Loss of consortium claims

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The common law recognised that a husband had a proprietary interest in his wife, and her services gave rise to a right of action when that interest had negligently been invaded by a third party. Thus, a husband might recover the loss he had suffered by being deprived of the comfort and society of his wife and the services which she had rendered to him. In Queensland this action remains, but the wife may bring the action pursuant to an entitlement statutorily afforded to her by Section 3 of the *Law Reform (Husband and Wife)* Act 1968 now "relocated" to Section 13 of the *Law Reform Act* 1995. Both actions are assessed in the same manner.

It should be noted that it was not the spouse that gave the rise to a right to bring an action for loss of consortium, but it was the status of marriage which common law recognised as conferring that right. See *Mallett v Dunn* (1949) 2 KB 180. Thus, in order to sustain an action the parties must be legally married. No action for loss of consortium exists to parties in a de facto relationship nor does a consortium action continue after the death of the spouse, nor does it survive the dissolution of marriage. See *Parker v Dzunza* (1979) QdR 55 at 57 per Hoare J and *Locher v Turner* (1995) Aust Torts Reports 81-336.

A claim for loss of consortium is regarded as a right of the spouse independent of the cause of action which subsists for the injured spouse. See *Curran v Young* (1965) 112 CLR 99. All that is required to maintain an action for loss of consortium is that the plaintiff's spouse suffered injuries as a result of the negligence of the third party causing the plaintiff a deprivation or impairment of the spouse's society and services. The fact that the injured spouse was partially at fault in causing the accident leading to a reduction in damages for contributory negligence will not result in a diminution of the damages recoverable by the plaintiff in the consortium action. See *Locher v Turner* (supra).

In most cases, injuries suffered by the spouse will be physical. However, a loss of consortium action is not precluded because the spouse has undergone no more than psychological harm of nervous shock. See *State Rail Authority (NSW) v Sharp* (1981) 1 NSWLR 240.

The statute of limitations applies to actions of this type, meaning that proceedings must be commenced within three years of the date of injury, being the time at which the cause of action arose. In those circumstances, it would appear that the parties must at the time of injury be lawfully married at the time the injury to the spouse is sustained in order to found an action for consortium and that such an action cannot subsequently be "created" by the parties' subsequent marriage. I am not aware of any authority where this issue has been raised.

The assessment of any claim

The damages which are able to be claimed pursuant to this action fall under three heads:

1. medical and similar costs incurred or to be incurred by the plaintiff on behalf of the injured spouse;
2. the loss which the plaintiff suffers as a result of the injured spouse being able to carry out services around the house (loss of servitium); and
3. the "temporal and material" as distinct from the "spiritual" aspect of the loss of society necessarily borne by the plaintiff (loss of servitium). See as to this latter distinction *Toohey v Hollier* (1995) 92 CLR 618.

The loss is collectively referred to a loss of consortium.

It is in respect of the first two aspects of any plaintiff's claim which would ordinarily be included in the action by the injured spouse, thus giving rise to questions of "overlapping" or "double recovery".

In the first instance, these expenses would clearly be included as a claim for special damages. Accordingly, claims made under this head in a loss of consortium action would be made infrequently.

It is proper to quantify the plaintiff's loss of the injured spouse's services on the basis of a reasonable cost of replacement services. The difficulty of the identification of those services as distinct from those included in the injured spouse's claim for *Griffiths v Kerkemeyer* damages looms large.

It is easy to envisage the situation where the injured spouse has, by virtue of the injuries sustained, had a need for domestic services created. Those services which had formerly been rendered to the plaintiff were now in fact rendered by him. Creation of this need gives rise to the *Griffiths v Kerkemeyer* claim in the injured spouse's action, but is also capable of giving rise to the loss of servitium aspect of the plaintiff's loss of consortium action. Whilst it is clear that the existence of a claim for *Griffiths v Kerkemeyer* damages by the injured spouse will not "whittle down" an action for loss of consortium, there can be no double recovery. See *Norman v Sutton* (1989) 9 MVR 525 and *Johnson v Nationwide Field Catering Pty Limited* (1992) 1 QdR 494.

When both the injured spouse and the plaintiff have their actions heard together, the trial judge is able to assess the loss attributable to each spouse and ensure that there is no double recovery. The difficulty arises however, when there is separate actions by the injured spouse and the plaintiff. In such a case where the injured spouse's claim is settled, the pleadings in the settled action determine what was decided or compromised in the case. Accordingly, if a claim for *Griffiths v Kerkemeyer* damages is thereby made, it

will be presumed that that claim is fully satisfied by the settlement, and accordingly a subsequent claim for loss of servitium would be precluded. See *Thorne v Strohfield* (1997) 1 QdR 540 per Pincus JA and Helman J.

A plaintiff in a loss of consortium action where the actions are "split" could find him or herself in a situation whereby they are confined to the loss of consortium aspect of the claim only for in the absence of evidence (which would appear to be encompassed solely by reference to the pleadings) that there is some room for complaint concerning that aspect of the original settlement, no such claim can be maintained. In this context, the views expressed by the New South Wales Court of Appeal in *Norman v Sutton* (supra) at page 528, where due to the generality of the pleadings generally filed in the New South Wales District Court, reference could not safely be had to those documents alone to determine what was ultimately decided in the original action, must now be viewed with some caution in Queensland.

In considering the third aspect of the assessment of loss of consortium claim, it must be demonstrated that the injuries sustained by the injured spouse resulted in a temporal loss such as a deprivation or impairment of the enjoyment and benefits derived from spousal society and companionship and not merely a claim for diminished happiness, lessened spiritual enjoyment of home life or mental distress, which are not recoverable. What may be recovered is a recompense for such matters as the diminution in the extent or quality of sexual relations and companionship and the loss of aid, comfort and advice. See *Keally v Jones* (1979) 1 NSWLR 723 at 750 per Samuels JA, *Johnson v Kelemic* (1989) FLC 90-657 at 78,491 per Reynolds JA at 78,493 per Samuels JA and *Toohey v Hollier* (supra) at 624.

It must be recalled that damages for loss of consortium must be assessed conservatively. See *Andrewartha v Andrewartha* (1987) 44 South Australia State Reports 1 Aust Torts Reports 80-084 at 88,440 and *Hodges v Frost* (1984) 53 ALR 373 at 389 per Kirby J.

The effect of *Thorne v Strohfield* is to, in my view, largely abolish actions for loss of consortium as a separate proceeding. For in most cases, the bulk of verdict would comprise the amount of damages assessed for the value of the services around the home which the injured spouse is no longer able to perform. If such a claim is not maintainable by virtue of having been incorporated or presumed to be incorporated into settlement of earlier proceeding, then it is only the third aspect of damages which remains liable to be recovered in which case being assessed conservatively would be of a fairly modest amount. Thus, separate proceedings for loss of consortium where a *Griffiths v Kerkemeyer* claim has been previously litigated or settled may provide very little scope for the continuation of a separate action for loss of consortium.

Practical concerns

Where a loss of consortium action is contemplated,

(1) it should be joined to the original proceedings or heard at the same time as the claim by the injured spouse; and,
(2) the pleadings should particularise the loss claimed in respect of each spouse.

Furthermore, there are practical reasons for joining the actions on the ground that the evidence of negligence in the injured spouse's claim is also essential evidence which is necessary to found the action for loss of consortium. If the actions are heard separately then, in those circumstances, that evidence must be repeated or gathered afresh if the injured spouse's action settled prior to the more expensive step of obtaining experts' reports and the like have been taken.

Of material concern to any plaintiff is an ability to be able to recover any judgment subsequently awarded in his or her favour. This ultimately resolves itself into a question of the identity of a relevant insurer. It is clear that indemnity will presently be afforded to the owner of any motor vehicle when claim is made for loss of consortium and/or servitium under the *Motor Vehicle Insurance Act* 1936, see *GIO v Crittenden* (1966) 117 CLR 412. It would appear that under the provision of the *Motor Accidents Insurance Act* a claim for loss of consortium would be identified as they are "claims for personal injury" the word "for" being interpreted to mean "in respect of".

On the other hand, a claim by a worker's widow under the *Law Reform (Husband and Wife) Act* 1968 for damages for loss of consortium was not covered by the employer's policy issue under the 1916 workers compensation legislation or the *Workers Compensation Act* 1990. See *Re: Mt Isa Mines Limited* (1994) 2 QdR 62. Therefore, claims for loss of consortium are, unless some other policy of insurance be identified, paid by the employer "personally".

Having regard to the fact that claims are assessed conservatively and, where claims for the loss of servitium may have been absorbed by a claim for *Griffiths v Kerkemeyer* in another action which has now been heard or has settled, claims should generally be brought in the Magistrates Court.

Prior to institution of any such claim, it would appear that insofar as motor vehicle insurance is concerned, a notice pursuant to Section 37 of the *Motor Accidents Insurance Act* should be given. For Section 37 uses the words "claim for personal injury" which has been interpreted to mean "in respect of" or "consequential upon" which envisages a loss or impairment of consortium being in respect of or consequent upon injury to a spouse. The same reasoning was adopted by the Court of Appeal in *Cardakliya v Mt Isa Mines Limited* (1995) 1QdR 500 where it was held that a statement of loss and damage under Rule 149A of the District Court Rules was required to be supplied where there was an action for loss of consortium. Therefore, similar reasoning would apply to claims proceeded in the Magistrates Court and by analogy to the *Motor Accidents Insurance Act*.

As noted previously, the evidence on liability in respect of an action for loss of consortium will be identical as in the injured spouse's action. So too is the evidence relevant to the injured spouse's condition. Thus, the medical reports as the injured spouse's condition should be available at any trial claiming damages for loss of consortium, although it is the impact of those injuries not upon the injured spouse which is directly relevant, but is a necessary prerequisite to show the direct consequences of those injuries upon the plaintiff.

If two separate proceedings are on foot claiming damages for negligence and damages for loss of consortium, an admission of liability between an employer and the injured spouse may not necessarily be binding in respect of the action for loss of consortium for such an admission to give ▶

rise to an estoppel there must be the same parties involved. This cannot be said to be the case in the loss of consortium action. Therefore, where a defendant settles an action at an early stage for an injured spouse, this may have the effect of placing a greater onus upon the plaintiff in the loss of consortium action to prove negligence, thereby incurring greater expenses which may be ultimately worth more than what the claim is valued at. Therefore, before separate proceedings are instituted, the prospects of success in respect of liability must be carefully appraised, including the costs of proving that negligence before those proceedings are instituted in another jurisdiction claiming damages for loss of consortium.

This position is being maintained in the present workers compensation legislation - see Section 316 *WorkCover Queensland Act* 1996. ■

Jeffrey Rolls, a barrister from Brisbane, presented the above paper at a recent APLA Queensland Litigation at Sunrise seminar. For more information on loss of consortium claims, contact Jeff, **phone** 07 3236 1211 or **fax** 07 3236 2006.

MS sufferers: can they bring a claim?

Kennedy v London Fire & Civil Defence Association

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For the first time, an English court has decided that a plaintiff's previously undiagnosed and asymptomatic multiple sclerosis (MS) was rendered symptomatic by trauma. The decision in *Kennedy v London Fire and Civil Defence Association*, (as yet unreported but transcript available) by His Honour Judge Kenny, sitting as a High Court Judge, judgment given on 20 June 1997, opens up the possibility that other MS sufferers, whose disease comes to light after trauma may be able to recover substantial damages to compensate them for MS and its financial consequences.

In *Kennedy*, the plaintiff was hit by a negligently driven fire tender at a junction in Central London. He sustained, inter alia, a concussive head injury and soft tissue injuries to his cervical spine. Within days of the accident, he began to experience paraesthesia in the fingers of his left hand which eventually spread to the right hand, facial numbness and dizziness, Extensive investigation, including MRI scans of the cervical spine and immunological examination of cerebrospinal fluid, eventually demonstrated undisputable MS, an incurable disease which intermittently destroys the myelin sheath surrounding the nerve pathways which carry electrical signals to and from the brain.

The plaintiff's case on causation (fought over eight days) was supported by expert evidence from two internationally-renowned professors of neurology whose work in this field has been widely reported in the medical literature. Relying upon the results of research and clinical studies conducted over many years by themselves and others worldwide they became satisfied that it is possible to demonstrate a link between trauma and the onset of MS where the trauma has resulted in a temporary breakdown of the blood-brain barrier such as occurs following a soft-tissue injury to the cervical spinal cord or with concussion.

Their thesis was that if an otherwise healthy patient develops signs or symptoms of MS within about three months of a breakdown in the blood-brain barrier, the onset of the disease can normally be attributed to the trauma causing the breakdown.

In the instant case, the causative link was that the whiplash and/or concussion had caused a breakdown in the blood-brain barrier and a careful scrutiny of the medical records confirmed that within three months of the trauma the plaintiff was exhibiting symptoms referable to MS.

The court rejected the defendants' expert neurological evidence to the effect that available research was insufficient to establish a reliable link between trauma and the onset of MS and the defendant's submissions that any such link could not be made on the evidence in this case.

In reality, the judge was presented with sufficient scientific and other evidence to enable him to conclude on the balance of probability that this plaintiff's MS was "triggered" by his injuries. The judge also accepted that it was unlikely that this plaintiff would have developed MS during his lifetime but for his injuries.

Although the cause of MS remains obscure, the decision may be of profound importance to potential plaintiffs who have sustained minor injury to the neck or head and go on to develop MS.

Total damages were assessed at £450,156, less 25% for agreed contributory negligence. General damages were assessed at £75,000 (which sum reflected other injuries including permanent urinary incontinence and impotence not caused by the MS). In addition substantial sums were awarded for past and future loss of earnings and care.

It is important to note that the decision does not establish that trauma causes MS. It merely decides that in some cases a court may be persuaded that trauma can trigger MS which would not otherwise have affected the individual. The decision raises the possibility that other demyelinating disorders (the group of disease processes of which MS is one), and even other classes of progressive neurological disorders may also be triggered or in clinical terms "caused" by trauma.

Practitioners should be alert to this development. Such potential claims should not be dismissed without further enquiry. ■

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