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LOSS OF CONSORTIUM—TEXAS SUPREME COURT DECLINES TO RECOGNIZE A PARENT'S LOSS OF CONSORTIUM CLAIM RESULTING FROM A NON-FATAL INJURY TO CHILD

Angela R. Lilly

IN the recent case *Roberts v. Williamson*, the Texas Supreme Court refused to recognize a parent's right to recover for loss of consortium resulting from serious, non-fatal injuries to a child.¹ In reaching this decision, the court created an anomaly in the law, reached a conclusion that did not logically follow from precedent, and left a real loss uncompensated in order to draw a line.² Furthermore, the court's reasoning in support of its decision to draw a line rather than recognize this claim is unpersuasive in light of the fact that the court could have both recognized the claim and drawn the line limiting recovery by secondary victims of negligent activity.

As a result of complications after her birth, Courtnie Williamson experienced respiratory distress. Because treating physicians placed her on a respirator that was not functioning correctly, Courtnie did not receive oxygen for several minutes. Additionally, Dr. Roberts, the consulting pediatrician, did not administer sodium bicarbonate as advised by another physician for several hours. Subsequently, Dr. Roberts arranged to transfer Courtnie to a better-equipped hospital.³ Courtnie now has a permanent shunt in her skull to drain the fluid and requires braces to walk. In addition, she is mentally retarded, behaves antisocially, and suffers from partial paralysis on one side of her body as a result of her brain injury. Courtnie's parents, individually and on behalf of Courtnie, sued Dr. Roberts, the hospital, and other treating physicians, contending that the malfunctioning ventilator and the delays in administering sodium bicarbonate and in transferring Courtnie to another hospital proximately caused Courtnie's injuries.⁴

1. 111 S.W.3d 113, 115 (Tex. 2003).

2. *See id.* at 133.

3. *Id.* at 115.

4. *Id.*

Only the claims against the on-call physician and Dr. Roberts proceeded to trial since the claims against the hospital and another doctor were settled. The jury determined that Dr. Roberts was fifteen percent responsible for Courtnie's injuries and that the on-call physician was not responsible at all. The jury awarded damages to the Williamsons in the amount of \$75,000 for past loss of filial consortium and one dollar for future loss of consortium. The trial court rendered judgment on the verdict and ordered Dr. Roberts to pay fifteen percent of the award with no deductions for the settlements reached with the hospital and other physician. Additionally, the trial court awarded an ad litem fee that was divided between Dr. Roberts and the Williamsons.⁵

Dr. Roberts appealed, arguing that Texas does not recognize a claim for a parent's loss of consortium caused by non-fatal injuries to a child, that the expert witness was not qualified to testify regarding the cause of Courtnie's injuries, that there was no evidence to support the jury's award of past and future medical expenses, and that the trial court erred in not applying a settlement credit before calculating Dr. Roberts' portion of the damages.⁶ The Williamsons appealed only the half of the ad litem fees that the trial court ordered them to pay. The court of appeals affirmed the trial court's award of damages against Dr. Roberts but reversed the trial court's division of the ad litem fees and ordered Dr. Roberts to pay the entire amount of the ad litem fees.⁷ The Texas Supreme Court, consolidating separate appeals from Dr. Roberts and the Williamsons, reversed only the court of appeals judgment pertaining to the parents' loss of consortium claim.⁸ The Texas Supreme Court held in *Roberts v. Williamson* that Texas does not recognize a parent's right to recover damages for loss of filial consortium resulting from a child's non-fatal injuries.⁹

Loss of consortium was originally limited under Texas law such that a wife could not recover for loss of her husband's consortium.¹⁰ The Texas Supreme Court recognized in *Whittlesey v. Miller* that "the emotional interests of the marriage relationship are as worthy of protection from negligent invasion as other legally protected interests."¹¹ Thus, the court held that either spouse could recover for loss of consortium resulting from a negligent injury to the other spouse.¹² Five years later, the Texas Supreme Court in *Sanchez v. Schindler* recognized that the common-law principle limiting a parent's damages after the death of a child to the pecuniary value of the child's services and financial contributions, minus the cost of the child's care, support, and education, was "antiquated and

5. *Id.* at 115-16.

6. *Id.*

7. *Id.*

8. *Id.* at 114-15.

9. *Id.* at 120.

10. See *Garrett v. Reno Oil Co.*, 271 S.W.2d 764, 768 (Tex. Civ. App.—Fort Worth 1954, writ *ref'd n.r.e.*) (declining to recognize a wife's claim for loss of consortium).

11. 572 S.W.2d 665, 668 (Tex. 1978).

12. *Id.*

inequitable.”¹³ Instead of viewing the child as an economic asset, the court recognized that the parent’s loss upon the child’s death is the loss of the child’s love, advice, comfort, companionship, and society. Because injuries to the familial relationship are significant and worthy of compensation, the plaintiff was allowed to recover both for the loss of her child’s companionship and society and for the mental anguish she suffered as a result of the child’s death.¹⁴ Two years later, the court permitted children to recover for the loss of companionship caused by their parent’s death.¹⁵ Next, the court in *Reagan v. Vaughn* determined that a child could recover for the loss of consortium suffered when the parent was severely injured by a third party.¹⁶ In reaching this decision, the court emphasized the importance of the parent-child relationship and the need for judicial protection of this relationship.¹⁷ Additionally, the court refused to limit the right of recovery to minor children.¹⁸

The court in *Roberts v. Williamson* declines to recognize a parent’s claim for loss of consortium because imposing liability for these damages will not produce either fair compensation or benefits of deterrence, which the court recognizes as fundamental purposes of the tort system.¹⁹ Additionally, the court finds that the difficulty in measuring intangible damages to secondary victims outweighs the need to compensate deserving victims.²⁰ Furthermore, the court decides that it must draw a line for fear that extending loss of consortium in this context “could logically lead to the recognition of such rights in other non-dependent relatives or even in close friends, given appropriate facts.”²¹ Ultimately, the court concludes that the interests of children and spouses deserve greater protection than the interests of parents because of the dependence present in relationships between spouses and between children and their parents.²² The court states that:

Although parents customarily *enjoy* the consortium of their children, in the ordinary course of events a parent does not *depend* on a child’s companionship, love, support, guidance, and nurture in the same way and to the same degree that a husband depends on his wife, a wife depends on her husband, or a minor or disabled adult child depends on his or her parent.²³

Justice Jefferson, joined by Justice O’Neill and Justice Schneider, dissented, arguing that the majority reached the wrong decision in this case

13. 651 S.W.2d 249, 251 (Tex. 1983).

14. *Id.* at 251-52.

15. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 551 (Tex. 1985).

16. 804 S.W.2d 463, 467 (Tex. 1990).

17. *Id.* at 466.

18. *Id.*

19. *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003).

20. *Id.* at 119.

21. *Id.*

22. *Id.* at 117 (quoting *Norman v. Mass. Bay Transp. Auth.*, 529 N.E.2d 139, 141-42 (Mass. 1988)).

23. *Id.*

because the majority's conclusion diverges from existing precedent and creates an anomaly in the law.²⁴ In the line of cases expanding loss of consortium, the court continually emphasized the importance of familial relationships and recognized that injuries to familial relationships are compensable.²⁵ By declining to recognize a parent's loss of consortium arising from injuries to a child, the court denies recovery for a loss that the court in previous decisions has concluded is "real, significant, and worthy of compensation."²⁶ Justice Jefferson believes that the court committed itself in *Reagan v. Vaughn* to the proposition that the parent-child relationship is worthy of "special protection"; thus, the court should be constrained by *stare decisis* since the court cannot show that *Reagan* has become unworkable or that the law has changed significantly such that loss of consortium claims are obsolete.²⁷

As a result of this decision, the Texas Supreme Court has created an anomaly in the law. Under the Texas Wrongful Death statute, the surviving parents, spouse, and children may bring an action.²⁸ Only two of these three plaintiff groups may recover damages for loss of consortium suffered as a result of non-fatal injuries. Thus, the majority's decision "relegates parents to second-class status and reneges on the [c]ourt's earlier promise to protect the familial relationship as a whole."²⁹ The court rationalizes the inconsistency in allowing parents to recover for loss of filial consortium upon a child's death but not upon a child's non-fatal injury with the fact that the child's cause of action remains in cases where the child is injured but does not die. If the child has a cause of action, "there is no need to recognize actions by other family members to prevent the tortfeasor from escaping liability."³⁰ According to the majority's reasoning, recovery of consortium damages by spouses and children, as previously recognized by this court, would not be warranted since the primary victims' causes of action remain when the primary victim suffers non-fatal injuries.³¹ The majority's argument is further weakened by the fact that under wrongful death statutes the survivor of the decedent may recover, on behalf of the estate, for the victim's medical expenses, funeral expenses, and damages for pain and suffering prior to the decedent's death, in addition to the survivor's damages for loss of consortium.³² Thus, in essence, the survivors may recover for loss of consortium, and the decedent's estate may recover the same types of damages that an in-

24. *Id.* at 125 (Jefferson, J., dissenting).

25. *See Reagan v. Vaughn*, 804 S.W.2d 463, 466 (Tex. 1990); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 551 (Tex. 1985); *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983); *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978).

26. *Roberts*, 111 S.W.3d at 128 (Jefferson, J., dissenting).

27. *Id.* at 133 (Jefferson, J., dissenting).

28. TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(b) (Vernon 2003).

29. *Roberts*, 111 S.W.3d at 131-32 (Jefferson, J., dissenting).

30. *Id.* at 120.

31. *Id.* at 131 (Jefferson, J., dissenting).

32. *See Reben v. Ely*, 705 P.2d 1360, 1363 (Ariz. Ct. App. 1985) (pointing out the fallacy in arguing that double recovery can occur with consortium claims resulting from personal injury but not with consortium claims resulting from death).

jured victim may recover. Therefore, the fact that the primary victim's claim remains is not a persuasive explanation for refusing parents the right to recover for the loss they suffer when their child is seriously injured.

The court's concern over the difficulty in measuring intangible losses to secondary victims³³ does not justify their refusal to recognize the parent's claim. The court said in *Whittlesey v. Miller* that loss of spousal consortium is not too indirect to be compensated because the loss of companionship, emotional support, and love are "real, direct, and personal losses."³⁴ The court acknowledged in *Sanchez v. Schindler* both that tort recovery is allowed for equally intangible injuries such as pain and suffering and that the judicial system has "adequate safeguards" to ensure that victims are compensated in a fair and just manner.³⁵

The fact that parents are not dependent upon children in the same way that children are dependent upon the parents does not rationalize the court's decision.³⁶ While parents are generally not dependent upon children, dependence is not a primary element of loss of consortium. In the marital context, the Texas Supreme Court has defined consortium as the "mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage."³⁷ In a parent-child context, the Texas Supreme Court allowed a child to recover for the "loss of the parent's love, affection, protection, emotional support, services, companionship, care, and society" that she suffered as a result of her father's serious injury.³⁸ Furthermore, the court indicated that the child's dependence on the parent was not a main reason for allowing the child's claim for loss of parental consortium by declining to limit the right of recovery to minor children.³⁹ When a child suffers a severe, non-fatal injury, the parents can lose the child's love, affection, companionship, services, and society. Thus, parents suffer a real loss that should be compensable under tort law even though the parents are not dependent upon the child.

While the court believes that recognizing the parent's claim in this case could lead to loss of consortium claims by other relatives or even close friends, the court could have recognized the parent's loss of filial consortium claim but limited loss of consortium to spousal relationships and parent-child relationships. The court has drawn this line in previous cases by refusing to recognize either a stepparent's or a sibling's loss of consortium claim.⁴⁰ Additionally, the court had "little difficulty" in *Reagan v. Vaughn* limiting recovery to the parent-child relationship in response to

33. See *Roberts*, 111 S.W.3d at 119.

34. 572 S.W.2d 665, 667 (Tex. 1978).

35. 651 S.W.2d 249, 253 (Tex. 1983).

36. See *Roberts*, 111 S.W.3d at 117.

37. *Whittlesey*, 572 S.W.2d at 666.

38. *Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990).

39. See *id.* at 466.

40. *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 380 (Tex. 1998).

respondent's contention that recognition of a child's claim for loss of parental consortium would have a "snowball effect" leading to recognition of claims by siblings, grandparents, and close friends.⁴¹ Furthermore, the court could have recognized the cause of action and provided factors that juries should consider in assessing damages for loss of filial consortium as the court did in *Reagan v. Vaughn*.⁴²

As a result of this decision, the Texas Supreme Court has left a real loss uncompensated by not allowing parents to bring a derivative claim for loss of consortium damages against a third party who tortiously injured their child. Paradoxically, the parents can bring such a claim if the tortious action results in the death of the child.⁴³ The majority in *Roberts* identifies the fundamental purposes of the tort system as "deter[ring] wrongful conduct, shift[ing] losses to responsible parties, and fairly compensat[ing] deserving victims."⁴⁴ While recognizing the parent's claim may not deter wrongful conduct because the parents are secondary victims, recognizing the parent's claim would without question shift the loss to the responsible party and fairly compensate deserving victims. In prior cases, the court recognized the importance of familial relationships and recognized that damages could be recovered for the tortious injury to these relationships.⁴⁵ In *Sanchez*, the court specifically recognized that the real loss suffered by a parent upon a child's death is the "loss of love, advice, comfort, companionship and society."⁴⁶ Previously, the court allowed recovery by a spouse for loss of consortium resulting from a non-fatal injury to the other spouse and acknowledged that nonfatal injury to a spouse can result in a "real, direct, and personal loss[]" to the other spouse.⁴⁷ When faced with the issue of whether to allow a child to recover for loss of a parent's consortium resulting from non-fatal injuries to the parent, the court was "hard pressed to say that a serious, permanent and disabling injury to a parent does not potentially visit upon the child an equally serious deprivation" as that which occurs when a spouse suffers loss of spousal consortium as a result of non-fatal injuries to the other spouse.⁴⁸ By holding that parents may not recover for loss of filial consortium resulting from a child's non-fatal injuries, the court is allowing injuries that they have previously recognized as real and compensable to remain uncompensated.

41. *Reagan*, 804 S.W.2d at 466.

42. *See id.* at 467 (providing factors such as severity of the injury to the parent and nature of the child's relationship with the parent for juries to use in assessing damages for loss of parental consortium).

43. TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(b) (Vernon 2003).

44. *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003).

45. *See Reagan*, 804 S.W.2d at 466; *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 551 (Tex. 1985); *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983); *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978).

46. *Sanchez*, 651 S.W.2d at 251.

47. *Whittlesey*, 572 S.W.2d at 667.

48. *Reagan*, 804 S.W.2d at 466.

While limiting recovery by secondary victims of tortious activity is necessary to prevent the ripple effect of the injury from expanding too far outward, the court could have both recognized the loss that a parent suffers when a child is severely injured and limited recovery by secondary victims based on the relationship to the injured party.⁴⁹ The court's decision to draw the line in this case and refuse to recognize a parent's right to recover for loss of filial consortium is not warranted given the fact that the court has allowed recovery for loss of consortium by spouses and by children whose parents were injured. In addition, the court has drawn lines in previous cases to limit this ripple effect by refusing recovery to stepparents and siblings and by limiting recovery to the parent-child relationship.⁵⁰ The court has previously recognized that familial relationships are important enough to warrant judicial protection; however, the court is unwilling to follow its previous line of cases. Thus, the court leaves the real loss suffered by parents of a seriously injured child uncompensated.

49. See *Roberts*, 111 S.W.3d at 119 (discussing the fact that once courts have fairly compensated the primary victim, they should be more troubled about the difficulties in measuring intangible losses to secondary victims).

50. See *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 380 (Tex. 1998); *Reagan*, 804 S.W.2d at 466.

