

1 **13-1810A. Loss of consortium; definition.**

2 [The emotional distress of _____ (*plaintiff*) due to the loss [of the society],
3 [guidance], [companionship] and [sexual relations] resulting from the injury to _____
4 (*name of injured or deceased spouse or child of plaintiff*).]

5 Loss of consortium is a claim to recover compensation for damage to certain relationships.
6 To recover for loss of consortium, _____ (*name of loss of consortium claimant or names*
7 *of loss of consortium claimants*) must show that _____ (*name of loss of consortium*
8 *claimant or names of loss of consortium claimants*) and [_____ (*name of injured party*)]
9 [_____ (*name of decedent*)] had a mutually dependent relationship. Mutual dependence
10 means that _____ (*name of loss of consortium claimant or names of loss of consortium*
11 *claimants*) and [_____ (*name of injured party*)] [_____ (*name of decedent*)] relied on the
12 relationship and could not enjoy life in the same way once [the injury took place] [after the death].

13 In deciding whether a relationship is mutually dependent, factors to consider may include:

14 [The duration of the relationship;]

15 [The degree of mutual dependence;]

16 [The extent of common contributions to a life together;]

17 [The extent and quality of shared experience;]

18 [Whether _____ (*name of loss of consortium claimant or names of loss of*
19 *consortium claimants*) and [_____ (*name of injured party*)] [_____ (*name of*
20 *decedent*)] were members of the same household;]

1 This instruction should be given when there is a jury question as to whether a claimant or
2 claimants had a sufficiently close relationship with an injured or a deceased person to recover for
3 loss of consortium. When this instruction is given, UJI 13-1810B NMRA should also be given.

4 [Adopted, effective October 1, 1996; as amended, effective March 20, 2000; as amended by
5 Supreme Court Order No. 19-8300-014, effective for all cases pending or filed on or after
6 December 31, 2019.]

7 **Committee commentary.** —

8 [*Romero v. Byers*, 117 N.M. 422, 872 P.2d 840 (1994) recognized loss of consortium as a
9 ~~claim for damages in the context of death or injury to a spouse. *Romero* overruled *Roseberry v.*~~
10 ~~*Starkovich*, 73 N.M. 211, 387 P.2d 321 (1963), and *Kilkenny v. Kenny*, 68 N.M. 266, 361 P.2d 149~~
11 ~~(1961), on this issue. *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-39, 126 N.M. 263, 968~~
12 ~~P.2d 774 recognized loss of consortium for a "familial caretaker", such as a parent or grandparent~~
13 ~~who loses a child to death or where the child suffers a serious injury.]~~

14 **Who may recover**

15 New Mexico has rejected the notion that only those with “special legal status” in relation
16 to the injured party, such as spouses or blood relatives, may recover consortium damages.
17 *Wachocki v. Bernalillo Cty. Sheriff’s Dep’t*, 2011-NMSC-039, ¶ 7, 150 N.M. 650, 265 P.3d 701
18 (citing *Lozoya v. Sanchez*, 2003-NMSC-009, ¶ 19, 133 N.M. 579, 66 P.3d 948, *abrogated on other*
19 *grounds by Heath v. La Mariana Apartments*, 2008-NMSC-17, ¶ 21, 143 N.M. 657, 180 P.3d 664).
20 Loss of consortium damages are intended to compensate “for damage to a *relational* interest, not
21 a legal interest[, because] . . . the use of legal status necessarily excludes many persons whose loss

1 of a significant relational interest may be just as devastating as the loss of a legal spouse.”
2 Lozoya, 2003-NMSC-009, ¶ 20. For example, co-habitants, even though not legally married, may
3 be entitled to recover, id. ¶ 27, as can a grandparent under certain circumstances, Fernandez v.
4 Walgreen Hastings Co., 1998-NMSC-039, ¶¶ 23-32, 126 N.M. 263, 968 P.2d 774, a sibling,
5 Wachocki, 2011-NMSC-039, ¶ 12, and Silva v. Lovelace Health Sys., 2014-NMCA-086, ¶¶ 43-44,
6 or a parent, id. ¶¶ 41-42.

7 **Nature of claim**

8 “Loss of consortium damages are derivative in nature because they arise from a physical
9 injury upon another person.” Thompson v. City of Albuquerque, 2017-NMSC-021, ¶ 9, 397 P.3d
10 1279. “[A] plaintiff who sues for loss of consortium damages must prove that the alleged tortfeasor
11 caused the wrongful injury or death of someone who was in a sufficiently close relationship to the
12 plaintiff, resulting in harm to the relationship.” Id. ¶ 14.

13 However, this does not mean that a loss of consortium claim must always be brought with
14 the underlying tort claim, or that actual recovery for the underlying tort is a prerequisite for the
15 recovery of loss of consortium damages. Id. ¶ 17; see also State Farm Mut. Auto. Ins. Co. v.
16 Luebbers, 2005-NMCA-112, ¶ 37, 138 N.M. 289, 119 P.3d 169. “Although claims for loss of
17 consortium damages derive from injury to another, the claimant has also suffered a direct injury for
18 which he or she may seek recovery separately from the underlying tort.” Thompson, 2017-NMSC-
19 021, ¶ 16. “The direct injury alleged by a loss of consortium claimant is one to a relational interest
20 with another who was physically injured.” Id.

21 **Elements**

1 “A loss-of-consortium claimant must demonstrate two elements in order to recover
2 damages.” *Wachocki*, 2011-NMSC-039, ¶ 5. “The first element is that the claimant and the injured
3 party shared a sufficiently close relationship. . . . The second element is a duty of care.” *Id.*

4 ***Mutual dependence***

5 “In *Lozoya*, [the Supreme Court] held that the degree of mutual dependence, as well as a
6 host of other factors, such as duration of the relationship, emotional reliance, and a sharing of a
7 common residence, bear upon whether the claimant and injured party shared a sufficiently close
8 relationship.” *Wachocki*, 2011-NMSC-039, ¶ 9; *see also Lozoya*, 2003-NMSC-009, ¶ 27 (noting
9 that additional potential factors that may bear upon whether the claimant and injured party shared
10 a sufficiently close relationship include “the extent of their common contributions to a life together,
11 the extent and quality of their shared experience, . . . the particulars of their day to day relationship,
12 and the manner in which they related to each other in attending to life’s mundane requirements”
13 (internal quotation marks and citation omitted)); *Fitzjerrell v. City of Gallup*, 2003-NMCA-125,
14 ¶ 13, 134 N.M. 492 (“[T]he qualities of the relationship that give rise to the claim are flexible in
15 scope.”).

16 In *Wachocki*, the Supreme Court recognized that “[the *Lozoya*] factors may be helpful in
17 the context of some relationships, especially spousal-type relationships[,]” but, in seeking to
18 provide “a uniform analysis applicable to all relationships,” identified mutual dependence as “the
19 key element.” *See Wachocki* 2011-NMSC-039, ¶¶ 9-10. In providing illustrative examples, the
20 Supreme Court discussed *Lozoya*, 2003-NMSC-009, in which an unmarried co-habitant brought a
21 loss of consortium claim, and *Fernandez*, 1998-NMSC-039, in which a grandmother brought a

1 loss of consortium claim. *Wachocki*, 2011-NMSC-039, ¶ 10. In both cases, circumstances were
2 present indicating that the claimant and injured party “relied on the relationship and could not
3 enjoy life in the same way once the relationship was severed.” *Id.* Under such circumstances, the
4 claimant and the injured party may be found to be mutually dependent. *See id.*

5 **Duty**

6 Although imposition of a duty is a legal question for the court, whether a duty exists often
7 depends on a factual determination, which we entrust to the jury. *Lozoya*, 2003-NMSC-009, ¶ 21.
8 “It is appropriate that the finder of fact be allowed to determine, with proper guidance from the
9 court, whether a plaintiff had a sufficient enough relational interest with the victim of a tort to
10 recover for loss of consortium.” *Id.*

11 **Judge or jury**

12 As with any action, a defendant may contend that a claimant’s loss of consortium claim is
13 insufficient as a matter of law, at which time the judge will decide whether there is sufficient
14 evidence supporting a loss of consortium claim to allow the claim to proceed to the factfinder. *See,*
15 *e.g., Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶ 64, 132 N.M. 631, 53 P.3d 398 (holding that
16 evidence as to loss of consortium was insufficient as a matter of law to permit the jury to consider
17 a loss of consortium claim).

18 [As amended by Supreme Court Order No. 19-8300-014, effective for all cases pending or filed
19 on or after December 31, 2019.]