



California Tort Damage Law Update

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The California Supreme Court extended the reach of a claim for loss of consortium made in a non-fatal personal injury case to post-death damages when the death of an injured spouse is “anticipated (and sufficiently certain) . . .”

The case, Judy Boeken v. Philip Morris, (2010) __ CA4 __ decided May 13, 2010 was one of three filed against Philip Morris by Richard and Judy Boeken seeking damages for Richard’s lung cancer. In its decision, the Supreme Court extended the general rule that a tort plaintiff may recover reasonably foreseeable prospective damages. The Court ruled that a plaintiff’s common law action for loss of consortium encompasses not only loss of companionship and affection through the time of trial, and for the spouse’s life expectancy absent the injury, but also for any future, post-death loss of companionship and affection that is sufficiently certain to occur.

The Court held that “under long-standing principles of tort liability, recovery of prospective damages in a common law action for loss of consortium includes damages for lost companionship and affection resulting from the anticipated (and sufficiently certain) premature death of the injured spouse.”

There are a number of implications that arise from this decision. The statute of limitations for common law loss of consortium claims begins to run at the time a spouse is injured and the inference is raised that the conjugal relationship is more than superficially or temporarily impaired, while the statute of limitations for a wrongful death cause of action accrues at the time of the spouse’s death. After Boeken, in the right circumstances, an argument could be made that the statute of limitations for a permanent loss of consortium claim began to run at the time of a spouse’s injury and, if not made in a personal injury suit, it may be time barred when a wrongful death claim is made.

Further, as the dissent noted, the common law loss of consortium action applies only to spouses, whereas a wrongful death action applies to both spouses and children, and includes additional claims, such as funeral expenses and pecuniary loss suffered by the heirs.

Ironically, due to the unusual procedural posture of the case, the Court’s holding cut off plaintiff’s claim.

A jury awarded Richard \$5.5 million in compensatory damages and \$3 billion in punitive damages, which was reduced by the trial to \$100 million. The Court of Appeals reduced the punitive damages to \$50 million. In satisfaction of this judgment (with interest), plaintiff received about \$82 million in 2006.

While Richard’s suit was pending (and while he was still alive), Judy filed a separate common law action against Philip Morris for permanent loss of consortium. Plaintiff later dismissed it with prejudice. Richard died about one year after Plaintiff dismissed her common law action for loss of consortium.

After Richard’s death, Plaintiff filed a wrongful death action against Philip Morris, again seeking compensation for loss of her husband’s companionship and affection. Philip Morris argued that Plaintiff’s wrongful death claim was barred by the doctrine of res judicata, because Plaintiff’s previous loss of consortium claim had involved the same primary right. The trial court agreed and a sharply divided Court of Appeals affirmed the trial court’s decision.

A similarly, sharply divided Supreme Court ruled in favor of Philip Morris, affirming the Court of Appeal’s decision that res judicata barred Plaintiff’s wrongful death cause of action for loss of consortium, saying that Plaintiff could have recovered all of her damages in the first suit if she had pursued it to a conclusion. Instead, she dismissed the action which operated as an adjudication in favor of Philip Morris.

Therefore, although this decision will have a significant impact on other cases, here Plaintiff was denied the right to pursue her claim for damages.

We may expect common law loss of consortium actions in non-fatal personal injury litigation to include prospective post-death claims where plaintiff is alleging that the injured spouse's premature death is both anticipated and sufficiently certain. This almost certainly will increase litigation costs for both sides as they debate the issue whether a spouse's premature death may be anticipated and is sufficiently certain. Unfortunately, the Supreme Court provided no guidance to trial courts as to the meaning of "anticipated" and "sufficiently certain," and so, we can expect trial courts to struggle with differing definitions of those terms while trying to craft ways in which those definitions can be applied to real world situations in cases coming before them.

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