TRIAL
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Loss of consortium: a continuing evolution

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Loss-of-consortium cases are challenging. Unlike most actions in tort, these cases seek compensation for impairment to a relationship.

Winning a case requires a basic understanding of the development of the law and a realistic, low-key approach at trial. This article examines both.

Although widely believed to have originated in English common law, the claim for loss of consortium can be traced to Roman civil law.1 Under the doctrine of *paterfamilias*, all rights of recovery for injuries to the family vested in the father,2 who possessed an ownership interest in the services of his wife and children.3

This concept was accepted by English common law, which recognized that a husband—as master of the household—had a property interest in his wife, children, servants, and animals.4 If a third party damaged this "property" or impaired the ability of these "chattels" to provide services to the master, he had a right of action against the third party.5 When the wife was injured or impaired, the action was called *per quod consortium amisit*.6—"whereby he lost the company (of his wife)." It was brought as a trespass action, under the doctrine of *trespass vi et armis*7—"trespass with force and arms." By the 1600s, the law recognized that since the husband had a right to conjugal relations with his wife, he was also entitled to damages for impairment to that relationship.

At that time, the wife and children could not bring a loss-of consortium claim for injury to the husband or father. There were several reasons for this. First, the wife and children were considered the master's property, not the reverse. When the master was injured, the wife and children suffered no property damage, so no action would lie.8 Second, the common law did not recognize women and children as independent entities with a capacity to sue.9 Under the law, their interests merged into those of the husband and father.10 Last, if the husband were injured, he could sue for his own damages, and the law presumed that compensation to him restored the entire family.11

These concepts were adopted by American jurisprudence, and the law remained unchanged until the mid-1800s.12 Attitudes about women then began to change and states started passing Married Women's Property Acts.13 These laws recognized women as separate legal entities with legal rights and created the first impetus for women to bring loss-of consortium actions. These laws, however, created only limited rights for women. Notably, women's actions were limited to intentional interference with the marital relationship; actions for negligent injury to a husband still did not lie.14

1900s, the husband's loss of consortium—which had previously been primarily for loss of services—expanded to include the loss of a wife's love, care, and companionship. While the "property" interest had been the original framework for these actions, the sentimental aspects of the loss now became the focus. Loss of services remained an element of damage, but they constituted only part of the claim.15

In 1950, the Court of Appeals for the District of Columbia took the first major step in equalizing the rights of men and women in the loss-of consortium arena. In *Hitaffer v. Argonne Co.*, the court noted, "[T]he incapacity of the wife to maintain a separate action for a tort has been swept away by modern legislation." Citing precedent, the court then pronounced, "The expressed view of this court is that the husband and the wife have equal rights in the marriage relation, which will receive equal protection of the law."16 Today, it is widely recognized (though not universally applauded17) that both husbands and wives can sue for damages caused by the negligent or intentional injury to a spouse.18

An issue currently being debated is whether loss-of-consortium damages should be recoverable for injury to the parent-child relationship. The primary arguments in favor of this action are logic, fairness, and recognition of the value of the parent-child relationship.19 The law no longer views children as servants. They have legal rights, they are recognized as people by the Constitution, and the parent-child relationship is important to society.

Logically, there is little or no qualitative difference between the love, affection, care, and attention children share with parents and that shared by husbands and wives. Just as a husband suffers a real loss when his spouse is seriously injured, so does a child when a parent is incapacitated, and vice versa. One hopes the law will soon universally

recognize the societal value of parent-child relationships.

Accepting the case

A trial lawyer must address the following questions when deciding whether to present a loss-of-consortium case to the jury:

- How do you select jurors?
- How do you present evidence?
- Will the uninjured spouse (and/or you) look greedy?
- Could the jury think the uninjured spouse will leave the injured spouse after the trial?
- What is the history and the quality of the marital relationship? Pursue a loss-of-consortium claim only where loss is significant. Do not bring the claim if there is evidence of infidelity or domestic violence or if the uninjured spouse is untrustworthy or leaves you with a bad impression.
- How do you argue the value of the case to the jury?

If you take the case without having answered these questions, you are likely to be unsuccessful.

Once you are ready to proceed with trial, you must turn your attention to jury selection. While you want jurors who will fully compensate the injured spouse for his or her injury, you may need to eliminate some otherwise good potential jurors because of their personal situations. Potential jurors with a strong commitment to family may feel that loss of consortium should not be equated with money. They may believe that since spouses commit to each other "in sickness and in health," an injury is simply part of the bargain.

There is no formula for selecting jurors, and there is no substitute for experience. Jurors must be chosen on an individual basis. Ultimately, you want compassionate, understanding, and fair individuals.

Presenting the case

Successfully presenting a case requires careful planning. These are challenging cases to present, and the results will be disastrous if they are not handled properly.

The three most important elements of a loss-of-consortium case are the character of the uninjured spouse, the magnitude of the loss, and the credibility of the trial lawyer.

The uninjured spouse. His character must be impeccable, and your judgment of his character must be accurate.20 The jury may see the uninjured husband as crass for seeking to collect money for himself, when his wife has been debilitatingly injured and he wasn't even "hurt." To avoid this, emphasize his devotion to his wife both before and after the injury. The jury should see him as a loving husband whose life has been permanently changed by the defendant's negligence.

The husband's claim must ask the jury to "look at what we have become," not "look at what I have lost." Otherwise, the husband seems selfish, since his loss is nothing compared to his wife's.

If the jury thinks the uninjured spouse is complaining too much, he will look greedy, the lawyer will lose credibility, and damages for both spouses will be deflated. The jury will think that the husband is simply trying to "get rich" off his wife's devastating injuries instead of seeking fair and reasonable compensation from the tortfeasor. If that happens,

then his loss-of-consortium claim will fail, and the jury's negative reaction might taint its perception of the injured spouse's claim.

The magnitude of the loss. The uninjured spouse must not complain, whine, or seem angry. He must communicate the following to the jury: "This has happened to my wife. I love her. I wish she could enjoy her life as she did before. I will do everything I can to make her as happy and as comfortable as possible. Although this injury is devastating, I accept that it has happened." If the uninjured spouse displays this attitude, the jury will see him as a caring, loving spouse, and it will see the marriage as a strong one.

This is crucial, since the jury will be evaluating the strength of the marriage when it assesses damages. To show that the marriage is strong, have the uninjured spouse list the activities his wife enjoyed before she was injured and some of the main activities and future plans they had shared as a couple. If you do this, the jury will award full damages, since it will see love, trust, and dedicated partnersnot greed.

Credibility of the trial lawyer. For the plaintiff's lawyer, credibility—or lack of it—will make or break any case. Without it, the lawyer cannot convince the jury of such an intangible loss. Credibility cannot be taught or learned. You either have it or you don't.

The importance of credibility is illustrated by *Vasilion v. Three I Truck Lines*, an Illinois case I recently tried with my partner, Mike Mahoney.

The wife's injuries, which were sustained in a multiple-vehicle collision, were catastrophic. Diane suffered a severe and permanent brain injury that left her profoundly disabled. She is restricted to bed and to a wheelchair. She is unable to control her bladder and bowels, and she can't talk, eat, or work.

Diane is on an emotional roller coaster—crying one moment and laughing the next. She is often hysterical and is adversely affected by even the simplest physical contact, such as having her hair brushed. She is in pain every day, often screaming because of its severity.

At the time of her accident, Diane had been married to Bill for 20 years. They had one child, Laura, who was 14. The family was loving, caring, and supportive of one another. For Bill and Laura, Diane's devastating injuries destroyed the family life they had cherished.

Under Illinois law, only Bill could bring a claim for loss of consortium. We decided that we would present his claim in a low-key manner. Since we knew that the testimony about Diane's injuries would be compelling, we believed that if we simply showed the jury what a loving, dedicated family man Bill was, the jury would understand the significance of his loss.

Five witnesses testified about the relationship between the two: Bill, Laura, Bill's mother, Diane's boss, and the charge nurse at the facility where Diane resided at the time of trial.

Bill testified about meeting and falling in love with Diane, the Vasilions' family life, and his desire for Diane to come home so that he could care for her. He testified that if his wife were home, he could just "reach over and hug her and give her all the care, love, and attention she deserved."

Laura's testimony showed the jury that Bill's loss included the help Diane had given him in rearing Laura. Diane's injuries left Bill alone to raise a teenage daughter. Due to the defendants' negligence, he had become "Mr. Mom."

Bill's mother described Bill and Diane together. Her dedication to her daughter-in-law, exhibited by weekly visits, further underscored the closeness of the Vasilion family. This was key, since Diane's parents are deceased and she has no siblings.

Diane's boss described how Diane carefully arranged her part-time work schedule so she could be home for her husband and daughter. She had consistently turned down better jobs within the company because of her dedication to her family.

The charge nurse described Bill's commitment to his wife. She testified that Bill visited Diane faithfully, took her out for walks, and "connected" and communicated with her.

During final argument, the evidence was highlighted in the context of the instruction given. The Illinois pattern instruction defines consortium as "the mutual benefits that a husband and wife receive from each other, including love, affection, care, attention, companionship, comfort, guidance, and protection."

We decided not to suggest a dollar amount during final argument. We knew the loss was significant, but large loss-of-consortium verdicts are rare. We didn't want to limit the amount the jurors would award, and we didn't want to jeopardize our credibility by suggesting a figure they thought was too high. Mike argued:

When you are considering Bill Vasilion's loss of consortium, you are going to be deliberating without a suggestion from me. Bill's loss is so closely tied to his wife's loss, to her disability, to her loss of a normal life, to her pain, to her suffering, to her disfigurement, that only through your own deliberations on those points will the truth about Bill's loss of consortium become clear to you. We think the amount is substantial, but we will leave that determination in your good hands.

The verdict for Bill's loss of consortium was an Illinois record. Never forget that jurors are smart, aware, and capable. Never overreach. Be fair and reasonable with jurors, and they'll respond in kind.

Notes

1. *See* Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1327 (1992); WILLIAM L. PROSSER, THE LAW OF TORTS §125 (1984).

2. Mogill, *supra* note 1, at 1327; PROSSER, *supra* note 1, at §129.

3. The demarcation between recoverable and nonrecoverable consortium damages has always been determined by marriage. Under Roman law, consortium was recoverable only where there was a lawful marriage. See Mogill, *supra* note 1, at 1328.

4. PROSSER, *supra* note 1, at §125.

5. See Mogill, *supra* note 1, at 1327-28.

6. *Id.* at 1328.

7. *See* PROSSER, *supra* note 1, at §125; Hyde v. Scyssor, 79 Eng. Rep. 462 (1620); Guy v. Livesey, 79 Eng. Rep. 428 (1629).

8. *See* Mogill, *supra* note 1, at 1328-29; PROSSER, *supra* note 1, at §125.

9. *See* Theama v. City of Kenosha, 344 N.W.2d 513, 515 (Wis. 1984) (citing Moran v. Quality Aluminum Casting Co., 150 N.W.2d 137 (Wis. 1967)).

10. *See* Mogill, *supra* note 1, at 1327-28; 3 WILLIAM BLACKSTONE, COMMENTARIES *142-43.

11. *See* Mogill, *supra* note 1, at 1329.

12. In the United States, the first published decision applying the doctrine of *trespass vi et armis* was *Clark v. Kenan & Hill*, 2 N.C. (1 Hayw.) 308 (1796), in which a man brought a claim for injuries to his animal. In *Brown & Boisseau v. May*, 15 Va. (1 Munf.) 288 (1810), the plaintiff sued for damages due to injuries of his slave. In *Parker v. Elliott*, 20 Va. (6 Munf.) 587 (1820), a father brought an action because his daughter had been debauched. The premise for these actions was the same as for loss of consortium—that an animal, a slave, and a daughter were chattels, and a man could sue for injury to his chattel.

13. *See* Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923).

14. Mogill, *supra* note 1, at 1329-30.

15. *Id.* at 1328.

16. 183 F.2d 811, 816 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

17. *See* Berger v. Weber, 303 N.W.2d 424, 431 (Mich. 1981) (Levin, J., dissenting) (suggesting that loss of consortium be abolished); Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 229 (1953).

18. *See* PROSSER, *supra* note 1, at §125 (noting that nearly every state has recognized recovery for loss of consortium either through reform of the common law, by statute, or on equal protection grounds).

19. *See, e.g., Berger*, 303 N.W.2d 424 (child allowed to recover loss of consortium for injury to parent); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980) (child allowed to recover loss of consortium for injury to parent); *Theama*, 344 N.W.2d 513 (minor child allowed to recover for loss of society and companionship caused by negligent injury to parent).

20. I have used the masculine in this article for ease of reading. Obviously, the husband or wife may be the uninjured spouse. My comments hold true for both.

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