

A separate coverage limit for the loss of consortium claim?

By James T. Nyeste

Your client, Jim, has suffered disabling physical injuries – let’s assume in an auto accident, but the type of accident really isn’t important. The defendant’s liability insurance provides limits of \$500,000 per person and \$1,000,000 per occurrence. Jim’s wife, Mary, was not involved in the accident and has no physical injuries, but she has been tragically affected by her husband’s injuries, suffering the loss of Jim’s companionship and services, injury to the marital and sexual relationship, and overwhelming stress and mental anguish. The defendant’s insurance company has offered the full \$500,000 “per person” limit for Jim’s injuries but refuses to offer anything on Mary’s loss of consortium claim, contending that the loss of consortium claim is subject to the same “per person” limit covering Jim’s injuries. Is the insurance company correct? Assuming that the defendant has no personal assets, should Jim and Mary settle for the \$500,000, or will they be leaving some insurance money on the table? As always, the answer depends on the wording of the policy, but first some background on loss of consortium claims.

Loss of consortium – background

It has always been the law in Illinois that a husband could recover for loss of consortium arising from an injury to his wife. It was not until 1960, however, that the Illinois Supreme Court recognized a wife’s loss of consortium arising out of an injury to her husband. *Dini v. Naiditch*, 20 Ill. 2d 406 (1960).

It is generally understood that a loss of consortium claim includes the right to recover for the possible loss of sexual relations, but loss of consortium includes several other elements as well, including loss of services and support and the loss of companionship and marital happiness.

When one spouse (the impaired spouse) is injured by the negligence of another, the other spouse (the deprived spouse) may recover from the tortfeasor for the loss the deprived spouse suffered by virtue of the impaired spouse’s injury. This loss, generally labeled a loss of consortium, includes material services, elements of companionship, felicity (i.e., happiness), and sexual intercourse, all welded into a conceptualistic unity.

Malfeo v. Larson, 208 Ill. App. 3d 418, 426 (1st Dist. 1990). “Consortium . . . includes, in addition to material services, elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity.” *Dini v. Naiditch*, 20 Ill. 2d 406, 427 (1960).

A loss of consortium claim can be brought when there has been no loss of sexual relations. *Malfeo v. Larson*, 208 Ill. App. 3d 418, 426 (1st Dist. 1990). Likewise, a loss of consortium claim can be brought when there has been no loss of support or services. *Dini v. Naiditch*, 20 Ill. 2d 406, 428 (1960). In *Dini*, the court cited with approval the case of *Montgomery v. Stephan*, 101 N.W.2d 227 (Mich. 1960), where the Michigan Supreme Court stated:

The fact of the matter is that there is no predominant element in the concept of consortium, that consortium is not capable of subdivision, and that it is not necessary that there be an allegation of the loss of any particular “element” thereof.

All aspects of consortium – sexual relations, services, support, companionship, and felicity or happiness – must be considered in connection with the loss of consortium claim.

Although loss of consortium is not a physical injury, it is considered an “injury” nonetheless. “‘Loss of consortium’ has been consistently defined by Illinois courts as an ‘injury.’” *Filip v. North River Ins. Co.*, 201 Ill. App. 3d 351, 353 (1st Dist. 1990) (holding that undefined term “injury” in insurance policy included loss of consortium). *Club Exchange Corp. v. Richter*, 221 Ill. App. 3d 77, 80 (5th Dist. 1991) (same); *General Casualty Co. v. McCowan*, 221 Ill. App. 3d 96, 99 (5th Dist. 1991) (same).

A loss of consortium claim is both derivative and independent of the physically injured spouse’s claim. The loss of consortium claim is derivative in the sense that, but for the physical injury to one spouse, there would be no loss of consortium for the other spouse. The claim is also derivative in that any comparative negligence on the part of the physically injured spouse will affect the loss of consortium claim. *Blagg v. Illinois F.W.D. Truck & Equip. Co.*, 143 Ill. 2d 188 (1991) (loss of consortium claim subject to other spouse’s comparative negligence). But, under Illinois law, the loss of consortium claim is also independent. Loss of consortium claims are both “derivative” and “independent.” *Blagg*, 143 Ill. 2d 188, 197 (1991). Loss of consortium is an independent action of its own. The party claiming loss of consortium may sue in his or her own name. *Dini v. Naiditch*, 20 Ill. 2d 406, 431 (1960). Additionally, a loss of consortium claim is not released by the settlement of the other spouse’s physical injury claim. *Brown v. Metzger*, 104 Ill. 2d 30, 35 (1984). Further, a loss of consortium claim is not reduced by a worker’s compensation lien that would apply against the other spouse’s physical injury claim. *Page v. Hibbard*, 119 Ill. 2d 41, 48 (1987).

Parsing the policy language in support of separate coverage for the loss of consortium claimant

Most liability policies provide coverage for damages on account of “bodily injury” and “property damage.” Whether your client Mary’s loss of consortium claim is entitled to a separate “per person” limit, in whole or in part, or whether it is subject to the same limit the insurer is offering on her husband Jim’s physical injury claim, will depend on the policy’s definitions of “bodily injury” and the “per person” limit. Separate coverage for Mary’s claim will require that the policy have a broadened definition of “bodily injury” so that Mary’s loss of consortium amounts to a separate “bodily injury.” Separate coverage for Mary’s claim may also depend on whether the definition of the “per person” limit has linking or aggregating language. Even if Mary’s claim is not confined by the “per person” limit offered on Jim’s claim, it will of course be subject to the “per accident” or “per occurrence” limit.

Where the policy does not define “bodily injury,” the phrase will be given its ordinary meaning, requiring a physical injury, sickness, disease, or death. In that event, loss of consortium will not

amount to a separate bodily injury, and any coverage for loss of consortium will be confined within the limit applicable to the physically injured spouse's claim. See *Cross v. Country Cos.*, 188 Ill. App. 3d 847 (4th Dist. 1989) ("bodily injury" not defined, no separate limit for loss of consortium claim); *Gass v. Carducci*, 52 Ill. App. 2d 394 (1st Dist. 1964) (same); *Ravenswood Hospital v. Maryland Casualty Co.*, 280 Ill. 103 (1917) (same).

Many policies expressly define "bodily injury" but give it a plain meaning definition such as "bodily injury, sickness, or disease, including death resulting therefrom." *Schweighart v. Standard Mut. Ins. Co.*, 227 Ill. App. 3d 249 (4th Dist. 1992). See also *Ill. Farmers Ins. Co. v. Marchwiany*, 222 Ill. 2d 472 (2006) ("injury to the body, sickness, disease or death of any person"); *McKinney v. Allstate Ins. Co.*, 188 Ill. 2d 493 (1999) ("bodily injury, sickness, disease, or death"); *Creamer v. State Farm Mut. Auto. Ins. Co.*, 161 Ill. App. 3d 223 (3rd Dist. 1987) ("bodily injury to a person and sickness, disease or death which results from it"). Under these definitions of "bodily injury," which do not differ from the term's ordinary meaning, loss of consortium will not amount to a separate bodily injury.

Crucial to a separate limit for loss of consortium is a broadened definition of "bodily injury." In *Giardino v. Fierke*, 160 Ill. App. 3d 648 (2nd Dist. 1987), the policy defined "bodily injury" as follows:

"Bodily Injury" means bodily injury to any person and includes sickness, disease, death *or loss of services* which result from it. [Emphasis added]

160 Ill. App. 3d at 654. Based on this definition, a wife who lost the services of her husband as the result of her husband's physical injuries suffered her own "bodily injury." The policy's "each person" limit of liability provided:

The limit of liability for "each person" for bodily injury liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident.

Id. Given that the wife's loss of consortium was a "bodily injury" in its own right, as broadly defined, she was entitled to coverage separate from the "each person" limit for her husband's injuries. Note that the definition of the "each person" limit in *Giardino* made no attempt to link the claim of the person suffering loss of services or other derivative loss with the claim of the person suffering physical injury.

In cases where the policy broadly defines "bodily injury" as "*injury, sickness, disease or death*" [emphasis added], the loss of consortium claimant will likewise have his or her own claim for "bodily injury" because loss of consortium, a personal injury, is nevertheless an injury. In that event, as in *Giardino*, the loss of consortium claimant, may be entitled to a separate "per person" limit of coverage. See *Filip v. North River Ins. Co.*, 201 Ill. App. 3d 351 (1st Dist. 1990) (loss of consortium is an injury and falls within policy's broadened definition of "bodily injury"); *Club Exchange Corp. v. Richter*, 221 Ill. App. 3d 77 (5th Dist. 1991) (same); *General Casualty Co. v. McCowan*, 221 Ill. App. 3d 96 (5th Dist. 1991) (same). In each of the foregoing cases, the court held that the loss of consortium claim was not subject to the "per person" limit applicable to the

physically injured spouse's claim. It should be noted, however, that in the *Richter* and *McCowan* cases, the policies defined the "each person" limit identically, as follows:

The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident.

As with the "each person" limit language in *Giardino*, this language does present a clear attempt to combine the claims for physical injury and loss of consortium or other related loss so as to make them subject to the same "each person" limit. In the *Filip* case, the court did not quote or otherwise address the language of the "each person" limit.

Recently, I encountered a policy defining "bodily injury" as:

Physical injury (including death) to any person, and any *mental anguish* or shock, sickness, disease, disability or death associated with or arising from such physical injury. [Emphasis added]

Would this definition give a loss of consortium claimant a separately covered "bodily injury" claim? Arguably, under *Giardino*, *Filip*, *Richter*, and *McCowan*, such a broad definition makes loss of consortium a "bodily injury" in its own right, at least to the extent that loss of consortium includes the mental anguish from the loss of marital felicity.

Many policies do attempt to define the "each person" limit so as to combine the claims of the physically injured person and the claims of persons with related, non-physical injuries or loss so as to make them subject to the same limit. The limit wordings vary widely, so they need to be parsed carefully. For example, in *Schweighart v. Standard Mut. Ins. Co.*, 227 Ill. App. 3d 249 (4th Dist. 1992), the policy defined the "each person" limit as follows:

The limit of liability for uninsured motorist coverage stated in the declaration as applicable to "each person" is the limit of the company's liability for all damages, *including damages for care and loss of services*, because of bodily injury sustained by one person as the result of any one accident. [Emphasis by the court].

227 Ill. App. 3d at 251. The court in *Schweighart* held that this language was "clear and consistent" with subjecting the loss of consortium claim to the same limit as the claim for the direct physical injury. *Id.* at 253. However, as explained above, loss of consortium claims may include more than just loss of care and services. Nevertheless, the court's holding may be justified by the "all damages" language used in the limit's definition and by the fact that the policy's "bodily injury" definition did not include loss of consortium or any element of it.

In *McKinney v. Allstate Ins. Co.*, 188 Ill. 2d 493 (1999), where the court held that a wrongful death claim was subject to the same "each person" limit as the survival claim, the policy defined the "each person" limit with greater clarity:

"Each person" [limit] is the maximum that we will pay for damages arising out of bodily injury to one person in any one motor vehicle accident, *including damages sustained by anyone else as a result of that bodily injury*. [Emphasis added].

Similarly, in *Cross v. Country Cos.*, 188 Ill. App. 3d 847 (4th Dist. 1989), which held that the loss of consortium claim was subject to the same limit as the claim of the directly injured spouse, the “each person” limit was defined as follows:

The bodily injury liability limit for “each person” is the maximum amount we will pay for bodily injury sustained by one person in any one accident. *That maximum amount includes any claim of other persons for damages arising out of that bodily injury.* [Emphasis added].

Even greater specificity was used in the “each person” limit in *Ill. Farmers Ins. Co. v. Marchwiany*, 222 Ill. 2d 472, 476-477 (2006):

“Each person” [limit] is the maximum we will pay for all damages resulting from bodily injury sustained by one person in any one accident or occurrence. Included in this limit, but not as a separate claim or claims, are all the consequential damages sustained by other persons, such as loss of services, loss of support, loss of consortium, wrongful death, grief, sorrow and emotional distress.

Nevertheless, despite such well-constructed “each person” limits, if loss of consortium, or some element of it, qualifies as separate “bodily injury” where that term is broadly defined in the policy, it is likely that there still will be separate coverage for the claim. The inconsistency between a broad “bodily injury” definition (making loss of consortium a separate bodily injury) and a restrictive “each person” limit (attempting to include derivative or consequential loss) should be resolved in favor of coverage. It would require a remarkable “each person” limit to combine the damages of two persons who each have suffered “bodily injury.” If the policy drafter were to be so skillful, he or she would likely just revise the “bodily injury” definition, narrowing it to bodily injury, sickness, disease, or death resulting therefrom.

In sum, before settling Jim’s physical injury claim and Mary’s loss of consortium claim for the single “per person” limit under the policy, get the policy and parse the language carefully. There may be a possibility for additional coverage.