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Raising the Bar in Asbestos Litigation

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COLUMNS

October 2025 • Vol. 25, No. 10

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HarrisMartin's *COLUMNS-Asbestos*

is published monthly by

HarrisMartin Publishing LLC

P.O. Box 10

Haddonfield, NJ 08033

\$975 print & online annual subscription

\$595 print & online 6-month subscription

Questions or subscription requests can be directed to service@harrismartin.com or call (610) 647-5500.

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You Can't Marry Into a Loss of Consortium Claim
by Edward R. Hugo of Hugo Parker LLP

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You Can't Marry Into a Loss of Consortium Claim

A Commentary by Edward R. Hugo of Hugo Parker LLP

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When a spouse suffers a personal injury, the marital partner may suffer an emotional injury as a consequence. Under what circumstances does the marital partner have a right to recover for that emotional injury?

There are four elements to a cause of action for loss of consortium: “(1) a valid and lawful marriage between the plaintiff and the person injured at the time of the injury; [¶] (2) a tortious injury to the plaintiff’s spouse; [¶] (3) loss of consortium suffered by the plaintiff; and [¶] (4) the loss was proximately caused by the defendant’s act.” [citations omitted] “A cause of action for loss of consortium is, by its nature, dependent on the existence of a cause of action for tortious injury to a spouse.” (*Hahn v. Mirada*, *supra*, at p. 746, 54 Cal.Rptr.3d 527.) And there is no right of action for loss of consortium if the spouse’s “injury occurs before the marriage.” (*Zwicker*, *supra*, 98 Cal.App.4th at p. 31, 118 Cal.Rptr.2d 912, italics added.) Therefore, it is the couple’s marital status at the time the spouse is tortiously injured that determines whether the plaintiff can meet the first element of a loss of consortium right of action. *Vanhossier v. Sup. Ct.* (2012) 206 Cal.App.4th 921, 927¹

The existence of “a valid and lawful marriage is usually not at issue. The Money

Shot² question is the definition of “at the time of injury.” *Id.*

Although injury often occurs at the same time as the wrongful act is committed (see, e.g., *Zwicker*, *supra*, 98 Cal.App.4th at p. 28, 118 Cal.Rptr.2d 912), that is not always the case. With latent diseases, it is difficult to determine when the injury occurs and “[n]o temporally discrete event exists that encompasses the defendant’s breach and the plaintiff’s injury.” (*Buttram v. OwensCorning Fiberglas Corp.* (1997) 16 Cal.4th 520, 529, 66 Cal.Rptr.2d 438, 941 P.2d 71, italics added (*Buttram*).)

“Mesothelioma is a latent, progressively developing disease,” our Supreme Court explained. “[D]ecades can often pass between the time a person is first exposed to asbestos and the time he first develops a cancerous mesothelioma tumor. Moreover, although early formation of undetected first develops a cancerous mesothelioma tumor. Moreover, although early formation of undetected cellular changes ultimately leads to contraction of the disease, it may be (30 to 40) years before the cancerous cells will result in a tumor large enough to be detected, be medically diagnosed, or cause symptomatology of the disease.” (*Buttram*, *supra*, 16 Cal.4th at p. 529, 66 Cal.Rptr.2d 438, 941 P.2d 71.) “The combination of lengthy latency periods and

diagnostic difficulties is a unique feature of toxic substances cases for purposes of statutes of limitations analysis or related legal issues Instead, insidious disease litigation involves an extended chronology of causation unlike traditional snapshot torts. [Citation.]” (*Ibid.*, italics added.)

With particular reference to latent injuries, our Supreme Court has established that “a cause of action for a latent injury or disease generally accrues, in the sense that it is ripe for suit, when the [spouse] discovers or should reasonably have discovered he has suffered a compensable injury.” (*Hamilton*, *supra*, 22 Cal.4th at p. 1144, 95 Cal.Rptr.2d 701, 998 P.2d 403, italics added.) Accordingly, “in the latent disease context, until the [spouse] is diagnosed with or otherwise learns *929 he has the disease, he has not placed any reliance on rules of law governing potential tort causes of action of which he is as yet unaware. It would make little sense to look to the occurrence of the ‘wrongful act’ (in essence, [the spouse’s] exposure to defendants’ asbestos products) as the sole event establishing accrual of a cause of action.... [T]hus [d]iagnosis or discovery of actual injury or symptoms is the earliest point at which it might reasonably be said, in the latent disease context, that the [spouse] has been placed on actual notice of his injuries such that he

might contemplate suit and place reasonable reliance on the rules and laws governing recovery of damages for his compensable injuries.” (*Buttram. supra*, 16 Cal.4th at p. 537, 66 Cal.Rptr.2d 438, 941 P.2d 71, first italics in original.) *Id.* at 929-930

But, what if the diagnosis of the physically injured spouse’s disease and its causation are in dispute? That is the issue currently being litigated in California’s Alameda County Superior Court in *Maricich vs. Perrigo*, Case No. 25CV116787. There, Plaintiffs contend that Mr. Maricich suffers from malignant mesothelioma caused by his exposure to asbestos and/or fibrous talc. Defendants contend that he has a primary sarcomatoid lung carcinoma caused by cigarette smoking.

In granting the defendant’s Motion for Summary Adjudication (“MSA”), the Trial Court relied heavily on the evidence that Plaintiffs presented in support of their Motion for Trial Preference.

Aside from the evidence Defendant presents in the moving papers, Plaintiffs presented a great deal of evidence regarding the history of Mr. Maricich’s disease in support of their successful motion to obtain trial preference in this action. Plaintiffs may not dispute any of the evidence they have placed in the record of this action to obtain trial preference because they have conceded these facts for purposes of this action.

In support of the trial preference motion, Plaintiffs presented the declaration of medical expert witness Dean Felsher, M.D. who describes in great detail at ¶ 23 of his declaration the history of Mr. Maricich’s malignant mesothelioma

“Thus, the marital partner may not recover for an emotional injury caused by the spouse’s physical injury, regardless of the diagnosis or the cause, unless the physical injury occurs after the marriage. In other words, you can’t marry into a loss of consortium claim.”

diagnosis based on his review of Mr. Maricich’s medical records. Dr. Felsher’s declaration is clear that as of 9/26/2024 Mr. Maricich was experiencing physical symptoms from his malignant mesothelioma.

....

“On January 8, 2025, Mr. Maricich underwent an ultrasound-guided biopsy of liver mass. The biopsied tissue showed carcinoma with infiltrative spindle cells, frequent mitoses

and necrosis that was consistent with metastatic carcinoma with sarcomatoid features, most likely from lung origin, given the prior imaging results.” (*Id.* at 23.f and Exh. 17.) In other words, as of 1/8/2025, Mr. Maricich had been diagnosed with metastatic liver cancer that his physicians believed made metastasized from cancer in his lung. Defendant presents Mr. Maricich’s deposition testimony that he knew he had can-



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PERSPECTIVES

cer as of New Years Eve 2024. (UMF No. 23.)

On January 25, 2025, Plaintiffs were married. UMF No. 8.)

....

Here, Ms. Maricich “married into her loss of consortium claim” with respect to Mr. Maricich’s then diagnosed metastatic carcinoma of the liver with sarcomatoid features, “most likely from lung origin, given the prior imaging results,” that ultimately turned out to be metastatic malignant sarcomatoid mesothelioma, as the prior imaging results had suggested.

It is clear from the record that Mr. Maricich was gravely ill before Plaintiffs married. Under these circumstances and the above-cited case law, Defendant is entitled to summary adjudication of plaintiff Kim Benedict Maricich’s Loss of Consortium Cause of Action.

“Order re: Ruling on Submitted Matter filed by Defendant [], dated 9/29/25.”

An examination of the recoverable damages demonstrates that this ruling is correct both as a matter of law and as a matter of common sense. In California, CACI Jury Instruction 3920 provides, in relevant part, as follows:

[Name of plaintiff] **claims that [he/she/nonbinary pronoun] has been harmed by the injury to [his/her/nonbinary pronoun] [husband/wife]. If you decide that [name of injured spouse] has proved [his/her/nonbinary pronoun] claim against [name of defendant], you also must decide how much money, if any, will reasonably compensate [name of plaintiff] for loss of [his/her/non-**

binary pronoun] **[husband/wife]’s companionship and services, including:**

1. The loss of love, companionship, comfort, care, assistance, protection, affection, society, and moral support; and

2. The loss of the enjoyment of sexual relations [or the ability to have children].

[[Name of plaintiff] **may recover for harm [he/she/nonbinary pronoun] proves [he/she/nonbinary pronoun] has suffered to date and for harm [he/she/nonbinary pronoun] is reasonably certain to suffer in the future.**

Thus, the marital partner may not recover for an emotional injury caused by the spouse’s physical injury, *regardless of the diagnosis or the cause*, unless the physical injury occurs *after* the marriage. In other words, you can’t marry into a loss of consortium claim.³

Endnotes

¹ Vanhossier is the seminal case in California regarding loss of consortium. Edward Hugo filed a brief as Amici Curiae on behalf of Real Parties in Interest in *Vanhoosier*

² Loss of consortium awards in mesothelioma cases are usually substantial. For example, a Los Angeles, California, jury made the following non-economic damages awards in *Beach vs. 3M Company*, JCCP 4674, Case No. 24STCV28404, on September 11, 2025:

QUESTION 18:

NON-ECONOMIC DAMAGES-
DAVID BEACH

1. Past non-economic damages, including: Physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, anxiety, humiliation, and emotional distress.
\$ 12,150,330.00

2. Future non-economic damages until David Beach’s death, including: Physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, anxiety, humiliation, and emotional distress.
\$ 2,849,670.00

NON-ECONOMIC DAMAGES –
MARLENE BEACH

1. Past non-economic damages including loss of David Beach’s love, affection, comfort, care, advice, guidance, companionship, assistance, and moral support?
\$ 6,075,165.00

2. Future non-economic damages until David Beach’s death, including loss of David Beach’s love, affection, comfort, care, advice, guidance, companionship, assistance, and moral support?

TOTAL NON-ECONOMIC DAMAGES: \$ 25,000,000.00

³ This interpretation is also consistent with the California Supreme Court’s instruction that “judicial recognition of a cause of action for loss of consortium ‘must be narrowly circumscribed.’” (*Elden v. Shelon* (1993) 36 Cal.3d 267,278, citing *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441,444.)