of the case.

111. DOBBS, *supra* note 2, at 843 (stating that tort's "modest economic component" may explain its almost universal acceptance today).

such claim that succeeds will both advance the cause of gay equality and possibly spur rethinking of the clearly outmoded wrongful death laws.

CONCLUSION

As currently constructed, most wrongful death laws fail in their essential purpose: to ensure that survivors are provided the economic support that was removed by the negligently caused death of their loved one. With varying degrees of comprehensiveness, several statutes and recent decisions have begun to recognize that drastic overhaul of these laws is long overdue. The best practice would be to grant standing to anyone who can make a preliminary showing of actual loss. At minimum, rigid status-based classifications tied to the law of intestacy should be removed and replaced with the decedent's wishes as expressed through a will.

Such changes might be inspired by recent developments in the law relating to loss of consortium and negligent infliction of emotional distress. A few courts have cast off from the moorings of status and focused on actual loss. The tide created by this movement could lift same-sex couples towards a broader legal recognition of their lives of committed intimacy.