

Loss of Consortium

by Darren Tobin

As a Family Law Attorney, you are regularly called upon to help families going through a difficult period. Often, prospective clients are unsure what type of attorney they need and have sought your help simply because of your title, Family Law Attorney. In many such cases, the difficulty these families face stems not from the actions of any one family member, but instead from an external problem that someone outside of the family has caused. This article addresses loss of consortium claims in the State of Georgia, and how the laws of this State treat a physically uninjured spouse who nonetheless has experienced an injury as a result of his or her spouse's injuries.

Under Georgia law, a loss of consortium claim includes "society, companionship, love, affection, aid, services, cooperation, sexual relations and comfort, such being special rights and duties growing out of the marriage covenants." *Smith v. Tri-State Culvert Mfg. Co.*, 126 Ga. App. 508, 510 (1972). A loss of consortium claim is not only about a couple's private sexual relationship. Though it certainly does include the couple's physical intimacy as one factor, it also encompasses the disruption of a couple's overall quality of life. An injured spouse who cannot perform his or her usual household duties (i.e. driving the children to and from extracurricular activities, cooking meals for the family, cleaning the house, running errands, volunteering at school activities, etc.) will inevitably be forced to rely on the uninjured spouse to pick up the slack. Invariably that additional work not only imposes an added time commitment, but it also introduces a new element of stress on the uninjured spouse. Moreover, the uninjured spouse likely has to contend with his or her injured spouse's changing personality and likely complaining. This emotional distress is recoverable through a loss of consortium claim,

and belongs exclusively to the uninjured spouse.

Nonetheless, simply determining that the uninjured spouse has a viable loss of consortium claim, does not automatically mean he or she can bring an action. A loss of consortium claim is a derivative claim, meaning that it only exists as long as the primary injury claim from which it derives exists. *Miller v. Crumbley*, 249 Ga. App. 403, 404, (2001). Thus, if the injured spouse settles his or her claim, then the loss of consortium claim disappears. In the unusual event that the injured spouse is late in filing an action and his or her statute of limitations has run (in Georgia the statute on most personal injury actions is two years from the date of injury O.C.G.A. § 9-3-33), it does not necessarily mean that the loss of consortium claim has expired as well. *Parker v. Silviano*, 284 Ga. App. 278, 280, (2007). A loss of consortium claim has a four year statute of limitations so even if the underlying action is dismissed or barred from being filed by the two year statute, the uninjured spouse can still pursue his claim. O.C.G.A. § 9-3-33.

A consortium claim has two elements: liability and damage. Liability is established by showing solely that the responsible party (neither spouse) has tortiously injured the consortium claimant's spouse; damages are established as in any other tort case. (*Smith v. Tri-State Culvert Mfg. Co.*, supra at 511.)

The most obvious injury that the injured spouse must be shown to have suffered is a physical injury. But based on a reading of the case law, there is no requirement that a physical injury per se needs to be suffered. In *Sevcech v. Ingles Markets, Inc.*, a wife tried bringing a loss of consortium claim on the grounds that her relationship with her husband had deteriorated as a result of her husband's changed behavior after he was falsely accused of shoplifting. There, the wife ultimately was unsuccessful in recovering on her loss of consortium claim, however, her inability to recover had nothing to do with the fact that it was the husband's reputation that was injured (versus say the husband suffering a physical injury), but rather on the merits of the loss of consortium claim itself. Accordingly, the *Sevcech* case supports the proposition that a spouse can recover damages for loss of consortium even when his or her spouse has not suffered a physical injury. (See *Sevcech v. Ingles Markets, Inc.*, 222 Ga. App. 221, 225, (1996).) So long as one spouse has suffered enough of an injury – irrespective of whether that injury is physical, emotional, or by reputation – the uninjured spouse can recover damages if the injury is proven to have interfered with the marriage.

As you consult with a prospective client and you are unsure whether there is a loss of consortium claim worth pursuing, consider the following: was this couple having marital problems such as voluntary separation from one another at any time; have there been any allegations of



domestic abuse or family violence petitions filed; how engaged are they intimately; have they sought marital counseling; and what type of roles did they each play in their children's lives. Remember, you are asking these questions as they relate to the couple's relationship before the alleged injury occurred and as they relate to the couple's relationship after the alleged injury occurred. If it is plainly apparent that this couple's marriage was facing dissolution well before the injury ever occurred (i.e. constant arguing, a dormant sexual relationship, allegations of adultery etc.) then there is no conceivable way that the uninjured spouse can claim the dissolution of the marriage was caused by the injury. If however during the course of your consultation you realize that this marriage was a happy and healthy one, but that the dynamic was abruptly altered following the injury to the one spouse, then you may very well have a viable loss of consortium claim in front of you.

Establishing that your clients have a viable loss of consortium claim only means that a jury can award the uninjured spouse something. Like pain and suffering, the enlightened conscience of the jurors will guide the amount of damages awarded. (*Smith v. Tri-State Culvert Mfg. Co.*, supra at 511.) A claim for 'loss of consortium' does not include lost wages, medical expenses, or loss of earning capacity. (*Branton v. Draper Corp.*, 185 Ga. App. 820, 821 (1988).) Further, a spouse can only recover for the injuries as they exist during the joint lives of the husband and wife. (*Marzetta v. Steinman*, 117 Ga. App. 471 (1968).) Given the opportunity and the right set of facts, a jury will recognize a loss of consortium argument and value the extraordinary damage to an uninjured spouse and to the couples' marriage and partnership.

In addition, a claim for loss of consortium is based not upon injury to the body of the claimant but instead solely upon the claimant's property right arising out of the marriage relationship to the love, companionship, and conjugal affection of the spouse. (*Bartlett v. American Alliance Ins. Co.*, 206 Ga.App. 252, 254(1) (1992).) In a typical injury action (assuming there is insurance available to cover the incident), under a standard insurance policy, an uninjured spouse is not entitled to recover from the liability insurer (the insurance company) for damages for loss of consortium independent of the injured spouse's claim under the bodily injury liability coverage in the policy. (*Bartlett v. American Alliance Ins. Co.*, supra at 255(1).) In other words, most liability policies are written in such a way that loss of consortium claims are included within the "single injury" limits. When the per person's maximum insurance under the policy has been paid on account of the injury to the injured spouse, then the loss of consortium claim belonging to the uninjured spouse will not be paid by the liability insurer. (*State Farm Mut. Auto. Ins. Co. v. Hodges*, 221 Ga. 355 (1965); *Thompson v. Allstate Ins. Co.*, 285 Ga. 24, 26-27 (2009).) Practically, this means the husband and wife will have to share the recovery. *FLR*



Darren. Tobin is a Plaintiff's Attorney practicing in the areas of Personal Injury and Wrongful Death. Tobin now focuses on helping families rebuild their lives after someone they care about has been injured as a result of someone's negligence or by some product's defective design. He is regularly brought in by other lawyers to help evaluate

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