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Loss of consortium

THE ONE CLAIM YOU *MUST* DISCUSS WITH YOUR CLIENTS, BUT MAY STRATEGICALLY CHOOSE NOT TO MAINTAIN THROUGH TRIAL

By their very nature, loss-of-consortium claims are unique: They depend on the specifics of each marriage before and after the injuries from which they arise. But that is not to say that they are rare. Indeed, nearly every personal injury to a married plaintiff gives rise to a potential loss-of-consortium claim held by the spouse. All too often, however, loss-of-consortium claims are either overlooked or handled as afterthoughts to the primary injury claim. Those approaches can have devastating consequences for the clients' case or the lawyer.

In this article, we explore the basis for loss-of-consortium claims and the strategic and practical considerations we believe lawyers should apply to any potential loss-of-consortium claim. While it can oftentimes be very valuable for the client, in our view, lawyers should take a hard look at the claim from the outset of the case to determine whether its benefits outweigh its risks. Lawyers should also make it their practice to have an upfront discussion with clients about the claim and the strategic and practical consequences bringing it can have. Thus, although the claim may be unique, there are a few, general considerations lawyers can use to guide their analysis and recommendations about whether to bring such claims.

What is a loss-of-consortium claim?

Loss of consortium is a claim that can be brought by the spouse of a person who was injured by the wrongful conduct of a third party. In California, the cause of action arises when a third party intentionally or negligently injures the plaintiff's spouse such that the plaintiff no longer enjoys the injured spouse's

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conjugal society, companionship, and sexual relations. (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408.) In laymen's terms, it means that a spouse can bring a separate claim against the third party that injured his or her spouse if the injury from the underlying incident caused a "disruption" or harm to the marriage.

Loss of consortium has also been referred to as a loss of "the noneconomic aspects of the marriage relation, including conjugal society, comfort, affection, and companionship." (*Deshotel v. Atchison, T. & S. F. Ry. Co.* (1958) 50 Cal.2d 664, 665, *overruled* on other grounds in *Rodriguez*, *supra*, 12 Cal.3d at 408.) There are four elements to this claim: (1) a valid and lawful marriage between the spouse and the injured spouse at the time of the injury; (2) a tortious injury to one spouse; (3) loss of consortium suffered by the non-injured spouse; and (4) the loss was proximately caused by the defendant's act. (*Vanhooser v. Superior Court* (2012) 206 Cal.App.4th 921, 927.)

Early California case law doubted the existence of such a claim. But in *Rodriguez*, the California Supreme Court found marriage to be a rational interest worthy of protection, distinguishing from the disapproved action for "alienation of affections." In the Court's view, loss of consortium did not depend upon intent to interfere with the marriage, but rather upon the intimate and predictable consequences of serious injury to a married person.

Observing that "[t]he loss of companionship, emotional support, love, felicity and sexual relations are real injuries," the Court concluded that "[t]hose losses were immediate and consequential rather than remote and unforeseeable." (*Rodriguez*, at pp. 400-401.) Further, the Court held that although the spouse's injury must clearly be severe enough to raise the inference that conjugal society is more than trivially or temporarily impaired, there is no requirement that the injured plaintiff suffer a permanent or catastrophic injury for this claim to be actionable for his or her spouse. Instead, where the tortious act committed upon the injured spouse is verifiable and harm to the uninjured spouse is foreseeable, the uninjured spouse is entitled to recover for consequential damages suffered from a third party's wrongful act, even though the injury to the spouse often results in emotional rather than physical injury.

What damages are recoverable?

Pursuant to CACI Instruction No. 3920, the spouse of the injured plaintiff may recover damages to reasonably compensate for the past and future loss of the injured plaintiff's companionship and services. These damages include: (1.) The loss of love, companionship, comfort, care, assistance, protection, affection, society, and moral support; and (2.) The loss of the enjoyment of sexual relations or the ability to have children.

A loss-of-consortium plaintiff may recover for harm he or she has suffered to date and for harm he or she is reasonably certain to suffer in the future. In essence, the consortium plaintiff is entitled to recover damages for the duration of the incapacity of his or her spouse giving rise to the loss of consortium; and in cases of permanent injury, the plaintiff may recover damage to his or her marital relation for the remainder of his or her married life – that is, from the date of his or her spouse's injury to the end of the injured spouse's expected lifespan, as measured from just prior to the spouse's injury. (*Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 352-353.)

Like other general damages, no method is available to the jury by which it can objectively evaluate such damages, and no witness may express his or her subjective opinion on the matter. Thus, a jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable or repeatable accuracy. (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 172.) There is simply no fixed standard or measuring stick to determine the amount of damages that are recoverable for this claim, save for statutory limitations like MICRA.

Unsurprisingly, the largest awards for loss-of-consortium claims stem from tragic circumstances where the spouse's injury is permanent or completely alters the marital relationship. A review of recent jury verdicts demonstrates as much. For example, in late 2016 a downtown Los Angeles jury awarded $4 million in past and future loss of consortium to a spouse whose husband of over 50 years suffered an injury that dramatically changed his active lifestyle. Notably, the loss-of-consortium award was higher than the total damages awarded to the husband for the primary injury, although that discrepancy may be attributable to the defense's successful motions in limine to limit the categories of damage the husband could seek.

In another instance, in April 2016 an Alameda County jury awarded $1 million in future loss-of-consortium damages to a spouse whose wife suffered a significant and life-altering traumatic brain injury in a car collision. Those verdicts are similar to a case my firm handled in which the jury awarded over $1 million to the wife of a client that suffered quadriplegia from a rollover accident her loss-of-consortium claim.

Navigating a loss-of-consortium claim

With that background in mind, we turn to the practical and strategic considerations we believe attorneys should apply to every potential loss-of-consortium claim. First, attorneys should be aware of the potential consequences of overlooking or failing to fully discuss the claim with married clients at the outset of the case. Second, attorneys should continuously evaluate the merits of the loss-of-consortium claim – both pre-filing and during litigation – and should ensure that both they and their clients understand the benefits and risks of maintaining the claim through trial. Finally, attorneys should consider the practical question of what evidence they will present to prove the loss-of-consortium claim.

Failure to discuss the claim up-front can have consequences

In every personal-injury case where your client is married and has sustained

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"serious" personal injuries, a lawyer should always *consider* bringing a claim for loss of consortium along with the injured spouse's injury claims. If possible, a lawyer should discuss this claim during the first consultation with the client and his or her spouse. Since every marriage is different, and the impact on the uninjured spouse and disruption to the marriage is different in every case, the elements of this claim (as set forth above) should at least be summarized to your client and his or her spouse so they both understand from the outset that this claim may be brought with the injured spouse's personal injury claims.

An attorney should also be on the lookout for rare cases which could raise a potential or actual conflict, such as where the marital union was already dissolving before the incident, or the uninjured spouse clearly abandoned his or her marital commitment to love, honor, care for, and support the injured spouse following the incident. Additionally, the consequences of alleging a loss-of-consortium claim – including, as discussed below, the invasive, personal discovery, the transformation of the spouse from witness to party, and the potential impact on the injured spouse's primary claim – should also be addressed at the earliest possible time.

Failing to have this discussion with clients can have consequences for an attorney. In addition to missing potential conflicts, an attorney may face liability for failing to properly advise the clients of viable claims. In *Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1029, the court held that an attorney representing a husband in a medical malpractice action had a duty to inform the husband and his wife of the existence of a possible action by the wife for loss of consortium. The court reasoned that the consortium tort was so closely interwoven with the personal injury action that the wife and her husband were in privity with respect to it, and the attorney's conduct had a direct effect on the wife's injury, and the imposition of a duty would prevent future harm by discouraging the loss of rights by an uninformed failure to act, and recognition of liability would not impose an undue burden on the legal profession.

The decision in *Meighan* is an excellent example of why all attorneys representing an injured, married client should properly advise his or her injured client and their spouse of the existence and elements of a loss-of-consortium claim before the concurrent statute of limitations runs. In fact, *should you choose not to bring* a loss-of-consortium claim on behalf of the spouse of a seriously injured plaintiff, you should always seek your clients' approval and confirm the decision in writing, even if you believe that the loss-of-consortium claim has no merit.

Meighan may suggest that the best practice is to simply plead a loss-of-consortium claim on behalf of any injured party's spouse. While that one-size-fits-all approach may minimize the risk of failing to include a colorable claim, it overlooks important strategic considerations and runs the risk of alienating clients unprepared for the reality of asserting such a claim. Instead, attorneys should, where possible, thoroughly vet each loss-of-consortium claim before asserting it in the complaint. Moreover, attorneys should strongly consider the strategic implications of the claim prior to presenting it at trial, and should have an informed discussion of the upside and risks with the clients.

Letting your clients know what they can expect

A primary consideration for asserting a loss-of-consortium claim is the spouse's willingness to become a party and subject to invasive and personal discovery. As noted above, a client who asserts a loss-of-consortium claim should understand exactly what he or she is signing up for when bringing the claim. Since loss of consortium is based, among other things, in the sexual aspect of the marital relationship, alleging the claim opens the door to wide-ranging and invasive discovery of the couple's private, intimate life. While the initial salvos are usually limited to your clients, defendants may try to expand the discovery to friends and family members, all of which can be potentially embarrassing or humiliating to your clients. Without forewarning, that discovery can shock your clients and, in extreme cases, discourage them from proceeding altogether – which, of course, is a boon to defendants. Properly preparing clients in advance about the invasive discovery they can expect can dramatically reduce the chance that a client feels blindsided.

That said, an attorney should not presume that *all* discovery into clients' sex life and private, intimate relations is on the table and forego any efforts to police the clients' privacy. We have observed that defendants are aggressively expanding the bounds of "sexual relations" discovery in what appears to be an effort to intimidate clients to drop loss-of-consortium claims from embarrassment. That includes discovery asking detailed questions about the manner and specifics of clients' sex life before and after the injuries. While every case will be different, we advise strongly protecting your clients' privacy rights to the extent possible, particularly when the discovery is so detailed that it appears to serve no purpose other than to humiliate and bully your clients into dropping the claim. However, the clients should understand that your ability to forestall such discovery is limited, and should assume that they will be compelled to divulge private, intimate details about their relationship should they pursue loss-of-consortium damages.

Strategic considerations and potential jury predispositions

There are also important strategic considerations to bear in mind for presenting a loss-of-consortium claim to a jury. Those considerations should not be limited to the loss-of-consortium claim alone, but also the potential impacts trying it to a jury may have on the presentation of the injured spouse's claim. Although not completely determinative, the nature of the spouse's injury will strongly inform the advisability of asserting a loss-of-consortium claim or maintaining it through trial.

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Obviously, because a loss-of-consortium claim is based on a change in the marital relationship, it is far more likely that a serious and permanent injury will affect the marriage than a temporary or discrete one.

Generally speaking, absent some extraordinary circumstances, a loss-of-consortium claim is almost always advisable where the injured spouse is permanently or completely disabled. The analysis becomes much harder when the underlying injury is temporary or only impacts the marital relationship in a small or transient way. Again, while claims based upon a temporary or discrete injury may be colorable in a legal sense, a lawyer should consider how a jury may view the claim – and how their view may affect the presentation of the overall case. That requires asking hard, specific questions of clients about how the injured spouse's condition affected the marriage in a tangible and explainable manner. If there are not any such effects, or if they are not substantial, then the claim is likely not worth pursuing.

A lawyer should also consider jurors' predispositions toward a loss-of-consortium claim, particularly where the underlying injury is not permanent or wholly disabling to the injured spouse. Some jurors may be unwilling to sympathize with, and compensate, an uninjured spouse when the injured spouse is already asking the same jury to award a substantial amount of money to compensate for his or her personal injuries. Those same jurors may view the marital vow of "in sickness and in health" as a spouse's unequivocal obligation to love, care for, and support the other spouse (following an injury or decline in health) without compensation from others. That perception can be particularly strong where the spouse's injury only temporarily impacts the marriage or has a small effect on the marital relationship. In those circumstances, a concern arises that the consortium plaintiff may be perceived as "double dipping" alongside the injured spouse's recovery or advantageously using the spouse's injury to enhance the couple's recovery.

Finding the skeletons in the closet

Of course, those general concerns should not scare off a loss-of-consortium claim grounded in solid facts. But no matter the nature of the underlying injury, understanding the clients' marriage prior to the injuries is an essential consideration in bringing the claim and presenting it to a jury. A lawyer should know whether the client and spouse have a close marriage, whether they have ever lived separately, filed for divorce or legal separation, or attended marital counseling in the recent past. That investigation should not just include the clients, but also family and close friends. Failing to take those steps prior to presenting the claim at trial can lead to a nightmare scenario: Impeachment of your clients on the strength of their marriage, which can destroy the credibility of the entire case. Jury verdict reports are littered with instances in which consortium plaintiffs were forced to drop their claim mid-trial after a defendant elicited information about a damning, pre-injury occurrence like a legal separation or temporary restraining order. That kind of impeachment can leave both clients' credibility – and the primary injury claim – in tatters.

Early discussion with clients is essential

Thus, before asserting a loss-of-consortium claim or presenting it at trial, a lawyer should have a detailed and meaningful discussion with the clients about the strengths and risks of the loss-of-consortium claim along with a recommendation about whether to maintain the claim through trial. It is important to keep in mind that, even where the facts counsel against maintaining the claim, there is a danger of minimizing the uninjured spouse's claim and harming the relationship with the clients. Framing the discussion properly avoids a perception by your clients that you "don't care" about their injuries or "don't believe" them.

It is therefore helpful to provide the overall strategic picture to the clients while explaining the general risks – such as potential hostility to a small or hard-to-define claim – or specific ones – like a rocky relationship prior to the injuries. Clearly, in instances where the clients' marriage was impaired before the injuries, or where the client's injuries have not substantially affected the marriage, you may wish to counsel the clients against maintaining the claim. In other instances, however, an attorney may determine that even a small loss-of-consortium claim makes sense to carry through to trial – perhaps the client is a great witness, or the effect on the marriage, although discrete, is something the lawyer believes the jury will understand and empathize with.

As we said at the outset, although every loss-of-consortium claim is unique, the strategic considerations that drive whether to bring them should be considered in every applicable instance. An attorney should not be afraid to have a tough conversation with his or her clients about the viability and potential impact of a loss-of-consortium claim he or she perceives to be weak or potentially damaging to the overall case. Failing to have these conversations or to raise these strategic considerations can catch both the attorney and clients unaware at the time of trial.

Presenting the loss-of-consortium claim at trial

If you do maintain your loss-of-consortium claim through trial, then awareness of some basic strategy is essential. Since the jury or finder of fact is given wide latitude in assessing damages for loss of consortium, it is imperative that the plaintiffs' attorney thoroughly understand the nature of the loss by the uninjured spouse, and properly present the claim to the jury. At its core, that requires spending enough time with the clients and other witnesses to be able to tell the "before and after" – which, after all, is precisely what the loss-of-consortium claim is all about.

In the best case scenario, the loss-of-consortium claim will dovetail with the primary injury claim. Thus, testimony concerning the injured spouse's limitations – whether from the clients, friends and family, or expert witnesses – will

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simultaneously explain the spouse's loss of consortium. In that instance, there is much less danger that a jury will be distracted from the primary claim or negatively view the consortium claim. Instead, the jury will be able to view the injury's full impact on both the injured spouse and the uninjured spouse through the marital relationship.

Notwithstanding, there is still a tricky balance between overselling and underselling the consortium claim. An overarching fear is for the jury to perceive the uninjured spouse as greedy, bitter, a complainer, or worse, looking for payday and a chance to get out of the marriage. However, on the other hand, the jury must truly understand the nature and extent of the uninjured spouse's suffering as a result of his or her spouse's inability to contribute physically, emotionally, and economically to the marital union following the incident. An attorney must strike a balance between saying too much and saying too little. While there is no one-size-fits-all rule for toeing that line, in our view, the closer the "loss of consortium" testimony is to the underlying injury, the more likely it will avoid a negative perception from the jury or distract from the primary claim.

Conclusion

If you are considering bringing a loss-of-consortium claim on behalf of the spouse of an injured plaintiff, it is extremely important that both spouses clearly understand that the closeness of their marital relationship, including their sexual relations, will be extensively investigated, and will likely be called into question by the defendant's lawyer should they choose to bring this claim. Further, you should take a hard look at the merits and viability of the claim and consider whether it may impact your overall presentation of the case. Although an attorney should not simply decide that a loss-of-consortium claim should not be asserted without discussion with the clients, you should present a clear recommendation to the clients about the claim and should not be afraid to recommend forgoing or dismissing it when the risks outweigh the potential benefit and the clients agree in writing.

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