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Loss of Consortium and the Unmarried Cohabitant: *Bulloch v. United States*

Traditionally, American courts have confined the tort action of loss of consortium to a husband's interest in the consortium of his wife.¹ The grounds for this restriction have not been clear,² and in recent years many jurisdictions have recognized a wife's equal interest in the consortium of her husband.³ Attempts to extend the action beyond marriage have met with little success.⁴ However, in *Bulloch v. United States*,⁵ the United States District Court for the District of New Jersey expanded the action's boundaries and allowed an unmarried cohabitant to sue for the loss of her partner's consortium.

I. INSTANT CASE

On May 21, 1977, David K. Bulloch was injured in a scuba diving accident off the coast of New Jersey. Three months earlier David and his wife, Edith, had divorced after twenty-six years of marriage. In spite of their divorce, the Bullochs regularly communicated, and by the time of the accident the couple had reconciled their differences, had decided to resume living together, and planned ultimately to remarry. Upon David's release from the hospital the Bullochs began living together and discovered the accident had rendered David impotent. They did not remarry, however, because they believed a formal marriage would not be legally binding unless it could be consummated. Nevertheless, the Bullochs held themselves out as husband and wife and considered themselves married. Subsequently, David Bulloch filed suit against the United States under the Federal

1. See Foster, *Relational Interests of the Family*, 1962 U. ILL. L.F. 493, 494; Green, *Relational Interests*, 29 NW. U.L. REV. 460, 465-66 (1934); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923); Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 193-94 (1916).

2. Holbrook, *supra* note 1, at 2-4.

3. Comment, *Loss of Consortium and Unmarried Cohabitants: An Examination of Tong v. Jocson*, 14 U.S.F.L. REV. 133, 137 n.35 (1979).

4. See *Chiesa v. Rowe*, 486 F. Supp. 236 (W.D. Mich. 1980); *Tong v. Jocson*, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977); *Sawyer v. Bailey*, 413 A.2d 165 (Me. 1980).

5. 487 F. Supp. 1078 (D.N.J. 1980).

Tort Claims Act⁶ and the Suits in Admiralty Act,⁷ and he was joined by Edith, who claimed damages for loss of consortium.⁸

The government moved to dismiss Edith's claim, arguing that marriage is a prerequisite to a loss of consortium action, but the court denied the motion and held that Edith Bulloch qualified as a plaintiff in the action.⁹ In an effort to resolve the case in accordance with New Jersey law, the district court grappled with a number of possible theories behind the consortium action and finally anchored its decision on the New Jersey policy of extending tort actions to justly compensate injured parties.¹⁰ This policy was expressed in *Ekalo v. Constructive Service Corp. of America*,¹¹ a case in which the New Jersey Supreme Court extended the action for loss of consortium to include the wife as a plaintiff. In *Ekalo* the court rejected the view held by some jurisdictions that the consortium action should be abolished altogether rather than extended¹² and stated that, absent sufficient countervailing policy considerations, tort actions should be broadened to justly compensate proximately injured parties.¹³ The *Bulloch* court recognized that New Jersey had previously declined to create an action for children similar to loss of consortium¹⁴ but determined that the policy considerations which led to that result were inapplicable to unmarried cohabitants.¹⁵ Finding no reasons to limit the consortium action to

6. 28 U.S.C. §§ 1346, 2671-2680 (1976).

7. 46 U.S.C. § 741 (1976).

8. 487 F. Supp. at 1079.

9. *Id.*

10. *Id.* at 1082-86. The court focused on three possible purposes for the consortium action. First, the court considered the action as a means for penalizing unmarried cohabitants for not marrying. Deciding that New Jersey did not intend to punish cohabitants by denying them the action, the court rejected this view. Secondly, the court viewed the action as a tool used by the state to encourage marriage. In discarding this theory, the court noted it was unlikely people marry in order to have a loss of consortium action. Finally, the court accepted the position that the purpose behind the consortium action was to compensate those proximately injured by the tortious acts of others. *Id.*

11. 46 N.J. 82, 215 A.2d 1 (1965).

12. *Id.* at 93, 215 A.2d at 7.

13. *Id.* at 95, 215 A.2d at 8.

14. 487 F. Supp. at 1086 (citing *Russell v. Salem Transp. Co.*, 61 N.J. 502, 295 A.2d 862 (1972)).

15. The court limited its search for countervailing policies to those discussed in *Russell v. Salem Transp. Co.*, 61 N.J. 502, 295 A.2d 862 (1972), in which the court denied a consortium-like claim by children. In that case the New Jersey court focused on problems of increased tort liability, double recovery, remoteness, and speculativeness of damages. The *Bulloch* court concluded these problems did not exist in the case of unmarried cohabitants. First, the court stated, since the extension to unmarried cohabi-

marriage and characterizing consortium as a relational interest that can exist outside of marriage, the court expanded the consortium boundaries to include any "person who, as a result of tortious conduct, loses services, aid, comfort and conjugal fellowship of the type typically shared by spouses."¹⁶

II. ANALYSIS

The *Bulloch* court failed to recognize two significant reasons not to extend the consortium action. First, shifting the consortium line from the objective test of marriage to an inherently subjective test would thrust courts into an unwieldy case-by-case evaluation of personal interests using uncertain and elusive standards. Secondly, such a shift ignores the differences between the interests of married and unmarried persons in their respective relationships.

If recovery is to be granted for third-party harm to personal relationships, courts must have some guidelines to determine which relationships actually deserve compensation. Arguably, the courts could recognize harm to each type of sentimental relationship, using the quality of the relationship merely as a factor in awarding damages. However, such a course would increase tort liability to a staggering degree and could fill the courts with frivolous claims. For example, under this approach an accident would not only leave the tortfeasor liable to the victim and his spouse, it would also leave the courtroom door open to the victim's relatives, friends, neighbors, and acquaintances. For this reason, courts have carefully limited recognition of relational harm.¹⁷

Bulloch implicitly acknowledged the need to limit recovery to deserving relationships; however, the court departed from the traditional boundaries of consortium, asserting that some unmarrieds may suffer harm identical to that suffered by spouses.

tants involved the addition of only one companion claim, there was no danger of substantially expanding tort liability. Secondly, the court considered the fear of double recovery unfounded in *Bulloch* because juries do not assume the presence of a cohabiting partner when awarding damages and so do not include the partner's suffering to any extent. Finally, the court felt that problems of remoteness and speculativeness of damages did not outweigh the need for compensation because the *Ekalo* court had held that such injuries are proximately caused by tortious injury to the spouse and damages would be no more speculative in the case of unmarried cohabitants than in the case of husband and wife. 487 F. Supp. at 1086-87.

16. 487 F. Supp. at 1088.

17. See generally Foster, note 1 *supra*; Green, note 1 *supra*; Pound, note 1 *supra*.

Therefore, rather than fixing the borders of recognized interests at a well-marked legal relationship, the court created an elusive line defined by the quality of a party's expectations and interests in any given relationship. Stating merely that judges and juries can undoubtedly separate "wheat from chaff,"¹⁸ the court gave no guidelines by which to determine that a party's frustrated expectations rise to the level of losses "typically shared by spouses." Must one have an expectation in the services, aid, comfort, and sexual relations of another before damage to any one of those expectations is compensable? Is an expectation in the sexual relations of another party essential to the action? If so, does harm to homosexual relations also qualify for compensation? If not, may close friends who expect services, aid, and comfort but not sexual relations also be entitled to recovery? What if one party's expectations do not coincide with those of the other party—which party's expectations determine the quality of the relationship? Such questions illustrate the difficulty of administering a line which hinges on subjective judgments about personal relationships and individual expectations.¹⁹

This shift from clarity to ambiguity was apparently prompted by the perceived injustice of refusing Edith Bulloch's claim. However, the drawing of legal lines necessarily leaves some parties so close to the line that not allowing their claims appears unfair. This is true no matter where the line is drawn. Shifting the line to include those close to it only moves the boundaries of recognized interests and brings another group close to the line. The *Bulloch* court tried to avoid this problem by defining the line by the nature of the loss suffered rather than the type of relationship involved. This solution has the virtue of eliminating a seemingly arbitrary bar to recovery; however, it also effectively eliminates line-drawing altogether leaving the court to struggle with the cumbersome process of adjudicating interests in innumerable relationships.

It is doubtful that any attempt to draw the consortium boundaries around sentimental relationships which are not also

18. 487 F. Supp. at 1088.

19. The problems of subjective analysis in the consortium area are certainly not new. Even within the clearly marked boundaries of marriage, subjectivity is required to determine the amount of harm to the relationship. However, subjective judgments in the awarding of damages do not bring with them the problems of unlimited liability and frivolous claims that accompany a subjective approach to determining qualified plaintiffs.

well-defined legal relationships will result in a line that can be objectively administered. Personal relationships vary so greatly in content and form that accurate assumptions about the expectations of unmarried cohabitants as a group cannot be made. On the other hand, accurate and justifiable assumptions can be made about expectations within marriage. Marriage differs from the relationship shared by unmarried cohabitants in that marital expectations are accompanied by legal commitment. Marriage entails a legally and socially recognized commitment to furnish such things as service, aid, comfort, and sexual relations to one's spouse. Although it is impossible to enforce these personal obligations,²⁰ the existence of such a commitment permits the court to assume that but for the tortious conduct of a third party those promises would be kept. Unmarried cohabitants, by choosing to forego formal marriage, indicate their commitment to the relationship is not as serious as that in marriage. Since relationships outside of marriage are not surrounded by such serious commitments, the justifiable expectations parties to non-marital relationships have in the future companionship of their partners do not rise to the level of marital expectations. Because the consortium action assumes the aggrieved party has a right to expect the continued enjoyment of his or her partner's consortium, the element of marital commitment provides the courts with both a workable and logical place to draw the action's boundaries.

In limiting the action for loss of consortium to marriage, courts have implicitly recognized the distinctions between married and unmarried relationships. Generally, courts have viewed the right of consortium as "grow[ing] out of the marriage relationship,"²¹ and consortium has basically come to represent the legal and social incidents of marriage.²² According to one court, the right of consortium arises because of the duties and obligations both husband and wife take upon themselves in marriage.²³ Most recently the concept of consortium springing from marriage has been reaffirmed by a number of courts dealing with

20. Professor Clark maintains rights of consortium within marriage are enforced indirectly. "Divorce is one such way. The spouse who does not live up to his obligations in specified respects may find himself the losing defendant in a divorce action." H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 10.1, at 262 (1968).

21. *Sawyer v. Bailey*, 413 A.2d 165, 166 (Me. 1980). See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 8.9 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 124, at 874 (4th ed. 1971).

22. H. CLARK, *supra* note 20, at 261.

23. *Harris v. Kunkel*, 227 Wis. 435, 437, 278 N.W. 868, 869 (1938).

loss of consortium claims by parties not married at the time of the accident.²⁴ In denying these claims, the courts emphasized that the interests involved in a consortium action exist only within the marriage relationship. The *Bulloch* court stands virtually alone in its treatment of consortium as a relational interest that can exist outside of marriage. This is largely because in *Bulloch* the court ignored the heightened interest the marital commitment creates and merely declared it "obvious that a member of a cohabiting couple can suffer identical damage to that suffered by a spouse."²⁵ Thus, not only is the *Bulloch* line unworkable, but it also is based on an assumption that has been constructively rejected by most other courts.

III. CONCLUSION

In extending the loss of consortium action beyond marriage, the *Bulloch* court neglected the distinctions between married and unmarried persons and failed to consider the problems involved in moving the consortium boundaries from the objective test of marriage to the elusive subjective test of "typical loss." The court should have denied Edith Bulloch's claim and confined the action to the marriage relationship, which provides both a judicially workable and logically justifiable place to set the bounds of consortium.

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24. See *Chiesa v. Rowe*, 486 F. Supp. 236 (W.D. Mich. 1980); *Tong v. Jocson*, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977); *Sawyer v. Bailey*, 413 A.2d 165 (Me. 1980).

25. 487 F. Supp. at 1085.