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**Finola McKinley v The Minister for Defence, the Minister for Justice, Daniel Green, Ireland and the
Attorney General**

High Court 15 November 1989

Supreme Court 27 July 1992

Conaghan J 27 July 1992

Does a wife have a cause of action for loss of consortium following an injury to her husband which renders him permanently sterile and impotent and unable to render services to her which previously he could perform? This is in essence the question we are asked to address.

The case comes before us as an appeal from a trial of a preliminary issue, namely whether the plaintiff's statement of claim discloses any cause of action. The assumed facts, in so far as they can be ascertained from the statement of claim and reply to a request for particulars, are as follows: In 1981, Finola McKinley's husband, Seamus, a member of the armed forces, was severely injured in an explosion allegedly caused by the negligence and breach of the duty of the first and second defendants. The injuries sustained were serious and included permanent damage to the scrotum which rendered Seamus McKinley sterile and impotent. Seamus spent some time in hospital being treated for his injuries during which period Finola was understandably anxious and distressed. Deprived of her husband's society and companionship, she had to cope alone with domestic and child-care responsibilities. When Seamus eventually returned home, McKinley family life was very different. Seamus and Finola could no longer engage in normal sexual relations and all prospects of having further children had effectively been eliminated. Seamus became depressed and irritable after the accident, placing further strain on marital accord. He could no longer help Finola with many of the normal household chores he had hitherto undertaken. For example, Finola had to learn to drive, a responsibility which Seamus has previously shouldered alone. In sum, and as stated in reply to the request for particulars, 'the continuity, stability and quality of the plaintiff's relationship with her husband and family has been, and continues to be, impaired.'

At common law *there* has long existed an action *per quod consortium amisit* by virtue of which a husband can sue another for loss of his wife's consortium. The action is unusual for at least two reasons. First, it is unusual in

conferring a right of action on someone other than the primary victim of a tort. In this sense, loss of consortium is a parasitic claim dependent upon injury to a person with whom the plaintiff has a particular relational connection. The nearest analogy here would be a claim for nervous shock which allows someone to sue, albeit within closely circumscribed circumstances, for the psychiatric harm they sustain after witnessing a serious accident to a loved one (*McLoughlin v O'Brian* [1983] AC 520; [1982] 2 WLR 982; [1982] 2 All ER 298). The action for loss of consortium is unusual for yet another reason. Relationally-based in marriage, it is traditionally a one-sided action which vests a claim in the husband with respect to injury to the wife but not a claim in the wife with respect to injury to the husband. The peculiarity of this position can only be understood historically. The action for loss of consortium was part of a package of common law rights, which also included actions for enticement, harbouring and criminal conversation, all of which were premised upon, and lent support to, a medieval notion of the family based upon the *potestas* of the husband/father. In *Best v Samuel Fox & Co Ltd* [1952] AC 716; [1952] 2 All ER 394, in which the English House of Lords, in circumstances similar to those before us today, declined to extend the action for loss of consortium to a wife, Lord Goddard observed:

The passages cited to us from Bracton's *De Legibus Angliae*, edited by Sir Travers Twiss, vol II, p 547 [Rolls Series, vol 70], Blackstone's *Commentaries* (1768) Book III, Chapter 8, and Holdsworth's *History of English Law*, vol VIII, p 430 – and there are no books of higher authority – all show that the action which the law gives to the husband for loss of consortium is founded on the proprietary right which from ancient times it was considered the husband had in his wife' (at 731; see also the comments of Lord Morton at 735).

The idea that a husband has any proprietary or quasi-proprietary right in relation to his wife is of course anathematic to modern conceptions of the marital relationship as a partnership of equals. For this reason, many common law jurisdictions have eschewed the action for loss of consortium. In England and Wales, for example, the action was abolished by the Administration of Justice Act 1982, s 2(2). Similarly, New South Wales abolished the action in the Law Reform (Marital Consortium) Act 1984. Other jurisdictions have retained the action but extended it to wives, thus eliminating the *de jure* discrimination which so offends modern mores. The State of South Australia and the State of Alberta, Canada, have enacted legislation to this effect (see respectively Wrongs Act 1936 (SA) s 33; Domestic Relations Act RSA, 1979 c 113 as amended by SA 1973 c 61). Similarly, in the United States, the majority of states now allow wives to bring a claim for loss of consortium (Law Reform Commission, *The law relating to loss of consortium and loss of services of a child*, Working Paper No 7, 1979 ch 4 p 22). Considering the common law position overall then, jurisdictions have tended to go down one of two routes, either to reject the consortium action

as a relic of times past with no place in a modern, egalitarian legal system or to rehabilitate it by making it gender-neutral and in some cases, extending the right to sue to family members other than spouses.

As a legal concept, consortium is frustratingly vague and not susceptible to precise definition. In general terms it is thought to encompass the society and services – *consortium* and *servitium* – which one spouse might be expected to render to another but inevitably, the nature of those spousal expectations varies over time and space, depending on how the marital relation itself is legally and socially conceived. According to my learned colleague, Hederman J ‘consortium means living together as husband and wife with all the incidents that flow from that relationship’. A fuller elaboration is offered by Schroeder J A in the Canadian case of *Kungl v Schiefer* (1960 25 DLR 2d 344) who states that ‘broadly speaking companionship, love, affection, comfort, mutual services, sexual intercourse – all belonging to the marriage state – taken together make up what we refer to as consortium’ (at para 11). Note that a number of these features of consortium are affective in character and not easily reduced to monetary value. By contrast the notion of services – and particularly the traditional domestic services which a wife was expected to perform for her husband and family – can be formulated in monetary terms drawing upon the value of purchasing such services in the open market. For this reason, among others, the services element of the consortium action and the material consequences of the loss of consortium more generally tend to be the main focus of damages quantification and assessment (*Toohey v Hollier* (1955) 92 CLR 618).

Against this general background summarising the state of the consortium action in modern common law jurisdictions, I turn directly to the question before this Court: does Finola McKinley have a right to sue for the loss of consortium following an accident to her husband caused by the negligence and breach of duty of the defendants?

The presumed legal position to date has been that the claim vests in the husband only. This position is reflected in the judgments of this Court in *Spaight v Dundon* [1961] IR 201;(1961) 96 ILTR 69 and *O’Haran v Devine* (1964) 100 ILTR 53 and is at least implicit in the text of the Civil Liability Act 1961, s. 35(2)(b). The Law Reform Commission, reviewing the law of consortium in 1979, offer a more circumspect position, observing that ‘the question whether a wife may sue in respect of loss of consortium resulting from injury to her husband has not so far been determined in this country’ (LRC Working Paper No 7 1979 p 3).

It is not contested by either party that the confinement of the right of action to a husband only violates the constitutional principle of equality enshrined in Article 40, s 1 of the Constitution of Ireland, the first sentence of which states: ‘All citizens shall, as human persons, be held equal before the law.’ The gender-specificity of the traditional consortium action clearly offends this unequivocal guarantee. Nor has it been argued before the Court

that the second sentence of Art 40, s 1, which states that '[the principle of equality] shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social functions', serves as a justification for limiting the right to sue to husbands only. Indeed it is difficult to see how any such argument could be mounted without relying on problematic and now wholly discredited assumptions about the nature of marriage as a hierarchical relation of male dominion and female subjection.

What then is the constitutional position? According to Article 50, s 1: 'Subject to the Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect...' If, as has been agreed, the action for loss of consortium in its traditional gender-specific form is indeed inconsistent with the constitutional guarantee of equality under Art 40, s 1, does the application of Art 50, s 1 render that action invalid in its entirety, on grounds of constitutional frailty, or does Art 50, s 1 allow the action to survive except 'to the extent to which [it] is inconsistent' with the equality provision? In other words, is the effect of the Constitution to extinguish the husband's right to bring a consortium claim or does the guarantee of equality require the extension of the right to wives on the same terms as husbands?

According to the defendants, the action for loss of consortium did not survive the enactment of the Constitution of Ireland. They further contend that because the basis of the right derives from a medieval conception of wives as the property of their husbands, it cannot be 'evolved' into modern times because its whole evolution was based on an inequality of status. In short, without that inequality of status, there is no base upon which the consortium action might comfortably rest.

Counsel for the plaintiff argue that the effect of the relevant Constitutional provisions is to extend the right to claim for loss of consortium to wives. They contend that from a constitutional position, there is nothing intrinsically objectionable in the right and that the correct constitutional solution is therefore to sever the discriminatory element but retain the substance of the claim. They further maintain that the Court should seek to place a constitutional construction upon the common law, to encourage its evolution along lines which allow common law and constitutional principles to cohere.

The parties are also in disagreement over the question of whether the action for loss of consortium lies for partial as opposed to total loss of consortium. This issue was argued at the preliminary issue hearing in the High Court, Johnson J ruling that the plaintiff should be allowed to continue her claim whether or not it is based on total loss of

consortium or mere impairment. I will return to this issue after I address the Constitutional question to which I now turn.

This is undoubtedly a difficult issue, yielding no ready resolution. It is no surprise therefore that my judicial colleagues are divided as to the correct outcome. The situation lends itself to conflicting interpretations, as the arguments before the Court reflect.

With this in mind, I turn first to consider the question of whether or not the action for loss of consortium can survive the taint of constitutional frailty. If it is established that it can, it will then be necessary to determine in what form and upon what basis a constitutionally rehabilitated action for loss of consortium might stand.

Confronting the question of whether it is possible to sever the substance of the consortium right from its discriminatory restriction to husbands only, Finlay CJ takes the view that severance is not possible because the discriminatory element underpins the whole basis of the consortium right and is therefore an inherent element of it. I respectfully disagree. Historically this was the case, but more recent common law experience in those jurisdictions where the action has taken a gender-neutral form suggests that the action for loss of consortium adapts quite easily to the loss of the discriminatory element. As Art 50, s 1 states clearly that the laws in force should continue *except to the extent to which they are inconsistent* with the Constitution, we should pause before declaring that a particular legal right, already firmly entrenched in the common law, cannot survive in an adapted form. Taking the clear wording of Art 50, s 1 expressly into account, along with the experience of common law jurisdictions where the right has successfully shed its discriminatory form, I therefore conclude that the action for loss of consortium *can* survive the enactment of the Constitution by discarding that element which directly infringes upon the constitutional guarantee of equality.

It might be suggested that discarding the discriminatory element of the old consortium claim, while surmounting the constitutional problem, leaves the action without any clear or principled foundation. This should not of itself present a problem. As the action is a creature of the common law, it is open to the Court to recraft it in such a way as to ensure it is fit for purpose in modern times. Whether we would wish to do this is another matter. It is tempting to succumb to the trend in many jurisdictions simply to discard the action as a relic of times past with no place in a modern legal system. However, once it has been determined that the action for loss of consortium survives constitutional challenge, albeit in an attenuated form, it is not open to the Court to declare that an action so well entrenched in the common law no longer stands. Abolition, if that is considered the wisest course of action from a social policy perspective, is a step which in these circumstances must be taken by legislation.

I thus turn to the question of how the action for loss of consortium should now be conceived and articulated, drawing upon the inherent power of the Court to develop the common law to ensure its fitness for purpose in the context of social change.

My learned colleague, Hederman J, suggests that modern articulation of the right might be based on Art 41 of the Constitution which emphasises the primary status of marriage as the necessary basis of social order and the special protection of and respect given to women as mothers and homemakers. He observes that 'the case therefore is not based on a question of discrimination in favour of men predating the Constitution but rather, in my view, it is based on the status which the Constitution gave to marriage and to married women in particular'. With respect, reliance on Art 41 cannot be correct here as it leads us back to a consideration of consortium in gender-specific terms which, all parties agree, is not consistent with the constitutional guarantee of equality in Art 40. It is certainly the case that historically the action for loss of consortium has resided exclusively in the marriage relationship. It is thus distinct from the parallel action *per quod servitium amisit* which allowed a master to sue for injuries sustained by his servant. That the actions are historically related is undoubtedly the case, Lord Goddard in *Best v Samuel Fox & Co Ltd* observing that the action for loss of consortium 'was in fact based on the same ground as gave a master a right to sue for an injury to his servant if the latter were unable to perform his duties' ([1952] AC 716 at 732). It is also true that a significant element of the action for loss of consortium as traditionally conceived, was the loss of the wife's services, the notion of consortium encompassing both the affective and material dimensions of wifely duty. Certainly, if the action for loss of consortium is to continue to inhere in the marital relation, as Hederman J suggests, then it must reflect a modern conception of what the marital bond entails. In this respect I consider the notion of service, etymologically derived from the Latin *servitium*, understood as a condition of slavery or servitude, to have no place in the modern marital relationship, whether at the behest of the husband or the wife.

An alternative base for the action of consortium is the family. This is the proposed basis put forward by the Law Reform Commission who suggest that the social policy concern to which the action for loss of consortium should be properly directed is 'protecting family solidarity and the continuity of family relationships' (LRC Working Paper No 7 1979 p 36). The LRC propose that the relevant law be amended in such a way as to expand the current action for loss of consortium to members of the family of the injured person (where family is understood to comprise parents and their children) and to create a 'single family action' which can be brought on behalf of all family members. A not dissimilar approach has already been enacted in Ontario where the action has been aligned with the right of dependants to sue in relation to fatal accidents. Under the Ontario Family Law Reform Act s 61(1), the right of dependants to sue where a person is injured or killed as a consequence of the fault or neglect of another

encompasses a wider range of potential claimants than is proposed by the Law Reform Commission with the right to sue vested in individual claimants and not in the family as a single unit.

The idea of extending the action for loss of consortium to family members is not without its attractions and clearly resonates with the special recognition of the family enshrined in Article 41 of the Constitution. At the same time, such a radical reworking of the consortium action raises a range of policy and other considerations which properly require the attention afforded by democratic decision-making processes. While it is open to the Court, indeed incumbent upon it, to develop the common law incrementally to keep step with modern times, and while this may sometimes require, as my learned colleague Hederman J aptly puts it, that we rise to the challenge and 'boldly lay down new principles to meet new social problems', extending the consortium action beyond the confines of the marital relation by judicial fiat alone would, in my opinion, be somewhat bolder than the occasion requires; indeed would stray too close to what my colleague McCarthy J describes as 'judicial legislation'.

Thus far I have determined that the action for loss of consortium has survived the enactment of the Constitution of Ireland but only in so far as it extends to both spouses, that is, is gender-inclusive in its exercise. I have also determined that it is beyond the power of this Court to extend the right beyond the marital relation so that *ipso facto* recognition and respect for the close and intimate bond which marriage creates becomes the basis for and justification of the action for loss of consortium as currently conceived. I have further determined that there is no place within such modern conception of the consortium action for the notion of *servitium*. It remains to be determined what, in practical terms, is comprised in the action for loss of consortium. For what kinds of loss does it provide redress?

At this point it is helpful to turn again to the facts of the case before us. The losses averred by Finola McKinley in her statement of claim and reply to a request for particulars can be itemised as follows:

1. Serious personal anguish, shock, anxiety, distress and trauma consequent upon the injuries to her husband
2. Deprivation of normal sexual relations by virtue of her husband's impotency
3. Inability to have further children by virtue of her husband's sterility, placing further strain upon the marriage
4. Deprivation of her husband's society and company while he was in hospital being treated plus loss of 'all the amenities of family and marriage for the aforesaid period'

5. Impairment of the comfort and companionship ordinarily associated with the marriage relationship by virtue of the injuries occasioned her husband which tend to make him depressed and irritable
6. Inability and incapacity of her husband to perform those services (especially domestic) that he formerly performed on her behalf.
7. Financial losses sustained by Finola from travelling to and from hospital, paying for babysitters and temporary accommodation during hospital visits.

To what extent do these losses fall within the scope of appropriate recovery for loss of consortium understood in terms of recognition and respect for the close and intimate bond of marriage? Thus expressed, consortium is concerned primarily with redressing relational harm, the harm to the quality of the relationship between the spouses prior to the accident. It could be argued that the first loss itemised is not relational, that is, it is expressive not of a harm to the marital relation but rather a harm to Finola McKinley consequent upon her attachment to her husband Seamus. It appears not dissimilar to the kind of bystander harm which is to a limited extent encompassed within the modern law of nervous shock (*McLoughlin v O'Brian* [1983] AC 520; [1982] 2 WLR 982; [1982] 2 All ER 298). Should this fall within the scope of the consortium claim? Such authorities as there are tend to suggest not (*Markellos v Wakefield* (1974) 7 SASR 436 per Hogarth J at 437) and on balance, and bearing in mind the need to provide a coherent basis for the consortium claim in the marital relation itself, I would agree, while acknowledging it may on occasion lead to the drawing of fine distinctions between distress consequent upon seeing one's husband suffering and distress consequent upon experiencing a diminution in the quality of the marital relationship.

It seems to me that the second and third items are clear and distinct expressions of relational harm which constitute a loss both to the wife and the husband: the quality of sexual relations is inevitably affected while the husband's sterility presents a significant constraint upon the couple's exercise of reproductive choice. The fourth and fifth items are expressive of the affective dimensions of the harm suffered and commonly recur in consortium actions particularly in the United States, where as the action has expanded to include both spouses, the focus has shifted away from the traditional concept of loss in terms of wifely services towards greater recognition of the emotional distress occasioned (Margaret Thornton, 'Loss of Consortium: Inequality before the Law' 10 *Sydney L Rev* 259 (1983-85) at 270). In the past, some judges have been chary of recognising and recompensing the affective aspects of a consortium claim, most notably Lord Wensleydale in *Lynch v Knight* who maintained that a wife should not recover for loss of consortium precisely because, unlike the husband, who suffered material, calculable loss as a consequence of the deprivation of wifely services, "the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy" ((1861) 9 HLC 577 at 599). However,

if this was ever the position in law, it is much less so now when tort claims based on emotional distress, whether intentionally or negligently inflicted, have become much more commonplace. Therefore, I see no reason why the fourth and the fifth items listed above should not fall squarely within the scope of a consortium claim.

We come now to the sixth and seventh itemized losses encompassing a claim for loss of services and financial losses incurred directly by Finola McKinley consequent upon her husband's injury. I have already expressed the view that a claim for loss of services should not constitute a part of any modern action for loss of consortium. Some might suggest that a primary virtue of the consortium action, at least as a matter of practice, is to allow those who suffer concrete, material losses (whether conceived as services or benefits) as a consequence of injuries to a spouse, to bring a claim. However, the need for additional care and support which injury occasions and similarly the constraints that injury places upon one's ability to contribute as one once did to family and domestic life, can also be conceived as a loss directly consequent upon the injury and therefore within the scope of damages recoverable by the injured spouse. In some jurisdictions, this is the direction the common law is taking (*Donnelly v Joyce* [1974] QB 454; *Griffiths v Kerkemeyer* (1977) 139 CLR 161). This solution is not without its difficulties as there is no formal guarantee that the injured spouse will share the benefits of the compensation he or she receives with the spouse who now provides additional care and performs additional household tasks. However, on balance this is the solution I prefer, certainly in so far as the issue falls to be resolved within the scope of judicial development of the common law. There are jurisdictions which have enacted legislation allowing a family member who provides voluntary caregiving support to another injured member of the family to claim directly. The Ontario provision, for example, allows dependants to claim damages for pecuniary loss (actual and travel expenses) as well as an allowance where the claimant provides nursing, housekeeping or other services (Ontario Family Law Reform Act 1986, s 61(2)). While such provisions may well have much to recommend them, the distributive implications are considerable and, it seems to me, raise issues best left to be determined by the legislative rather than the judicial process.

I conclude, then, that the action for loss of consortium in its modern gender-inclusive form is best understood as a way of recognizing and redressing relational harm, specifically conceived in terms of a diminution in the quality of the marital relationship (understood broadly to include all the incidents that ordinarily flow from the close and intimate bond that marriage occasions) consequent upon a tortiously inflicted injury to a spouse. Such a conception is consistent with the spirit and intent of the Constitution, aligns well with judicially engendered developments of the consortium claim in other common law jurisdictions, and offers a sounder basis for the action than has historically been the case.

It follows too that the action thus conceived clearly encompasses claims for impairment as opposed to total loss of consortium.

It is possible that changes in social norms and practices, in particular, changes in the nature and social significance of marriage and newly evolving conceptions of family, may give rise to a need further to develop this cause of action. The common law should resist any impulse to cling to fossilised notions of social organisation and be open to the possibility of reshaping legal norms to accord with social expectations and practices; in the area of intimate human relationships, more than any other, this is particularly so. There is also a case for following the lead in other jurisdictions and turning the difficult questions which the consortium action presents around the nature of the loss and the scope and bases of recovery over to the legislature for thorough and considered deliberation.

I would dismiss the appeal and allow the plaintiff's claim to proceed.